



*Inquiry Into Australia's
Consumer Policy Framework*

Submission by

Telstra Corporation Ltd

to the

Productivity Commission

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Abbreviations

ABN	Australian Business Number
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ACN	Australian Company Number
AS	Australian Standard
CSO	Community Service Obligation(s)
DDA	<i>Disability Discrimination Act 1992 (Cth)</i>
DNCR Act	<i>Do Not Call Register Act 2006 (Cth)</i>
E000	Emergency Number Voice Call Handling Service
FTA	Fair Trading Act(s)
ISO	International Standard Organisation
LIMAC	Low Income Measures Assessment Committee
NSW FTA	<i>New South Wales Fair Trading Act 1987</i>
SCNPMGTE	Steering Committee on National Performance Monitoring of Government Trading Enterprises
Telco Act	<i>Telecommunications Act 1997 (Cth)</i>
TIO	Telecommunications Industry Ombudsman (Scheme)
TISSC	Telephone Information Services Standards Council
TPA	<i>Trade Practices Act 1974 (Cth)</i>
Vic FTA	<i>Victorian Fair Trading Act 1999</i>
VoIP	Voice over Internet Protocol

1. Executive Summary

Telstra Corporation Limited ("Telstra") welcomes the opportunity to provide input to the Productivity Commission's *Inquiry into Australia's Consumer Policy Framework, 2007*.

1.1 The rationale for consumer policy

- Telstra strongly supports the existence of consumer protection safeguards and laws in Australia.
- An effective consumer policy framework contributes to economic development by promoting fair, open and transparent markets.

1.2 Market trends and developments

- Telstra considers that the perceived complexity of new products, services and pricing plans is evidence of healthy and continuing innovation in the telecommunications industry. New ways of accessing information, eg. by the Internet, are helping to better and more readily inform customers, give them more choice and helping to reduce confusion. Telstra considers that even greater innovation would be possible if the third line forcing provisions in the *Trade Practices Act 1974 (Cth)* ("TPA") were made subject to a substantial lessening of competition test rather than being a per se breach.

1.3 How well is the current framework and suite of measures performing?

- Telstra supports a regulatory approach that encompasses broad principles of consumer protection law rather than an approach that is detailed and overly-prescriptive. Telstra considers that some existing consumer protection regulation (particularly, many of the telecommunications specific consumer regulations and codes) is unnecessarily and unduly prescriptive and that existing broader principles of consumer protection law (namely, that provided by the TPA) are more appropriate and just as effective at achieving the desired outcome but less burdensome on business and result in less complexity for customers.
- Telstra believes that the single most important contributor to consumer welfare in Australia is continued investment in new and innovative technologies that lead to improved products and services. Consequently, regulation and enforcement should encourage rather than discourage legitimate investment that benefits consumers in the long term.
- Telstra recognises that some consumers may face greater difficulty than others in accessing services and making appropriate purchasing decisions and supports moves to assist such consumers. However, in the telecommunications industry, responsibility for such assistance is highly skewed towards one service provider only, namely Telstra, which results in significant market distortion and consequent gaps in consumer protection. Telstra considers that there is considerable adjustment required to the consumer policy framework, particularly Community Service obligations, in the telecommunications industry to remove these serious distortions for the benefit of all consumers, not just some. The delivery of community service obligations should be separated from the funding of those obligations. Affordability measures should be determined and funded at a government policy level.
- Telstra considers that the Universal Service Obligation in Australia is grossly under-funded resulting in disincentives to invest in new technologies, products and services that may benefit consumers in rural and regional areas.

- Telstra considers that there is a real need for clarity as to what constitutes a “small business customer”, in particular how to define this for the purposes of consumer protection laws and whether small business should in fact be covered by consumer protection provisions.
- Telstra is concerned at what it considers to be a lack of fairness and consistency in the approach to enforcement taken by regulators, particularly the Australian Communications and Media Authority (“ACMA”) and the Australian Competition and Consumer Commission (“ACCC”). The same consumer protection framework applies to all players, however these laws are applied more often and more vigorously to Telstra than its competitors. Regulatory enforcement is often unconnected to the where market failure is actually occurring.
- Telstra considers that in recent years the balance has tipped so that there is too little emphasis on the use of demand side policy tools whereby consumers are empowered to take responsibility for their own choices. Telstra is particularly concerned when a small impact to a small number of consumers is deemed to outweigh the prospect of larger benefits to the greater majority of consumers.
- Telstra considers that consumer redress schemes need to strike a balance between wide jurisdictions and effective operation. Telstra considers that a focussed industry specific solution is the best model and does not support the establishment of a general consumer redress body. The Telecommunications Industry Ombudsman (“TIO”) Scheme should, therefore, continue to focus on complaints associated with the provision of telecommunications services but should look to establish links to other redress schemes so that together they can address the full breadth of the telecommunications issues raised by the customer.
- Telstra considers that there is a real and immediate need for clarity, consistency and harmonisation of State, Territory and Federal consumer protection laws in Australia. In particular, Telstra has identified areas of marked divergence in the following consumer protection laws: unfair terms in consumer contracts, telephone marketing, door to door sales and trade promotions.
- Telstra considers that there is a need for greater effectiveness in public participation in consumer policy development and in consumer-industry dialogue. In particular, there is a need for increased coordination and training resources in the consumer sector to enable relevant issues to be identified and resolved in a commercially realistic and balanced way.
- Telstra supports the Productivity Commission’s views on good practice regulation, but wishes to add further principles that should be considered such as whether the policy tool chosen will act as an incentive or disincentive to investment.

2. Introduction

Telstra Corporation Ltd is Australia's leading telecommunications and information services company, with one of the best known brands in the country. We offer a full range of services and compete in all telecommunications markets throughout Australia, providing more than 9.86 million Australian fixed line and more than 8.9 million mobile services. Our main activities include the provision of:

- basic access services to most homes and businesses in Australia;
- local and long distance telephone calls in Australia and international calls to and from Australia;
- mobile telecommunications services;
- broadband access and content;
- a comprehensive range of data and Internet services (including through Telstra BigPond®, Australia's leading Internet service provider)
- management of business customers' IT and/or telecommunications services;
- wholesale services to other carriers, carriage service providers and ISPs;
- advertising, search and information services (through Sensis, Australia's leading directory and search company); and
- cable distribution services for FOXTEL's® cable subscription television services.

One of our major strengths in providing integrated telecommunications services is our vast geographical coverage through both our fixed and mobile network infrastructure. This network and systems infrastructure underpins the carriage and termination of the majority of Australia's domestic and international voice and data telephony traffic.

Telstra owns 50% of FOXTEL®, and its international business include CSL New World Mobility Group, one of Hong Kong's leading mobile operators, TelstraClear Limited, the second largest full service carrier in New Zealand and Reach Ltd, a provider of global connectivity and international voice and satellite services, as well as SouFun Holdings Limited, a leading real estate and furnishings website in China.

Telstra's submission

Telstra welcomes the opportunity to provide information to the Productivity Commission on the effectiveness and efficiency of Australia's consumer policy framework and how it might be improved to give greater certainty and less cost to business operations as well as improve consumer choice and engagement in the Australian market.

This submission follows the general outline given in the *Consumer Policy Framework: Productivity Commission Issues Paper*, January 2007.

3. The rationale for consumer policy

Telstra strongly supports the existence of consumer protection safeguards and laws in Australia. As a major company that seeks to promote the highest standards of customer service and corporate social responsibility, we consider that an effective consumer policy framework contributes to business success by promoting fair, open and transparent markets. Telstra welcomes the opportunity to compete on its “consumer credentials” and is always seeking ways to improve the experience of its customers in dealing with the company.

Example: With the implementation of “Market Based Management”, Telstra has appointed dedicated customer experience people and resources in all of its consumer marketing teams. Telstra also has a range of specialised consumer affairs functions that focus on complaints, compliance and disadvantaged and vulnerable customers.

Telstra considers that effective demand-side policies can help lead to more efficient markets as consumers are empowered in their choices to drive the supply of appropriate products and services that suit their needs.

Demand-side strategies, such as effective consumer education and redress, may also be a practical policy tool in dealing with occasions of market failure.

There is a growing recognition of the importance of user innovation as a mechanism that is driving the adaptation of products and services to meet differing consumer needs. Effective consumer policy can then promote innovation and investment.

