



TELSTRA CORPORATION LIMITED

**Response to
Productivity Commission Draft Report
Review of Australia's Consumer Policy Framework**

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Introduction

Telstra Corporation Limited (“**Telstra**”) welcomes the opportunity to respond to the Productivity Commission’s Draft Report on its Review of Australia’s Consumer Policy Framework, 2007 (“**Draft Report**”). This second submission builds on the comments provided in May 2007 to the Commission’s inquiry.

In general, Telstra welcomes the Draft Report, the priority it gives to businesses operating efficiently in national markets and the balance shown in weighing the arguments for the need for change. Telstra agrees with many of the observations and recommendations by the Commission in its Draft Report, and in general supports the objective of developing a consistent national approach to consumer policy and regulation to provide greater guidance to policymakers, regulators, consumers and suppliers.

However, Telstra believes that further detailed consideration needs to be given to some of the draft recommendations to better determine whether these will truly improve the consumer protection framework or in fact unnecessarily add to the regulatory and administrative burden of regulators and suppliers without any real benefit to consumers or other stakeholders. Where Telstra’s views differ from the Productivity Commission’s draft recommendations, Telstra has set these out in the following sections.

Specific comments on draft recommendations

A Objectives for consumer policy

A.1 Draft Recommendation 3.1

- 1 Telstra supports the adoption of a common overarching objective for consumer policy to the extent that such an approach can be implemented without increasing the regulatory burden on suppliers (which in turn would lead to an increase in prices paid by consumers).
- 2 In addition, Telstra submits that the objectives should recognise the active role of consumers as participants in the innovation and production of appropriate goods and services. This is very evident in the information, communications and technology industry. “User led innovation” is just as important on the supply side as informed decision making is on the demand side.
- 3 Accordingly, Telstra submits that an additional operational objective of a new consumer policy framework should be “to encourage investment in products and services that meet consumer needs”. Such an approach recognises that investment is necessary for innovation and greater choice of products and services that benefit consumers and that the intended regulatory framework should not present disincentives to such investment.

B A new national generic consumer law

B.1 Draft Recommendation 4.1

- 1 As the Commission has highlighted, inconsistencies in consumer protection laws add to the complexity and costs of compliance for organisations that conduct business on a national basis (together with the potential to result in an unfair market advantage by some players). Ultimately, the extra costs incurred complying with inconsistent, multiple regimes is borne by the consumer.
- 2 Accordingly, Telstra strongly supports the development of a national, generic consumer law implemented to apply uniformly across Australian jurisdictions. This law should be based on broad principles of consumer protection law rather than based on an industry or State/ Territory specific approach that is different across different industries or States/ Territories and therefore would be more burdensome on business and would create more complexity for consumers and business without any benefit. Fundamental consumer protection provisions relating to misleading conduct, false representations, unsolicited services, referral selling and so forth that are reflected in Federal and State/ Territory legislation should continue to apply but uniformly in all jurisdictions (as presently there are some variations in these provisions in the fair trading legislation in each jurisdiction, as highlighted by the report of Professor Corones and Sharon Christensen). However, for consumer protection provisions that have traditionally been the domain of States and Territories, such as telemarketing, doorknocking, trading stamps and unfair terms, the national law should work on an “opt-in” basis so that these jurisdictions have the

ability to implement those laws uniformly only if they consider these relevant and necessary to their constituency and local issues.

- 3 The main areas of consumer protection law that are relevant are:
 - misleading and deceptive conduct;
 - false representations;
 - unconscionable conduct;
 - implied conditions and warranties;
 - product safety and liability;
 - bait advertising;
 - referral selling;
 - unsolicited services;
 - door-to-door sales;
 - telemarketing;
 - unfair terms;
 - trade promotions; and
 - trading stamps.
- 4 Currently, these areas of consumer law are covered in a number of Acts and regulations (Federal, State and Territory) as well as in a number of Codes and Standards (largely industry-specific although some of general application). All the areas of consumer law need to be comprehensively identified. Once that has been done, the best and most appropriate set of regulations for each area needs to be determined and agreed and then that one set of regulations should consistently be implemented by those jurisdictions and applied in jurisdictions by virtue of template arrangements.
- 5 As Telstra has previously submitted, there is a real need for harmonisation of many State and Territory consumer protection laws (particularly with regard to unfair terms in consumer contracts, telephone marketing, door-to-door sales, trade promotions and trading stamps legislation which diverge significantly in each State and Territory creating significant compliance burdens for national operators and leading to gaps in the framework as detailed in Telstra's previous submission). However, such harmonisation should not result in an unnecessary increase in the overall regulatory burden on suppliers. As the Commission has recognised, the benefits of regulatory intervention cannot be considered in isolation from its costs. Accordingly, in harmonising such consumer laws which are currently inconsistent, careful and serious regard should be had to implementing regulatory measures which are both necessary for the protection of consumers in all jurisdictions and not unduly burdensome on

suppliers. Telstra submits that an automatic “highest common denominator” approach, that is, automatically adopting the set of provisions affording the most stringent protection for consumers and the most onerous obligations for suppliers in all jurisdictions, will not always be the best approach as this could effectively result in a significant increase in the regulatory compliance obligations of suppliers, and therefore costs for consumers. Rather, the starting position for harmony should be to determine the most appropriate set of regulations for each consumer law area taking into account both consumer and supplier interests as well as whether there is a local consumer issue that needs to be addressed, that is, whether there is a need in a given jurisdiction to legislate on that particular subject matter. Telstra is of the view that the most appropriate set of regulations for some areas of consumer protection law might in fact be to permit States and Territories, if there is a local consumer issue that needs to be addressed, to “opt-in” to adopt a set of regulations which is the least onerous for suppliers yet still achieves the consumer protection policy objective in question as this would reduce regulatory compliance costs.

