



TELSTRA CORPORATION LIMITED

Response to

*An Australian Consumer Law
Fair Markets - Confident Consumer*

24 March 2009

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OVERVIEW

Telstra Corporation Limited (“Telstra”) welcomes the opportunity to provide comments on the reforms outlined in the “An Australian Consumer Law - Fair Markets - Confident Consumers” Consultation Paper (“Consultation Paper”).

Telstra welcomes the release of the Consultation Paper and supports a national approach to consumer protection laws in Australia. Despite its many strengths, Australia’s current consumer protection landscape is rightly recognised by the Government as unwieldy, with overlapping and, at times, inconsistent rights and obligations at the Federal, State and Territory levels of government. Telstra believes there are real benefits to be gained by streamlining these rights and obligations for both suppliers and consumers in the form of greater certainty and confidence for those transacting daily and across national borders. For the business community, if implemented appropriately, this should also translate into reduced compliance costs (particularly in already overregulated industries) and greater certainty of regulatory outcomes. Telstra also considers it vital that Australian consumer protection laws are able to support - and not hinder - the growth of modern forms of doing business, such as e-commerce and online transactions. These relatively new forms of contracting have become a major part of the Australian economy and Telstra believes that consistent rights and obligations across jurisdictions and industries will boost confidence in, and acceptance of, these efficient forms of dealing going forward.

However, it is important that the new framework not seek to interfere with legitimate business activities or adopt provisions that yield unintended results or impose further regulatory burdens on businesses. There are some examples in the Consultation Paper that, in Telstra’s view, represent a disproportionate response to the perceived issues and create the potential for regulatory overreach. The proposed enforcement powers, such as “naming and shaming” powers, are good examples where Telstra believes the recommendations do not strike the right balance between the desire to protect consumers and the need to protect the legitimate interests of businesses. They also go beyond what the Productivity Commission recommended in its review of Australia’s Consumer Protection Framework in 2008¹.

It is also important that in bringing uniformity to the different State and Territory consumer protection regimes the Government seeks to adopt the “best practice” elements of those regimes. The Government should not merely adopt the harshest or strictest measures from each of the regimes in a “lowest common denominator” approach. This would not serve the interests of consumers or business in the long run.

A theme of the Rudd Government, particularly the Minister for Deregulation, has been that regulation only be introduced where is “absolutely necessary and at minimum cost to consumers and business.”² A regime that imposes additional costs and regulatory burdens on businesses will ultimately impact consumers in various ways, including stifled innovation, a reluctance to release new products, services or marketing initiatives, or an increase in prices. This is an important issue for the Government and the Council of Australian Governments (“CoAG”) to keep in mind when developing the Australian Consumer Law, including provisions earmarked

¹ Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Final Report (2008).

² *Relieving the burden on business - Labour’s deregulation agenda*, speech by the Hon Lindsay Tanner MP to the Sydney Institute (26 February 2008).

for fast-tracking, over the coming months. They must ensure the new framework can deliver real results without detrimentally impacting businesses and consumers.

The key points of Telstra's submission are:

- the proposed unfair terms regime should not extend to business customers;
- there is no justification to ban any terms outright under the proposed unfair terms regime as the circumstances of each case must determine whether or not a term is "unfair";
- it is critical that the unfair terms regime not apply to "upfront prices" and that the definition of an "upfront price" be clear and unambiguous;
- the proposed new enforcement powers are not necessary given the range of enforcement tools already available under the *Trade Practices Act 1974* (Cth) ("TPA") and risk regulatory overreach and error if appropriate safeguards or checks and balances are not put in place;
- the definition of "consumer" under the TPA already protects many small businesses and should not be extended any further, particularly given the difficulties inherent in defining the types of operations that would fit the definition of "small business" and get protection;
- a uniform national approach to "best practice" provisions, such as door-to-door sales and telemarketing, is welcomed. However, to maximise the benefits of a national regime, the Government should only seek to regulate practices that are relevant to modern commerce and should consider repealing outmoded or archaic practices that occur rarely, if at all, today; and
- the Government and CoAG should take steps to remove other legislation and regulation (particularly at industry level) that replicates or covers those matters that form part of the new Australian Consumer Law.

Telstra would welcome the opportunity to work with the Government to help develop this framework and to provide additional comments on any aspect of this submission.

1 UNFAIR TERMS

1.1 General comments

Telstra supports a uniform approach to unfair terms and believes that both consumers and businesses can reap benefits from a national regime. Businesses that operate nationally are already required to comply with the unfair terms regime in Victoria (under the *Fair Trading Act 1999* (Vic) ("**Vic FTA**")) and some businesses, such as Telstra, are also required to comply with unfair terms regimes at the industry level (for example, under Communications Alliance's *Telecommunications Consumer Protections Code* ("**TCP Code**")). Telstra has invested significant time and resources into ensuring that it complies with the existing unfair terms laws, and has worked closely with consumer regulators, such as Consumer Affairs Victoria ("**CAV**"), to achieve this result.

Telstra believes it is critical that a national regime strikes the right balance between the interests of consumers and the legitimate interests of businesses. It is also important that, as part of the implementation of a national regime, the Government and CoAG work to repeal and remove duplicated regulations, particularly at the industry level, to achieve the benefits of having a national regime.

To that end, Telstra makes the following observations and comments concerning the legislative model proposed by CoAG in relation to unfair contract terms. These comments are consistent with previous submissions made by Telstra to the Productivity Commission in the course of developing a national consumer policy framework.

(a) Legitimate interests of the supplier

Telstra welcomes the introduction of a "legitimate interests of the supplier" test to the definition of an unfair term. This test acknowledges that there can be sound reasons why an apparently one-sided term is not unfair because it legitimately protects the supplier's interests, to the ultimate benefit of consumers.

- **Example:** A term in a standard form contract broadly drafted 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, it is difficult for suppliers to foresee all types of inappropriate conduct that opportunistic consumers might undertake. 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 being that consumer choice is lessened.
- **Example:** A term in a telecommunications contract which allows a supplier to vary international call rates without prior notice. In reality, most international calls terminated overseas will be carried by many different overseas carriers to certain destinations. A domestic supplier will not realistically be able to control the price at which these services can be resold. The domestic supplier would need a workable mechanism to reflect price changes imposed on it by the overseas carriers and it would not be reasonable to require the supplier to bear all the risks where there is no meaningful way for those risks to be avoided or mitigated. The

alternatives would be to increase the costs of calls for all consumers to factor in the inherent pricing risk or to not supply any calls at all to international destinations, both of which would clearly lead to consumer detriment.

- **Example:** A term in a standard form contract for a software product which requires the customer to acknowledge that there may be potential glitches or bugs. At first glance, this term appears to allow the supplier to provide products which are unsuitable for use or not of a particular quality and therefore seems “unfair”. However, no reasonable supplier will be able to guarantee that any of software products supplied by them will ever be “bug-free” and the absence of this term may in fact lead to consumer detriment in the sense that consumers will purchase the product without having its potential limitations drawn to their attention.

(b) **“Material” or “more than minor” detriment**

Telstra’s view is that a term should only be considered “unfair” (or at least, that redress be made available) where the consumer suffers “material” or “more than minor” detriment, as opposed to mere or negligible detriment or a substantial likelihood of mere detriment. A key part of the Productivity Commission’s recommendations³ was that redress only be available where the consumer suffers “material” detriment. In Telstra’s view, there are instances where harm flowing from an “unfair” term can be so trivial and negligible that it would not be in the interests of either consumers or businesses for those terms to be void or otherwise scrutinised under regime.