International developments in consumer policy also have implications for Australian consumers and business impacts.

Example: Standards Australia has recently endorsed a new complaints handling standard, AS ISO 10002, based essentially on the international standard and replacing the 1995 Australian developed standard AS4269.

With increasing international trade, Internet based commerce, outsourcing of business operations nationally and internationally, and global business operations, consistency and cooperation in consumer policy making becomes ever more important. Telstra notes, in this regard, the United Nations sanctioned eight consumer rights. These rights are:

- Right to satisfaction of Basic Needs
- Right to Safety
- Right to be Informed
- Right to Choose
- Right to be Heard
- Right to Redress
- Right to Consumer Education
- Right to Healthy and Sustainable Environment

In reviewing Australia’s consumer policy framework, Telstra suggests that the Commission might have regard to these themes, which provide a useful benchmark for consistent and principles-based consumer policy development.

4. Market trends and developments

Telstra considers that the main and most significant driver of innovation in new telecommunications product and service offers coming to the market is the convergence brought about through digital technologies. This means that an almost limitless number of communications, information and entertainment services can be accessed from the one suitable device. Many of those services may be provided by third-parties, even by overseas service providers.

Example: A mobile phone once used primarily for voice calls and SMS may now also be used for video-calling, taking photos or video clips, sending and receiving MMS, browsing the Internet, sending and receiving e-mail, listening to the radio/ audio tracks, watching streaming video and/ or TV channels, paying bills and looking up directory information based on the user's location.

4.1 Complexity and pricing

Complexity can arise due to the many accessible services being individually tariffed, with some services included in a set monthly fee, others are pay-as-you-use, on-net charges (ie. where the service is provided using the service providers network only) may differ from off-net charges (ie. where the service provider has to make out-payments to other providers for delivery of that service), special "capped" plans may apply to some services (often those that are on-net) but not others. Further, service providers will want to differentiate themselves in the market, often through special offers.

Telstra considers that innovation in pricing is a sign of healthy competition that will result in greater consumer benefit.

Example: Some consumer representatives have questioned the validity of "capped" plans, due to possible exclusions that may apply and the issue of unexpected high bills. However, judging by their popularity and the number of competitive responses within the industry, these plans have been a significant innovation with considerable benefits to consumers.

Telstra believes that as consumers gain experience with new offers in the market and settle into regular patterns of use many of these "complexity" issues are likely to dissipate.

Further, there are a number of preventative measures that both consumers and service providers are taking. Pre-paid mobile services are the fastest growing segment of the market and provide security against unexpected high bills. Telecommunications service providers, through the development of a Communications Alliance Credit Management Industry Code (C541:2006), provide a range of protections such as dollar spend limits for premium services, automatic notifications when data usage limits are being approached, and/ or courtesy calling/ notification when a pre-bill is detected to be unusually higher than compared with previous usage.

4.2 Complexity and bundling of services

The Commission notes in its issues paper the increasing complexity of product offerings, often through product bundling. Rather than hindering effective participation by consumers in the market, Telstra considers that innovative product bundling by the telecommunications sector has simplified consumer choice, often with price benefits.

Example: Telstra provides attractive discounts to customers who choose to bundle their eligible services, such as fixed line service together with mobile, Internet and/ or pay TV services on a single bill.

However, the current per se prohibition against third line forcing conduct as set out in sections 47(6) and (7) of the TPA means that third line forcing is prohibited even where there is no substantial lessening of competition. This has the effect of limiting the development of many innovative bundled product offerings and therefore limiting consumer choice without providing a corresponding benefit of consumer protection. It is also inconsistent with the approach in New Zealand (where if

the proposed conduct does not have or is not likely to have the effect of substantially lessening competition in a market, it will not contravene the *Commerce Act 1986* (NZ).

Accordingly, Telstra considers that the effect of sections 47(6) and (7) of the TPA regarding third line forcing may on balance be inhibiting opportunities for consumer benefit through innovative bundled product offerings. Telstra submits that it is open to the Commission to recommend that the TPA be amended so that third line forcing is subject to a substantial lessening of competition test.

4.3 Complexity and customer information

The Commission asks in its *Issues Paper* "whether the provision of more information to consumers will necessarily be an effective way of improving market outcomes."

Telstra considers that often it is the many regulatory instruments and regulator decisions that call for the provision of (more) information as the primary response to ensuring informed consumer choice or mitigating potentially detrimental decisions. However, Telstra considers that in some cases any actual consumer benefit is far outweighed by the increased costs of compliance.

Example: Many of the telecommunications industry codes have information requirements that are specific to that code, which has the effect of multiplying the amount of information delivered to consumers as well as costs to industry. In August 2005 Telstra and the Communications Alliance compiled a list of all customer information requirements imposed on participants in the telecommunications industry. The list includes 19 separate regulatory instruments and 10 pages of specific requirements. The purpose of this audit was to begin to seek an appropriate balance between the effectiveness of providing customer information (content and method) against the costs of providing. However, the process was short-circuited when approaches to regulators and policy makers resulted in regulatory compliance being given a higher priority than effectiveness and efficiency.

Example: The disclosure of information in relation to reverse charge calls. Telstra provided full details of its reverse charge calls service in its standard form of agreement (which is available online or in Telstra Shops and third party dealers). This information is also available from Telstra operators before deciding to reject or accept a call as well as by virtue of a 1800 number advertised in the White Pages™ and online. However, the ACCC believed that all service providers should provide such information to consumers prior to the consumer accepting the service (although the ACCC did not appear to consider that current practices raised issues under the TPA). As the service could be used by a number of customers in different locations (including from 65 overseas locations) to which different call rates apply, such information would have to be provided by an operator. This would have resulted in a significant increase in call handling times which would in turn lead to an increase in labour costs associated in providing the services with the flow-on effect likely to be an increase in the prices Telstra charged for the provision of reverse charge calls.

The Commission notes in its paper the greater use of standard form contracts. This mechanism for contracting with consumers is common in the telecommunications sector given its statutory creation and endorsement in the *Telecommunications Act 1997* (Cth) ("**Telco Act**"). Telstra considers standard form contracting it to be a positive thing for consumers, creating consistency and certainty in the terms on which telecommunications goods and services are provided. Further, increasing market choice can drive simplification as a response by service providers to compete for customers.

Example: Telstra has undertaken a major project to re-draft its standard terms in plain and easy to understand language, in particular, its consumer contracts for mobile phone services and its BigPond Internet services, which benefits consumers.

4.4 New ways of informing consumer choice

As the Commission notes in its *Issues Paper*, technologies such as the Internet are redefining ways in which consumers and businesses interact. The latest ABS *Household Use of Information Technology, Australia* survey indicates that 60% of households had Internet access in 2005-06 with 70% of the population being Internet users in December 2006 (Neilson//NetRatings).

The Internet is positively addressing issues of access to information (including helping to break down complexity) for consumers through the following means:

- Consumers can search for products and services that meet specific requirements, locally and internationally. They can access substantially more information about the product prior to purchase, for example, downloading the user manual and even viewing three-dimensional reproductions of the product, to determine if it meets their needs.
- Consumers can access (independent) reviews of products and services that might guide their choices, for example, at www.choice.com.au.
- Consumers can access information that allows them to compare between various product and service offerings and prices. For example, www.phonechoice.com.au has sections on mobile, fixed line, broadband and VoIP (Voice over IP) including a forum where consumers can ask questions and receive specific answers.
- Consumers can learn from the experiences of users in other markets, such as overseas, where many products originate. In fact, consumers can often join (international) campaigns that seek to redress issues of consumer detriment.
- In the telecommunications industry, as a result of a Communications Alliance industry code, people with a disability will be able to retrieve standard-form information about the accessibility features of (mobile) telephone handsets that can help guide their purchase.

The Commission should find that with very high levels of Internet usage in Australia that any information asymmetry between supplier and consumer is fast disappearing. Further, that such access provides a greater ability to compare and move between suppliers, which creates greater discipline on the market as suppliers are forced to do better to attract and retain customers. This often means that new offers tend to be simplified in order to gain "cut-through" in a crowded market.

