



# Australian and New Zealand competition and consumer protection regimes

Response to the Productivity Commission's  
draft research report by  
Telstra Corporation Limited and TelstraClear Limited

19 November 2004

## 1 EXECUTIVE SUMMARY

---

Telstra Corporation Limited of Australia and TelstraClear Limited of New Zealand (together "Telstra") welcome this opportunity to comment on the Productivity Commission's October 2004 draft Research Report.

Telstra supports the initiatives by the Governments of Australia and New Zealand towards a single economic market and emphasises the important role of competition law and policy in providing a foundation for a single market.

Telstra supports most of the draft findings of the Productivity Commission in that light. However, Telstra submits that several important opportunities for further developing the trans-Tasman economic relationship appear to have been overlooked in the draft report.

In particular, Telstra strongly submits that a more expansive approach to considering harmonisation and convergence initiatives should be adopted by the Productivity Commission. Such an expansive approach to harmonisation initiatives is appropriate given the ultimate ambition of realising greater economic integration between Australia and New Zealand. Such harmonisation would provide an important precedent for the future development of the trans-Tasman economic relationship.

With this in mind, Telstra's makes two key submissions in response to the draft report, both of which Telstra believes should be addressed in the final report:

- Sectoral competition law was not mentioned in the draft report and would clearly realise net benefits from selective harmonisation and convergence.
- Greater institutional co-ordination and trans-Tasman pooling of regulatory resources should be directed at those areas where specialist expertise is critical.

Telstra also wishes to emphasise that greater information sharing should be appropriately qualified by the need to protect confidential information and ring-fence information based on the regulatory purpose for which it was initially obtained. Telstra supports the Productivity Commission's recommendation to this effect.

Telstra expands upon these submissions, in turn, below.

## 2 NET BENEFITS WOULD ARISE FROM SELECTIVE HARMONISATION OF SECTORAL COMPETITION LAW

---

Telstra agrees with the Productivity Commission's conclusions that Australian and New Zealand generic competition laws have already undergone considerable harmonisation and that there is probably only limited scope for further harmonisation.

However, Telstra submits that harmonisation has a number of key dimensions in a competition law and policy context, extending beyond harmonisation of generic competition laws alone. Telstra submits that harmonisation and convergence efforts should be applied to:

- substantive generic competition laws;
- supporting institutions;
- competition policy; and

- sectoral competition law.

Telstra is concerned that harmonisation of competition policy and sectoral competition law has not been mentioned at all in the draft report, even in passing. In Telstra's view, this is a disappointing omission. The Productivity Commission appears to have considered only a small element of the bigger picture.

As the Productivity Commission will be aware, competition law has both generic and sectoral application. The sectoral application of competition law is particularly important in industries such as telecommunications where greater competition law obligations are usually imposed.

Telstra notes that little (if any) trans-Tasman harmonisation or convergence effort has yet been directed to competition policy or sectoral competition law. As a result, there is little pre-existing harmonisation or convergence in the manner that exists with the generic competition laws of both nations.

With this in mind, Telstra believes that the Productivity Commission should take a more qualified approach to its cost-benefit assessment conclusions. It may be correct overall that the costs of greater harmonisation of substantive generic competition laws may exceed any resulting benefits given the extent of pre-existing harmonisation. However, this conclusion does not apply in areas that have not yet experienced any pre-existing harmonisation, namely sectoral competition laws.

Telstra believes that the Productivity Commission should be more targeted in its analysis of these issues and should concentrate on identifying those areas where little harmonisation or convergence has yet occurred. Further selective harmonisation initiatives directed specifically at those areas are likely to reap the greatest future rewards for Australia and New Zealand.

Telstra believes that sectoral competition laws represent one area where the cost-benefit equation clearly favours greater harmonisation, particularly in relation to competition laws applied specifically to the telecommunications sector. Please refer to section 4 of Telstra's original submission, which addressed this issue in detail. Telstra indicated, for example, that New Zealand is continuing to "under-regulate" its telecommunications sector by international standards.

Telstra urges the Productivity Commission to address this issue in its final report (even if only by way of express qualification to its recommendations, indicating that further analysis may be required of these issues).

The current recommendations of the Productivity Commission risk giving the misleading impression that there is no scope for further harmonisation of competition law or policy at all.