- For example, the prohibition in section 38 of the South Australian Fair Trading Act 1987 on a trader advertising or offering goods for sale on the condition that no more than a specified quantity may be purchased by one consumer which only applies in that one State and for which there seems to be no compelling consumer protection, should not be adopted in all other States and Territories (but rather, should be repealed).

6 Due to constitutional difficulties in implementing a single consumer law at the Federal level, as well as the benefits in continuing to utilise the extensive experience and resourcing (including unique understanding of local issues) of State and Territory regulators, Telstra considers the best approach for such a system is for the States, Territories and Commonwealth to each implement uniform legislation in respect of the fundamental consumer law protections (namely those in Part V of the Trade Practices Act (“TPA”)) to the extent that the same subject matter is already covered in State/ Territory legislation, and also implement identical consumer legislation with respect to other consumer law provisions according to the “template” law arrangements (similar to the approach taken with other subject matter such as the Uniform Credit Code) but only in those States/ Territories that consider such legislation necessary to address local issues. This would mean, for example, that:

- the TPA would continue to apply to misleading conduct, false representations, unconscionable conduct, implied warranties, product liability and the other consumer protection provisions contained in that legislation. These provisions should be replicated precisely (without any variations) by State and Territory Fair Trading Acts to ensure consistency of these laws to all legal entities;
- State and Territory fair trading legislation and lotteries legislation would continue to apply to other areas of consumer protection law (such as door-to-door sales, telemarketing, unfair terms, trading stamps, etc) to the extent that such jurisdictions consider there to be a need to legislate on these subject matters to address local issues but by template arrangement to ensure consistency of these laws throughout all jurisdictions that choose to implement these

protections. That is, State and Territory jurisdictions should have the option to implement only those aspects of the generic template law that are relevant to their constituencies, local conditions and priorities, but if such laws are relevant, they must adopt these as set out in the template law;

- inconsistent, duplicate or unnecessary State and Territory consumer protection related legislation (such as Sale of Goods Acts) would need to be repealed; and
 - inconsistent, duplicate or unnecessary industry specific codes and standards would need to be repealed. Robust assessment processes should be introduced to ensure any new industry specific regulation is genuinely required (and should only be introduced when a full review of the specific industry is undertaken, with consultation with all participants (including suppliers and consumers) to test and ensure that the generic law cannot regulate the subject but that there is a real need to supplement it.
- 7 Procedures governing any subsequent changes to any area of consumer law should be directed to ensuring that no inconsistencies develop in the future.
- 8 This approach may also be more likely to result in State and Territory governments supporting the implementation of a uniform generic law given they will still have a role to play and allow such a system to be implemented far more quickly.

Definition of consumer

- 9 Telstra considers that all consumers and suppliers require certainty in the application of consumer protection law to them. Further, in Telstra's view, protections provided by consumer law should generally only extend to individuals.
- 10 Whether or not small businesses require protection is dependant on factors like the relevant law, the goods or services in question and the nature of the entity (for example, a large, well resourced company compared to a small "mum and dad" run local milk bar). Generally (albeit with some exceptions) Telstra considers the inclusion of business customers in the areas of consumer protection law primarily intended to protect "consumers" to be unnecessary and potentially harmful to the Australian economy because extending protection to small business will lead to regulatory and higher transaction costs. All stakeholders need certainty as to the laws that govern their transactions and there will be a lack of certainty if consumer protection laws apply to small businesses in some transactions and not in others, and inconsistency where it is often practically difficult for consumers and suppliers (and presumably regulators) to determine if and when small business is covered.
- 11 The application of consumer protection areas to business to business transactions will lead to more costs for business suppliers which will be passed on and will increase uncertainty in the marketplace and discourage big businesses from contracting with small businesses.
- 12 Accordingly, Telstra submits that:

- if any areas of consumer protection laws are currently expressed to apply to “consumers”, these should not be extended to any other segment of the community (mainly business) unless there is a valid and clear established need to do so;
 - regulation of business to business transactions is a complex area such that if consumer protections were extended to further govern such relationships, further specific consideration and analysis would need to be undertaken; and
 - if a need to protect small businesses in relation to particular goods or services or a particular area of law is identified after fulsome analysis, this should be dealt with separately and not within the Commission’s review.
- 13 Accordingly, protections currently afforded to businesses under consumer law should not be extended by expanding the definition of “consumer” or the areas to which such a definition applies. Further, there should be serious consideration given to changing the existing definition of “consumer” in consumer protection law so that those provisions that rely on this term apply only to persons that:
- (a) acquire goods or services of a kind ordinarily acquired for personal, domestic or household use; and
 - (b) use those goods or services for the primary purpose of personal, domestic or household use.