This is not to say that the actual use of the Internet by many suppliers and others has reached its full potential. The hyper-text representation of information on most web-sites is very under-developed, not utilising the rich, exploratory, multi-media and user-generated content potential of the medium. This is a shame since such representation has the potential to assist consumer comprehension and comparison by "doing" rather than just "observing". The Commission might recommend ways to encourage suppliers and consumers to make better use of new media.

A further area of investigation and research that could be recommended by the Commission, which would assist both consumers and service providers, is consumer behaviour in purchasing and contracting, particularly as it relates to making informed choices. Telstra notes that suggestions have been made for the development of industry wide "standard form" contracts in telecommunications with add-ons for specific features of the service. While not necessarily agreeing that this is the best course of action, (rather individual suppliers should be free to develop the terms on which they offer their products and services), Telstra does believe that undertaking suitable research may provide useful consumer behavioural information that informs how to generally improve the level of informed choice in consumer transactions.

5. How well is the current framework and suite of measures working?

5.1 Overall framework and approach

The telecommunications sector is one of the most heavily regulated sectors in Australia. In addition to general consumer protection legislation such as the TPA, there are at least 7 principal Acts, 30 codes and numerous regulations and other subordinate instruments, as well as licence conditions, which businesses like Telstra must comply with. This is in addition to numerous other regulatory instruments with which telecommunications providers must comply relating to areas such as direct marketing, consumer contracts and trade promotions.

Of particular note are the extensive obligations and regulatory powers to which telecommunications providers such as Telstra are subject to under Part XIB of the TPA. Division 2 of Part XIB replicates some of the restrictive trade practices provisions which already exist in Part IV of the TPA. The competition notice regime in Division 3 of Part XIB exposes businesses to millions of dollars in penalties per day and effectively reverses the onus of proof in relation to the conduct which is the subject of the notice. However, for all the red-tape imposed, there seems little consumer benefit arising from these provisions. In fact, as argued elsewhere, such regulation may act as severe disincentive to investment, which can then lead to greater long-term consumer detriment.

Telstra believes that the consumer policy framework should not act as a disincentive to investment in meeting the needs of particular customer groups, such as disadvantaged and vulnerable consumers. Further, the current framework in the telecommunications industry is heavily skewed with a number of welfare measures or Community Service Obligations (“CSOs”) applying only to one service provider, namely Telstra. This acts as a disincentive for all service providers to invest for the benefit of particular groups of customers.

5.1.1 Regulatory balance

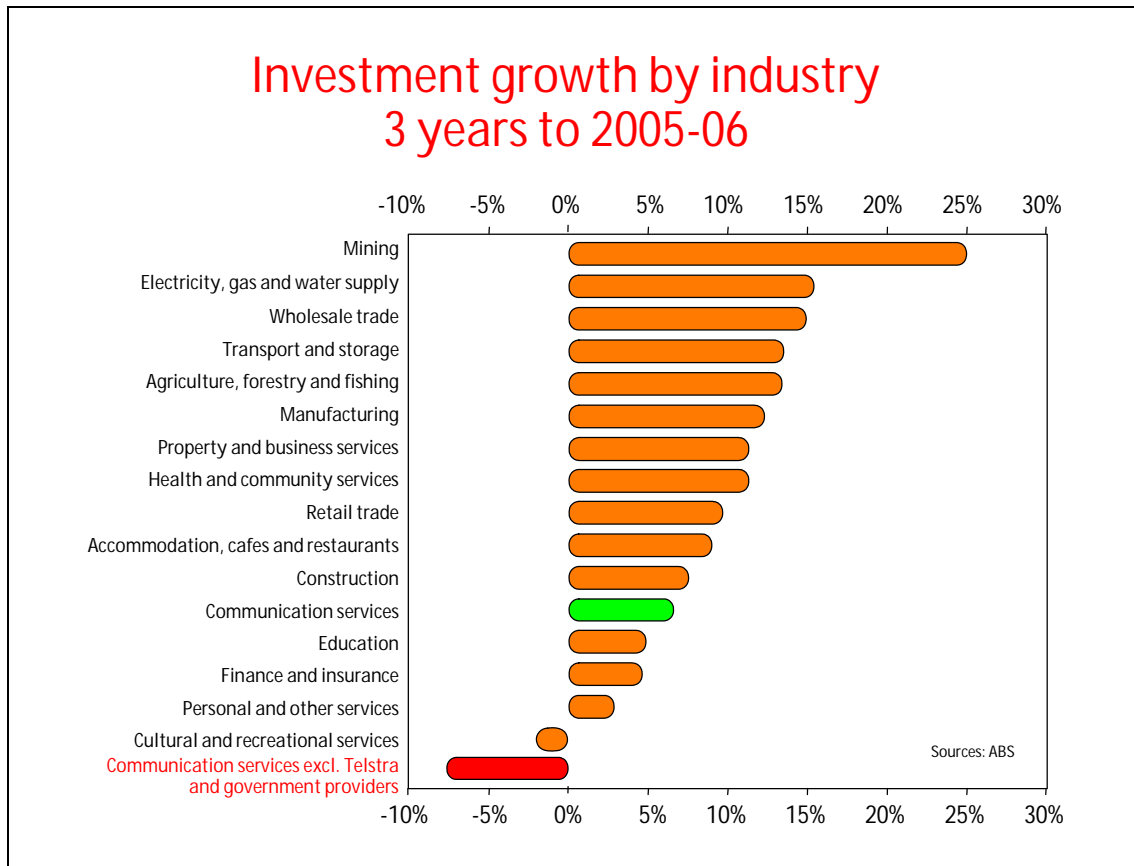
While regulation to protect consumers is necessary, Telstra considers that in recent years the balance has tipped so that there is too little emphasis on the use of demand side policy tools whereby consumers are empowered to take responsibility for their own choices. A paternalistic approach to consumer protection (both in the laws and in enforcement activity) means that legally-compliant businesses may be subject to the burden of over-regulation while consumers may become complacent and benefit from being absolved from risk even where this should be appropriately shared.

Telstra is particularly concerned when small risks to a small number of consumers is deemed to outweigh the prospect of larger benefits to the greater majority of consumers. This is often a point of contention between consumer representatives and service providers. Telstra agrees that incidences of wide-spread detriment, ie. affecting a large proportion of consumers, and/ or incidences of significant detriment affecting even a small proportion of consumers, should be addressed. However, even here there is often disagreement on what quantitative thresholds may be relevant in assessing whether an issue is wide-spread enough to warrant intervention and what qualitative thresholds may be relevant in assessing the impact on particular groups of consumers. Often a balance will need to be struck between delivering the greatest welfare benefit to the greatest number of consumers and protecting those who may suffer a detrimental impact.

Where intervention is deemed necessary, Telstra considers that there should be a formal assessment of what policy tool, including demand side options such as consumer education, will be most effective in delivering the required market outcomes. It may be that in some cases existing individual redress mechanisms are the most efficient and effective way of dealing with residual market failure and impacts on some consumers.

5.1.2 Relationship between competition regulation and consumer benefit

Telstra believes that the single most important contributor to consumer welfare in Australia is continued investment in new and innovative technologies that lead to improved products and services. Consequently, regulation and enforcement should encourage rather than discourage legitimate investment that benefits consumers in the long term. This is not the case in the telecommunications industry under parts XIB and XIC of the TPA. Telstra believes that these particular regulations are disincentives to investment to the point of resulting in negative investment growth and consequent long-term consumer detriment and are in need of urgent reform. The following chart shows how telecommunications industry investment growth has fared under this regime compared to other industry investment growth in Australia.



5.1.3 Definition of small business

Telstra considers that there is a real need for clarity as to what constitutes a “small business customer”, how to define this for the purposes of consumer protection laws and whether small business should be covered by consumer protection provisions. There are a number of instances where a lack of clarity on this issue causes difficulties for compliance with consumer protection laws.

Example: The Do Not Call Register Act 2006 (Cth) (“**DNCR Act**”) allows Australian phone numbers used or maintained exclusively or primarily for private or domestic purposes to be entered on the register. However the DNCR Act prohibits the making of telemarketing calls to any number on the Register, regardless of whether a number is entitled to be registered. The draft Do Not Call Register (Administration and Operation) Determination 2007 requires a person registering a phone number to confirm that the number is private or domestic. However there is no verification procedure in place. This means that telemarketers cannot be certain that a business number they may wish to call has not been listed on the register, notwithstanding that the number is ineligible to be registered. Despite the fact that the regime was designed so that only private or domestic numbers could be registered, telemarketers will be forced to incur the extra expense and administrative burden of “washing” their business number calling lists against the register.

