Submission to the Senate Environment, Communications, Information Technology and the Arts Committee

Inquiry into the provisions of the *Communications Legislation Amendment (Information Sharing and Datacasting) Bill 2007*

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1 General Comment: Principles of Good Regulation

Telstra notes that there has been some significant discussion recently about what constitutes principles of good regulation. These principles should be applied in this matter.

Gary Banks, Chairman of the Taskforce on Reducing Regulatory Burdens on Business (Taskforce) has identified the following 6 principles[1]:

- Governments should not consider introducing or amending regulation unless a case for action is established;
- Where a prima facie case for action is established, a range of feasible options need to be identified and their relative merits rigorously assessed (including cost benefit analysis);
- The option that generates the greatest net benefit for the community should be adopted;
- There needs to be effective guidance to relevant regulators and regulated parties as the regulation is being implemented;
- There is a need for mechanisms such as sunset clauses and periodic reviews to ensure regulation remains relevant and effective over time; and
- There needs to be effective consultation with regulated parties at all stages of the regulatory cycle.

In accordance with these principles, the Taskforce states that no regulation should be introduced unless the need for government action and the superiority of the preferred option have been transparently demonstrated.

In light of these principles, Telstra believes it is not clear what "failure" the *Communications Legislation Amendment (Information Sharing and Datacasting) Bill 2007* (Bill) is seeking to address (i.e. there has been no established cause for action). It appears that the Australian Communications and Media Authority (ACMA) is being given an almost unfettered ability to obtain information and then share that information with a fairly wide audience, without any demonstrated need for such action Further, there have been no complaints, as far as we are aware, from the proposed recipients of information that have been stymied in the application of "their" regimes by a lack of information.

In any event, if there is a failure of the existing information gathering regimes, it would be more appropriate for the regime/s relating to each authority to be examined to see whether their individual information gathering powers requires review rather than giving this extremely broad power to ACMA to provide information. That is, the

[1] Rethinking Regulation : Report of the Taskforce on Reducing Regulatory Burdens on Business, January 2006

"failure" (if indeed there is one) needs to be appropriately identified and a range of feasible options must be considered.

Telstra further believes that policy solutions, and their implementation in regulation, should be formed via an open and accountable process, and:

- generally, protect the interests of consumers and other affected members of the public;
- be the most effective and efficient means of achieving the relevant policy objective;
- be clear and clearly understood by all affected parties;
- operate in a competitively and technology neutral manner; and
- not have unintended consequences.

Telstra believes that the proposed regulation would not meet these criteria and could result in inefficient, costly and uncertain outcomes.

2 Broad current scope of ACMA powers to gather information

ACMA has a very broad ability to obtain information under current legislation.

For example, ACMA's powers to obtain information under the *Telecommunications Act 1997*[2] include:

- **ACMA power to request information from carriers and service providers or persons:** ACMA may obtain information and documents from carriers, carriage service providers (CSPs) and persons if ACMA has reason to believe that the carrier, CSP or person:
  - has information or a document which is relevant to the performance or exercise of ACMA's telecommunications functions or powers; or
  - is capable of giving evidence which the ACMA has reason to believe is relevant to the performance or exercise of ACMA's telecommunications functions or powers.

- **Record-keeping rules**: ACMA may make rules for and in relation to requiring carriers or CSPs to keep and retain records. The record keeping rules must relate to information which is relevant to the ACMA's powers under Part 5 (the monitoring of the performance of carriers and CSPs) or Part 2 or the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with the Universal Service Obligation).

[2] ACMA has information gathering powers under a number of Acts but in the interests of brevity this submission only lists powers under the *Telecommunications Act*.

- **Search and seizure powers**: A magistrate may grant a search warrant where an inspector (which includes a person appointed by ACMA) suspects on reasonable grounds that there may be anything which relates to an offence, or an intended offence, against Part 21 (technical regulation) or anything which relates to a breach, or intended breach, of the *Spam Act 2003*.

- **Emergency powers:** An inspector may search a person and seize anything found in the course of that search without a warrant where they have reasonable grounds to believe that a person is carrying anything that is connected with an offence against Part 21 and there is a risk that that thing will be concealed, lost or destroyed if it is not seized.

In addition, ACMA will often be the recipient of information that has not been requested but has been voluntarily provided to inform (i.e. brief) ACMA or is obtained through ACMA committees (e.g. the Numbering Advisory Committee (NAC) or the Law Enforcement Advisory Committee (LEAC)).

Telstra is significantly concerned that all of this information may fall within the definition of "authorised disclosure information" and therefore be subject to disclosure, on satisfaction of extraordinarily low thresholds (discussed below), by ACMA.

3 Telstra concerns in respect of Part 1 of the Bill (proposed new Part 7A titled "Disclosure of information")

3.1 Use of information by other agencies

Telstra believes there are very real concerns that, because of ACMA's very broad information gathering powers, other agencies may approach and seek ACMA to obtain information on their behalf.

