Inquiry into Harmonisation of Legal Systems

Submission by

Telstra Corporation Limited

to the

Standing Committee of Legal & Constitutional Affairs

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1. Executive Summary

Telstra Corporation Limited welcomes the opportunity to comment on the Standing Committee of Legal and Constitutional Affairs "*Inquiry into harmonisation of legal systems"* ("the Inquiry").

The focus of Telstra's submission is on the key areas of divergence in the competition and consumer protection laws within Australia and between Australia and New Zealand.

Competition Legislation

Telstra considers that the competition laws of Australia and New Zealand already have a very high degree of harmonisation, particularly by international standards – although Telstra continues to have concerns about the significant differences between sector specific competition regulation across the Tasman. This convergence in general competition law has been achieved as a result of deliberate efforts made by Australia and New Zealand to achieve harmonization under the Closer Economic Relations (CER) framework.

Notwithstanding such efforts, Telstra strongly supports greater harmonisation of competition laws between Australia and New Zealand.

Telstra has identified two key areas where it is beneficial for harmonisation of competition laws. First, there should be greater institutional coordination between the two competition regulators, the Australian Consumer & Competition Commission (**ACCC**) and the New Zealand Commerce Commission (**NZCC)**. Second, the exclusionary provisions and exclusive dealing provisions of the Trade Practices Act 1974 (Cth) (**TPA**) should reflect the New Zealand provisions.

Consumer Protection Legislation

Telstra strongly supports the existence of consumer protection safeguards and laws in Australia. However, Telstra considers that there is an immediate need for harmonisation of some State, Territory and federal consumer protection laws in Australia.

In particular, Telstra has identified areas of divergence in the following consumer protection laws: telephone marketing, door to door sales, unfair terms in consumer contracts, third party trading stamps and trade promotions legislation.

Inconsistencies in the competition and consumer protection laws add to the complexity and costs of ensuring compliance for organisations that conduct business nationally or on a trans-Tasman basis.

Telstra therefore strongly supports further steps towards greater harmonisation of both competition and consumer protection legislation in the future.

2. Background

As a national telecommunications provider, Telstra competes across a range of telecommunications and information services in all telecommunications markets in Australia. Telstra provides more than 10.3 million fixed line and 7.6 million mobile services across Australia[1].

Telstra's wholly owned subsidiary in New Zealand - TelstraClear Limited (**Telstra Clear**), is New Zealand's second largest full service telecommunications company and provides a suite of telecommunications and information services including; voice, data, Internet, mobile, managed services and cable television to approximately 12% of the New Zealand market [2]. TelstraClear also provides a seamless service to Telstra's trans-Tasman customers.

Telstra therefore considers itself well placed to comment on the issue of further harmonization of legal systems within Australia and between Australia and New Zealand.

3. Competition Law

As noted by Telstra in its submission to the Productivity Commission's Issue Paper - *Australian and New Zealand Competition and Consumer Protection Regimes* "substantive and procedural differences in Australia and New Zealand's generic competition laws are likely to impose material transaction costs, result in externalities and have adverse efficiency effects for the economies of each country".[3]

These additional costs and efficiency effects were also noted in the Productivity Commission's Issue Paper and are briefly summarised below.

3.1 Material Transaction Costs

"Differences in competition regulation may impose material transactions and compliance costs on firms operating in Australia and New Zealand. This is due to the fact that firms are required to comply with different domestic legislation, different regulatory decisions of two national regulatory regimes and regulators. The same transaction, for example, may be scrutinised twice by two different regulators that

[1] Telstra Annual Report, 2004, pg 3
[2] Telstra Annual Report, 2004, pg 30

each seek different undertakings and remedies. A lack of process to enable the regulators to learn from each other's decisions may also result in wasteful duplication of effort, further increasing transaction costs"[4].

3.2 Adverse externality effects

"Externalities in regulatory decision-making arise where decisions made by a regulator in one jurisdiction have positive or negative spillover effects in another jurisdiction. This could arise where one jurisdiction makes decisions that are over-regulated or under-regulated relative to the optimal level for both".[5] For example, conduct that is permitted in one nation but not the other may adversely affect competition.

3.3 Adverse efficiency effects

"Over-regulation or under-regulation by one jurisdiction relative to the other may also distort efficient trade between Australia and New Zealand. This may encourage firms to arrange their international transactions inefficiently in order to minimise their regulatory risks."[6]

Telstra provides the following information on some of the key areas of divergence between Australian and New Zealand general competition laws.[7]

3.4 Exclusionary provisions

Exclusionary provisions are *per se* illegal under section 4D (referenced by section 45(2)) of the *Trade Practices Act 1974* (**TPA**). This means that they are not subject to a test based on their effect on competition.