B.2 Draft Recommendation 4.2

- 1 Telstra agrees that having one national generic consumer law applying to both financial services and non-financial services activities is logical and more efficient, and that the Australian Securities and Investment Commission (“ASIC”) should remain as the regulator for financial services given its expertise and other areas of responsibility. However, for clarity and certainty this appointment should be expressly recognised in the legislation rather than being left to administrative arrangements between ASIC and the Australian Competition and Consumer Commission (“ACCC”).

B.3 Draft Recommendation 4.4

- 1 Telstra notes that the Commission in its Draft Report appears to support the view that the ACCC should be the responsible regulator for any new national generic consumer protection laws, presumably over time replacing the role of State and Territory regulators.
- 2 However, Telstra believes that State and Territory fair trading regulators have a valuable role to play in their existing areas of regulatory responsibility, providing a wealth of experience and expertise (including an understanding of local issues and an ability to act more quickly and be more responsive). It is not clear to Telstra that a transfer of existing responsibilities for consumer protection laws from State and Territory authorities to a single national regulator would result in any real net benefit to consumers or suppliers. Telstra is of the view that most of the inconsistencies in the areas of consumer protection law result from different laws and not from different regulators.

- 3 As the Commission has found, State and Territory government departments and regulators can have advantages over Federal based government departments and regulators in tailoring policies and approaches to specific jurisdictional needs. Telstra would expect that years of experience of regulating and enforcing particular areas of law have given State and Territory regulators valuable experience and knowledge that would be not be quickly replicated by a new regulator. More importantly, the fact of the disparities in population between the Australian States and Territories mean that the energies of a national regulator are likely to focus on the most populous States or issues considered to be of national significance only. While it is appropriate that regulatory attention focus on the issues that affect the greatest number of people, there is a risk that the removal of State and Territory responsibility for consumer protection altogether could result in the neglect of issues that affect those in the smaller States and Territories and more localised issues that, although affecting a smaller number of consumers and/ or suppliers, nevertheless cause consumer detriment and therefore need to be addressed. While various steps suggested by the Commission in its Draft Report could be taken to help increase the ACCC's accountability on State and Territory issues, it is unlikely that these would be sufficient to replace the inherent interest of a State or Territory body in addressing the issues that affect its constituency.
- 4 As the Commission has noted, a number of other important considerations militate against any move towards having only one national regulator for consumer protection law. These include the lack of tribunals and small claims courts at the Federal level designed to facilitate easier access to justice for consumers. Because these consumer-friendly forums do not exist at the Federal level, a move away from State and Territory enforcement could negatively impact on consumer access to justice. As the Commission knows, constitutional issues mean that there are significant barriers to implementing forums of this kind at the Federal level. Further, the State and Territory fair trading authorities have important links with other State and Territory bodies that are necessary for their successful operation and any transfer of responsibilities to the Federal government would require transfer or replacement of these linkages as well. Because of the significant costs and time likely to be involved in replicating the State and Territory systems at the Federal level, the expected benefit to consumers would also need to be significant to outweigh these costs. Telstra's view, which appears to be supported by the Commission's findings, is that the expected benefits of a single national regulator would not be sufficient to justify the costs.
- 5 While there is a risk that the enforcement of national consumer laws by different regulators would lead to inconsistencies, there are ways of minimising this risk. As the Commission has noted, Australia's consumer laws are currently inconsistent in their statements of objective and in fact some consumer protection legislation has no statement of objective at all. A national generic consumer law which includes a clear statement of legislative intent, combined with a greater uniformity of understanding between regulators as to the purposes of consumer policy (which the Commission's Inquiry seeks to produce) as well as continuing communication amongst such regulators would greatly assist in overcoming this issue at little cost.
- 6 Telstra notes the inclusion in the Draft Report, page 199, of Telstra's comments regarding what it considers to be unfair treatment in "example"

type enforcement actions. Telstra strongly contends that the consumer policy framework should lead to consistent regulatory enforcement.

B.4 Draft Recommendation 4.5

- 1 As noted previously, Telstra does not consider that the ACCC should become the sole regulator for all consumer protection laws. The role of State and Territory regulators should be recognised and preserved in any new regime.
- 2 However, if States and Territories are permitted to refer their enforcement powers to the ACCC, there must be clear and transparent guidelines as to when and how (including that such ability be within the complete discretion of State/ Territory regulators) to avoid uncertainty and confusion amongst regulators and market participants. Telstra submits that there should be further consultation on this point once any such guidelines are developed.

