IT'S HOW WE CONNECT

TELSTRA CORPORATION LIMITED

Submission to the Competition Panel Review in response to the Draft Report dated September 2014

17 November 2014

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Executive Summary

Telstra welcomes the release of the Competition Policy Review Draft Report dated September 2014 (**Draft Report**). We are grateful for the opportunity to provide our views, and seek to contribute to the Panel's aim of identifying and advocating reforms that will help ensure Australian industry can meet relevant economic and related challenges in the decades ahead.

Telstra commends the Panel's efforts to develop a comprehensive set of proposals that recognise and seize upon opportunities for ensuring regulation is proportionate, accountability and transparency is enhanced, and our competition laws are made clearer and more predictable.

We support in full a number of the Panel's recommendations. For example, we support the competition principles that the Panel has put forward to guide Commonwealth, state and territory, and local governments in implementing competition policy and the proposals relating to the cartel prohibitions, third line forcing, and streamlining of the authorisation and notification processes. We believe these proposals will help to achieve greater proportionality of the regulatory burden in the relevant areas of competition law regulation.

Regarding other detailed proposals included in the Draft Report, we have limited our comments to proposals or issues under the Review that are most relevant to our business and our position that a key focus of any adjustments to Australia's regulatory settings need to be on ensuring they support technological advancement and stimulate investment in Australian markets.

In this context, Telstra makes the following observations:

Comments on Panel recommendations relating to regulator governance and processes:

Merits review - Telstra supports the Panel's recommendation that the Australian Competition Tribunal (**Tribunal**) be empowered to undertake merits review of access decisions under Part IIIA of the *Competition and Consumer Act 2011 (Cth)* (**CCA**). Telstra agrees with the Panel that the economic significance of these decisions mean that the costs of getting these decisions wrong are likely to be high and the decisions therefore need to be subject to appropriate scrutiny. While the Harper Panel did not make any recommendations in relation to reinstating merits review under Part XIC, the Government's parallel Cost Benefit Analysis and Review of Regulation of NBN (**Vertigan Review**) by Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM (**Vertigan Panel**) has recommended that ACCC decisions of enduring impact under Part XIC be subject to full and effective merits review. Given the Harper Panel's wide remit to review competition policy in Australia and the significant alignment between the Harper and Vertigan Panel's views on this issue, Telstra encourages the Panel to lend its support to the mentioned Vertigan Panel recommendation.

Merger process - Telstra supports the Panel's recommendations for reform of the formal clearance process to (1) remove the unnecessary restrictions such as prescriptive information requirements; (2) make the process subject to strict timelines; and (3) make decisions of the ACCC subject to Tribunal review also governed by strict timelines. While the Panel has recommended the formal merger clearance process and the authorisation process be combined, Telstra does not see a clear reason to combine these two processes.

If reforms to the formal process are successfully implemented and this process becomes a practical, workable alternative to the informal clearance process, Telstra agrees this will go some way to alleviating concerns raised by market participants in relation to aspects of the informal process. However, noting that previous recommendations relating to enhancement of the formal merger clearance process have failed to gain traction with Australian governments, Telstra believes it would be helpful for the Panel's recommendations in this area to be supplemented with some recommendations 'in the alternative' relating to

concerns that the informal clearance process lacks transparency, timeliness and appropriate review mechanisms.

Telstra also suggests regular, independent reviews of the informal process (on issues of both process and substance) may help promote accountability, timeliness and transparency which would result in more efficient outcomes for businesses ultimately benefiting their customers.

Section 155 notices - Telstra supports the Panel's recommendations aimed at ensuring the regulatory burden placed on recipients of compulsory information notices is proportionate, particularly given the increased use of technology leading to more electronic material being retained by businesses. Regarding the specific proposal that the requirement of a person to produce documents in response to a section 155 notice should be qualified by an obligation to undertake a "reasonable" search, Telstra considers that hardwiring this principle into the relevant legislative regime would help ensure certainty of application of the principle.

While introducing a requirement that a recipient need only undertake a "reasonable" search is a step in the right direction, Telstra is conscious that in practice it may not do much more than provide a 'safety net' in most cases and is unlikely to materially change the way searches are conducted by businesses. Telstra therefore, encourages the Panel to focus on other ways of ensuring the scope of notices is as narrow as possible. For example, by submitting notices to a pre-issuance internal expedited review and, or alternatively by allowing parties to request a post-issuance peer review of the notice. Such mechanisms could provide the ACCC with the correct incentives to narrow the scope of section 155 notices and reduce the regulatory burden associated with complying with these notices.