### **3 INSTITUTIONAL HARMONISATION SHOULD BE FOCUSED ON REALISING NET BENEFITS BY POOLING SPECIALIST EXPERTISE**

---

Telstra generally agrees with the Productivity Commission's conclusions that there should be greater co-operation and co-ordination between the Australian Competition & Consumer Commission ("ACCC") and the New Zealand Commerce Commission ("NZCC").

However, Telstra believes that the Productivity Commission should expressly identify those selective areas that are likely to realise the greatest benefits from greater co-operation and co-ordination. Telstra submits that future institutional harmonisation and co-operation initiatives should be directed specifically at those areas, thereby realising the greatest net benefits.

Most importantly, as outlined in Telstra's initial submission, greater institutional harmonisation and co-ordination should be directed specifically towards the pooling of specialist expertise between the ACCC and the NZCC. This is particularly true in complex industries such as telecommunications that are subject to significantly greater competition regulation, attract a greater proportion of regulatory resources, and require considerable knowledge and expertise on the part of regulatory personnel in

order to make accurate decisions. This is true both in regard to the application of generic competition law to the telecommunications sector, as well as the application of sectoral competition law.

There would be clear benefits to the NZCC if it were able to draw, to a greater extent, upon the ACCC's specialist expertise and resources in this area. Please also refer to section 3.1 of Telstra's original submission in which Telstra identified in greater detail the benefits arising from greater pooling of specialist expertise.

For this reason, Telstra submits that certain types of greater trans-Tasman institutional harmonisation and co-ordination which may not be appropriate on a holistic basis, may still be appropriate on a selective basis in particular specialist areas. This could include, for example, joint reviews of competition in various sectoral markets, the sharing of specialist staff between regulators, or even the merging or pooling of particular teams so that they consider specialist issues on both sides of the Tasman.

Telstra also understands that the Productivity Commission may be considering a new recommendation in its final report that an applicant is permitted to ask for a single trans-Tasman regulatory process for ACCC and NZCC decision-making on the same matter, but each regulator would retain the ability to make its own independent decision. Telstra understands that the Productivity Commission's intent is that the ACCC and NZCC would agree that joint process and, if unable to agree, would identify reasons for their lack of agreement. Telstra would support such a recommendation, consistent with Telstra's comments in section 3.2 of its original submission.

Again, the cost-benefit analysis undertaken by the Productivity Commission may not sufficiently recognise that the costs and benefits may differ widely between particular areas, based on the level of expertise required and the extent to which the regulators could benefit by pooling that expertise. In expertise-intensive areas, the benefits of pooling expertise may be significantly greater than in areas that are less dependent on such specialist expertise.

Telstra again urges the Productivity Commission to recognise in its final report that greater levels of institutional harmonisation and co-operation may be desirable in those specific areas which require specialist knowledge and expertise (e.g., telecommunications). Greater institutional harmonisation efforts should be directed at these areas.

## **4 GREATER INFORMATION SHARING SHOULD BE APPROPRIATELY QUALIFIED**

---

Telstra supports the Productivity Commission's draft recommendation 5.2 regarding greater information sharing between the ACCC and NZCC of information gained through their respective information gathering powers.

Telstra also supports the Productivity Commission's draft recommendation 5.4 regarding further enhancement of co-operation and co-ordination between the ACCC and NZCC, including operational, enforcement and research activities.

However, Telstra notes that it would be concerned if such information sharing were to extend too far, hence the Productivity Commission's draft recommendation 5.3 is critically important.

Telstra understands that the Productivity Commission is not proposing a particular legislative solution, but is rather making broad policy recommendations. Telstra therefore does not propose to address this issue in detail at this time.

However, Telstra submits that:

- consistent with the Productivity Commission's recommendation 5.3, appropriate safeguards should be incorporated to ensure against unauthorised use and disclosure of confidential or protected information;
- in certain circumstances, it may not be appropriate to share confidential or protected information between the regulators, and the safeguards identified by the Productivity Commission should identify those circumstances; and
- if a regulator has obtained certain information for a particular regulatory purpose (e.g., price controls), it would not usually be appropriate for the regulator to share that information with the other regulator for use for a different regulatory purpose (e.g., breach of a competition prohibition).

## **5 FURTHER SUBMISSION**

---

Telstra would be happy to make further written or verbal submissions to the Productivity Commission on the matters contained in this submission and Telstra's original submission.

**Telstra Corporation Limited**

**TelstraClear Limited**

**19 November 2004**