For example, the Australian Competition and Consumer Commission's (ACCC) ability to obtain information is limited in nature and has relatively strict thresholds in certain circumstances. The ACCC powers include relevantly[3]:

- **Search warrants:** In order to obtain a search warrant, the ACCC must satisfy a magistrate, by affidavit or oral evidence, that there are reasonable grounds to suspect that there is evidential material relating to a breach of the *Trade Practices Act 1974* (TPA) at the premises at that time, or that there may be within the next 72 hours;

- **s 155:** ACCC may require information or documents or answering of questions under a formal examination where it has reason to believe that the relevant information relates to a contravention or possible contravention of the TPA; and

[3] The ACCC also has the ability to obtain other information, for example in relation to undertakings and tariffs (where a carrier or CSP has a substantial degree of market power) and specifically from Telstra in relation to price changes for basic carriage services.

- **Record keeping rules:** The ACCC has the power to direct that a carrier or CSP keep records and provide reports containing that information to the ACCC.

The information gathering powers of Commonwealth Royal Commissions are also limited and are generally restricted to the "Terms of Reference" of the Commission which it is conducting. The information gathering powers of Royal Commissions include:
- summoning a person to appear before the Commission at a hearing to give evidence or to produce documents;
- requiring a person to produce a document (including one which may be subject to legal professional privilege) or thing; and
- obtaining a search warrant where it has reasonable grounds for suspecting that there may be (at that time or within the next 24 hours) a thing which is connected with a matter into which the relevant Commission is inquiring.

Telstra reiterates that the information sharing power under the Bill, if used to its fullest extent, may subvert the limitations that have been expressly placed on the information gathering powers of these, and other, agencies.

3.2 Low threshold for ACMA to share information

Further, Telstra has considerable concerns that the threshold for ACMA sharing information under the Bill is extremely low and the potential recipients of the information are broad and varied.

Essentially <u>any</u> authorised disclosure information (which in itself is extremely broadly defined) can be disclosed to the Minister (i.e. the Minister responsible for ACMA), or the Secretary of the Department, or an authorised Australian Public Servant employee in the Department. That is, there is no threshold in relation to sharing information with these people.

Authorised disclosure information can also be disclosed to another Minister if it is relevant to a provision of an Act administered by the Minister. Therefore, although there is a threshold of “relevance”, it is an extremely low threshold.

ACMA may also disclose authorised disclosure information to the multitude of authorities listed in section 59D as long as the Chair of ACMA is satisfied that the information will enable or assist the authority to perform or exercise any of its functions or powers. Again, Telstra is very concerned that the threshold in relation to the listed authorities is extremely low.

None of these disclosures needs to be on request of the other party.

This can be compared with the ACCC’s ability under the TPA to disclose information, which is limited to:

- responding to requests under the *Freedom of Information Act 1982* (FOI Act);
- as part of its duty to provide discovery or comply with a notice to produce in proceedings;

- in response to a subpoena regarding proceedings between third parties; and
- in response to statutory discovery obligations (e.g. there is a limited right of access to documents obtained by the ACCC in the course of an authorisation application or a proceeding for civil penalties, an injunction or remedial orders).

Telstra considers that the information sharing ability has been too broadly drafted and refers back to the principle that any regulation should be the minimal effective regulation to address the issue in concern.

3.3 Conflict with Telstra's continuous disclosure obligations

Telstra is very concerned that the ability for ACMA to disclose to third parties potentially market-sensitive information concerning Telstra directly conflicts with Telstra's continuous disclosure obligations.

As a public listed company, Telstra must ensure that any market-sensitive information is not released to anyone before it is sent to the Australian Stock Exchange (ASX) and released by the ASX. It must also ensure that market-sensitive information is released to the ASX immediately it becomes known to Telstra, except where it concerns an incomplete proposal or internal management information which is kept confidential. If the information ceases to be kept confidential, however, Telstra would be forced to prematurely disclose it.

The problem is that, if the information given to ACMA by Telstra is or becomes market-sensitive information, Telstra may be forced to prematurely disclose that information to the ASX or to be in breach of those obligations. This could be very damaging to Telstra and threatens to freeze the information flow between Telstra and ACMA.

3.4 Lack of consultation with the entity to whom the information relates nor with the entity that provided the information to ACMA

Further, Telstra is extremely concerned that neither the entity to whom the information relates nor the entity that provided the information to ACMA (if they are different entities) need to be consulted about, or even informed of, the disclosure.

Unlike the application of FOI Act, there is no oversight or accountability placed on ACMA under the Bill to ensure that affected entities are adequately advised and have an opportunity to apply for an exemption from the disclosure. The FOI Act requires the agency or Minister to give a person or organisation a reasonable opportunity to make submissions in support of the contention that the document is exempt from disclosure. The person making a decision in relation to the disclosure must consider any such submissions.

There are a number of reasons under the FOI Act for which documents may be considered exempt, including that disclosure:

- would disclose trade secrets;
- would disclose information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
- would unreasonably affect a person or business adversely in respect of his, her or its lawful business or professional affairs.

In addition, the Bill gives no right of recourse if information is disclosed beyond the remit of the Act.[4] This is particularly pertinent given that no consultation is required prior to ACMA sharing the information.