Example: There is inconsistency in the application of state fair trading legislation to small business customers. The *New South Wales Fair Trading Act 1987* (“**NSW FTA**”) applies to contracts for the supply of goods or services with an individual. However, because a small business customer may also be an individual, companies such as Telstra cannot conclusively determine whether the NSW FTA does not apply to a particular individual unless the customer supplies an ABN or ACN. Similarly, the *Victorian Fair Trading Act 1999* (“**Vic FTA**”) applies to agreements for the supply in trade or commerce of goods or services ordinarily used for personal, household or domestic use. Many consumer goods and services (such as phones) fall within this definition yet are also commonly used for business purposes. Accordingly prudent businesses cannot be certain that the Vic FTA does not apply unless the customer supplies an ABN or ACN, adding a layer of complexity, confusion and uncertainty.

Telstra considers it important for the Commission to make recommendations on a consistent approach to defining small business, and if required, how this is effectively dealt with in characterising the scope of any particular consumer protection policy.

5.2 Policy tools

5.2.1 *Community service obligations*

Telstra understands and appreciates that CSOs, as determined by Government and delivered via private firms, effectively assist vulnerable and disadvantaged consumers whom the market would fail due to their difficulty in meeting the market price for essential services. Telstra therefore does not object to the nature of the social policies in place. However Telstra is firmly of the view that welfare should be the domain of the State and not private organisations. This is reflected in the fact that in all other industries, State and Territory Governments compensate private companies for the delivery of Government mandated policy.

Telecommunications competition has brought great benefits to all Australian customers through lower prices, more choice and new services and Telstra should be on a level playing field with its competitors operating in Australia in order to strengthen these beneficial outcomes. Consumers should have the benefit of that competition without distortion of choice through asymmetric regulation that mandates Telstra to pay for government mandated social policies. This, in fact, runs counter to the Government’s own policies and market based principles.

Telstra stands ready to be a distribution channel for Government policy and is open and willing to discuss all possible methods for distributing Government funded policies. Of course, all industry participants should be able to do the same, so that consumer choice is not distorted.

The Federal Government’s National Competition Policy recognises that CSOs are often established to meet Government social policy objectives and that consumer policy should not reduce efficiency that contributes to healthy competition, particularly with regard to the funding mechanism of CSOs. It directs CSOs to be funded by Government in order to achieve the goals of assisting the vulnerable consumer and encouraging efficient production and delivery of products/services.

The Federal Government has recognised that in the current competitive environment it is ultimately the shareholder who bears the cost since internal cross-subsidies of CSOs are not possible in competitive markets such as the telecommunications industry. In its *Socio-Economic Consequences of the National Competition Policy*, November 1998, report, the Government’s position was articulated as follows:

In the past, there has been a tendency for the business sector to subsidise household consumers in the provision of public operated utility services, while urban residents have tended to subsidise rural residents. However, charging some consumers at a higher rate to subsidise others becomes untenable where there is access to alternative suppliers who do not contribute to funding the CSO and whose prices more closely reflect the cost of providing the service.

It is even more important today as the ACCC has required Telstra to de-average wholesale access prices. The Government prevents Telstra from recovering costs in the high cost areas through retail price controls. This regulatory pincer encourages and enables Telstra's competitors to cherry pick Telstra's most profitable and lowest cost customers. This disadvantages Telstra and reduces Telstra's ability to compete and invest in new/ innovative services that would benefit all customers.

The set of Government principles regarding the funding of community service obligations has been repeated many times in a number of reports and forums, including previous Productivity Commission reports. Please refer to Appendix 1 for examples of Department of Treasury statements.

In practice, these principles have been implemented in virtually all industries, except in the telecommunications industry. This is a situation that must be addressed as a priority given the potential detriment to consumers.

- Consumers who choose providers other than Telstra are detrimentally affected because they receive none of the consumer policy coverage that applies to customers of Telstra.
- Consumer choice is limited as Telstra becomes the "only" option for customers seeking to benefit from the consumer policy in question, particularly those "vulnerable and disadvantaged" customers that the Commission has highlighted. These customers are therefore not deriving the full benefits of open competition.
- It leaves one player in the market, Telstra, with a "regulated" higher cost structure than its competitors. This runs absolutely counter to Government competition policy.
- Telstra starts at a competitive disadvantage in the marketplace and there is no doubt that this acts as an investment disincentive that reduces overall consumer welfare.
- The telecommunications industry only carries the burden of funding community service obligations that benefit all Australian households and businesses, disadvantaging investment in relation to other industries.

Telstra considers:

- That competition and consumer welfare in the telecommunications industry is being severely distorted due to specific regulations that target one provider only.
- That community service obligations that benefit most Australian consumers and businesses should not be funded by only one provider or only one industry but through more general societal means, for example, from consolidated revenue.

Example: The Telstra only provision of free residential directory assistance, as required by the Price Control Determination. The cost of this provision is approximately \$23m.

Example: The Telstra provision of the emergency number voice call handling service ("E000") at an annual cost of approximately \$13 million, without any recompense, yet a third party, the National Relay Service, is responsible for 106 (the text emergency service number, eg. used by the Deaf) but is recompensed. With new forms of communications emerging, such as video-calling for the Deaf, it is possible that the consumer policy framework in this instance will become fragmented. Telstra considers that it is better to have one suitably resourced national emergency services call handling centre able to deal with customers no matter what their communications preferences, centrally funded and competitively neutral. The National Emergency Communications Working Group and the Emergency Service Advisory Committee both support Telstra's proposal to migrate the E000 service to a more suitable manager.

Telstra submits that there is considerable adjustment required to the consumer policy framework in the telecommunications industry to remove these serious distortions.

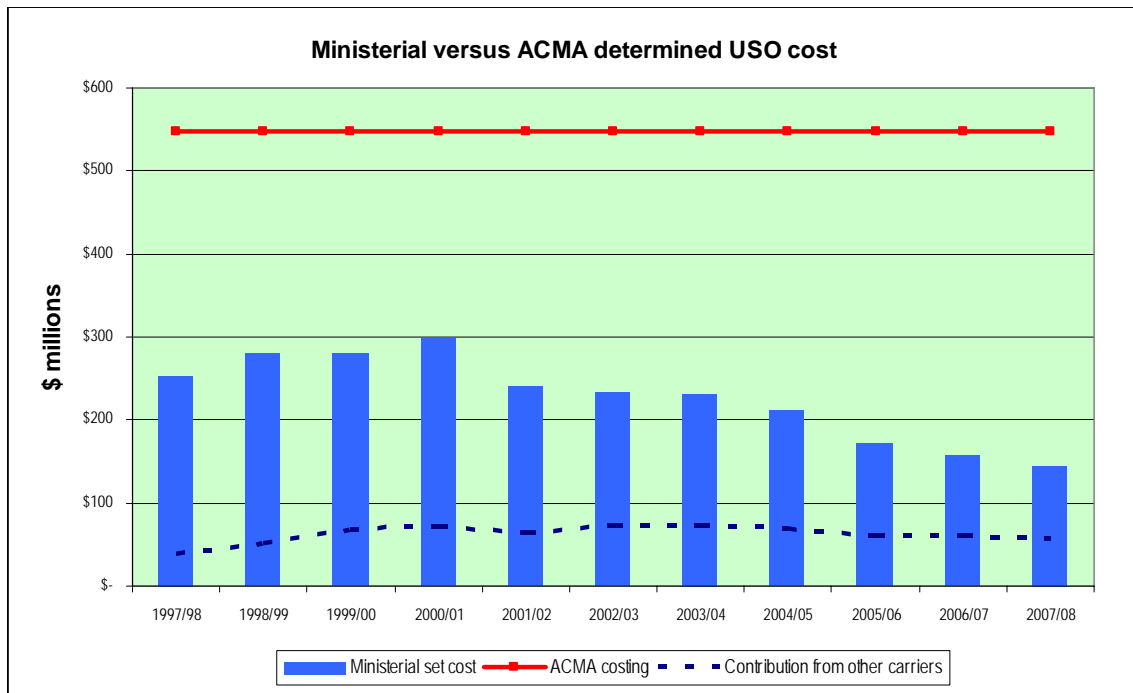
5.2.2 Universal service obligation

This is another example of a policy tool that results in Telstra being burdened with an unfair share of regulated costs and consequent disincentives to invest in new technologies, product and services that may benefit consumers.