In contrast, New Zealand's prohibition on exclusionary provisions, set out in section 29 of the *Commerce Act 1986* (NZ) (**Commerce Act**) provides a competition defence. If the exclusionary provision does not have the purpose, or does not have or

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[3] Telstra Submission to the Productivity Commission on Australian and New Zealand Competition and Consumer Protection Regimes, August 2004, p.8.
[4] Telstra Submission on Australian and New Zealand Competition and Consumer Protection Regimes to the Productivity Commission, 2004, pg.8)
[5] Telstra Submission on Australian and New Zealand Competition and Consumer Protection Regimes to the Productivity Commission, 2004, pg.8)
[6] Telstra Submission on Australian and New Zealand Competition and Consumer Protection Regimes to the Productivity Commission, 2004, pg.8)
[7] See Telstra's submission on Australian and New Zealand Competition and Consumer Protection Regimes to the Productivity Commission for details on the significant divergences in telecommunications-specific competition regulation.

is not likely to have the effect, of substantially lessening competition in a market, then liability is not established.

The Dawson Committee recommended that Australia's approach should be harmonised with New Zealand in this regard. Whilst initially adopting the recommendation, the Australian Government has reversed that decision and, in the *Trade Practices Legislation Amendment Bill (No 1) 2005* (**TPAB**), only proposes to incorporate a limited defence for joint ventures into the TPA.

Telstra considers that the recommendation of the Dawson Committee should be adopted on this issue.

3.5 Exclusive dealing

Section 47 of the TPA regulates various types of vertical restraint practices, or exclusive dealing. All the provisions of section 47 are currently subject to a substantial lessening of competition test (with the exception of third line forcing, although following enactment of the TPAB, this will also become subject to a substantial lessening of competition test).

The New Zealand Commerce Act does not contain an equivalent to section 47 of the TPA. Rather, vertical restraints are regulated in New Zealand through the general "substantial lessening of competition" test in section 27 of the Commerce Act (the equivalent of section 45 of the TPA).

Telstra considers that the complex approach adopted in Australia is unnecessary. The section 47 test ultimately distils to the "substantial lessening of competition" test currently relied upon in New Zealand.

Telstra suggests that Australia should repeal section 47 of the TPA and solely rely on section 45 of the TPA.

3.6 Institutional Coordination

Telstra supports greater institutional coordination between the ACCC and the NZCC as it considers that "integration on a trans-Tasman basis is likely to realise material efficiency gains by realising synergies, particularly economies of scale and scope"[8].

Telstra has identified two key areas where it believes greater institutional coordination could be achieved:

[8] Telstra Submission to the Productivity Commission on Australian and New Zealand Competition and Consumer Protection Regimes, August 2004, pg 14).

(i) in the pooling of specialist expertise; and

(ii) through greater institutional amalgamation.

3.7 Pooling of Specialist Expertise

The resourcing of the NZCC could be improved by sharing of expertise and resources with the ACCC. The obvious benefit to firms operating in both Australia and New Zealand is that there would be an increase in the speed, quality and consistency of decisions between the two countries.

3.8 Institutional amalgamation between the ACCC and NZCC

Telstra supports the concept of further institutional amalgamation, particularly in highly technical specialist areas such as telecommunications.

Telstra proposes that the there should be express requirements for the ACCC and NZCC to consult with each other on regulatory decisions that require a high degree of specialist expertise and knowledge (eg telecommunications) and that each regulator has regard to the decisions of the other with a view to ensuring harmonisation.

Moreover, Telstra considers that institutional harmonisation should extend beyond the regulators to include policy formulation, policy review and judicial entities. This could for example involve greater coordination between the Productivity Commission, the respective Ministries and other relevant entities that review and develop competition law and policy in either nation.

4. Australian Consumer Protection Regimes

Telstra strongly supports the existence of consumer protection safeguards and laws in Australia. However, Telstra also considers that there is an immediate need for greater harmonisation of some State, Territory and Federal consumer protection laws.

Several agencies administer consumer protection policy at the State and Territory level in Australia. These include Consumer Affairs Victoria, the Queensland Office of

Fair Trading, the West Australian Department of Consumer and Employment Protection, the South Australian Office of Consumer & Business Affairs, the Tasmanian Office of Consumer Affairs & Fair Trading and the NSW and ACT Office of Fair Trading.

In addition, various self-regulatory codes developed under the telecommunications industry body, the Australian Communications Industry Forum (ACIF) or other organisations such as the Australian Direct Marketing Organisation (ADMA) contain regulation that often covers the same subject matter as the consumer protection obligations that exist under federal, State and/or Territory regimes.