ACCP market studies: Telstra generally supports the Panel's proposal to establish a new national competition body, the Australian Council for Competition Policy (**ACCP**), including the Panel's recommended functions and focus of this new body. We also support market studies by the ACCP being conducted at the request of government.

Regarding the Panel's request for comment on the appropriate scope of ACCP information gathering powers, Telstra considers that until evidence arises that an absence of coercive information gathering powers is stifling the ACCP's market study functions it would be appropriate for the powers given to this body to be framed in a way that minimises the potential regulatory burden for participants in any sector it may enquire into.

Proposal for a new national access and pricing regulator: Telstra notes the Panel's recommendations on this issue and will closely review developments. Telstra's more immediate focus is to continue to stress the importance of ensuring access and pricing regimes (regardless of regulator) incorporate appropriate mechanisms to help ensure good decision-making.

Comments on Panel recommendations relating to Part IV of the CCA:

Price signalling – Telstra agrees with the Panel's comments on the price signalling provisions in Division 1A of the CCA. However, regarding the Panel's proposal that section 45 of the CCA be expanded to incorporate the concept of 'concerted practices', our submission raises some questions about the way this concept has been articulated in the Draft Report, and suggests that it will be important for a precise definition of the term (such as drawn from European Union law) to be put forward for consideration. Absent this, it will be difficult for the public to assess the potential degree of expansion in the law, the extent to which it may address any identified current gap in the competition law, and whether it poses any risk of disproportionate or unintended consequences in doing so.

This will also allow further consideration of whether such expansion is properly applied in the context of section 45 or should be directed at the specific cartel prohibitions, and also whether other aspects of, for example, the European regime which operate in conjunction with the

focus on concerted practices, such as the defences to otherwise unlawful concerted practices under Article 101(3) of the Treaty for the Functioning of the European Union, would also need be imported into section 45.

Misuse of market power prohibition – We note that many of the submissions made in the first phase of the Review have expressed the view there is no compelling case for any change to the core wording of section 46, suggesting there will be significant debate about the Panel's proposed broad reframing of the prohibition.

Regarding the specific amendments put forward for consideration, our key observations are:

- The scope and nature of unilateral conduct that can be impugned would be dramatically recast by removing any need for a person prosecuting a claim of breach of this section to show there is a 'misuse' of market power.
- For reasons already well documented in submissions to the Review, and in previous reviews of section 46, introducing an effects test into section 46 risks deterring legitimate pro-competitive conduct that has consumer benefits. This risk is heightened by the proposal to remove the 'taking advantage' element and introduce a defence that would require a firm whose conduct is impugned to bear the evidentiary burden of proving matters that currently need to be addressed by those prosecuting section 46 cases.
- The 'second limb' of this defence, which would require a business whose conduct has been impugned to show that the conduct "would be likely to have the effect of advancing the long-term interests of consumers", is also likely to lead to significant complexity and unpredictability for businesses. Telstra has significant experience of the types of uncertainties and debates this concept can give rise to given application of a broadly analogous test in the context of regulatory decisions relating to telecommunications under Part XIB of the CCA. This is discussed in more detail in the body of the submission.

Accordingly, Telstra respectfully submits that the proposed reformulation of section 46 should be reconsidered and further consultation should occur on whether there is a convincing case for reform in this area.

1. Introduction

Telstra welcomes the opportunity to respond to the Draft Report.

In general Telstra believes allowing markets to operate freely, without regulatory intervention where there is no clear market failure, provides the best incentives for businesses to innovate and invest, increase productivity and boost Australia's international competitiveness.

In this context, Telstra strongly supports the Draft Report's strong focus on removal of regulations which are preventing markets from operating efficiently and increasing business costs, and on proposing reforms that will help enhance the competitiveness of Australian industry and ensure it is well placed to meet relevant challenges and opportunities in the decades ahead.

We support in full a number of the Panel's recommendations. For example, we support the:

- The competition principles that the Panel has put forward to guide Commonwealth, state and territory and local governments in implementing competition policy;
- The Panel's recommendation that third line forcing conduct be subject to a competition test rather than prohibited per se;
- The proposals for streamlining of the authorisation and notification processes;
- The proposed refinements of the cartel provisions; and
- The Panel's recommendation that related bodies corporate be exempt from the resale price maintenance prohibition and that the process of notification to the ACCC be available for this conduct.

Telstra believes these reforms will benefit Australia's competition landscape and will help achieve greater proportionality of regulatory burden in areas of competition regulation.