Regardless of the threshold eventually chosen by the Government (“material”, “more than minor” or otherwise), Telstra strongly encourages the Government to adopt a threshold that is capable of objective determination and that has a substantive body of jurisprudence behind it to aid interpretation and compliance. This will also provide certainty to consumers as to whether redress will or will not be available.

(c) **“Problematic” terms**

Telstra does not agree with the Government’s view that certain terms, such as unilateral variation terms, are inherently “problematic” and likely to cause consumer detriment as a rule of thumb (see list of “problematic” terms on page 31 of the Consultation Paper). Telstra would also object to the Government adopting this ‘rule of thumb’ view in any guidelines developed by regulators or the Government in relation to the new regime.

Whether a term is “unfair” must be assessed according to all the relevant circumstances, which was a recommendation of the Productivity Commission⁴ and endorsed by the Ministerial Council of Consumer Affairs (“MCCA”) and CoAG.⁵ This means that while a term may be “problematic” in one context, it is

³ Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Final Report (2008), Vol 1 at 69.

⁴ *Review of Australia’s Consumer Policy Framework*, Vol 1 at 69.

⁵ Ministerial Council on Consumer Affairs, *Joint Communiqué - Ministerial Council on Consumer Affairs Meeting* (15 August 2008).

not necessarily problematic in all other contexts; a point acknowledged by CAV in its guidelines to the Victorian unfair terms regime.⁶

With that in mind, there can be situations where terms such as unilateral variation rights will not be unfair having regard to the context and relevant circumstances such as:

- the nature of the good or service purchased (for example, low versus high value purchases, once-off versus ongoing supply relationships, services with terms that customers know are volatile in nature (such as whether or not international calls can be made to countries at war));
- other terms of the bargain that may balance or offset the perceived unfairness of one term (including any terms that require the supplier to provide notice or allow customers who are materially worse off to terminate without cost);
- the type of consumer involved (for example, a business customer versus an individual customer); and
- the measures adopted by the supplier to ensure such terms are brought to the customer's attention before entering into the contract.

In addition, there will be situations where the exercise of a unilateral variation right will result in consumer benefits (such as a supplier passing on price reductions or improved product specifications or functionalities) or have a neutral impact on consumers.

In the case of unilateral variation terms, it has been accepted by many regulators and consumer groups that they can, in some circumstances, serve legitimate and fair functions:

- "CAV recognises that in long-term and ongoing contracts, some traders may have a legitimate need to be able to change terms to keep abreast of dynamic market conditions or to accord with changes in the terms of their own supply contract."⁷ (CAV);
- "[A unilateral variation term] is more likely to be found fair if: (a) it is narrowed in effect, so that it cannot be used to change the balance of advantage under the contract - for example, allowing variations to reflect changes in the law, to meet regulatory requirements or to reflect new industry guidance and codes of practice which are likely or raise standards of consumer protection; (b) it can be exercised only for reasons stated in the contract which are clear and specific enough to ensure the power to vary cannot be used at will to suit the interests of the supplier, or unexpectedly to consumer..."⁸ (UK Office of Fair Trading); and

⁶ Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts* (2007).

⁷ *Preventing Unfair Terms in Consumer Contracts*.

⁸ Office of Fair Trading, *Unfair Contracts Terms Guidance* (2008). (.

- "...a supplier should be permitted to unilaterally vary the agreement for legitimate reasons such as security and fraud and for technical reason such as network issues"⁹ (Communications Law Centre).

Furthermore, where consumers are given notice and/or the right to exit or escape the contract without additional cost, there are far less compelling reasons to suggest a unilateral variation term is unfair.

- **Example:** Telstra's standard contracts for some business customers contain a clause that allows Telstra to vary the service of the customer (for example, where Telstra is exiting a service or product range), but only where new service is equivalent and provided Telstra takes steps to offset any detriment. Though such a term technically gives Telstra the right to unilaterally vary the customer's contract, the outcome is beneficial for the customer because they can obtain a better, more innovative and modern service. Otherwise, they have the choice to not remain bound by the contract and exit.

(d) **Standard form contracts and business customers**

While Telstra does not object to the proposed unfair terms regime applying to standard form contracts in a genuine consumer context, it does not support the regime applying to standard form contracts agreed to by all business customers, especially large corporate customers. Telstra strongly disagrees with the view put forward in the Consultation Paper that the interests of business and consumer customers "are essentially the same in respect of the potential for unfair terms" simply because they contract under standard form arrangements. It is illogical that a large corporate customer, such as an ASX 200 company, and a consumer customer be automatically entitled to the same level of protection simply because they both happen to purchase a product under a standard form contract. Telstra has itself entered into a variety of standard form agreements with suppliers, such as software vendors, and certainly does not view itself as being in "essentially the same" position as a normal consumer negotiating with these suppliers when it comes to relative degrees of resourcefulness and bargaining strengths.

Telstra's view is that the key driver for protection under an unfair terms regime should be the characteristics of the customer and the types of goods or services they purchase, rather than the nature of the supply agreement.

The use of standard form agreements is well recognised as an effective way to reduce transaction costs to the benefit of consumers and suppliers and their use is especially endorsed in the telecommunications industry under the *Telecommunications Act 1997* (Cth) ("**Telecommunications Act**"), particularly due to the sheer volume of customers in the industry. As noted in the Explanatory Memorandum to the Telecommunications Act, the standard form of agreement "overcomes the need for a carrier or carriage service provider to enter into separate agreements with each of their customers". Part 23 of the *Telecommunications Act* essentially provides that, to the extent that a carriage service provider and its customers do not agree on terms and conditions of supply, but where those terms and conditions are set out in the provider's

⁹ Communications Law Centre, *Fair Trading Act 1999 (Vic) Compliance Review* (2006).

standard form of agreement, then goods or services are supplied on the terms set out in the standard form of agreement.¹⁰

Typically, business customers are less vulnerable than consumer customers and are better equipped to protect their interests. In most cases, they are astute, well-resourced and well-informed parties to transactions. Furthermore, Telstra does not believe business customers (particularly large corporate customers) would normally expect the same level of protection as consumer customers. Telstra can think of many examples where its large corporate customers (who are ASX 200 companies) have highly negotiated contracts but choose to buy other products and services “off the shelf” under Telstra’s standard form contracts. They may choose to do this because they only require a few services or simply want one of our simple, standardised products (such as advertising in the Yellow™ directories or a White Pages® directory business listing). These businesses all have the ability and resources to negotiate with Telstra if they want to, but choose not to for these purchases. In these cases, the simple fact that a product or service is acquired under a standard form agreement is no evidence that these customers are in any way vulnerable or in need of *consumer* protection for these purchases.

In the event that CoAG believes it appropriate to extend protection to small businesses under the national unfair terms regime, Telstra suggests that the operation of that regime be confined to “consumers” as currently defined in the TPA, which would:

- afford protection to business customers acquiring goods or services priced at \$40,000 or less; and
- provide more certainty to suppliers as to which customers are covered by the regime, given the practical difficulties of defining a “small business” (discussed later in this submission).

(e) “Upfront price”

Telstra welcomes CoAG’s proposal that the regime not apply to the “upfront price” of goods or services. However, the Government must clarify what it means by “upfront price”, particularly as this term is not used in regulation 6(2) of the UK’s *Unfair Terms in Consumer Contracts Regulations 1999* (where the relevant concept is “price or remuneration”).

Telstra submits that the “upfront price” for goods or services should be expressly defined as consisting of prices or charges that:

- (i) are reasonably ascertainable by the customer before entering into the contract (for example, set out in the contract or other documents made available to customer before or at the time of contract, or accessible by contacting the supplier); or
- (ii) a customer would reasonably expect to form part of the provision of the goods or services.

¹⁰ Section 479 of the *Telecommunications Act 1997* (Cth).