The following section highlights some of the key areas of divergence in the consumer protection laws of the different States and Territories of Australia.

5.1 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, **ACIF** has developed an industry code on Consumer Contracts. The Australian Communications Authority (**ACA**) will register the code under the *Telecommunications Act 1997* (Cth) and it will then apply to all carriers and carriage service providers.

Legislation covering the same or similar subject matter already exists or is being proposed in some States and Territories. For example, Victoria has introduced a new Part 2B into the *Fair Trading Act 1999* (Vic) relating to unfair terms in consumer contracts.

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

5.2 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 Australian

Communications Authority, various State based departments and the Department of Communications, Information Technology and the Arts.

There are also a large number of different pieces of legislation that regulate telephone marketing. These include for example:

- Financial Services Reform Act 2001;
- Amendments to the Victorian (VIC) Fair Trading Act;
- New South Wales (NSW) Fair Trading Amendment Act 2003;
- Telecommunications Act;
- Ministerial Counsel for consumer affairs modified practices for direct marketing;
- The Australian Direct Marketing Code of Practice; and
- The Australian Communications Industry Forum (ACIF) Customer Transfer Industry Code.

In particular the new legislation enacted by the Victorian and New South Wales (NSW) governments, has created a disparate regulatory approach toward telephone marketing nationally.

In late 2003, the State Parliaments in New South Wales and Victoria both introduced restrictions for selling goods and services over the phone into their Fair Trading Acts. New South Wales was the first Australian State to pass legislative controls specifically targeting telephone marketing with the *Fair Trading Amendment Act* 2003 No 35 and Victoria soon followed with the *Fair Trading (Further Amendment) Act 2*003 No 106.

Whilst there are similarities between the New South Wales and Victorian legislation, key differences exist that have proven to be complex and costly for telephone marketing firms to implement. This has been compounded by the fact that although the amendments were introduced in Victoria and New South Wales, they also impact operations in other States. To illustrate, 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 telephone marketing 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	Permitted call times	Weekdays: 9am to 8pm. Weekends: 9am to 5pm. No calls on public holidays.	9am to 8pm on any day
3	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.
4	Contract cooling-off periods (right	10 days from the date of receipt of the written	Five business days from the day the written notice

	to cancel)	agreement and prescribed notice of cancellation rights.	of cancellation rights is given to the consumer.
5	Penalties for breach	Depending on which section of the Act is breached: ▪ Companies: $12,270 or $24,540. Individuals: $6,135 or $12,270.	$11,000

Given the operational complexities and costs associated with ensuring compliance with differing regimes for companies that trade nationally, Telstra would strongly support any future movement towards harmonisation of the telephone marketing laws in Australia.

5.3 Door to Door Sales Legislation

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 QLD $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 (although they are minor in some cases) 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.

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. This is because an organisation must either:

(a) implement different administrative rules and procedures and communicate these to staff engaged in door to door sales depending on where the staff member will conduct sales activities; or

(b) create its own compliance rules which comply with the highest standard required by the different pieces of legislation.

It also reduces flexibility for national sales organisations to relocate resources or staff as demand requires, given the differing legislative requirements.

5.4 Trade Promotions Legislation

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. The most significant difference relates 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.

(c) In New South Wales, if a prize is worth more than $10,000 the winner's details must be provided to the Department of Gaming and Racing.

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.

5.5 Third Party Trading Stamps Legislation

Telstra submits that there is also legislative divergence in the third party trading stamps legislation in Australia.

For example, in Western Australia and the Australian Capital Territory, there is a prohibition on supplying, redeeming or publishing third party trading stamps. Third party trading stamps are vouchers supplied in connection with the sale or promotion of goods and services. We understand that this legislation was not intended to prevent legitimate business activity, but this has been the practical effect.

What this means in practice is that, for example, if a company wished to offer bonus movie tickets to a customer in connection with a purchase, they are not able to offer this to Western Australian or Australian Capital Territory customers. For national promotions, this means that exceptions to the bonus must be advertised, and it can

leave customers in these affected areas questioning why they are not permitted to receive the bonus, or are being treated differently.

6. Conclusion

In Telstra's view, harmonisation of competition and consumer protection laws within Australia and between Australia and New Zealand will realise material benefits to both economies. The most obvious benefit will be facilitation of national markets, improved protection for consumers and reduced compliance costs for organisation's that operate on a national or trans-Tasman basis.

Telstra therefore strongly supports any movement towards greater harmonisation.