As stated above, regarding other proposals included in the Draft Report, we have limited our comments to proposals or issues under the Review that are most relevant to our business and our position that Australia's regulatory settings can better support technological advancement and stimulation of investment in Australian markets.

Accordingly, the remainder of this submission is structured as follows:

- **Section 2**: Comments on Panel recommendations relating to regulator governance and processes

- **Section 3**: Comments on Panel recommendations relating to Part IV of the CCA

2. Comments on Panel recommendations relating to regulator governance and processes

As stated in Telstra's first submission to the Panel, the extent to which market participants can operate efficiently and dynamically, and are incentivised to invest and innovate, is directly impacted by the regulatory framework they operate under. In particular, regulatory predictability is required to provide investors with the right environment to invest in Australia in the longer term, across political cycles. A regulatory framework that lacks predictability and transparency fails to facilitate best practice regulatory decision-making and can result in sub-optimal market conduct. This is invariably detrimental to economic growth and consumer welfare.

Telstra supports a number of the Panel's recommendations which will help to ensure regulatory accountability, transparency and predictability in the administration of competition law and policy. In particular, Telstra believes the Panel's recommendations in relation to reinstating full merits review for Part IIIA, making the formal merger review process more workable and reducing the regulatory burden of s155 notices are sensible and will go a long way to achieving these goals if properly implemented. We have set out our comments in relation to these recommendations below and also our comments on the Panel's proposal for a new national competition body and ACCC governance reforms.

2.1 Merits review of Part IIIA and Part XIC

Telstra supports the Panel's recommendation that the Tribunal be empowered to undertake merits review of access decisions under Part IIIA and be able to hear directly from employees of a concerned business and relevant experts to ensure informed reviews on such issues.

Telstra agrees with the Panel that:

> *"[d]ecisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of getting the decision wrong are likely to be high."*

For this reason, Telstra believes it is important for these decisions to be subject to appropriate scrutiny. The ACCC said in its submission to the Productivity Commission's Review of Part IIIA that,[1]

> *"the ACCC supports appropriate reviews of decisions in promoting confidence in regulatory decision making and in minimising the risk of regulatory error."*

We agree that merits review of access decisions is of utmost importance and believe that merits review by the Tribunal is appropriate to give market participants confidence in decisions, by helping to minimise the risk of regulatory errors and encouraging quality decision making by the regulator.

As the Panel is aware, decisions made by the ACCC under Part XIC of the CCA are not subject to any form of merits review. While the Harper Panel did not make any recommendations in relation to reinstating merits review under Part XIC, the Vertigan Panel's parallel review of the telecommunications access regime has recommended that ACCC decisions of enduring impact under Part XIC be subject to full and effective merits review.

Specifically, the Vertigan Panel found that[2],

> *"wide-ranging discretions that the regime vests in the ACCC mean that the **risks and costs of regulatory error are potentially very high, with virtually no checks and balances in place to curb any resulting harms.** As a matter of principle it is **inappropriate, and offensive to the norms of good government**, that regulators should be left to regulate themselves." (emphasis added)*

[1] ACCC submission to the Productivity Commission Review of the National Access Regime, February 2013 at p 56.
[2] Independent cost-benefit analysis of broadband and review of regulation – statutory review under section 152EOA of the *Competition and Consumer Act 2010*, June 2014 at 59.

The Vertigan Panel has sensibly suggested that to minimize the potential for unnecessary regulatory costs, uncertainty and delay merits review should be carefully limited in scope and application, subject to those limitations not undermining the effectiveness of providing independent, transparent and rigorous scrutiny of regulatory decision-making. We strongly support the Vertigan Panel's recommendations in this regard.

While the Harper Panel appears to have largely avoided comment on Part XIC given it has been the focus of a separate review, Telstra notes there is significant alignment between the Harper and Vertigan panel's recommendations. Both recommendations express concern with the significantly high costs of regulatory errors in these types of decisions and the resulting need to ensure appropriate merits review mechanisms are available. Given the Harper Panel's wide remit to review competition policy in Australia and the alignment between the Harper and Vertigan Panel's views on this issue, Telstra encourages the Panel to lend its support to the Vertigan Panel's recommendation that merits review be reinstated for ACCC decisions of enduring impact in the telecommunications sector. This would include decisions under Part XIC of the CCA and decisions relating to facilities access under Schedule 1 of the Telecommunications Act.

2.2 Merger process

We welcome the Harper Panel's acknowledgement of the strong concerns expressed by market participants about the timeliness and transparency of the informal merger clearance process and its view that improvements can be made to the administration of the merger law.