As noted by the Productivity Commission: “[T]he argument for exclusion rests on the fact that prices are clearly visible to consumers and, unlike many other terms, *cannot legitimately be seen as surprises* veiled by a complex contract.”¹¹

In Telstra’s view, no customer acting reasonably should be surprised by a price or charge that they can ascertain before choosing to enter into the contract. For example, in addition to its advertising campaigns, Telstra develops an array of brochures, booklets and other pre-sales collateral about its products and services, which are widely available through Telstra shops, on the website or by calling Telstra; displays comprehensive product information, pricing and its standard form of agreement on its website; has trained sales assistants in its stores to answer customer and prospective customer queries; and has dedicated phone numbers, fax numbers and email addresses for people to contact Telstra to find out more about its products and services. Further, Telstra believes that consumers acting reasonably would not be surprised to be charged amounts for the provision of additional goods and services, such as installation, servicing or upgrade charges or fee-for-service charges when they request a service visit.

Telstra considers the following examples of prices and charges to form part of the “upfront price” for goods or services that should not be assessed under the proposed unfair terms regime:

- the price for a good, whether paid upfront or in instalments;
- ongoing fees for using a service (for example, monthly access fees and usage charges (such as call and data charges));
- connection and reconnection fees;
- early termination fees;
- excess usage fees;
- administrative charges;
- repair and replacement fees; and
- charges for ancillary/optional goods or services the customer later elects to acquire and would therefore reasonably expect to pay for.

Telstra is concerned by the prospect of the regime interfering with business pricing decisions. In Telstra’s view, the role of the regime should not be to regulate prices or pricing decisions. Whether or not a price or pricing decision is fair is a matter for the market and competition laws, which was a point recognised by the Productivity Commission: “competition policy is a more appropriate vehicle for achieving efficient prices rather than the discretionary use of unfair contracts law to impose de facto price controls.”¹² Furthermore, customers always have the choice to reject goods or services if they think the price is too high.

¹¹ *Review of Australia’s Consumer Policy Framework*, Vol 2 at 162.

¹² *Review of Australia’s Consumer Policy Framework*, Vol 2 at 162.

Telstra recommends the Government consider the definition of “upfront price” very carefully against these considerations and define, with precision, what it means by an “upfront price” to enable business certainty.

(f) “All the circumstances”

Telstra is pleased that the Government has adopted the Productivity Commission’s recommendation that “in all of the circumstances” form part of the test for unfairness. As stated earlier in this submission, the assessment of “unfairness” cannot be properly done without considering external factors and is very much dictated by the circumstances of each case.

According to the Productivity Commission, the “circumstances” a regulator (or court) might take into account include:

- the degree to which the term reduces transaction costs;
- effects (adverse or favourable) on risk allocation and prices; and
- broader impacts of any action on consumers (for example, higher prices or restricted choice).¹³

To help promote a balanced assessment, Telstra would support “circumstances” such as these being included in any guidelines to the regime.

(g) Removing duplicated regulations and codes

The Government has pledged to put deregulation “at the heart of its economic agenda for the future.”¹⁴

To facilitate the introduction and effectiveness of a national unfair terms regime, the Government and CoAG must take prompt steps to see the removal of duplicated legislation, regulations and industry specific codes dealing with consumer protection matters, including unfair terms. It was a key recommendation of the Productivity Commission that CoAG, in consultation with MCCA, oversee a program to repeal unnecessary specific consumer regulation at the industry-level.¹⁵ For example, in addition to Federal, State and Territory consumer protection laws, telecommunications companies face further duplicated consumer protection obligations under industry codes such as the TCP Code (which includes an unfair terms regime). Financial services and food safety are other good examples of industries facing duplicated industry regulation.

Without this streamlining process, the national regime loses one of its core benefits: the promise of certainty about a consumer’s rights no matter where they buy a product or what that product is.

1.2 Banning certain types of unfair contract terms

¹³ *Review of Australia’s Consumer Policy Framework*, Vol 2 at 160-161.

¹⁴ *Relieving the burden on business - Labour’s deregulation agenda*.

¹⁵ *Review of Australia’s Consumer Policy Framework*, Vol 1 at 58 and 65.

Please set out any views on whether the types of terms described in this chapter should be banned in the initial text of the Australian Consumer Law.

Telstra's position is that a national unfair terms regime should not ban or blacklist certain types of terms. In Telstra's view, it would be impossible to state with any certainty that a term, such as entire agreement clause or a unilateral variation clause, is unfair in *all* cases. Whether or not a term is "unfair" must be assessed according to all the relevant circumstances. It is also important to remember that while the Victorian unfair terms regime allows for terms to be blacklisted through a prescription mechanism, no terms have actually been "prescribed" in the more than 5 years the regime has been in operation.

Even if a blacklist of unfair terms is included, Telstra does not support terms of the nature described in the Consultation Paper being banned outright. There are legitimate reasons why the terms outlined in the Consultation Paper would not be unfair in all circumstances to warrant an outright ban, for example:

- *'Entire agreement' terms.* Entire agreement terms provide certainty as to the terms of the bargain struck between the consumer and supplier. They help to focus the subject matter of a dispute on the matters set out in the relevant contract and encourage customers to ensure that matters important to them are reflected in that contract. Where a customer disputes a pre-contractual representation made by the supplier (including oral or implied), Telstra disagrees with the Government's view that entire agreement terms would deter or prevent consumers from pursuing such claims. A consumer with a valid case to argue is not prevented from taking action under the generic consumer protection laws (including section 52 of the TPA), which are well-understood to apply to contractual relationships, or referring the matter to a consumer regulator to be investigated, which can be done without cost. The Government has not provided any tangible evidence that consumers are not empowered to do this. In addition, disputes arising from pre-contractual statements of this nature are often heard in tribunals or other low cost forums where legal representation is not permitted (and so arguments as to the effect of entire terms clauses are perhaps less likely to be made).
- *Terms under which consumers acknowledge that they have read or understood the contract.* Telstra's view is that asking consumers to acknowledge that they have read and understood a contract is not unfair, nor is it unreasonable. Doing so results in benefits both to consumers and businesses. From a consumer's perspective, acknowledgment terms can act as a reminder to the customer as to what important information or documents they should have read or have access to. From a business perspective, it provides certainty that consumers have taken the opportunity to understand the terms of the bargain. Where it transpires that consumers have not properly understood the terms, they are not without remedy or redress. For example, where the supplier has approached the customer to make a sale (ie cold-calling), the law provides protection in the form of cooling-off periods and obligations on supplier to various information to consumers. In addition, where the customer approaches the supplier, after having inspected the supply terms, price and other factors key to the bargain, they are not entitled to a cooling-off period but are entitled to remedies where the advice they were at point of sale is wrong (for example, under section 52 of the TPA).

Telstra does not consider that customer acknowledgement terms would prevent or deter consumers from objecting to terms and pursuing the supplier, particularly in cases of unusual terms not brought to their attention or explained to them properly before entering into the contract. Consumers are empowered and statistics from bodies such as the Telecommunications Industry Ombudsman ("TIO") demonstrate this. The TIO's 2008 Annual Report states that the 54.1% of contract-related complaints received last financial year related to point of sale advice, which included consumers not being "provided enough information or advice at the point of sale about the service or the terms and conditions for the service (42.9%)."¹⁶ This statistic contrasts with the 8.8% of contract-related complaints concerning the variation terms.

