

17 November 2006

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Senate Legal and Constitutional Affairs Committee  
Department of the Senate  
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Dear Committee Secretary

**Telstra's submission on the Inquiry into provisions of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 ("Bill")**

Telstra is pleased to have the opportunity to make a submission on the Bill to the Senate Legal and Constitutional Affairs Committee.

Telstra has also made submissions to the Attorney-General's Department on the December 2005 and July 2006 drafts of the Bill and attended the presentation by the Minister for Customs and Justice on 28 August 2006.

**Application of the Bill to the telecommunications industry**

While many of the issues raised in our previous submissions have been addressed we are concerned that the Bill continues to apply to services that are not provided by the financial sector or persons in direct competition with the financial sector.

The Attorney General has publicly stated on several occasions that the Bill is intended to "cover services provided by the **financial and gambling sectors, bullion dealers, and designated financial services provided by lawyers and accountants** in direct competition with the financial sector" (emphasis added).

The intention for the first tranche of the legislation to regulate only the financial and gambling sectors and those in direct competition with the financial sector has been reflected in the Department's extensive consultation with these sectors through industry working groups. It is also reflected in the Explanatory Memorandum to the Bill in relation to the explanations of the designated services of "*making a loan in the course of carrying on a loans business*" and "*issuing a debit card*" as detailed in the table attached in this letter.

Despite this intention the Bill will regulate a number of Telstra's products and services including post-paid third party content, mobile phones and calling cards. These products and services are clearly telecommunications services and are in no way in competition with the financial sector. Further, these products and services have a low or negligible risk of money laundering or terrorist financing activity.

The table attached to this letter identifies Telstra's products and services that are currently regulated by the Bill. We have also recommended amendments that could be made to the Bill

to resolve this issue. Telstra submits that these amendments are consistent with the Financial Action Task Force's Forty Recommendations and the approach adopted in the United Kingdom and United States.

### **Designated business groups**

Telstra welcomes the revised definition of a "*designated business group*" and the extent to which one member of a designated business group can discharge obligations on behalf of another member<sup>1</sup>. However, Telstra further submits that there should be a general provision to the effect that any obligations of a reporting entity under the Bill can be discharged by another member of a designated business group. This would provide certainty to members of a designated business group as to how the obligations of the group's reporting entities under the Bill can be satisfied. In addition, Telstra does not consider that this would compromise the objectives of the Bill to combat money laundering and terrorism financing.

Further, the Bill still provides no qualification or exception where a designated service is provided to another member of a designated business group. Telstra submits that a designated service should not be deemed to have been provided in these circumstances. For example, intra-group loans and parent company guarantees should not be covered by the Bill.

### **Support of solutions and recommendation of previous submissions**


Given the Committee's stated intention to concentrate on issues arising from changes to the Bill since the initial exposure draft, this submission focuses on the amendments made to the July 2006 draft of the Bill. However, Telstra still has concerns with other aspects of the Bill and continues to strongly support the solutions and recommendations set out in its previous submissions.

### **Further consultation**

Telstra supports the Government's decision to legislate in this area and is committed to working with the Government to develop measures that address the specific money laundering and terrorist financing risks faced by the telecommunications sector.

However, Telstra submits that in its current form the Bill would impose onerous and impractical legislative obligations on the telecommunications sector without any clear anti-money laundering or counter-terrorism financing benefit. Such an outcome appears to be inconsistent with the Government's purported intention, and an unintended consequence of the first tranche of reforms. Therefore, Telstra requests that the Committee recommends in favour of the submissions outlined above regarding designated business groups and the amendments set out in the table attached to this letter.

Yours faithfully



**Will Irving**  
**Group General Counsel**

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<sup>1</sup> The obligations that can be discharged include undertaking ongoing customer due diligence, providing the AUSTRAC CEO with AML/CTF compliance reports, making and retaining records, performing the customer identification procedure for another reporting entity and retaining customer provided documents in an AML/CTF Program and related records.