C Industry specific consumer regulation

C.1 Draft Recommendation 5.1

- 1 Telstra supports Draft Recommendation 5.1 as a general proposition.
- 2 However, it is unclear how the Council of Australian Governments (“**CoAG**”) will implement the proposed review and reform package. Telstra submits that the primary focus of CoAG should be removing industry specific consumer regulation where broad based general law exists which can just as effectively protect consumers or where there is otherwise duplication or unnecessary regulation without any real benefit compared with the cost of compliance.
 - For example, various telecommunications specific codes prescribe unduly prescriptive requirements for the advertising and marketing of telecommunications products and services. One such code is the “Customer Information on Prices, Terms and Conditions Code” (ACIF C521:2004) which includes, amongst other things, obligations on suppliers to ensure information in advertising material is accurate and current and that disclaimers are readily understandable and clearly indicated or stated, providing prescriptive details of how this obligation is met (including font size requirements and use of asterisks). However, the consumer protection provisions of the TPA and Fair Trading Acts (including the well established principles from the relevant case law) already impose general obligations on corporations, persons and other legal entities not to mislead and deceive customers. These effectively address and achieve the same ends as the telecommunications specific codes (the latter of which Telstra submits are overly burdensome and simply create greater compliance costs for one industry without any real advantages to consumers).
 - Another example relates to unfair terms. As the Commission knows, Part 2B of the Victorian *Fair Trading Act 1999* sets up a consumer protection regime which voids unfair terms in consumer contracts (providing a framework for how to determine when a term is unfair and the consequences). Further, the Productivity Commission has

recommended the introduction of a national unfair terms regime, based in part on the Victorian system. Accordingly, the telecommunications specific unfair terms regime encapsulated in the “Consumer Contracts Code” (ACIF C620:2005) effectively covering the same subject matter will be unnecessary and should be removed to avoid unnecessary industry specific duplication.

- A further example relates to implied terms. The TPA implies non-excludable warranties into certain consumer contracts. So too does each of the fair trading legislations and the Goods Acts in many States and Territories. The application of implied terms provisions in State and Territory Goods Acts and fair trading legislation should be limited to those situations where the Commonwealth Parliament is unable to legislate for constitutional reasons.
- 3 Telstra submits that CoAG should engage the relevant industry participants in consultation in undertakings any review and reform program, to develop an agreed framework for identifying unnecessary regulation.

C.2 Draft Recommendation 5.2

- 1 Telstra supports the recommendation that all credit providers must participate in an ASIC-approved Alternative Dispute Resolution (“**ADR**”) scheme, noting that telecommunications services are sometimes linked either formally or informally with financing arrangements. This requirement on credit providers would provide an additional avenue of recourse.
- 2 However, Telstra does not understand the Commission to be recommending that the application of the Consumer Credit Code (or other financial services legislation) be expanded to regulate products and services not currently covered by them. Nor does Telstra believe this is necessary. However, if any such expansion is proposed, this should be subject to thorough consultation and analysis amongst all market participants.

C.3 Draft Recommendation 5.4

Price controls

- 1 Telstra fully supports the removal of retail price caps applying to telecommunications products and services because competition does a far better job at constraining prices. Introduced in 1989 as a temporary measure in the absence of competition, price controls are another example of outdated regulation which can no longer be justified in a competitive telecommunications market.
- 2 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. Telstra price controls create unnecessary compliance hurdles and costs. They stifle pricing innovation and their complicated nature holds Telstra back from delivering pricing arrangements which would benefit many customers.

Community Service Obligations

- 3 Telstra understands and appreciates that community service obligations (“CSOs”), as determined by government and delivered via government or non-government owned entities, effectively assist vulnerable and disadvantaged consumers who might not otherwise be provided with essential services. Telstra supports such social policies being in place. However Telstra is of the view that government and not private organisations should bear the funding responsibility in relation to CSOs. This is reflected by the fact that in most industries, State and Territory governments compensate private companies for the delivery of Government mandated concessions policy. Further, in other cases where Government Business Enterprises have been privatised, the CSOs have been funded solely through Government concessions.
- 4 Telstra strongly submits that Australia’s consumer policy should not require only one player in an industry to bear the burden of CSOs. Potential detriments to consumers of this approach include:
 - consumer choice is limited as the industry player with the burden of the CSO would become 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 with a “regulated” higher cost structure than its competitors. This runs absolutely counter to Government competition policy; and
 - the industry player bearing the burden of the CSO 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.
- 5 Telstra notes again the lack of reference in the Draft Report to the *Disability Discrimination Act 1992*; to issues of vulnerability faced by people with a disability; and to the lack of consistency, specifically impacting the telecommunications industry, in the funding of accessibility responsibilities.
- 6 Telstra submits, therefore, that this draft recommendation does not go far enough in specifying a workable policy framework to enable disadvantaged consumers to participate in competitive markets. The recommendation should reiterate the National Competition Policy principles on funding CSOs, including competitive neutrality and consumer choice, and that these should be extended to the telecommunications industry in particular. Further, Telstra believes that the final recommendation should also call for a speedy review of all industry CSOs with a view to resolving all existing inconsistencies and asymmetries.