- *Terms mandating arbitration of disputes or otherwise inhibiting access to courts or tribunals.* These terms do not inhibit the ability of consumers to seek redress or to take action against a supplier and can actually benefit consumers. These terms provide consumers with certainty as to how disputes will be resolved, not only in relation to the forum but also potential timeframes and costs. This is particularly so when the supplier and customer are located in different jurisdictions (which is increasingly the case with online transactions). A dispute resolution clause tailored to the supplier's location may actually help the consumer overcome difficulties to enforce a foreign judgment as the dispute can be resolved in the place where the supplier is located and has its assets. It is also in the interests of consumers (and shareholders) that suppliers be able to avoid costly and frivolous, vexatious or unmeritorious claims because doing so allows suppliers to focus their energy, time and resources on innovation, customer service and product delivery. Lastly, both parties to the transaction can also benefit from terms mandating arbitration because of the confidentiality available in this forum, as opposed to in public courts cases.

If the Government determines that consumers would benefit from disallowing certain types of terms (either by outright banning or something similar), one approach could be to identify the terms the Government has concerns about and only allow the supplier to use these terms in consumer contracts where:

- the supplier includes words such as "This term does not limit your rights at law and will only be exercised where it is fair and reasonable to do so"; or
- no such words are required, but the terms can only be enforced if the supplier implements them fairly and reasonably.

2 ENFORCEMENT POWERS

2.1 General comments

Telstra considers the suite of remedies currently available under the TPA to be more than adequate for consumer regulators to effectively enforce the Australian Consumer Law and is not convinced that there is sufficient justification for an expansion of these powers. In particular, Telstra considers that the ACCC already has a vast array of enforcement tools

¹⁶ Telecommunications Industry Ombudsman, *TIO Annual Report 2007/08* at 35.

and remedial outcomes available to it, which are capable achieving the same ends sought to be achieved by the proposed new enforcement powers. Furthermore, the Government will also recall that the Productivity Commission was not supportive of all the new enforcement tools (such as public warning powers), which the Government has foreshadowed will be fast-tracked in Parliament later this year.

Accordingly, Telstra's view is that the introduction of additional enforcement tools such as civil pecuniary penalties, substantiation notices, public warnings and infringement notices is unnecessary and would only increase an already burdensome regulatory environment and increase compliance costs without any guarantee of clear consumer benefit.

2.2 Civil pecuniary penalties and disqualification orders

As a starting point, penalties should only apply in cases where the conduct that will attract the penalty is clear. Corporations must be able to know with certainty the types of conduct that will attract penalties. Telstra understands the Government intends for civil pecuniary penalties to apply to conduct falling foul of section 52 and has serious doubts about whether this is appropriate. Section 52 of the TPA does not prohibit any particular forms of conduct but rather establishes a norm of conduct and, in many situations, catches unintentional or inadvertent breaches of the law. Furthermore, section 52 issues often arise in the context of advertising matters where reasonable minds may differ as to the representations made. These considerations make the case for civil pecuniary penalties unconvincing.

Similarly, Telstra does not consider it appropriate that the disqualification orders apply to section 52. Given the serious effects of disqualification orders, Telstra does not consider it appropriate to allow for such orders to be made in section 52 cases, where what amounts to misleading conduct is a subject on which reasonable minds may differ. Telstra would not object to disqualification orders being available for provisions that attract criminal penalties.

2.3 Substantiation notices

Telstra is not convinced that substantiation notices would lead to additional consumer benefit, especially in the light of the ACCC's existing formal and informal information gathering powers.

In the Consultation Paper, the Government suggests that consumer regulators could issue substantiation notices without a factual basis for believing a business is breaching or has breached the law: mere suspicion will be enough to trigger this power. In Telstra's view, allowing such an invasive power to be triggered by suspicion alone is unjustified, inappropriate and creates the opportunity for regulators to undertake "fishing expeditions" without any real basis for their concerns. The ACCC has stated that it "does not consider it appropriate to use its powers under section 155 to conduct a 'fishing expedition'",¹⁷ so Telstra does not understand why the ACCC should be provided the rod and tackle to do this under the guise of a "substantiation notice". It is of particular concern to Telstra because section 52 and 53 matters, which are the key areas where Telstra expects regulators to use this power, often arise in the context of advertising matters where, as noted above, reasonable minds may differ as to the representations made.

¹⁷ ACCC, *Section 155 and the Trade Practices Act* (2008) at 9.

In Telstra’s view, section 155 notices serve the same purpose as the proposed substantiation notices and there is no evidence to suggest that the ACCC faces any significant barriers to use this power where it believes there is cause to do so. Telstra disagrees with the view previously articulated by the ACCC that its ability to issue notices under section 155 is limited by the evidentiary threshold. Indeed, according to the ACCC’s annual reports, the ACCC issued hundreds of section 155 notices in the two past financial years:¹⁸

Type of section 155 notice	2006-2007	2007-2008
Compulsorily acquire information	484	482
Provide information in writing	206	184
Provide documents	206	171
Appear in person	72	163

According to the ACCC, substantiation notices will enable the ACCC to “undertake initial investigations in a greater number of matters”,¹⁹ however, there is currently nothing stopping the ACCC from doing this if it wishes to. Outside the section 155 power, the ACCC routinely investigates matters and, in the course of these investigations, asks businesses to volunteer information. If anything, this power will encourage increased and costly intrusion into business affairs at the hands of the regulator. Telstra is also very concerned by recent comments made by the ACCC that substantiation notices will “provide an avenue for legitimate businesses to back up their claims and stand out from those businesses that cannot.”²⁰ Businesses will not receive a ‘pat on the back’ from the general public or its customers or potential customers for overcoming a substantiation notice. This is not an example of exemplary behaviour: the very fact that a business receives a notice is enough to raise suspicion and reputation damage may still follow, even if the claim can be readily substantiated.

The Productivity Commission noted that State and Territory regulators rarely issue substantiation notices and acknowledged that “although this could be due to a number of factors (including the availability of effective alternatives such as injunctions), it does raise a valid question about the need for, and practical effect of, the introduction of substantiation powers more broadly”.²¹

Telstra would like to understand more about the final form of the proposed power before providing further comments. If this power is ultimately given to the ACCC, Telstra’s view is that the power should be limited (for example, to only “complex representations” as noted by the Productivity Commission²²) and include the necessary safeguards to minimise the adverse impacts on businesses. Also, as recommended by the Productivity Commission, objective assessment criteria should be included to minimise regulatory

¹⁸ ACCC, *Annual Report 2006/2007* at 5 and *Annual Report 2007/2008* at 185.

¹⁹ *Consumer Protection: New Challenges and Opportunities*, speech by Peter Kell to the National Consumer Congress (12 March 2009).

²⁰ *Consumer Protection: New Challenges and Opportunities*.

²¹ *Review of Australia’s Consumer Policy Framework*, Vol 2 at 244.

²² *Review of Australia’s Consumer Policy Framework*, Vol 2 at 245.

error.²³ Telstra's position is that, without the appropriate checks in place, this power risks being abused and, as a result, consumers could face adverse effects in the form of reduced marketing initiatives, entrepreneurship and innovation.

2.4 Public warning powers

How can the interests of a business be safeguarded in the formal requirements for a national public warning power?

Telstra's position is that a national public warning (or "naming and shaming") power would not provide consumers with any greater protection than they currently enjoy and is an inappropriate, unjustified and disproportionate measure to impose on the general business community.

Telstra understands the ACCC sees one of the real benefits of this warning power to be the ability to quickly alert consumers to scams. However, the ACCC and State and Territory consumer regulators already have a number of administrative measures at their disposal to provide "early warnings" to consumers, which include media releases (of which the ACCC issued 382 last financial year²⁴), published enforceable undertakings, corrective advertising orders and interlocutory injunctions. In addition, there are many examples of regulators successfully alerting consumers to a host of scams, ranging from get-rich-quick schemes to missed calls scams, and empowering consumers to spot and expose scams themselves with initiatives including the ACCC's SCAMwatch and CAV's "Dob-in-a-Scam", publications like the ACCC's "Little Black Book of Scams", bodies such as the Australasian Consumer Fraud Taskforce and events such as National Consumer Fraud Week. Given all this, Telstra does not believe that a "naming and shaming" power is necessary.