3.5 Lack of protection of shared information

Further, Telstra is disturbed there is no protection of the subsequent use of the shared information. That is, there is no obligation for ACMA to provide the information subject to the same conditions on which the information was supplied to ACMA. For example, if an entity provides ACMA with information on a “commercial in confidence” basis and ACMA provides that information to the Minister, there is no express obligation for the Minister to treat that information as confidential in nature. This could lead to a situation where ACMA is not able to publish information, but the authority to which ACMA provides the information, is able to publish it.

There is a real risk that entities will cease to provide any information to ACMA which they are not obliged to provide (i.e. ACMA will cease to receive voluntary proactive briefings and participation in information sharing forums such as the NAC and LEAC will be significantly curtailed).

3.6 Superfluous provisions

Notwithstanding Telstra’s concerns from a policy perspective set out above, Telstra observes that as the following sections are not likely to have an impact on the information that may or may not be disclosed, these sections could be removed from the Bill:

- section 59E as disclosure with consent would always be allowed; and
- section 59F as information that is publicly available is already “disclosed” and providing it in another context would not constitute a disclosure.

Finally, it is also worth noting that, contrary to the Taskforce recommendation, there are no sunset provisions for the Bill nor are there any provisions for review of the legislation once it has been implemented.

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[4] While Telstra has not considered this area in detail, even if this is a “decision” on which action could be taken under the *Administrative Decision (Judicial Review) Act 1977*, it is hard to imagine an appropriate outcome to an administrative review once the information has been shared.

3.7 Summary

In general, Telstra has significant concerns about various aspects of the Bill relating to the information sharing provisions. Telstra considers that this aspect of the Bill should be reconsidered and at the very least the following should be incorporated:

- a higher threshold placed on disclosure to Ministers or their advisors under sections 59A(2) and 59B(2) such that the information needs to more than simply relate to a matter arising under a provision of a relevant Act (for the Minister / advisors). For example, an appropriate threshold may be that information should only be shared when it relates, or could relate to a breach of an Act administered by a Minister;

- a higher threshold placed on disclosure to authorities listed in section 59D such that the information needs to more than simply enable or assist an authority to perform or exercise any of its functions or powers. For example, an appropriate threshold may be that information should only be shared when it relates, or could relate to a breach of the legislation enforced by those authorities;

- a requirement for ACMA to consult with the entities that provided the information and/or about which the information relates;

- the ability to conduct a review of the decision making process prior to the information being shared;

- a requirement that the authority which receives information treat it with the same restrictions placed on it by the entity which gave it to ACMA; and

- that concerns in respect of triggering public companies' continuous disclosure obligations be addressed specifically.

Telstra requests that serious consideration be given to these changes to ensure the legislation is workable for all parties likely to be affected.

4 Telstra concerns in respect of Part 2 of the Bill (proposed amendments to Division 1 titled "Varying conditions of Datacasting Transmitter Licences")

Telstra has serious reservations about the proposed amendments to the *Radiocommunications Act 1992* set out in this Part of the Bill. The amendments have the effect of permitting ACMA to vary the conditions of datacasting transmitter licences post-auction in the case of Channels A and B, and in particular to vary the frequencies on which the licences operate.

The primary effect of the proposed amendments will be to increase the uncertainty associated with the business case for bidding for a Channel B licence, because it permits changes to be made post-auction that may disadvantage the Channel B licensee. Particularly, as explained below, an adverse chane will increase the cost of

service provision for the Channel B licensee. The Channel B licensee is simply expected to wear these costs without compensation.

Telstra recognises that in some digital channel plan areas (DCPs) there is currently a suboptimal overall outcome in terms of frequency assignments, and some replanning may be appropriate as the opportunity to rearrange frequencies arises. However, such replanning processes should be undertaken by ACMA in close consultation with the licensee based on agreed criteria.

One of the key opportunities for a Channel B licence is to provide a mobile TV service. This type of service has been suggested in several media releases and speeches by the Minister for Communications when discussing potential uses for the Channel B licence. Unlike a broadcast television network (based notionally on one main transmitter in each Digital Channel Plan Area) which is relatively inexpensive to retune, a mobile TV network must be rolled out on an additional number of towers to obtain adequate coverage. Hence, retuning is likely to be a costly exercise – as experienced in the GSM band retune in the early to mid-1990s.

For example, mobile TV transmitters are likely to require high performance output filters to reduce out-of-band emissions at each mobile TV transmit site in Digital Channel Plan Areas where there are critical adjacencies. If a retune was required in such an area then the Channel B licensee would be faced with the cost of a filter retune, or the cost of replacement filters, as well as a program to implement either of these options at each transmit site. This would amount to a substantial extra cost in a large metropolitan area. An additional factor is whether equivalent performance of a mobile TV service can be maintained after a change in frequency without additional expense if the change is too large. Significant top-up investment may be required to restore the network back to its original design standards.

In conclusion, Telstra believes that ACMA should allow commercial imperatives to prevail in DCP areas where retunes are proposed. In cases where a proposed retune is in the public interest but not in the interest of the Channel B licensee, then due compensation must be paid to the Channel B licensee. Provision for such compensation should either be included in the Bill or as a condition of sale in the Channel B auction process.