D Supporting institutional changes

D.1 Draft Recommendation 6.2

- 1 Telstra submits that this draft recommendation should be strengthened to ensure that best practice regulation principles are utilised by the Ministerial Council on Consumer Affairs when considering changes to the consumer policy framework. In particular, the process for identifying effective and efficient consumer policy instruments as detailed in figure 3.1, page 45, of the Draft Report.

E Unfair contracts

E.1 Draft Recommendation 7.1

- 1 Telstra supports in principle a uniform national unfair terms regime of the kind described by the Commission in this recommendation which, if properly drafted and implemented, should help to balance the need to protect consumers against substantive unfairness in contractual terms, without imposing an additional burden on suppliers through an unnecessarily prescriptive and inflexible approach.
- 2 Telstra agrees with the Commission that any uniform prohibition against “unfair terms” in standard form contracts should not apply unless there is evidence of actual material consumer detriment and overall material public detriment. This is because, as the Commission has recognised, there can be sound reasons why an apparently “one-sided” clause may legitimately protect the supplier’s interests, to the ultimate benefit of consumers.
 - An example of such a situation is where a clause in a standard form consumer contract is broadly drafted in order to enable the supplier to prevent arbitrage or fraud. While in some cases it is possible to draft terms in a way that specifically targets the conduct which the supplier wishes to protect itself against, as the Commission has recognised, it is difficult for suppliers to foresee all types of inappropriate conduct that opportunistic consumers might take. If a supplier is unable to reserve its rights to prevent such fraud or arbitrage, it may be deterred from making certain products or services available altogether, with the ultimate result that consumer choice is lessened.
- 3 Telstra is also of the view that the new provisions should not list the types of clauses that might be unfair. Doing so is unhelpful because whether in fact a clause in a contract is unfair will depend upon all the relevant circumstances.
- 4 Further, any national unfair terms regime should not extend to the protection of any form of business customers. Clearly, if a national unfair terms regime is introduced, current State based legislation and specific codes dealing with unfair terms should be repealed. Template arrangements consistent with the national requirement need to be enacted.

F Access to remedies

F.1 Draft Recommendation 9.1

- 1 Telstra believes that the effective implementation of a web-based information tool for consumers recommendation would go a long way to resolving consumer confusion about where to take their concerns and complaints, particularly in regard to telecommunications related products and services. This is likely to be a more efficient proposal at this stage of the development of the electronic media and communications industry in Australia, rather than extending the jurisdiction of the Telecommunications Industry Ombudsman (“TIO”) as proposed in Draft Recommendation 9.2.

F.2 Draft Recommendation 9.2

Telecommunications Industry Ombudsman

- 1 Telstra does not support extending the functions of the TIO as detailed in this draft recommendation. The TIO already deals with the vast majority of escalated complaints arising from the telecommunications industry, however, there would be significant cost and regulatory issues to be faced in extending its jurisdiction to cover a small number of additional specialised complaint areas.
- 2 Escalated complaints regarding the provision of telecommunications premium content services are already included in the TIO’s jurisdiction but not the content elements, which are expressly precluded from consideration by the TIO under the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. When content issues arise, these are referred to either Australian Communications and Media Authority (“ACMA”) or Telephone Information Services Standards Council (“TISSC”) to be addressed. Telstra believes the current arrangements are working well, provide reliable access and a high level of service for customers, and have specific advantages over seeking to incorporate another type of service provider group within the TIO membership.
- 3 Escalated complaints regarding pay TV services are extremely minimal in number according to the Australian Subscription Television and Radio Association (“ASTRA”), which works with State/ Territory fair trading departments and suppliers to resolve complaints and other concerns. In addition, Telstra has reviewed its TIO inquiry statistics and notes that this category of referral is extremely small. While the TIO is in any case able to deal with billing issues where pay TV is bundled with other carriage services, it appears that even this has not been necessary and that current arrangements are working well. Telstra therefore submits there is no reason to create additional administrative overheads for the industry by seeking to incorporate another type of service provider group within the TIO membership when the evidence so far is lacking.
- 4 In regard to escalated complaints regarding associated services and hardware, Telstra submits that this is already appropriately covered by TIO jurisdiction over mobile handset purchases that are part of a service contract and rental customer premise equipment (“CPE”) supplied as part of the Standard Telephone Service (including equipment for disability access). To increase the jurisdiction further to cover other customer equipment that

is not sold in conjunction with a telephone service would appear to be inappropriate. Such equipment should be treated in the same way as other consumer goods, which are dealt with by the State and Territory fair trading regulators. Further, Telstra has reviewed its TIO inquiry statistics and notes that this category of referral is also extremely small. To increase the ambit of the TIO's jurisdiction to include CPE would create great uncertainties for TIO members and consumers.

- 5 Telstra notes that the Board of the TIO (as recommended by the Council of the TIO and in consultation with the relevant ministers) has the power to consider and implement an extension of its functions (to the extent permitted by the *Telecommunications (Consumer Protection and Service Standards) Act*) should further experience with and evidence of the above issues indicate the need to do so. Direct consumer representation on the TIO Council provides an efficient and timely mechanism to consider these issues. A specific Commission recommendation regarding the TIO may therefore run the risk of encumbering direct consumer-industry discussions on matters that have an agreed priority.
- 6 While Telstra believes it is open to the Commission to canvass these issues in its final report, and to encourage the TIO Council to review them, Telstra submits that the reference to the TIO in Draft Recommendation 9.2 should be removed.