The Government will be aware that the Productivity Commission was particularly sceptical about the introduction of naming and shaming powers, stating that the case for introduction to be "nowhere near as compelling" as the case for other new enforcement powers.²⁵ Underpinning this scepticism was the potentially devastating and irreversible effects of being formally "named and shamed". As noted by the Productivity Commission, "[E]ven if further investigation or an appeal reveals that the conduct was not in breach of the law, the stigma associated with the original decision is unlikely to be entirely extinguished."²⁶

Telstra would like to understand more about the final form of the proposed power before providing further comments. However, if it is considered that a national public warning power should be introduced, Telstra submits that the power be confined to situations where:

- there is an actual finding of more than one breach by an independent third party (ie a court or tribunal); and
- the business has repeatedly breached the TPA and done so deliberately.

²³ *Review of Australia's Consumer Policy Framework*, Vol 1 at 45.

²⁴ ACCC, *Annual Report 2007/2008*, at 29 and 31.

²⁵ *Review of Australia's Consumer Policy Framework*, Vol 2 at 250.

²⁶ *Review of Australia's Consumer Policy Framework*, Vol 2 at 249.

In Telstra's view, these thresholds will also help to properly confine the power to "fly by night" operators and itinerant traders.

In addition, Telstra would support the power being limited to certain subject matter (as is currently done at the State and Territory level). Telstra would not support Crown immunity from prosecution; a view also taken by the Productivity Commission.²⁷

2.5 Infringement notices

In Telstra's view, the costs and risks associated with infringement notices outweigh any perceived benefit to consumers. There are significant risks involved in giving consumer regulators such broad discretion, especially since regulatory mistakes can be made. Telstra's view is that any finding of breach should be done so by an independent, qualified third party (being a court or tribunal) and fast-track court procedures are in place to help the regulators do this quickly (such as the Federal Court's Fast Track List in Victoria). Indeed, the statistics on the Federal Court of Australia's website show that the ACCC has taken full advantage of the Fast Track List since its introduction in May 2007, with 14 matters being filed on the Fast Track List to date.²⁸

If it is considered that infringement notices should be introduced, Telstra submits that these notices:

- be subject to a high evidential threshold;
- be limited to a specified list of offences (for example, offences that are numerous and generally not serious in nature);
- not impose additional penalties on the recipient of the notice (given the adverse publicity that would already be generated by receiving the notice);
- be able to be appealed by the recipient of the notice;
- not constitute prima facie evidence of a breach of the law; and
- be publicly retracted by the regulator if it:
 - is subsequently satisfied that there has been no breach; or
 - fails to issue proceedings relating to the conduct in question within 3 months of issuing the notice.

Telstra also recommends the Government consider renaming the notice (for example, "consumer notice") to minimise unfair reputation damage caused to businesses, particularly where the notice is later retracted.

2.6 Non-party redress

Telstra does not support this proposal. A provision that allows consumer regulators to take representative actions on behalf of consumers, whether identified or not and

²⁷ *Review of Australia's Consumer Policy Framework*, Vol 2 at 251.

²⁸ See http://www.fedcourt.gov.au/how/fast_track_list_key_matters.html (at 17 March 2009).

whether or not they are or wish to be a party to the proceeding, is unnecessary and inappropriate.

First, there are existing procedures in place for representative actions, which are more than adequate. For example, Part IVA of the *Federal Court of Australia Act 1976* (Cth) ("FCA 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 (with proceedings involving less than seven group members permitted in certain situations).

Secondly, Telstra is concerned that any relaxation in the threshold requirements imposed by the FCA Act would lead to increased frivolous, vexatious and unmeritorious claims. For example, in cases of alleged misleading conduct, Telstra would be concerned that customers who have not been genuinely misled (according to the legal standard) but claim to have suffered loss could assert that they fall within the relevant class of affected customers (particularly if the court action were publicised) and seek recompense without a legitimate basis. It would be difficult for a supplier to determine if the customer was or was not genuinely affected by the relevant conduct in a manner that would entitle them to redress.

Even if non-party redress is introduced, Telstra objects to the Government and CoAG's proposal that non-party redress involve suppliers undertaking to honour or "make good" representations made. To do so would mark a significant departure from the current approach to remedies under the TPA for misleading or deceptive conduct, where the focus is placing a consumer back in the position they would be in if the misleading representation had not been made, and not if the representations were true.

3 BEST PRACTICE REGULATION

Are there reforms other than those covered in Chapters 10 and 11 that could be included in the Australian Consumer Law, based on existing best practices in existing State and Territory laws?

3.1 General comments

Telstra welcomes the intention that the Australian Consumer Law will reflect best practice in existing jurisdictions. However, it is important that when considering what is "best practice" for a national regime, the Government is careful to only include provisions that are relevant across the whole national economy and, in doing so, strikes the right balance between the consumer and business interests.

In general, there should be less compelling reasons to consider that provisions that are once-offs or unique to a jurisdiction reflect "best practice" for a national regime. For example, South Australia is currently the only jurisdiction that does not allow suppliers to limit the amount of goods it can advertise or offer for sale.²⁹ Though this provision has some exceptions, they are limited and do not help a supplier who seeks to act legitimately to limit the quantities available for sale to prevent scammers from buying items in bulk

²⁹ Section 38 of the *Fair Trading Act 1987* (SA).

and reselling them at higher prices domestically or overseas. Telstra's view is that provisions such as this should not be included in the Australian Consumer Law.

3.2 Motor vehicle advertising

Each State and Territory has a licensing regime for car dealers and prescriptive regulations about how businesses can advertise new and used cars online and in print publications. With the growing popularity of car trading websites that bring buyers and suppliers from different jurisdictions together, Telstra thinks it would be of great benefit to all if a national approach to licensing and advertising regulations were adopted.

However, as a first step in formulating the provision, Telstra would encourage the Government to consider the extent to which the generic protections under the TPA (including sections 52, 53 and 53C) would already provide protection.

3.3 Trade Promotions

Telstra encourages the Government to take steps to harmonise trade promotions laws in Australia, which would equally benefit consumers and businesses. Currently, lotteries legislation in each State and Territory (as well as the TPA) regulates trade promotions, with differences between jurisdictions being quite significant. For example, no permits are required in Queensland, Western Australia and Tasmania, whereas a permit is always required in New South Wales and the Australian Capital Territory, in South Australia if the prize pool is greater than \$500 and in Victoria if the prize value exceeds \$5000. Consistent requirements will aid compliance, as staff who organise trade promotions can concentrate on following one single set of clear requirements regardless of whether the promotion is nationwide or in a single State or Territory.

4 THE DEFINITION OF "CONSUMER"

Should the scope of the TPA's existing definition of "consumer" be expanded to cover a wider range of circumstances, such as goods used in business contexts?

Telstra does not think the current definition of "consumer" needs to be expanded. The current definition already extends some protections to business customers, either as a result of the existing monetary threshold or the nature of the goods or services acquired.

Telstra's general view (which was articulated in previous submissions to the Productivity Commission) is that the definition of "consumer" should not extend protections available under *consumer* protection law to businesses. The nature of business-to-business and business-to-consumer transactions are inherently different and levels of protection should reflect these differences. Business customers are less vulnerable than consumer customers and many large corporations would not consider that they need protection under *consumer* protection law to defend or better understand their rights when contracting with their suppliers. These corporations would have the resources and ability to ensure they are protected without legislative subversion of the fundamental contractual bargaining process. Furthermore, it is not a legitimate reason to extend consumer protection laws to business customers simply because they acquire goods or services of a "personal, domestic or household" character (such as mobile phones) or purchase goods or services whose value falls within an arbitrarily set monetary threshold.