The USO obliges Telstra to make a Standard Telephone Service reasonably available to any Australian, regardless of where they live or work. In general, rural communications services are more expensive to install and maintain than metropolitan services.

The ideal funding mechanism would be for Government to pay for the USO in line with stated policy. A properly funded USO would at least be a competitively neutral arrangement. However, under current arrangements the USO is grossly under-funded. All telecommunications service providers contribute to the USO fund in proportion to their industry revenue. However the total fund amount is Ministerially determined and is un-related to actual costs. Further, there is pressure from and opportunity for Telstra's competitors to ensure the fund is as small as possible.

As a result, contributions by other carriers represent a very small proportion of the total USO cost, leaving Telstra to fund the rest. As illustrated in the chart below, the total fund amount has also been declining each year, despite rising costs for copper, fuel, labour and other inputs.



The last time a thorough cost model was done was 1997/ 98 by the then Australian Communications Authority (now ACMA the Australian Communication and Media Authority), which determined the cost of the USO as \$548 million. Even assuming this costing remained constant over the past nine years, the total contribution by Telstra to the maintenance of rural services will be close to \$489m per annum, with the rest of industry paying just under \$60m per annum. This is not only unfair on Telstra shareholders, it is not in the best interests of rural and regional customers because Telstra is being dissuaded from investing in new technologies that would benefit customers living in rural and regional Australia. A new, more realistic costing needs to be carried out.

Now that telecommunications markets are highly competitive it is anachronistic in the extreme to expect only Telstra to incur these substantial "regulated" costs and be placed at a competitive disadvantage within its own industry.

5.2.3 Price controls

This is another example of out-dated telecommunications regulation, which only Telstra is subject to. It was introduced as a temporary measure in 1989 within the context of an absence of network and retail competition and to ensure that productivity gains flowed through to consumers. The efficiency grounds for retail price controls may have made economic and social policy sense at the time. However, the telecommunications market has become so competitive since that time that the rationale for price controls has evaporated.

Telstra should now have the same flexibility to respond to customer demands and compete in the market as every other carrier in the Australian market has. Telstra price controls create unnecessary compliance hurdles and costs. They stifle pricing innovation. Their complicated nature holds Telstra back from delivering pricing arrangements which would benefit hundreds of thousands of customers.

In all other equivalent jurisdictions the presence of wholesale regulation has led to the phasing out of retail price controls. The EU regulatory framework which came into force in July 2003 states that:

...regulatory controls on retail services should only be imposed where national regulatory authorities consider that relevant wholesale measures or measures regarding carrier selection or carrier pre-selection would fail to achieve the objective of ensuring effective competition and public interest. (Paragraph 26, preamble to Universal Service Directive.)

While the ACCC has overseen the rapid expansion of declared and regulated wholesale access arrangements, the Government has at the same time tightened price controls and made them more prescriptive. As a result Australia is out of step with the rest of the OECD. Quite simply it makes no economic sense to regulate both wholesale and retail services. Regulatory error is inevitable.

5.2.4 Disadvantaged and vulnerable consumers

Telstra recognises that some consumers may face greater difficulty than others in accessing services and making appropriate purchasing decisions and supports moves to assist such consumers. However, in the telecommunications industry, responsibility for such assistance is highly skewed towards one service provider only, namely Telstra, which results in significant market distortion and consequent gaps in consumer protection.

Definitions and criteria

Telstra notes that there are difficulties for service providers in implementing policies designed to assist disadvantaged and vulnerable consumers. In particular, it can be difficult for service providers to assess whether a particular customer is in fact "disadvantaged" or "vulnerable", particularly where privacy and/ or discrimination law constraints preclude a service provider from seeking proof or evidence that a customer meets any relevant criteria.

Example: Telstra had to seek specific privacy regulation changes via the Attorney General to be able to verify discounts based on Government welfare criteria, such as holding a Pensioner Concession Card or Health Care Card. These changes took considerable time and petitioning to achieve and resulted in multi-year delays to the associated programs and significant costs.

Example: Telstra is very sensitive to the issues of discrimination that may arise if staff were expected to assess the capacity of a customer to contract beyond objective criteria such as credit assessment and proof of age. Telstra is then often subject to complaint where after-the-fact it is alleged that capacity to contract was in question.

Further, there is generally no clear definition for what constitutes "vulnerable" or "disadvantaged" customers despite this being a central concept. These terms need to be more clearly defined and

based on objective criteria so that policies designed to assist such consumers can be applied and administered fairly and consistently.

The work that has been done by Consumer Affairs Victoria in their "Discussion Paper: What do we mean by 'vulnerable' and 'disadvantaged' consumers?", Melbourne 2004, is an excellent starting point. The Communications Law Centre report "Not So Special: Telecommunications contracts, disability and unfair practices," Melbourne, January 2006, provides an excellent overview of case law. The ACCC also seeks to provide guidance through its publication "Dealing fairly with disadvantaged or vulnerable consumers – advice for businesses". Telstra is aware that certain ACCC actions against vendors for unconscionable conduct have not succeeded (ACCC MR 198/05 issued 17th August 2005), which highlights not only possible gaps in consumer protection but potentially unfair impacts on service providers seeking to avoid both discriminatory and unconscionable conduct.

Telstra is not aware of any further developments in objectively based criteria from these recent discussions and submits that this is an area where further clarity is required so that both service providers and consumers can have greater certainty.

Disability discrimination

Telstra is surprised that the Commission's *Issues Paper* does not include the *Disability Discrimination Act 1992* (Cth) ("DDA") as part of Australia's consumer policy framework. The implications of this legislation are far reaching and important for access to product and service markets by people with a disability. Telstra has well-developed policies and procedures to ensure that it complies as far as possible with the DDA. However, this legislation, in combination with other regulations, does have greater impacts on some service providers than others, and on some industries than others.

- There are a range of situations faced by people with a disability that have more to do with affordability than accessibility. Telstra recognises that many if not most people with a disability face both issues as significant barriers on a day-to-day basis. However, Telstra is of the view that affordability issues should generally be resolved at the societal level, for example, through the application of government funding programs, rather than at the industry or service provider level. The consumer protection effect of the DDA, in some cases, could be more efficiently achieved through subsidies to people with a disability to make choices in the market where that is possible, rather than mandating supply of certain equipment by certain suppliers.
- Only the telecommunications industry is being required to fund generic "disability" services, such as the National Relay Service, which provides interpreting between text and oral/ aural messages. Telstra notes that the Deaf perceive themselves as a specific cultural and linguistic community, not as a disability community. The National Relay Service should then be viewed as providing a similar function to the generic Telephone Interpreter Service, and funded in a similar broad-based way.
- The DDA has been specifically interpreted and written into the *Telecommunications Act 1997* covering the provision of the Standard Telephone Service. While this has had the desired effect of clarifying service provider responsibilities, modern developments in technology and competitive infrastructure could over time lessen the effectiveness of this policy. Empowering consumers, including people with a disability, through income policies to choose their preferred communications options would be a better, pro-competition, pro-investment policy.
- Finally, Telstra is the nominated Primary Universal Service Provider and so in practice carries the bulk of the cost of providing disability equipment to augment the Standard Telephone Service. This cost is not recognised as part of the Universal Service Obligation ("USO"), which as argued elsewhere is grossly under-funded.

Nothing in the above should be read or interpreted as a lessening of Telstra's very strong view that people with a disability should be given the support they need to effectively engage in society on a similar basis to other consumers and Telstra's commitment and compliance in this area is second to none. Telstra submits, however, that the most efficient and effective means of providing that support needs to be reviewed, particularly where obligations impact one service provider in particular or one industry only.

Example: The national Workplace Modifications Scheme is a good example of helping to provide equitable access for people with a disability, whereby the costs of workplace modifications and/ or adaptive equipment are met by this Australian Government scheme, irrespective of the industry or the size of the employer.

Affordability

Telstra notes that "disadvantaged and vulnerable consumers" may also include people on a low income or who face financial hardship. Telstra believes that affordability protections in the telecommunications industry are highly skewed and limits the choice of carriers for consumers.