Telstra generally supports the Panel's recommendations for reform of the formal clearance process which is generally thought to be too prescriptive and burdensome with the potential for delays making the process commercially impracticable in some cases.

We support the Panel's proposals to remove the unnecessary restrictions and requirements of the formal process to make it more accessible and effective. In particular, we strongly endorse the Panel's recommendations in the Draft Report that:

- The formal process not be subject to any prescriptive information requirements;
- The formal process be subject to strict timelines that cannot be extended except with the consent of the merger parties; and
- Decisions of the ACCC should be subject to review by the Tribunal under a process that is also governed by strict timelines.

Telstra does, however, note that the Panel has not appeared to address market participants' transparency concerns in its proposed reforms to this process. We suggest the Panel recommending reforms in relation to this issue, such as the ability for merger parties to be granted increased ability to test and challenge evidence from third parties, would significantly improve the effectiveness of the formal process.

While the Panel has recommended the formal merger clearance process and the merger authorisation process be combined, there appears to be no clear reason to combine these two processes as part of Panel's proposed merger reform. The separate Tribunal authorisation process appears to be working well for market participants as an alternative to the formal clearance process. In addition, market participants have only recently begun to use the authorisation process in its current form and it would be sensible to give the Tribunal and market participants more time to use, understand and refine the process before deciding whether it is in need of reform.

If the Panel's proposed reforms to the formal clearance process are successfully implemented and the formal process becomes a practical, workable alternative to the informal process, we agree this will go some way to alleviating concerns raised by market participants in relation to the timeliness and transparency of the informal process. In order to ensure that these reforms are implemented successfully, we agree with the Panel that consultation between businesses, practitioners and the ACCC is vital. In addition, we would suggest that given the significance

of merger decisions on the economy and our belief that merits review should be investigatory rather than adversarial in nature, the Tribunal should undertake full merits review of mergers rather than be limited to reviewing the evidence that was before the ACCC. We believe that the Tribunal review process would be most effective if measures are taken to ensure costs and delays are minimised.

Noting that previous recommendations relating to enhancement of the formal merger clearance process have failed to gain traction with Australian governments, Telstra believes it would be helpful for the Panel's recommendations in this area to be supplemented with some recommendations 'in the alternative' relating to the informal clearance process. As stated in its initial submission:

- We recognise the informal process appears to work well in the majority of relatively 'simple' cases, and there is benefit in the flexibility it affords both the regulator and parties to a proposed merger;
- But the process is failing on some of the more complex transactions that are currently effectively forced down this path due to lack of suitable alternative review options.

Specifically, Telstra's concerns with the informal clearance process are that it does not adequately deal with complex mergers given the lack of transparency, clearly defined time frames and timely review mechanisms available to the merger parties.

In this context, and as discussed in Telstra's first submission to the Panel, Merger parties would benefit from the following as an alternative set of reforms if the formal merger clearance process remains substantially in its current form:

- More transparency in the informal review process such as providing merger parties with access to more information regarding the basis for the position adopted by the ACCC.
- More clearly defined timeframes and less opportunities for delay (on both sides) to give merger parties better certainty and predictability in the process.
- Availability of a timely, accessible and cost effective review mechanism (as an alternative to the Federal Court process) to increase ACCC accountability for its decisions and ensure the correctness of these important decisions. Telstra believes that an effective review mechanism would have characteristics such as being timely, transparent, inquisitorial rather than adversarial and may be conducted as an internal or external peer-review rather than a judicial review. It is Telstra's view that the specific measures via which this type of reform could be achieved should be the subject of consultation in a separate process.
- Measures that would help avoid an unduly conservative approach to merger policy. In particular, any procedural or other steps that would ensure the regulatory approach during all stages of merger reviews is consistent with judicial standards relating to section 50 (e.g. that a proposed transaction would substantially lessen competition, and the level of proof required to demonstrate this). This would increase the confidence parties have in merger review processes.

Telstra is aware other parties such as the BCA are outlining, in detail, commonly held concerns with the informal clearance process, which we support.

While we understand the Panel's reluctance to attempt to regulate an informal process which, by definition, sits outside a formal legal framework, Telstra considers the Panel's guidance would aid the ACCC and business representatives to work together to come to a useful solution. We also would recommend a regular, independent review of the informal process looking at issues of both process and substance may help promote accountability, timeliness and transparency which would result in more efficient outcomes for businesses ultimately benefiting their customers.

2.3 Section 155 information gathering powers

We welcome the Panel's acknowledgement of concerns raised in submissions about the cost of compliance with section 155 notices and its recommendations to reduce the regulatory burden associated with these notices.