## APPLICATION OF THE BILL TO TELSTRA'S PRODUCTS

| TELSTRA PRODUCT REGULATED   | SOLUTION  |
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| <p><b>Premium content &amp; information accessed using a post-paid mobile</b></p> <p>It is arguable that Telstra makes a "loan" each time a customer uses their mobile to access premium content and information.</p> <p>This is because under the payment arrangements for premium services Telstra generally pays the third party content or information provider before the customer pays Telstra.</p> <p>A loan is made under subparagraph (c) of the definition of loan at the time Telstra makes the payment to the third party because in doing so it extends credit to the customer.</p> <p>The definition of loan currently excludes trade credit. However, that exclusion does not apply in these circumstances because Telstra (the credit provider) does not provide the good or service to which the credit relates.</p> | <p><b>Amend the definition of "business" to give effect to statements in the Explanatory Memorandum that a person carries on a loans business if lending is a "core activity"</b></p> <p>As a result of amendments made to the July 2006 draft Bill an entity now only provides the designated service of "making a loan" if the loan is made in the course of a "loans business". Although this term is not defined in the Bill the Explanatory Memorandum to the Bill states that the result of this limitation is that "item 6 is limited to businesses where lending is a core activity"<sup>2</sup>.</p> <p>While Telstra welcomes the amendment, the inconsistency between the stated intention of the limitation in the Explanatory Memorandum and the definition of "business" creates uncertainty for those seeking to rely on the limitation.</p> <p>The term "business" is defined broadly to include one-off transactions. Further the Explanatory Memorandum states that "the definition is intended to...be given a broad interpretation"<sup>3</sup> This is not consistent with the term "loans business" being limited to where lending is a core activity.</p> <p>Telstra submits that the following words should be inserted at the end of the definition of "business":</p> <p style="padding-left: 40px;">"A person carries on a business of providing a particular designated service if the provision of that service is the person's sole or principal business activity. "</p> |
| <p><b>Mobiles &amp; calling cards</b></p> <p>It is arguable that providers of mobile phones "issue a debit card" when they sell pre-paid mobile phones and calling cards. This is because a pre-paid mobile phone or calling card may be an article that allows the customer to debit their account for the cost of phone calls and other services.</p>   | <p><b>Limit the designated service of "issuing a debit card" to debit cards issued by a financial institution</b></p> <p>In its previous submissions Telstra has recommended that the designated service of issuing a debit card be limited to cards issued by ADIs. Although this amendment has not been made to the Bill, in discussing this service the Explanatory Memorandum provides that it "captures an account held with an ADI or bank that has a debit card facility attached to the account" (emphasis added).</p> <p>Telstra submits that the Bill should be amended to reflect the intention stated in the Explanatory Memorandum by consolidating items 18 and 19 of table 1, section 6 as follows:</p> <p style="padding-left: 40px;">"issuing a debit card that enables the holder of an account to debit the account where the debit card is issued by:</p> <ul style="list-style-type: none"> <li>(a) an ADI;</li> <li>(b) a bank;</li> <li>(c) a building society</li> <li>(d) a credit union; or</li> <li>(e) a person specified in the AML/CTF Rules"</li> </ul> <p>The relevant customer of the designated service would then be:</p> <p style="padding-left: 40px;">"both (a) the holder of the account; and (b) each other signatory to the account".</p> <p>This amendment is consistent with the designated services in items 1 to 5 and 17 of table 1, section 6 which are limited to</p>   |

<sup>2</sup> Page 55.

<sup>3</sup> Page 27.

| TELSTRA PRODUCT REGULATED  | SOLUTION   |
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|  | services provided by ADIs, banks, building societies and credit unions.  |
| <p><b>Transfers of value between pre-paid mobiles and calling cards</b></p> <p>A "remittance arrangement" is defined in the Bill to include any arrangement for the transfer of money or property regardless of whether the transfer results in the movement of money or property from one geographic location to another. As a consequence, Telstra will provide a remittance arrangement when it accepts money from the holder of a pre-paid mobile phone account or calling card account for transfer to the holder of another pre-paid mobile phone account or calling card account.</p> | <p><b>Limit the designated services relating to remittance arrangements to circumstances where the value of the money or property to be transferred is greater than \$1,000</b></p> <p>It is unclear why the Bill applies a monetary threshold of \$1,000 to some designated services, such as money orders and stored value cards, but not to other designated services that are similar in nature, such as remittance arrangements.</p> <p>Further, under the FATF Forty Recommendations financial institutions are only required to undertake customer due diligence measures in carrying out occasional transactions above USD/EUR 15,000. In the United Kingdom, the Money Laundering Regulations 2003 also contain an exemption from the requirement to perform identification procedures for one-off transactions below 15,000 Euros.</p> <p>Telstra submits that the designated services relating to remittance arrangements should be limited to circumstances where the value of the money or property to be transferred is greater than \$1,000 by amending the definition of remittance arrangement in section 10(2) as follows:</p> <p style="padding-left: 40px;">"A reference in this Act to a <i>remittance arrangement</i> is a reference to an arrangement that is for the transfer of money or property <u>where the value of money or property is not less than \$1,000</u>, and includes a reference to an arrangement that, under the regulations, is taken to be a remittance arrangement for the purposes of this Act."</p> <p><b>Limit the designated services relating to remittance arrangements to circumstances where the money or property is transferred from one geographic location to another.</b></p> <p>Telstra submits that it is inconsistent with international practice for the Bill to apply to services for the transfer of money or value even if the money or value is not transferred to another location. For example:</p> <ul style="list-style-type: none"> <li>• FATF's definition of a money or value transfer requires that the money or value is accepted in one location and paid to a beneficiary in another location;<sup>4</sup> and</li> <li>• the Asia Pacific Working Group on Money Laundering (of which Australia is a member) defines an alternative remittance system as a system for moving money or other forms of stored value between countries.<sup>5</sup></li> </ul> <p>Telstra submits that the designated services relating to remittance arrangements should be limited to circumstances where the money or property is to be transferred from one country to another by amending the definition of remittance arrangement in section 10(2) as follows:</p> |

<sup>4</sup> Interpretive Note to Special Recommendation VI: Alternative Remittance. A money or value transfer system is defined as:

*a financial service that accepts cash, cheques, other monetary instruments or other stores of value in one location and pays a corresponding sum in cash or other form to a beneficiary in another location by means of a communication, message, transfer or through a clearing network to which the money/value transfer service belongs (emphasis added).*

<sup>5</sup> Asia Pacific Group on Money Laundering, Alternative Remittance Regulation Implementation Package (July 2003) at page 10.

| TELSTRA PRODUCT REGULATED  | SOLUTION  |
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|  | <p>"A reference in this Act to a <b>remittance arrangement</b> is a reference to an arrangement that is for the transfer of money or property <b>into or out of Australia</b>, and includes a reference to an arrangement that, under the regulations, is taken to be a remittance arrangement for the purposes of this Act."</p>   |
| <p><b>Trade promotions &amp; other games</b></p> <p>Telstra runs trade promotions. For example, if you buy a pre-paid mobile this month, you can go into the draw to win a car. That sort of trade promotion is arguably similar to a lottery (as the term is commonly understood).</p> <p>Telstra also provides many other games to promote its business that are lotteries, or similar to lotteries, in that a winner is drawn randomly by computer from all eligible entries.</p> <p>Sometimes, those games may involve a mix of chance and skill, in that in order for an entry to be eligible for the draw, a question must be answered correctly, or other skill-based criteria must be met.</p> | <p><b>Include a definition of "lottery"</b></p> <p>As a result of amendments made to the July 2006 draft Bill lotteries have been excluded from the definition of a "game".</p> <p>While Telstra welcomes this amendment the Bill does not define the term "lottery". Telstra submits that this will lead to considerable uncertainty as there is no single, authoritative legal definition of lottery. Various definitions are adopted under State and Territory legislation regulating lotteries, and there is an additional definition at common law. Any of these definitions might be applicable, and they differ in several important ways:</p> <ul style="list-style-type: none"> <li>• under the common law definition, and arguably under the applicable ACT and NSW statutory definitions, a lottery can only distribute prizes based wholly on chance (and without any element of skill). In contrast, the statutory definitions of lottery in other States and Territories provide that a lottery need only distribute prizes based, either wholly or partly, on chance.</li> <li>• under the common law definition, and under most State and Territory legislation, a competition conducted to promote trade is capable of being a lottery. However, the Tasmanian statutory definition specifically excludes certain competitions conducted to promote trade. As a vast number of competitions are conducted in Australia to promote trade, it is necessary to clarify whether such competitions would be considered lotteries for the purposes of the Bill.</li> <li>• the scope of the definitions differ. For example, under the NSW legislation applicable to lotteries conducted to promote trade, a lottery must be determined by lot, whereas under the equivalent WA legislation, a lottery may be determined in any manner howsoever involving a degree of randomness or chance</li> </ul> <p>Telstra submits that this uncertainty should be removed by including the following definitions of "lottery" and "trade promotion" in the Bill.</p> <p><b>"lottery means</b></p> <ul style="list-style-type: none"> <li>(a) a trade promotion; and</li> <li>(b) a game, scheme or device for the distribution of a prize, in which: <ul style="list-style-type: none"> <li>(i) the prize consists of any real or personal benefit or any real or personal thing; and</li> <li>(ii) the distribution of a prize depends, either entirely or partly, on chance."</li> </ul> </li> </ul> <p><b>"trade promotion means</b> a game, scheme or device for the distribution of a prize by way of gift or otherwise where:</p> <ul style="list-style-type: none"> <li>(a) the prize consists of any real or personal</li> </ul> |

| TELSTRA PRODUCT REGULATED | SOLUTION  |
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|                           | <p>benefit or any real or personal thing; and</p> <p>(b) the game, scheme or device is for the promotion of a business.”</p> <p><b>Limit the gambling services in table 3 to circumstances where the amount of the bet, winnings or value of the game is greater than \$1,000</b></p> <p>The FATF Forty Recommendations only apply to “casinos”. Further, as discussed above, under the FATF Forty Recommendations financial institutions are only required to undertake customer due diligence measures in carrying out occasional transactions above USD/EUR 15,000. The UK Money Laundering Regulations 2003 also contain an exemption from the requirement to perform identification procedures for one-off transactions below 15,000 Euros.</p> <p>For consistency with international standards and in recognition of the low money laundering and terrorism financing risks associated with low value transactions, Telstra submits that a \$1,000 threshold should be included in relation to the gambling services described in table 3 of section 6.</p> <p><b>Games should only be regulated if the customer pays to enter</b></p> <p>The December 2005 draft of the Bill only applied to games where the customer “<i>gives or agrees to give consideration to play or enter the game</i>”. This requirement has been removed from the current draft of the Bill.</p> <p>It is difficult to see how money could be laundered using a game where there is no opportunity to use criminal proceeds to pay an entry fee. This is particularly the case where the person participating in the game cannot ultimately control whether they will receive back any money or value.</p> <p>Telstra submits that due to the negligible money laundering risk associated with such games a subparagraph (e) should be included in items 6 and 9 as follows:</p> <p>(e) the customer of the designated service gives or agrees to give consideration to play or enter the game (and the consideration does not relate to the acquisition by the customer of any other good or service).</p> |