Something more is needed. To this end, Telstra would support an overhaul of the definition of “consumer” so that *consumer* protection laws only apply to *consumers* that:

- (a) **acquire** goods or services of a kind ordinarily acquired for personal, domestic or household use; and
- (b) **actually use** those goods or services for the primary purpose of personal, domestic or household use.

This approach to defining “consumer” is adopted under the unfair terms regime in the Vic FTA.

However, Telstra appreciates that there may be some reluctance to move away from the current definition of “consumer” as it already extends some protections to business customers and is currently well understood by both customers and suppliers. While Telstra does not support the definition of “consumer” being extended, it would be generally satisfied if:

- **for existing generic TPA provisions** (including implied warranties and unconscionable conduct), the current definition of “consumer” is retained and not expanded; and
- **for new “best practice” provisions** (such as unfair terms, door-to-door, telemarketing, lay-bys), a definition similar to the definition of “consumer contract” under the Victorian unfair terms regime is adopted, namely goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption **and** used for the purposes of personal, domestic or household use or consumption. This will ensure that these protections are firmly directed to those people in the community that are most in need of protection under these provisions.

Should a new definition of “consumer” specifically deal with small businesses and farming undertakings?

For the reasons explained above, Telstra’s view is that definition of “consumer” should not specifically deal with small businesses and farming undertakings. As stated above, many small businesses are already covered by the existing definition of “consumer” and protections do not need to be extended any further.

In addition, Telstra believes that it would be very difficult to reach agreement as to an appropriate definition of “small business”. How do you measure what a small business is? Is it according to annual revenue, turnover, number of staff or the value of goods or services acquired from a given supplier? Any definition would need to provide certainty to businesses. Furthermore, at what point in time do you assess whether a business falls within the definition? The logical point would be at the time of entering into the contract, but what happens if the business grows during the life of the contract? This could mean that a business would be entitled to different levels of protection and the supplier subject to different obligations at different periods during the contract term. Trying to define with precision what a “small business” is could involve a number of difficulties and have unintended consequences.

If the Government wishes to specifically define "small business" in the Australian Consumer Law, Telstra suggests the definition adopted in the telecommunications industry under the TCP Code would be appropriate, namely: "a business or non-profit organisation which at the time it enters into the [relevant contract]:

(i) does not have a genuine and reasonable opportunity to negotiate the terms of [that contract]; and

(ii) has or will have an annual spend with the [relevant supplier] which is, or is estimated on reasonable grounds by the [relevant supplier] to be, no greater than \$20,000,

other than a person acquiring a [consumer product] for resale."

Should a new definition of "consumer" cover commercial vehicles or vehicles purchased for a predominately commercial purpose?

Telstra has no views on this issue.

Should a new definition of "consumer" retain the monetary limit of \$40,000 or should the limit be increased? If it were increased, what would be an appropriate amount?

Telstra's general view is that *consumer* protection laws should not serve to protect the interests of businesses simply because their purchases fall within an arbitrarily set monetary limit: this is not an appropriate way to determine whether someone actually requires regulatory protection. That said, Telstra appreciates that the monetary limit has actually extended protection to some small business customers. As such, if a monetary threshold is retained, Telstra would not support the threshold being increased above \$40,000.

Should a new definition of 'consumer' exclude any purchases for business purposes, regardless of the existence of monetary limits? Alternatively, should business consumers be entitled to protections available under the Australian Consumer Law, such as implied conditions and warranties?

Should a new definition retain the exclusion in relation to 'resupply'?

Are there other approaches to the way that 'consumer' can be defined?

For the same reasons outlined above, Telstra would support the definition of "consumer" excluding purchases made for business purposes regardless of the monetary threshold (if it is retained) and the nature of the goods or services purchased.

Telstra supports the exclusion in relation to resupply being retained.

5 OTHER DEFINITIONS

Are there any other definitions currently used in the TPA in relation to consumer protection issues that require modification to improve their operation?

Telstra has no views on this issue.

6 DOOR-TO-DOOR SALES

Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different door-to-door sales regulation? If so, please provide evidence of this.

Businesses do incur additional compliance costs to comply with the different door-to-door sales requirements in each jurisdiction. To comply with the individual requirements of each State and Territory, all sales processes must comply with the different jurisdictions' requirements. This may involve preparing different contracts (both printed and oral) and other documentation, and training the sales force on the laws relevant to their area of operation. In addition, as each jurisdiction changes its laws, additional costs are incurred in amending these processes and documents and retraining staff to comply with the changes.

Should the Australian Consumer Law include a provision regulating door-to-door sales? If so, having regard to the principles of best practice regulation, what aspects of current regulation should this provision reflect? What other approaches might be used?

Telstra welcomes a uniform approach to door-to-door sales requirements and is very supportive of a provision regulating door-to-door sales being included in the Australian Consumer Law. This would be a good outcome and provide the certainty needed by both businesses and consumers. Telstra also recognises that door-to-door and telemarketing sales have clear similarities and would endorse a provision dealing with telemarketing sales that is as aligned as much as possible with a new door-to-door provision.

Each jurisdiction currently has its own requirements and Telstra believes that a hybrid model based on several jurisdictions would be most appropriate, so as to ensure that the uniform requirements are "best practice". Telstra would support a regime that at least:

- applies to personal goods and services only (that is, goods or services that are actually acquired for the purposes of personal, domestic or household use or consumption);
- applies to contracts that have a total consideration of more than \$100 (if ascertainable) (similar to NSW);
- provides a cooling-off period of 10 business days to customers (similar to Victoria, rather than 5 business days as is required in NSW);
- includes an exemption for classified advertisers that is based on the exemptions that currently exist under the *Fair Trading Regulations 2007* (NSW)³⁰ and *Fair Trading Regulations 1999* (Vic)³¹, including an exemption that telephone

³⁰ Under regulation 106 of the *Fair Trading Regulations 2007* (NSW) and in accordance with section 40B (2A) of the *Fair Trading Act 1987* (NSW):

- (a) section 40D(3)(b) of the Act does not apply to or in respect of a contract for the supply of classified advertising (unless the contract is for the supply of a series of advertisements over a period of time), and
- (b) section 40E of the Act does not apply to or in respect of a contract for the supply of classified advertising once the publication deadline in relation to the advertisement has passed, and
- (c) section 40H of the Act does not apply to or in respect of a contract for the supply of classified advertising.

³¹ Under regulation 8(4) of the *Fair Trading Regulations 1999* (Vic), a telephone marketing agreement for the supply of classified advertising is exempt from sections 67E and 67H of the Vic FTA if the agreement entitles the purchaser to cancel the agreement at any time until the expiry of the publication deadline by telephoning the supplier or the person acting on behalf of the supplier.

marketing agreements for classified advertising are exempt if the agreement entitles the purchaser to cancel the agreement at any time until the expiry of the publication deadline by telephoning the supplier or the person acting on behalf of the supplier (similar to Victoria);

- includes an obligation on consumers to return goods to suppliers within 10 days of exercise their cooling-off rights (similar to Victoria), unless the supplier agrees to collect the goods. Consumers should also be responsible for the reasonable costs of returning the goods;
- does not set out prescriptive form requirements for consumer documents (such as font size) as this would be unnecessary in the light of the generic consumer protection provisions and the unfair terms regime; and
- allows suppliers to visit between 9am and 8pm on weekdays (excluding public holidays) and 9am to 5pm on Saturdays.