In particular, we support the Panel's recommendations that:

(1) The ACCC should review its guidelines on section 155 notices to take into account the increasing burden imposed by notices in the digital age; and

(2) The ACCC should accept responsibility to frame the notices in the narrowest form possible. Telstra agrees that these steps are needed to reduce the cost of compliance with these notices to businesses.

Telstra also supports the Panel's recommendation that the requirement of a person to produce documents in response to a section 155 notice should be qualified by an obligation to undertake a "reasonable search", taking into account factors such as the number of documents involved and the ease and cost of retrieving the documents.

In order to promote certainty of application, we would encourage the Panel to specifically recommend that the "reasonable search" requirement be included in the law rather than in a guideline. The penalties for breaching section 155 are severe and any qualification of that obligation should be set out in the law itself. Clear guidance in the law around what is considered reasonable would also benefit practitioners and the business community.

While introducing a requirement that a recipient only undertake a "reasonable" search is a step in the right direction, in practice it may not do much more than provide a safety net in most cases (despite being enshrined in law) and is unlikely to materially change the way searches are conducted by businesses. In this context, and in order to ensure cost savings from the recommended reforms actually materialise, the Panel should focus on other ways of ensuring the scope of notices are as narrow as possible. While the Panel has recommended the ACCC take responsibility for this and amend its guidelines, we suggest it may be more effective to incentivise the ACCC to reduce the scope and cost of compliance with these notices wherever possible.

In this context, the Panel's recommended revised governance structure (i.e. advisory board for the ACCC or similar) could offer some new solutions. For example, an advisory board could undertake a pre-issuance internal expedited review to ensure the scope of notices is as narrow as possible while satisfying the ACCC's information requirements. In addition (or alternatively), businesses could be given the ability to submit notices to a post issuance peer review (to the advisory board, non-executive board members or other panel) who would assess notices against the goal of proportionality to reduce the costs of compliance.

Telstra believes such mechanisms could provide the ACCC with the correct incentives to narrow the scope of section 155 notices and reduce the regulatory burden associated with complying with these notices. In the absence of a revised governance structure for the ACCC, Telstra suggests a pre- and post- issuance review could be undertaken as an internal peer review or by an external independent review body.

2.4 Institutions and ACCC governance

(a) Australian Council for Competition Policy and market studies

We note the Panel's proposal for establishment of a new national competition body, the Australian Council for Competition Policy (**ACCP**), which would have a mandate to provide leadership and drive implementation of the evolving competition policy agenda. We generally support this proposal and the recommendations the Panel has made regarding the functions and focus of this new body.

Specifically regarding the proposal for the ACCP to be assigned with a market studies function:

- We support this function being invested in a new body rather than as an adjunct to the functions of an existing regulator; and

- We support the proposal for such studies to be conducted at the request of government. However, we note that also requiring the ACCP to accommodate requests from market participants or other bodies risks increasing its workload significantly and diluting its focus. In particular, we note that:

    - even if the ACCP is given a broad discretion regarding which requests it takes up, it is likely to feel pressure to do some level of initial review and investigation, and explain any decision not to review an issue to the relevant requesting party, so as to limit the scope for concerns about it 'unfairly' prioritising some issues/sectors above others, etc.; and

    - there is always a risk that an 'open' request process will be 'gamed' by entities who identify the ability to publically call for reviews as a potentially powerful leverage tool.

  In this context, we consider that it would be more appropriate for the ACCP to be tasked with responding to market studies requests from government, with other parties being able to lobby government on issues they believe are appropriate for referral to the ACCP. Government can then consider whether there is compelling evidence of significant public concerns to warrant referral to the ACCP.

Regarding the Panel's request for comment on the appropriate scope of ACCP information gathering powers when it conducts market studies, we consider that the ACCP should be empowered to liaise with and seek comments from industry participants. Market participants will be incentivised to cooperate to ensure any assessment of their sectors and attendant recommendations are based on an appropriate understanding of relevant practices and dynamics in those sectors.

As the Panel has noted, the Productivity Commission does not generally rely on any information gathering powers to conduct its reviews. Until evidence arises that an absence of coercive information gathering powers is stifling the ACCP's market study functions we believe it would be appropriate for the powers given to this body to be framed in a way that minimises the potential regulatory burden for participants in any sector it may enquire into.

(b) Access and pricing regulator

Telstra notes the Panel has recommended that certain regulatory functions of the ACCC, including its telecommunications access and pricing functions, be transferred to a new, dedicated, national access and pricing regulator.