Example: Telstra alone bears the responsibility and cost for maintaining a "low-income package" of products and services, which exceeds \$200m per annum and affects the choices of more than 1.5m telecommunications customers.

Telstra submits that this restrictive regime produces distortions in consumer choice and leads to less efficient markets. It also means that support is only provided to basic home telephone access, which ignores the remarkable changes taking place in consumer needs for mobiles and Internet access, including by people on a low income. With increasing competitive telecommunications infrastructure build (for example, in new estates) the need for broader based consumer protections becomes more acute and more urgent.

Financial hardship

Many service providers, including those in the telecommunications, energy and water, and financial services industries, have responded to the issue of consumers facing financial hardship by developing specific credit management policies and procedures, often with dedicated staffing.

Example: In 2006 the Communications Alliance developed a revised Credit Management Code (C541:2006) for the telecommunications industry that includes provisions for dealing with customers who find themselves in financial hardship.

Telstra submits that this is an appropriate industry level development that provides consumer protection consistent with choice and competition. It responds to all consumers, whether well-informed or not, who may be vulnerable in situations such as unemployment or interest rate rises. It is able to take into account the particular nature of the products and services of that industry and contemplate options and solutions that each service provider is able to support.

Conclusion – disadvantaged and vulnerable consumers

The current consumer policy framework in telecommunications is taking into account disadvantaged and vulnerable people's circumstances, but often in a piecemeal way.

- For people on a low income and /or with a disability, there is an urgent need for a broader policy framework to be implemented and funded at a societal level to prevent coverage gaps appearing in relevant protections, to ensure competitive neutrality and to provide incentives for investment benefiting these groups.
- For people with irregular or reduced capacity to contract, greater clarification and certainty is required of both service provider and consumer responsibilities.

5.3 Generic v industry-specific regulation

Telstra supports a regulatory approach that encompasses broad principles of consumer protection law rather than an approach that is detailed and overly-prescriptive. Telstra considers that some existing consumer protection regulation (particularly, many of the telecommunications specific consumer regulations and codes) is unnecessarily and unduly prescriptive and that existing broader principles of consumer protection law (namely, that provided by the TPA) are more appropriate and just as effective at achieving the desired outcome but less burdensome on business and result in less complexity for customers.

5.4 Enforcement and redress issues

Consumers rightly expect to have confidence in regulatory authorities to maintain discipline in the marketplace, particularly when there is systemic or serious detriment occurring. Consumers' right to effective and efficient redress is also important protection and market discipline. Delivering this effectively and efficiently is an intrinsic part of any consumer policy framework. Whilst the nature of the redress mechanisms might vary depending on the issues, there are two important perspectives that need to be considered:

- The adequacy, effectiveness and coverage of existing arrangements; and
- The flexibility to deal with future developments, either technology or consumer driven.

5.4.1 Enforcement by regulators

Telstra is concerned at what it considers to be a lack of fairness and consistency in the approach to enforcement taken by regulators, particularly the ACMA and the ACCC.

The same consumer protection framework applies to all players, however these laws are applied more often and more vigorously to Telstra than its competitors. Telstra is often the target of regulators seeking to prevent conduct that is widespread across the telecommunications industry. Yet when other industry operators fail to modify their behaviour following regulatory action against Telstra, too often no equivalent action is taken against them.

Example: In August 2003 the ACCC brought proceedings against Telstra regarding the use of "\$0" and "\$0 upfront" claims in respect of mobile handsets and plans. At the time, every major mobile service provider was using the same claim in advertising mobiles, but Telstra was singled out as the industry test case. Telstra attempted to resolve the matter out of court, but the ACCC's position was that Telstra must stop using both the "\$0" and "\$0 upfront" claims while the rest of the industry continued to use these claims, which would have caused Telstra immense competitive disadvantage. The ACCC was successful in relation to only three of its seven claims in the Federal Court. As a result of the court decision, Telstra stopped using the "\$0" claim but was able to continue use of the "\$0 upfront" claim. However, some providers continued (and still continue) to use "\$0" to advertise mobile handsets. As far as Telstra is aware, the ACCC has taken no action against such providers in respect of this ongoing conduct, despite its comments to Telstra that the decision will act to create a level playing field.

Telstra understands that the limited resources of regulators means that enforcement by example is sometimes necessary, but feels strongly that it is not appropriate or effective if the same operator is always targeted.

Telstra knows from its competitor monitoring program that it is often the smaller operators who commit the most blatant breaches of consumer laws resulting in consumers being misled and suffering detriment, yet such conduct often continues without action by regulators. Regulatory enforcement, then, is unconnected to the where market failure is actually occurring.

5.4.2 The Telecommunications Industry Ombudsman

The telecommunications industry and consumers have been well served by the industry funded TIO Scheme, which was established in 1993 and is now dealing with over 100 000 complaints a year. However, there are a range of pressures developing as technology, products and services continue to develop at a rapid pace. Many of these developments will require responses that balance making it easier for customers to have their complaints addressed in full while ensuring that the providers of the redress service can do so effectively and efficiently.

Industry specific scheme or customer "one-stop-shop"?

Telstra considers that a compromise needs to be made between ease of access for consumers and the ability of the TIO to obtain skilled resources to deal with the issues. The broader the scope of activities combined with increasing product and packaging complexity make it harder to recruit and train resources capable of adequately addressing the full range of consumer issues. Telstra considers that it is very important for schemes like the TIO to be able to work closely with the industry they cover to support root cause analysis of complaints and drive improvements in customer service. Specific expertise needs to be built up and some specialisation is inevitable. For this reason, Telstra considers that a focussed industry specific solution is the best model and does not support the establishment of a mega-complaints body. TIO Scheme should, therefore, continue to focus on complaints associated with the provision of telecommunications services.

However, where issues arise in the telecommunications industry that require access to jurisdictions beyond those usually available to the TIO Scheme, there is a need to ensure customers can have these issues addressed. The TIO may therefore need access to expertise in jurisdictions not covered by its normal operation. For example, if a telecommunications issue also involves the provision of financial services, then the TIO should have the capacity to work with a similar redress scheme so that the customer's issue can be dealt with in its entirety. If determinations are needed, then the authority of the two schemes could be brought to bear on the final decision.

Example: The TIO currently liaises with ACMA for "content" related issues; the Telephone Information Services Standards Council (TISSC) for 1900 premium service issues; and the Privacy Commissioner for privacy related complaints.

If customer disputes begin to highlight gaps in the range of redress options required, then there may be a need for a suitable government policy response to ensure a full range of necessary redress options are available. In determining issues of jurisdiction for redress schemes, Telstra considers that any decision should apply equitably to all industry participants and be independent of the technology used. Where potential regulatory overlaps occur, there should be policy guidance about which groups could best address the issue and the various groups impacted by any policy decisions should be consulted prior to making final decisions.

The TIO should be recognised as a low cost largely informal means of dispute resolution that can assist with those matters that haven't been able to be resolved between suppliers and their customers. Similarly, more complex disputes, which may require higher evidentiary standards, are best dealt with through the more traditional channels of tribunals and courts.

5.5 Self and non-regulatory approaches

Telstra considers that there is an important role for industry-specific *operational* codes that may be service or technology specific and which provide a significant consumer benefit.

Example: Through the Communications Alliance the telecommunications industry implemented an industry operational code covering Mobile Number Portability, which has provided a most significant benefit to consumers in allowing them to keep their mobile number even if transferring to a different service provider or mobile network.

However, in telecommunications, there is less certainty in regard to the welfare benefits that industry-specific *consumer* codes are bringing. There is often disagreement between consumer representatives and industry on the extent and impact of particular problems. Solutions to address a small proportion of problems may be very expensive and lead to higher prices. Telstra considers that there is a need for an agreed framework for identifying, quantifying and qualifying impacts and consumer detriment, and whether supply side and/ or demand side and/ or regulatory resolution strategies might be most effective and efficient.

The Commission's *Issues Paper* notes some "support for consumer advocacy" as a "specific non-regulatory option". However, Telstra considers that such a single-sector advocacy body would not necessarily resolve the current problems. Rather, there may be merit in establishing a suitable tripartite body with consumer, industry, and academic expertise that can commission precise research on a range of current and future issues, and can prioritise issues and suggest effective and efficient policy responses. This could include research into consumer behaviour, informed consumer choice and any implications for policy settings.