Catch-all ADR scheme

- 7 Telstra does not support the implementation of a broad consumer ADR body for the reasons outlined on page 160 of the Commission's Draft Report, namely, that such a body would lack the features which make an industry-based ombudsman successful, that is:
 - significant coercive power tempered by the fact that the offices are owned and funded by the industry;
 - they operate in industries dominated by a few major players which facilitates communication and co-operation; and
 - industry-ownership provides incentives to develop and maintain cost-effective ADR methods.

F.3 Draft Recommendation 9.3

- 1 Telstra supports the recommendation that small claims court and tribunal processes should be improved as these often provide a more efficient and cost effective way of resolving consumer disputes and claims for all parties involved.

Common higher ceilings for claims

- 2 Telstra supports any changes that ensure that ceilings for small claims are consistent across all States and Territories.
- 3 However, while small claims courts and tribunals can be a more cost effective and efficient way of resolving disputes, any increase in the ceiling for small claims needs to be balanced against the real risk that corporations

like Telstra will be exposed to an increase in the number of vexatious, frivolous and unmeritorious claims.

- 4 The Commission should also note that there are already a variety of mechanisms available to consumers to resolve small claims and disputes, and the use of these should be encouraged rather than lifting the ceiling for claims.
 - For example, Telstra has an internal complaints service that aims to resolve customer complaints within 30 days of the complaint being made. If the customer is not satisfied with the resolution of the investigation of the complaint, the complaint is escalated to a Case Manager who deals with the customer personally to discuss the complaint and the resolutions available. If a customer is still not satisfied with this process, Telstra has a Complaint Review Centre which provides an independent review of how the complaint was handled.
- 5 In addition to this internal process, Telstra customers can also approach a variety of dispute resolution agencies to assist them such as the TIO, ACMA and the ACCC.

Uniform subsidy rates for consumers seeking redress for small claims

- 6 Telstra seeks further clarification as to how a uniform subsidy rates system as proposed by the Commission would work. This is important in balancing against the risk of increased numbers of vexatious, frivolous and/ or unmeritorious claims. For example:
 - what would the rates be?;
 - who would set these rates?;
 - how would the rates be set (by reference to what sort of criteria)?;
 - to what sort of claims would uniform subsidy rates apply?; and
 - would there be any mechanisms in place to allow a party to a dispute to argue that the uniform rates don't apply in particular circumstances?

Equal availability of fee waivers for disadvantaged consumers

- 7 While Telstra supports this recommendation in principle, Telstra submits that further clarification is necessary, such as the definition of disadvantaged consumer and what types of fees would be waived. Again, this is important in balancing against the risk of increased numbers of vexatious, frivolous and/ or unmeritorious claims.

Allowing small claims courts and tribunals to make judgments about civil disputes based on written submissions, unless either of the disputing parties requests otherwise

- 8 Telstra supports this recommendation as it would appear to be a cost effective and more efficient way of dealing with small claims provided that:

- the process of allowing for disputes to be dealt with by written submission does not impact on the existing appeals process in any way or prevent a party from appealing; and
- the right to an oral hearing is still available to either party should they require it following receipt of the other party's written submission.

F.4 Draft Recommendation 9.4

- 1 Telstra is concerned that any increase in access to third party financing for representative actions may increase the risk of the litigation processes being subjected to excessive, frivolous and/ or vexatious claims.
- 2 Further, this recommendation does not propose any actual changes to the current position regarding third party financing of private class actions.
- 3 Telstra submits that any assessment or inquiry by the Australian Government into facilitating third party financing of private class actions/ representative proceedings should be subject to a thorough consultation process and all interested parties should be invited to provide further comments and make submissions on specific proposed amendments.

F.5 Draft Recommendation 9.5

- 1 Telstra does not support this recommendation. A provision that allows consumer regulators to take representative actions on behalf of consumers, whether identified or not and whether or not they are or indeed wish to be a party to the proceeding, is simply unnecessary and there is a risk of regulatory error in that proceedings not representative of consumers' concerns or reflecting a common causation of loss may be issued.
- 2 There are existing procedures in place for representative actions to be taken and these existing procedures are more than adequate. For example, Part IVA of the *Federal Court of Australia Act* provides for representative actions to be commenced provided that seven or more people have claims against the person/ entity and those claims are in respect of, or arise from the same, similar or related circumstances. Telstra is concerned that any relaxation in the threshold requirements set out in this part may lead to an increase in frivolous and unmeritorious claims.
- 3 Telstra also notes that the Commission, in its Draft Report, states that one of the barriers to representative consumer actions is the "same interest" test. Again, Telstra is concerned that any lowering of this threshold may lead to an increase in frivolous and unmeritorious claims.
- 4 Therefore, Telstra submits that any proposed changes which would allow a consumer regulator to commence representative actions on behalf of consumers, should be subject to a thorough consultation process and all interested parties should be invited to provide further comments and make submissions.