We do not have any specific comments on this proposal, other than to note that it supports the Panel's consideration of any measures that will aid good decision-making, particularly in the vitally important area of infrastructure and access regulation. Telstra will closely review developments relating to this proposal to determine where its input may help to ensure prudent consideration and assessment of the options.

At present, Telstra's more immediate focus in terms of contribution to the Panel's review is to continue to stress the importance of ensuring access and pricing regimes (regardless of regulator) incorporate:

- appropriate mechanisms to ensure decision-making rigour and accountability; and
- due transparency in decision making processes.

These issues have been discussed above in relation to merits review of ACCC decisions, merger review processes and section 155 notices.

Telstra also notes that it agrees with the Panel's comments in the Draft Report regarding the fundamental role that 'check and balances' play in regulatory governance, and supports the Panel's focus on examining whether there may be benefit in structural adjustments to competition regulators that may allow a broader range of business, consumer and academic perspectives to be factored into its day to day decision-making.

3. Comments on Panel recommendations relating to Part IV of the CCA

In our prior submission to the Review, we suggested that consideration of any reforms to Part IV of the CCA should occur within the framework of the following principles:

- Clarity and predictability in the operation of the law is vital.
- Competition laws should have a benefit that outweighs the burden imposed on the business sector.
- Competition law should be cross-sector in application.

We are pleased that most of the Panel's recommendations relating to Part IV of the CCA, such as changes to the way third line forcing and resale price maintenance conduct is regulated, accord with these principles. However we also believe there is scope for further refinement of some of the recommendations. We provide comments on the relevant areas below.

3.1 Price signalling

Telstra agrees with the Panel's comments on the price signalling provisions in Division 1A of the CCA.

In its earlier submission, Telstra stated that the price signalling provisions attempt to address a perceived "gap" in the law that is not universally recognised. The Panel appear to acknowledge this in the Draft Report, noting that it "might be debated" whether there can realistically be concerns about practices such as exchanges of price information between competitors not being able to be captured by section 45 of the CCA. Nonetheless, the Panel proposes amending section 45 so that its application to anti-competitive price disclosures is more certain.

As it has stated previously, Telstra believes the issue of whether incremental reforms to Part IV are necessary to ensure the law captures an appropriate range of information exchanges between firms is an appropriate subject of consultation. In that context Telstra welcomes the Panel's call for comments on the specific proposal it has raised.

We are not in principle opposed to the concept of reforms if the Panel's review of this area leads it to conclude there is a 'gap' in the law and that it can be addressed in a targeted and proportionate manner.

The Panel have suggested this could be done by introducing the concept of 'concerted practices' into section 45, so that such practices may fall within the ambit of the section in addition to relevant contracts, arrangements and understandings.

The concept of 'concerted practices' is well established in the context of European Union (EU) competition law, and Telstra assumes that the Panel has had regard to how the concept is defined and applied in the context of the EU regime (in particular under Article 101 of the Treaty for the Functioning of the European Union (**TFEU**)) when formulating its recommendations. In this context, Telstra queries whether the following language used in the Draft Report is the best way to describe the concept of a concerted practice, given the breadth of the wording and the fact that it is not wholly reflective of the concept as applied in jurisdictions such as the EU:

> *"A concerted practice is a regular practice undertaken by two or more firms. It would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange..."*

In particular, while it may be appropriate to characterise the concept of a concerted practice as commonly involving "a regular practice undertaken by two or more firms" and having potential application to the mentioned price information exchange, we believe the quoted wording omits what should be a key aspect of any definition of the term in the proposed context.

Specifically, we believe any definition of a concerted practice needs to require that there exists in the context of competing parties an element that while not necessarily equating to an 'agreement' or an 'understanding', involves some level of mental consensus between them about the practices they are engaging in and their intention for this to facilitate a coordinating or collusive effect on the parties' respective conduct going forward. This is essential to ensure that truly independent conduct of firms (such as pure conscious parallelism) cannot be captured, and to focus any extension of section 45 on relevant horizontal conduct only.

Accordingly, we believe a more appropriate definition of a concerted practice is such as has been articulated by the courts in Europe:-

> "...a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition"[3],

In this context, if the Panel continues to be of the view that it is appropriate to expand section 45 to cover 'concerted practices' in addition to contracts, arrangements and understandings, we believe it will be important for a precise definition of the term 'concerted practices' to be put forward for consideration. That definition should also clarify precisely how the concept differs from the concept of an 'understanding', especially as the latter term is not utilized in the relevant sections of the European competition law where the concerted practices terminology is employed, and thus that distinction has not had to be clearly articulated under that regime.