5.5.1 Consumer participation

The Commission's *Issues Paper* asks "Do consumer advocacy bodies adequately represent the interests of all consumers?" Telstra submits that the Commission should formally consider and make recommendations about the general role and practice of consumer consultation, participation or engagement.

Telstra views such consultation as a basic and necessary method for gaining informed outcomes that seek to balance service provider and consumer responsibilities. It is an important aspect of the "Right to be Heard".

Example: People with a disability have asserted that their right to be heard in the slogan "nothing about us without us".

It is also becoming recognised that users of technologies have an important role to play in the continuing innovation of products and services. Eric von Hippel, *Democratizing Innovation*, MIT Press, 2005, asserts that "a growing body of empirical work shows that users are the first to develop many and perhaps most new industrial and consumer products. Further, the contribution of users is growing steadily larger as a result of continuing advances in computer and communications capabilities". Consumer participation, therefore, can be seen as having an important market function by contributing to innovation and investment.

Example: Telstra has maintained and resourced its own consumer consultation mechanisms since 1988, addressing general consumer issues as well as for disadvantaged and vulnerable consumers. This has led to new products and services, or policies and processes. The Communications Alliance, ACMA and ACCC also maintain these types of forums in response to regulatory requirements or as a way of gaining consumer feedback.

Telstra considers that there are some basic principles or "core values" underpinning public participation, such as those as set out by the International Association for Public Participation (see www.iap2.org).

- Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
- Public participation includes the promise that the public's contribution will influence the decision.
- Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.

- Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
- Public participation seeks input from participants in designing how they participate.
- Public participation provides participants with the information they need to participate in a meaningful way.
- Public participation communicates to participants how their input affected the decision.

In telecommunications, there appears to be a range of challenges for both industry and consumer representatives in gaining effective consultation mechanisms. Both the Communications Alliance and ACMA have recently restructured their arrangements. Expectations are sometimes not being met in regard to the prioritisation of issues raised, the resources available to the different parties, the need for commercial understanding as well as social awareness, the need for efficiency and cost effectiveness, the need to consider the range of policy tools available versus just relying on regulation, and the need to represent the interests of consumers in general versus only disadvantaged and vulnerable consumers (See also comments under 5.1.1 Regulatory balance).

Example: The development of the Mobile Premium Services Industry Scheme highlighted the gap between consumer expectations for quite detailed regulation of such services with TISSC as the complaints body versus service provider expectations for primary reliance on consumer information with the TIO as the complaints body to “ensure the safe and responsible delivery of premium mobile services, informed and satisfied customers, and a sustainable marketplace for all.”

Telstra considers that there is a need to “invest” in capacity building for the undertaking of effective consumer policy research, analysis and promotion. There is a need for governments to fund coordination resources within the consumer sector, and the need to provide training to participants to become skilled in particular industries and policy fields.

Example: Overall funding by the Department of Communications, Information Technology and the Arts for consumer participation in the telecommunications industry has not kept pace with inflation and has become increasingly fragmented leading to reductions in coordination and policy development resources for that sector.

While Telstra agrees that consumer representatives should maintain a healthy independence free from any conflict of interest, we would submit that good consultation outcomes are generally best achieved through some form of partnership between the industry and consumer sectors. This means that consumer representatives must have some (quantitative) economic and commercial understanding and industry representatives must have some (qualitative) customer advocacy and social awareness. Representation needs to be effective.

Example: Telstra’s Low Income Measures Assessment Committee (LIMAC) consists of a number of member organisations that actively partner with Telstra to deliver some of the low income products and services through their agency and member networks. In this way both Telstra and community agencies utilise their expertise and infrastructure to address a specific consumer policy issue.

5.6 Jurisdictional responsibilities

Telstra considers that there is an immediate need for harmonisation of some state, territory and federal consumer protection laws, particularly with regard to unfair terms in consumer contracts, telephone marketing, door to door sales and trade promotions legislation.

Inconsistencies in consumer protection laws add to the complexity and costs of ensuring compliance for organisations that conduct business nationally. For example, inconsistencies in telemarketing and door-to-door legislation mean that national operators are forced to apply the most stringent obligations to their national operations, leading to lost revenue in states or territories

where they could otherwise be calling as well as potential competitive disadvantage. Ultimately the extra costs incurred due to the need to comply with inconsistent legislation will be borne by the consumer.

The following sections highlight some of the key areas of divergence in the consumer protection laws of the different states and territories of Australia.

5.6.1 *Unfair terms in consumer contracts*

In the telecommunications sector, a particular example of duplication in consumer protection laws relates to unfair terms in consumer contracts.

At the federal level, the industry code regulating Consumer Contracts (ACIF C620:2005) (“Code”), which applies to all carriers and carriage service providers and specifies how to determine when consumer contract terms may be unfair and the consequences.

However, legislation covering the same or similar subject matter already exists in Victoria, by virtue of an amendment in 2004 which introduced a new Part 2B into the Vic FTA relating to unfair terms in consumer contracts. The Code and Part 2B of the Vic FTA are largely a duplication of regulation. However, notably no other jurisdiction has enacted the same requirements. Accordingly, only relevant participants in the telecommunications industry and businesses in Victoria need comply with the requirements. The result is a fragmented approach depending on the relevant industry and jurisdiction under consideration.

Telstra considers that it would be beneficial for consumers to be protected by a single national regime relating to unfair terms in consumer contracts, to avoid duplication and the inefficiencies associated with administering and complying with multiple regimes and ensure a level playing field for all participants.

5.6.2 *Telephone marketing*

Telstra is of the firm view that there needs to be greater harmonisation of telephone marketing laws in Australia.

Currently, there are a number of bodies that oversee and regulate telephone marketing including: the Office of the Federal Privacy Commissioner, the ACMA, various state based departments and the Department of Communications, Information Technology and the Arts.

There are also a number of different pieces of legislation and instruments that regulate telephone marketing. These include:

- the Financial Services Reform Act 2001;
- the Vic FTA;
- the NSW FTA;
- the Telco Act;
- the DNCR Act;
- the Telecommunications (Telemarketing and Research Calls) Industry Standard 2007;
- Ministerial Counsel for consumer affairs modified practices for direct marketing;
- The Australian Direct Marketing Code of Practice; and

- The Communications Alliance Customer Transfer Industry Code (C546:2006).

In particular, telemarketing legislation in Victorian and New South Wales has created a disparate regulatory approach toward telephone marketing nationally.

Whilst there are similarities between the New South Wales and Victorian legislation, key differences exist that have proven to be complex and costly for service providers to implement. For example, a telephone marketing call centre based in one state, which makes outbound calls to customers in Victoria and New South Wales is required to apply different administrative rules depending upon the regulatory regimes that exist in the state where the customer they are calling resides.

Another important difference concerns the type of contracts to which the respective regime applies. The telemarketing legislation in New South Wales applies to direct commerce contracts, which include door to door sales. However, in Victoria, the telemarketing legislation only applies to telephone marketing agreements. Door-to-door sales and other non-contact sales agreements are subject to separate regime with different obligations. Furthermore, the New South Wales legislation applies to the supply of goods and services to a consumer who is an individual. In comparison, the Victoria legislation applies to contracts for products and services of a kind ordinarily acquired for personal, household or domestic use.

The following table highlights some other key differences between the telemarketing provisions of the New South Wales and Victorian Fair Trading Acts.

	Requirement	Victoria	New South Wales
1	Scope of law	Uninvited telephone marketing agreement for goods or services that exceed \$100.	Uninvited direct commerce contract for goods or services that exceed \$100.
2	Disclosure	Consumers must be informed of their cancellation rights during a telesales call and be provided with a hard copy of the contract and a prescribed notice form detailing cancellation rights within five days (or a later agreed date) after the telemarketing call.	Consumers must be informed of their cancellation rights during a telesales call and in writing before concluding any contract.
3	Contract cooling-off periods (right to cancel)	Ten days from the date of receipt of the written agreement and prescribed notice of cancellation rights.	Five business days from the day the written notice of cancellation rights is given to the consumer.
4	Penalties for breach	Depending on which section of the Act is breached: <ul style="list-style-type: none"> • Companies: \$13 214 or \$26 429. • Individuals: \$6607 or \$13 214. 	\$11 000.