F.6 Draft Recommendation 9.6

- 1 Telstra generally supports this recommendation as an effective way of assisting vulnerable and disadvantaged customers. Community Financial

Counsellors and Community Legal Services provide an accessible means for consumers to obtain support and advice relating to their particular circumstances. As the Commission has noted, consumer policy should be assessed with reference to alternatives and, typically, the best way to assist vulnerable and disadvantaged consumers will be through targeted demand-side intervention.

- 2 Telstra submits that the recommendation should be strengthened to specifically include support for training and accreditation of consumer advocates so that relevant skills and experience can be recognised in dealings between business and consumer advocates.

G Enforcement

G.1 Summary

- 1 Telstra considers that the suite of remedies currently available to regulators is more than adequate to effectively enforce the consumer protection laws, and that there is insufficient justification for an expansion of the powers and remedies available to regulators.
- 2 In particular, Telstra considers that regulators already have available to them a vast array of enforcement tools and remedial outcomes which are capable of flexible and efficient application to achieve the very same ends sought to be addressed by the proposed new remedies. As the Commission itself acknowledges in its Draft Report, Australia's current enforcement framework is performing satisfactorily in balancing the interests of consumers and businesses and containing the cost of enforcement activity to the community. The introduction of such additional remedial tools as civil pecuniary penalties, substantiation notices and infringement notices would have the effect of significantly increasing an already heavy regulatory burden on businesses and increasing compliance costs in circumstances where there is simply no need to do so.

G.2 Draft Recommendation 10.1

Substantiation notices

- 1 Section 155 notices already serve the function of the proposed substantiation notices. The ACCC's submission that the powers conferred on it by section 155 of the TPA are inadequate ought to be rejected.
- 2 Telstra submits that the evidentiary threshold for the activation of the ACCC's power to issue a section 155 notice – that the ACCC be merely “satisfied” that there is a matter that “may” constitute a contravention – is relatively low. The ACCC seems to suggest that the threshold is too high, and that the provision is problematic in that it is only enlivened if there is “some factual basis for the suspicion”. In Telstra's view, to countenance the use of coercive powers and a reversal of the onus of proof in the absence of any factual basis for a suspicion on the part of the regulator would amount to a denial of natural justice and to imposing no threshold at all on the activation of these powers.

Cease and desist orders

- 3 The current use of interlocutory injunctions achieve the outcomes sought to be achieved by the mooted “cease and desist” orders in a more disciplined fashion and in a manner which is subject to judicial supervision, as opposed to cease and desist orders which are essentially administratively-imposed interlocutory injunctions. Telstra submits that the law which has been developed around the grant of interlocutory injunctions appropriately balances the interests of the parties in attempting to arrive at a just outcome, and is well understood by all stakeholders. The creation of an administrative power to impose cease and desist orders in the absence of a hearing or judicial supervision is inappropriate. Telstra agrees with the ACCC that Court-ordered interlocutory injunctions are a sufficient and preferable remedy to cease and desist orders.

Naming and shaming powers

- 4 Telstra agrees with the Commission that any additional benefits to be offered by public warning notices would not justify the risks associated with added administrative discretion provided to consumer regulators.

Infringement notices

- 5 Telstra submits that the administrative discretion entailed in infringement orders and the consequent risk of both regulatory error and conflict of interest (resulting in a regulator effectively exercising a judicial power for which it is inappropriate and ill-equipped to administer, particularly given its prosecutorial role) overrides any perceived benefit to be gained by the introduction of infringement notices in consumer protection law areas.

Deterrence and the proposed civil penalty regime

- 6 The main justification provided by the Commission for its recommendation to introduce a civil penalty regime is that the current selection of remedies available to regulators do not focus “explicitly” upon deterring conduct. This argument about lack of deterrence is then used as a spring-board to support the recommendations of increasing the smorgasbord of remedies already available, including introducing a civil penalty regime. Telstra considers that these arguments cannot be sustained.
- 7 As an example, the remedies presently available to regulators include injunctions, damages, other orders to compensate, prevent or reduce loss and damage, corrective advertising, orders varying contracts or declaring them void, orders to repair goods or provide services etc. Whilst it is arguable that such remedies do not focus “explicitly” upon deterring conduct, it is submitted that they plainly have that effect. For example, the prospect of a compensation order or corrective advertising and the associated adverse publicity and costs which may go with the making of such orders acts as an effective deterrent to contravening the law. Accordingly, insofar as the Commission purports to justify the introduction of new remedies on the basis that the existing regime does not deter potential contraventions of the law, Telstra submits that this argument is misconceived.
- 8 In addition, the other justification cited by the Commission for the introduction of a civil penalty regime is the existence of gaps in the

availability of enforcement mechanisms. However, the Commission itself notes that “there was little in the way of hard evidence” provided by participants as to the problems caused by such gaps, but rather “an in principle appeal for powers that would facilitate a more layered approach to enforcement”. Telstra submits that in the absence of this evidence, there is insufficient justification for the broad increase in powers which would be created by the introduction of a civil penalty regime.