Absent this step of clearly explaining the intended meaning of the proposed words to be inserted into section 45, it will be difficult for the public to assess the potential degree of expansion in the law, the extent to which it may address any identified current gap in the competition law, and whether it poses any risk of disproportionate or unintended consequences in doing so. This will also allow further consideration of whether such expansion is properly applied in the context of section 45 or should be directed at the specific cartel prohibitions, and also whether other aspects of the European regime which operate in conjunction with the focus on concerted practices, such as the defences to otherwise unlawful concerted practices under Article 101(3) of the TFEU, would also need be imported into section 45.

3.2 Proposed reforms to section 46

Outline of the proposed reforms

The Panel has suggested three major reforms to section 46 of the CCA:

- Incorporating an 'effects test' rather than focussing only on the purpose of relevant conduct by a business with substantial market power;
- Clarifying that the requisite purpose or effect/likely effect of relevant conduct is a 'substantial lessening of competition' (as opposed to the current wording's focus on impact to a competitor or potential competitor)

[3] 48-69, *Imperial Chemical Industries Ltd. v Commission (Dyestuffs)* [1972]

- Removal of the 'taking advantage' element and (effectively in its place) introducing a defence so that the primary prohibition would not be breached if the conduct in question:

  (a) would be a rational business decision by a corporation that did not have a substantial degree of power in the market; and

  (b) the effect or likely effect of the conduct is to benefit the long-term interests of consumers,

  with the onus of proving the defence falling on the firm engaging in the relevant conduct.

The case for change on section 46 and the proposed reforms

We note that many of the submissions made in the first phase of the Review have expressed the view there is no compelling case for changing the core wording of the misuse of market power prohibition.[4] Despite this, the Panel has put forward a number of significant amendment proposals, which would fundamentally alter the focus of the prohibition. In particular, the scope and nature of unilateral conduct that can be impugned would be dramatically recast by removing any need for those prosecuting a section 46 case to show there is a 'misuse' of market power, and instead directing the focus to whether there is *any* conduct by a relevant firm (whether or not linked to market, financial, or indeed any 'power' it holds) that has the purpose or effect of substantially lessening competition.

We also note that a large number of submissions to the Panel in the first phase of the Review presented the strong case that no change is needed to section 46, and articulated the concern that introducing an effects test into section 46 risks blurring the distinction between pro-competitive and anti-competitive behaviour. As noted in the Draft Report, the latter concern has underpinned the decision of many previous Committees over the past 40 years not to support introducing an effects test into section 46.

We expect the Panel to receive many further submissions highlighting these issues, as the concern is greatly heightened when the other proposed amendments to section 46 are added into the equation. Accordingly, we focus our comments below on other aspects, most particularly the uncertainties that would arise from the proposed reformulation of the prohibition.

Issues of legal certainty and predictability

This need for clarity and certainty in the operation of laws is repeatedly emphasised in the Draft Report. In its discussion about section 46, the Panel notes that:

> *"The challenge is to frame a law that ... [is] ... written in clear language and state a legal test that can be reliably applied by the courts..."*

In this context, we believe it is reasonable to question whether the proposed reformulation of section 46 satisfies this aim. There are three issues that Telstra would like to raise in this context.

First, we note the Draft Report suggests that amending the prohibition so that the requisite purpose or effect/likely effect of relevant conduct is a 'substantial lessening of competition' would "enable the courts to assess whether conduct is harmful to the competitive process". However, this appears to assume competition on its merits can never result in a

[4] We note there is broad support for repeal of the amendments to section 46 introduced since 2007, including the specific provisions prohibiting predatory pricing, and the wording introduced to clarify the meaning of 'take advantage' and how the causal link between the substantial degree of power and anti-competitive purpose may be determined. We also note the Panel has itself recommended these relevant subsections of section 46 be repealed.

'substantial lessening of competition' as that phrase is employed in the context of the CCA. As commentators have noted, this is not at all clear[5]. Indeed, the Panel appear to recognise this because the Draft Report goes on to state that "in recommending reform, the Panel wishes to minimise the risk of inadvertently capturing pro-competitive conduct", and thus proposes introduction of the new defence mentioned above to address "concerns about over-capture".