Telstra believes it is important that the new provision does not attempt to weaken the rights generally enjoyed by consumers under existing regimes and appreciates the need for consumers to be protected against the unscrupulous and invasive door-to-door (and telemarketing) practices adopted by some traders. Telstra believes that the features proposed above strike a fair balance between the interests of consumers and of businesses acting legitimately.

Telstra also submits that a provision similar to section 40J of the *Fair Trading Act 1987* (NSW) should not form part of any new door-to-door or telemarketing provisions.³² The unclear drafting of the section has created uncertainty as to whether the section was intended to extend to door-to-door sales within the proscribed 30 day period. That aside, Telstra believes consumers can now easily prevent subsequent telemarketing calls by registering their phone number on the Do Not Call Register.

7 TELEMARKETING

Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different telemarketing regulation? If so, please provide evidence of this.

As is the case with door-to-door sales, in Telstra's experience businesses do incur additional compliance costs to comply with the different telemarketing requirements in each jurisdiction, as well as under the *Do Not Call Register Act 2006* (Cth), for the same reasons as set out above in relation to door-to-door sales. For example, the South Australian Government is currently legislating to include a 5 day cooling-off period for

Under regulation 8(6), a telephone marketing agreement for the supply of classified advertising is exempt from section 80 of the Vic FTA.

³² Under section 40J of the *Fair Trading Act 1987* (NSW):

- (1) A dealer who is carrying on negotiations on the telephone with a person (*the prospective purchaser*) for the purpose of making a direct commerce contract (or for an incidental purpose) must cease those negotiations on the request of the prospective consumer.
- (2) If any such request is made by the prospective consumer:
 - (a) the dealer; or
 - (b) if the dealer was acting on behalf of a supplier when carrying on negotiations with the respective consumer - the supplier or any other person acting on behalf of the supplier;must not contact the prospective customer for the purpose of negotiating a direct commerce contract (or for an incidental or related purpose) for at last 30 days after the perspective customer made the request.

telemarketing sales, which, if passed, would now need to be reflected in Telstra's contracts, contractual documents and voice signature scripts, despite no changes being made in the other jurisdictions.

Should the Australian Consumer Law include a provision regulating telemarketing? If so, which aspects of current regulation should this provision reflect? What other approaches might be used?

Please refer to the response set out above.

8 FALSE AND MISLEADING REPRESENTATIONS

Bearing in mind the principle that the Australian Consumer Law should apply to transactions in any sector of the economy, is there a need to augment the current scope of sections 53, 53A and 53B of the TPA to include prohibitions on false or misleading representations concerning discounted goods, refunds or unqualified claims, 'closing down' sales and items are on sale?

Telstra does not believe sections 53, 53A and 53B need augmenting to include specific prohibitions against false or misleading representations concerning discounted goods, refunds or unqualified claims, 'closing down' sales and items are on sale. Consumers are already adequately protected against misrepresentations concerning these matters under sections 52 and 53.

Is the scope of sections 53, 53A and 53B of the TPA sufficiently broad to cover these issues?

Telstra considers the scope of sections 53, 53A and 53B to be sufficiently broad for the reasons set out above.

9 FALSE BILLING

Is section 64 of the TPA effective in its current form?

Telstra considers the section 64 to be generally effective in its current form.

How could it be improved for inclusion in the Australian Consumer Law by reference to existing state and territory approaches or otherwise?

In Telstra's view, one way section 64 could be improved is by introducing exemptions similar to those under the Victorian and New South Wales regimes. In relation to directory entries, section 64 currently requires a person to "authorise" the making of the entry and that authorisation must take a specific form. Without the "authorisation" in the form required, the directory provider would be unable to claim payment for the entry. In Telstra's view, a business acting legitimately should not be prevented from receiving payment if it fails on this kind of technicality. Accordingly, Telstra believes the provision could be improved by exempting, for example, publishers that are large proprietary companies or their subsidiaries so that they can receive payment. These exemptions will

also help ensure that this prohibition is properly confined to true scammers and does not affect legitimate directory providers.

10 TRADING SCHEMES

Should the Australian Consumer Law include a provision regulating third-party trading schemes? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

If trading schemes are a legitimate consumer protection concern, Telstra would support a provision in the Australian Consumer Law. However, if trading schemes are an outmoded concept, Telstra would prefer that the concept be left out of the Australian Consumer Law and that more relevant consumer protection issues be addressed so consumers can take full benefit of the new regime.

11 MOCK AUCTIONS

Should mock auctions continue to be prohibited? If so, should the Australian Consumer Law include a provision prohibiting mock auctions? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

In the Consultation Paper, the Government acknowledges that mock auctions “occur rarely” nowadays, which brings into question whether the Australian Consumer Law should address mock auctions specifically at all. If mock auctions are a legitimate consumer protection concern, Telstra would support a provision in the Australian Consumer Law. However, if mock auctions are an antiquated problem, Telstra would prefer the concept be left out of the Australian Consumer Law and more relevant consumer protection issues be addressed.

12 LAY-BY SALES

Do businesses operating across Australia use different terms and conditions for lay-by sales depending on whether there is regulation? If so, please provide examples of these terms and conditions.

Telstra does not currently engage in any significant use of lay-bys so has no specific comments on this issue.

Does the level of complaints about lay-by sales received by such businesses vary across jurisdictions depending on the existence of regulation?

Telstra has no comments on this issue.

Should the Australian Consumer Law include a provision regulating lay-by sales? If so, should this provision reflect the current regulatory approaches used in NSW, Victoria and/or the ACT?

Telstra would support a national approach to lay-by sales in the Australian Consumer Law based on the New South Wales regime because it represents the most simplified approach. Telstra understands that the current New South Wales and Victorian provisions are quite similar, but that Victorian provisions are much more prescriptive (for example including specific instructions as to the size of print which must be used in a lay-

by statement and requiring that any cancellation charge must be presented in bold). In Telstra's view, prescriptive regimes are not necessarily beneficial to consumers because they can make it difficult for consumers to understand exactly what their rights are.

13 OFFERING GIFTS AND PRIZES

Should the Australian Consumer Law modify the existing form of section 54 of the TPA along similar lines to section 16 of the Victorian FTA?

Telstra does not consider the "within a reasonable time" element necessary for the effectiveness of section 54. This is particularly so in circumstances where the supplier communicates the timeframe for making prizes and gifts available to customers at the time the consumer enters the promotion or competition (for example, in the terms and conditions). There would be no consumer detriment flowing in this situation unless the supplier did not honour the term, which would be covered by the current "intention" test (and contractually).

If the Government considers it is necessary to introduce a time-based element to section 54, Telstra would only support it where the supplier does not communicate the timeframe for making prizes and gifts available to consumers.

If an approach like that in section 16 of the Victorian FTA were adopted, should a 'reasonable time' be defined? If so, what would a reasonable time be?

In Telstra's view, what is "reasonable" in a particular case will depend on the facts of each instance (such as the length of the competition), so it would be inappropriate to include a definition of this term. For example, a reasonable time to make prizes and gifts available for a competition run over 12 months may be 3 or more months, whereas a shorter period of time would be reasonable for a competition run over 1 month.

14 EVIDENTIARY PROVISION REGARDING REPRESENTATIONS AS TO FUTURE MATTERS

Should the provisions in section 51A of the TPA be extended to include presumptions in relation to 'false', 'misleading' or 'deceptive' representations for inclusion in the Australian Consumer Law?