Although the soon to commence Telecommunications (Telemarketing and Research Calls) Industry Standard 2007 will introduce some harmonisation nationally in telemarketing practices, anomalies will still exist as the state and territory regimes continue to apply (to the extent of any inconsistency with the Standard).

Given the operational complexities and costs associated with ensuring compliance with differing regimes for companies that trade nationally, which may be passed on to consumers, Telstra would strongly support any future movement towards harmonisation of telemarketing laws in Australia.

5.6.3 Door to door sales

Telstra is of the view that there needs to be greater harmonisation of “door to door sales” laws in Australia.

Fair Trading legislation in each state and territory regulates door to door sales. Areas where there are significant differences in state and territory legislation include:

- (a) For the door to door legislation to apply, the consideration under the contract made by a door to door sale must reach a certain value – in SA, WA, TAS, NT ACT and VIC, this is currently \$50, in Queensland \$75 and in NSW \$100.
- (b) The legislation provides that prescribed forms must be given to a consumer to inform them of the applicable cooling off period and their right to cancel the contract. The difference in the forms between states and territories adds to the cost of compliance. Further, in the ACT the prescribed notice explaining the customer’s right to rescind the contract must also be read aloud to the customer. This is not required elsewhere.
- (c) The cooling off period in NSW is 5 days whereas in all other states and territories it is 10 days.
- (d) Permitted calling times vary in each state and territory.

The differences in each state and territory law add to the complexity and costs of ensuring compliance for organisations that conduct business nationally. Particularly, in areas that border between two states or territories, heightened compliance is required because of the differences in those laws in a potentially overlapping area.

Whilst in most cases it is practical to train staff on the legal requirements in their state and territory, from a process perspective, the need for different forms and training increases the complexity and cost of compliance. It also reduces the ability of national sales organisations to relocate resources or staff as demand requires, given the differing legislative requirements.

5.6.4 Trade promotions

Telstra is of the firm view that there needs to be greater harmonisation of the laws relating to the conduct of trade promotions (competitions) in Australia. Currently, lotteries legislation in each state and territory and the TPA regulate trade promotions.

The differences in the state and territory laws in the area of trade promotions are quite significant particularly in relation to whether a permit is required to conduct a trade promotion in a particular state or territory. Generally, in Queensland, Western Australia and Tasmania no permits are required. In New South Wales and the Australian Capital Territory a permit is always required, in South Australia a permit is required if the prize pool is greater than \$500 and in Victoria if the prize value exceeds \$5000. The requirements relating to unclaimed prizes also vary significantly between the states.

There are many requirements that are particular to one or two states. For example:

- (a) In New South Wales and South Australia a scrutineer is sometimes required to witness the draw.
- (b) In Victoria an authorised nominee (who must hold a current police check) must certify that they will ensure the competition is run in accordance with legislative requirements.

Because of these inconsistencies when a trade promotion is promoted nationally, the highest set of requirements prescribed by the legislation must be followed. However when a trade promotion is

conducted in one state or territory, the difference in the laws could arguably lead to confusion. Increased consistency in the laws will aid compliance, as staff who organise trade promotions can concentrate on following one single set of clear requirements.

Telstra believes that the Commission will agree that there exist substantial examples of differing regulations in different State/ Territory jurisdictions that have led to significant cost for businesses and that the State/ Territory Fair Trading/ Consumer Affairs Ministers/ Attorneys should address these as a matter of priority.

5.7 Gate-keeping and review arrangements

Telstra supports the Productivity Commission's previously stated views on good practice regulation, for example:

It must have a sound rationale and be shown to bring a net benefit to society, requiring costs as well as benefits to be brought into account. It must be better than any alternative regulation or policy tool. It should be clear and concise. It should also be communicated effectively and be readily accessible to those affected by it. It must be enforceable. But it should embody incentives or disciplines no greater than are needed for reasonable enforcement, and involve adequate resources for the purpose. Finally, it needs to be administered by accountable bodies in a fair and consistent manner ... important features of good governance include clear statutory guidance, transparency of both process and judgement, and public accessibility. (Commission Chairman Gary Banks, 2 October 2003)

Telstra also considers the following principles to be relevant and important:

- Regulatory intervention should only occur when market failure has been clearly demonstrated;
- Obligations placed on one industry, or one technology, should be consistent and comparable with those imposed on similar services and industries;
- Obligations and enforcement should be applied equally or at least equitably to all service providers within an industry;
- Policy tools chosen should provide incentives to invest or at least no disincentive to investment. That is, consumer policy (particularly in relation to accessibility and affordability by disadvantaged and vulnerable consumers) should empower and resource consumers to purchase their preferred solutions within the marketplace rather than placing the cost of supply on only one industry or one service provider; and
- Regulation in Australia should be consistent with regulation applied in Australia's major trading partners and in comparable economies and/ or be based on international standards.

5.8 Regulatory and oversighting bodies

Please refer to our comments under 5.4.1 Enforcement by regulators.

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6. Appendix 1 - Department of Treasury statements on CSOs

The Steering Committee on National Performance Monitoring of Government Trading Enterprises (SCNPMGTE) definition of a CSO has been accepted by both the Federal Government and the Productivity Commission.

In 1994 the SCNPMGTE clearly articulated the definition of a CSO as:

A Community Service Obligation arises when a government specifically requires a public enterprise to carry out activities relating to outputs or inputs which it would not elect to do on a commercial basis, and which the government does not require other businesses in the public or private sectors to generally undertake, or which it would only do commercially at higher prices.

Sources:

Industry Commission, *Community Service Obligations: Policies and Practices of Australian Governments*, February 1997, page 7.

Department of the Treasury, *The Socio-Economic Consequences of the National Competition Policy*, November 1998, page 39.

The Federal Government clearly recognised why cross subsidisation was not appropriate for funding CSOs in its 1998 report, *The Socio-Economic Consequences of the National Competition Policy*, whereby it was stated that:

The traditional means of funding CSOs has been through internal cross subsidies by an incumbent monopolist. However, it is not possible to maintain internal cross-subsidies in a competitive environment as these cross-subsidies rely on barriers preventing the entry of potential competitors.

Cross-subsidisation involves charging some categories of consumers at a higher rate in order to subsidise others. In the past, there has been a tendency for the business sector to subsidise household consumers in the provision of public operated utility services, while urban residents have tended to subsidise rural residents. However, charging some consumers at a higher rate to subsidise others becomes untenable where there is access to alternative suppliers who do not contribute to funding the CSO and whose prices more closely reflect the cost of providing the service.

Source:

Department of the Treasury, *The Socio-Economic Consequences of the National Competition Policy*, November 1998, page 40.

As recently as 2005, the Federal Government has clearly recognised the definition of a CSO, its purpose and appropriate funding. Furthermore, the Federal Government directed the State Governments to fund CSOs.

A CSO arises when the Government specifically requires a business to carry out an activity or process that:

- *the organisation would not elect to do on a commercial basis, or that it would only do commercially at higher prices; and*
- *the Government does not, or would not, require other organisations in the public or private sectors to fund.*

CSOs are often established to meet government social policy objectives.

Competitive neutrality does not prevent the provision of CSOs, but it does establish certain requirements in terms of their costing, funding and interaction with other competitive neutrality obligations. The intention is to encourage more effective and transparent provision of such services, with minimal impact on the efficient provision of other commercial services.

At the November 2000 Council of Australian Governments (CoAG) meeting it was decided that parties should be free to determine who should receive a CSO payment or subsidy when implementing competitive neutrality requirements under the CPA, and that such payments should be transparent, appropriately costed and funded directly by government.

The intention is to encourage more effective and transparent provision of such services, with minimal impact on the efficient provision of other commercial services.

CSO agreements should include similar requirements as applied to other activities, that is, these activities should be able to pay taxes and earn a commercial rate of return.

Source:

Department of the Treasury, *Australian Government National Competition Policy Annual Report 2004-05: Chapter 2.1.3*, pages 84-85.

CSOs should not be financed through cross-subsidies within the business activity.

Avoidable cost is the preferred method to value CSOs. This is the cost that would be avoided if the organisation was not required to provide the CSO.

Source:

Department of the Treasury, *Australian Government Competitive Neutrality Guidelines for Managers*, February 2004; page 41

7. Contacts

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