- 9 Further, the introduction of civil pecuniary penalties may undermine the role of, and raises questions about the need for the retention of, criminal sanctions, especially in relation to a number of sections of Part VC of the TPA which would not seem to involve such serious and reprehensible moral culpability of the nature which should warrant criminal sanction.
- 10 In this context, it is difficult to understand the ACCC's submission that its powers under section 155 should be broadened to apply after proceedings for an interlocutory injunction have been commenced (page 195 of the Draft Report). In particular, the ACCC claims that, after such an application is made, the scope to further investigate a matter and gather evidence to be used in substantive proceedings is restricted. This submission is entirely unsustainable. Indeed, the opposite is true. Once a proceeding is commenced, the ACCC (like any other litigant) is able to gather evidence by the use of subpoenas, notices to produce, discovery etc. Consequently, there is no need to extend the application of section 155. Further the use of the Court's coercive powers is subject to Court supervision, which is essentially to ensure that the information gathered is relevant to the matters in dispute in the proceeding and that such coercive powers are not abused or used for collateral purposes or otherwise inappropriately. Any extension of section 155 would not provide these necessary protections.
- 11 In short, the existing procedures are necessary and sufficient and any extension of the powers granted by section 155 as proposed by the ACCC would pose a substantial risk to due process and be likely to lead to a defendant being unfairly prejudiced in the conduct of its defence, including by having to deal with section 155 notices when other steps are required to be undertaken in the proceeding. Complex admissibility issues may also arise.
- 12 Similarly, the justification offered on page 187 of the Draft Report for broadening the scope of remedies – that regulators may have difficulty using available enforcement tools – is no basis for simply adding new remedies to the armoury already available which may or may not be easier for the regulator to use. It is also noted that ease of use for the regulator should not be a goal in and of itself to the exclusion of concerns about increasing the regulatory burden and inappropriate use of associated powers.
- 13 In addition, it has always been the case that penalties should only apply in cases where the types of conduct that will attract the penalty are entirely clear. Corporations must be able to know with certainty what conduct will attract penalties. As section 52 of the TPA does not prohibit any particular forms of conduct but rather establishes a norm of conduct, and in many situations involves an unintentional or inadvertent breach of the law, it is not appropriate for penalties to apply. In addition, sections 52 and 53 issues often arise in the context of advertising matters where reasonable minds

might differ as to the representations made. Again it is not appropriate for penalties to apply in these cases.

Conclusion

- 14 In summary, Telstra submits that there is insufficient justification to broaden the suite of remedies currently available to regulators when one has regard (as the Commission has at page 184 of the Draft Report) to the additional compliance costs for firms (which may be passed on to consumers) and the increased risk of regulatory error and regulatory uncertainty which such a step would create.
- 15 Telstra submits that there is insufficient evidence disclosed in the Draft Report to endorse an increase in the powers of the ACCC or the introduction of additional remedial provisions. In any event, the array of enforcement tools and remedial outcomes currently available to regulators is more than adequate to effectively enforce consumer protection laws.

G.3 Draft Recommendation 10.2

- 1 As previously outlined in this submission, Telstra considers that the existing procedures are necessary and sufficient and that any further powers to gather evidence after an application for injunctive relief has been granted is likely to pose a substantial risk to due process, and be likely to lead to a defendant being unfairly prejudiced in the conduct of its defence of the proceeding.

H Empowering consumers

H.1 Draft Recommendation 11.1

- 1 Telstra generally supports this recommendation by the Commission and notes that it already adopts a layering approach where it is necessary to disclose complex information to consumers. However, Telstra submits that further clarification of this recommendation is necessary. In particular, what process for consumer testing and amendment is contemplated and who would be responsible for determining what amendments are necessary and what would be the consequences of a failure to comply?
- 2 In relation to layering, Telstra submits that as a general principle, it should be left to the individual company to ensure disclosure is clear and adequate in the circumstances. Generally, it is in the interest of suppliers to communicate product information in a clear and informative way and in a manner that is not appropriate having regard to the good or service to which the information relates or the areas by which such information is being published (in-store, over the phone, online etc). Any failure to ensure clear and adequate disclosure would of course be subject to existing general principles of consumer law regarding misleading and deceptive conduct.

H.2 Draft Recommendation 11.2

- 1 Telstra supports this recommendation and submits that such an evaluation should occur prior to the implementation of the measures described in Draft Recommendation 11.1.

- 2 Telstra notes that such a review to determine the effectiveness of existing consumer safeguards information provision obligations and delivery mechanisms, and determine the best way of conveying consumer safeguard information in the future, was initiated by the telecommunications industry itself in 2005, but was never completed by the ACMA. Telstra submits that the “evaluation” referred to in the draft recommendation could in certain instances be usefully done in conjunction with relevant industry bodies, such as the Communications Alliance in the case of telecommunications.

H.3 Draft Recommendation 11.3

- 1 Telstra generally supports this recommendation, however, believes it should be further strengthened to ensure that the “appropriate guidelines and governance arrangements” include reference to requisite skills required for effective representation within specific industries. ■

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