Telstra's position is that the presumption in section 51A should not extend to "false" or "deceptive" representations. The burden to prove that something is "false" or "deceptive" should be on the person making the allegation. In addition, whether something is "false" or "deceptive" is judged according to different thresholds than "misleading", so adding these concepts to section 51A should be done carefully and with proper consideration of the implications. Furthermore, in most instances, conduct to which section 51A relates must either be proved to be "misleading or deceptive" or "false or misleading", so including "false" or "deceptive" in the section 51A presumption may actually be of little practical benefit to consumers.

Should the provisions of section 51A of the TPA be amended to further clarify their relationship with the accessorial liability provisions of the TPA?

To the extent the cases create real uncertainty, Telstra would support section 51A being amended to clarify its relationship with the accessory liability provisions. Telstra's view is that section 51A should only apply to the principle offender and not others who are involved in the conduct (see *Quinlivan v ACCC* and *ACCC v Universal Sports Challenge Ltd*).

15 PYRAMID SELLING

Are the current pyramid selling provisions in the TPA effective? How could they be improved?

Telstra has no views on this issue.

16 ACCEPTING PAYMENT WITHOUT INTENDING TO SUPPLY

Should the claimant in an action relating to accepting payment without intending to supply be required only to prove that the supplier failed to supply the goods after accepting payment?

Telstra does not believe a claimant should be entitled to statutory relief where a supplier fails to provide goods or services after accepting payment without anything more. In Telstra's view, it is important that "intention" remain an element of section 58. If the Government is concerned about how claimants prove intention, there are other ways it could address this evidential issue without simply removing the requirement.

In Telstra's view, amending section 58 in the way suggested would interfere with contractual arrangements in relation to the supply of goods or services. Suppliers may fail to provide goods or services for a variety of reasons, many of which are legitimate (for example, where the supplier's upstream supplier has failed to provide the goods or services on time or as requested) and for which the consumer would typically have redress under its contract with the supplier.

Should a maximum limit be imposed on the amount or percentage of the purchase price that may be taken as a deposit for goods that have been ordered, but not yet delivered?

Telstra does not support maximum limits. What is an appropriate amount or percentage will depend on the circumstances of a particular case.

17 DUAL PRICING

Is there a need to introduce a specific provision into the Australian Consumer Law to provide that a supplier must not sell goods to which more than one price is appended at a price that is greater than the lower or lowest of the prices?

Telstra considers the issue of dual pricing to be adequately covered by existing generic provisions of the TPA, such as sections 52 and 53. The number of cases and the high level of success the ACCC has enjoyed show that sections 52 and 53 of the TPA adequately protect consumers. For example, in 2008, the ACCC succeeded in prosecuting five cases where suppliers had engaged in false or misleading advertising

using a “was/now” price comparison.³³ It should also be noted that false dual pricing was one of the matters to which section 52 of the TPA was originally directed.³⁴

Telstra understands that the NSW Department of Fair Trading has received few complaints concerning the dual pricing provision of the *Fair Trading Act 1987* (NSW). Furthermore, Telstra understands these provisions were introduced in New South Wales to provide a legislative response to an industry-specific problem (being supermarket barcode scanning) and not general dual pricing practices.³⁵ Accordingly, Telstra considers that any concerns of this nature should be dealt with on an individual or industry basis.

18 MANDATORY DISCLOSURE

Should the Australian Consumer Law include a provision providing for minimum standards for consumer documents? If so, what should these standards be?

Telstra acknowledges that the ability of consumers to have access to information in order to make informed purchasing decisions is an important aspect of promoting and enhancing competition. However, Telstra considers a separate requirement that traders meet certain minimum standards for consumer documents to be unnecessary to protect consumer interests. In Telstra’s view, consumers would be adequately protected in this regard under existing generic provisions of the TPA and will have further protections under the proposed unfair terms regime. In addition, consumers are also protected outside the TPA, with certain industry codes applying minimum standards to consumer documents (for example, the TCP Code).

In any event, minimum standards would need to be *at least* consistent with the norm of conduct required by section 52: it would be an illogical outcome where a supplier meets the minimum standards but does not meet the norm. This further suggests that minimum standards are unnecessary and would be superfluous.

If the Government decides that minimum standards are required in the Australian Consumer Law, Telstra strongly suggests the Government and CoAG act promptly and with industry groups to remove all industry regulations that mandate minimum standards for consumer documents.

Should the Australian Consumer Law include a provision relating to the disclosure of a supplier’s address in documents, statements or advertisements?

Telstra does not believe requiring that a supplier’s address be disclosed in all documents, statements and advertisements would be of any additional benefit to consumers.

While Telstra appreciates the importance of ensuring that fly-by-night and itinerant traders are identifiable and contactable by customers, the requirement that physical addresses be included by *all* traders, including large suppliers, has practical difficulties. For

³³ *ACCC v Prouds Jewellers Pty Ltd* (2008) 75 IPR 306; *ACCC v Ascot Four Pty Ltd* (2008) 250 ALR 467; *ACCC v Carrerabenz Diamond Industries Pty Ltd* [2008] FCA 1103 (9 July 2008); *ACCC v Harbin Pty Ltd* [2008] FCA 1792 (28 November 2008); *ACCC v Terania Pty Ltd* [2008] FCA 732 (22 May 2008).

³⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1974, 576 (William Morrison, Minister for Science).

³⁵ NSW Office of Fair Trading, *National Competition Policy Review, Fair Trading Act 1987 & Door to Door Sales Act 1967*, Final Report (2002) 38-9.

example, many large suppliers have multiple addresses for their different sales divisions and some popular advertising forms are limited by space requirements (such as SMS and MMS marketing). Telstra is strongly of the view that any concerns of this nature should be dealt with on an individual basis or at the industry level.

If this requirement is considered necessary under the Australian Consumer Law, Telstra recommends the provision:

- be confined to certain contexts (such as door-to-door sales); and
- include an exemption for suppliers whose address details can be readily obtained by consumers (for example, all publicly listed companies).

Should the Australian Consumer Law include a provision relating to the provision of an itemised bill on request?

Telstra does not consider it necessary to include a provision relating to itemised bills in the Australian Consumer Law. In Telstra's view, this is an issue best dealt with at the industry level. Indeed, suppliers already face obligations at the industry level to provide itemised bills (for example, under the TCP Code).

In addition, Telstra considers that the benefits of imposing this obligation on businesses would not outweigh the associated costs, such as the environmental impacts of providing itemised bills on request.

If a provision of this kind is considered necessary under the Australian Consumer Law:

- suppliers should be allowed to recover their reasonable costs in preparing the bills; and
- the frequency of requests should be limited in number (to avoid or deter frivolous or vexatious requests) and in purpose (for example, where there is a genuine dispute).

19 REQUIREMENT TO RETURN REPLACED PARTS

Should the Australian Consumer Law include a provision requiring a supplier to return replaced parts along the lines of section 162 of the Victorian FTA?

Telstra does not support a provision similar to section 162 of the Vic FTA being included in the Australian Consumer Law. Requiring suppliers to return replaced parts in all circumstances (which would be the effect of a national provision) would not be workable in all cases and would depend on a variety of factors, including safety and environmental considerations. In Telstra's view, any concerns of this nature should be addressed at the industry level.

20 LIABILITY OF RECIPIENT OF UNSOLICITED SERVICES

Should the Australian Consumer Law extend the current application of section 65 of the TPA to services?

Telstra's position is that section 65 should not extend to services. Extending the provision to services is unlikely to have any meaningful or practical effect, which is demonstrated by the Victorian experience. Telstra understands that section 26 of the Vic FTA has not been relied upon in any court cases or to have attracted much attention from CAV. In addition, the fact that no other Australian jurisdiction has considered it necessary to extend similar provisions to "services" adds weight to the argument that amending section 65 in the way suggested would offer no real benefits to consumers.

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