Second, the Draft Report notes the 'taking advantage' element of the prohibition has been interpreted to mean engaging in conduct that would not be undertaken in a competitive market. It is well recognised that assessing this issue involves some difficult supposition. The Draft Report states that this test is "subtle and difficult to apply in practice", and the ACCC Chairman was recently quoted as stating that "courts struggle with this hypothetical analysis" as it "requires a court to predict the behaviour of a hypothetical firm in a hypothetical market"[6]. Yet the proposed reformulation of section 46 appears to require a firm whose conduct is impugned to prove that its conduct satisfies the flipside of essentially the same test – that is, that the conduct would be a rational business decision by a business that did not have a substantial degree of power in the market. The difficulties of applying this test in practice would continue to exist, but would now be borne by the firm being prosecuted.

Shifting the onus away from those bringing a misuse of market power case appears inconsistent with the legal orthodoxy under which the prosecuting party bears the onus of proving essential elements of an offence (which in this case would be the 'misuse' of market power).

Third, Telstra submits that the 'second limb' of the proposed defence, which would require a business whose conduct has been impugned to show that the conduct "would be likely to have the effect of advancing the long-term interests of consumers", is likely to lead to significant complexity and unpredictability for businesses.

While the concept of "the long-term interests of consumers" is well known in regulatory circles[7], there is no doubt it involve subjective assessment and doesn't easily lend itself to specific assessment by an individual firm at a given point in time in any timely and predictable way.

In the Draft Report, the Panel notes that one of the main arguments advanced for inclusion of an effects test is that - as opposed to only focusing on the subjective element of purpose - it involves an objective enquiry: was there a substantial lessening of competition resulting from impugned conduct. The suggestion seems to be that this will make the process of identifying breaches of the prohibition more evidence based and reduce the risk of regulatory error. Yet it is clear determining whether conduct "advances the long term interests of consumers" involves a significant degree of subjective assessment.

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[5] See, for example, the analysis of Caroline Coops in her address to the University of South Australia 12th Annual Competition and Consumer Law Workshop 2014, 10-11 October 2014, reported here - http://www.unisa.edu.au/Global/business/law/events/2014/CCW/CCW2014_Session%207_Caroline%20Coops.pdf - in which she stated the following in relation to the substantial lessening of competition test as employed in the context of the CCA: "What is perhaps particularly concerning is that we have very little consideration of when competition that is occurring 'on the merits' or in pursuit of legitimate pursuits such as greater efficiency could cross the line through its competitive effects"

[6] Speech of Rod Sims, Chairman, ACCC, at the RBB Economics Conference *Bringing more economic perspectives to competition policy and law;* Sydney, 7 November 2014; transcript here: http://accc.gov.au/speech/bringing-more-economic-perspectives-to-competition-policy-law.

[7] For example, under Part XIC of the Telecommunications Act key regulatory decisions relating to the telecommunications sector are required to be made with the objective of promoting the long-term interests of end-users. Promotion of the long term interests of consumers is also wording describing the required focus of regulatory decisions in the National Electricity and Gas Laws in Australia, and the New Zealand Commerce Commission uses a Long Term Benefits to End-Users criteria in determining its regulatory policies.

Lessons from application of the 'long term interests of end-users' test in telecommunications regulation

Telstra has significant experience of the uncertainties this gives rise to, and the delays and costs that may need to be borne by a business seeking to satisfy itself that particular activities may satisfy such a test.

Under Part XIC of the Telecommunications Act, key regulatory decisions relating to the telecommunications sector are required to be made with the objective of promoting the long-term interests of end-users (LTIE). This is an appropriate and worthy aim when it comes to regulation of the sector, but it is also one that provides scope for argument about what is or is not a policy, decision or conduct that satisfies the test.

For example, complex debates occur in the context of ACCC consideration of whether to declare particular telecommunications services, and if so on what mandated terms of wholesale supply - decisions required to be made for the purpose of promoting the LTIE. While we would expect the regulator would be confident it has appropriately navigated the test in these contexts, it would acknowledge this could rarely be accomplished without significant, lengthy enquiry and testing of a range of different views. We also expect it would acknowledge the benefit of being able to conduct broadly similar assessments at periodic intervals (such as at the end of each declaration or determination period, which will commonly be no longer than four or five years), building on the information gathered in previous regulatory periods and refining its approach.

In this context, Telstra believes there is good reason to question whether it is reasonable to expect a business to have confidence in its ability to prove to the required standard any belief it may have that its conduct is in the long term interests of consumers.

Concluding comments

In Telstra's view, the proposed reformulation of section 46 will render it be far less certain in its operation, meaning even more difficulties will be faced by compliance personnel who are tasked with the already significant challenge of navigating the maze of competition regulations that governs corporate conduct. It is not unreasonable to suspect that legitimate competitive behaviour will be chilled as a result.

Accordingly, Telstra respectfully submits that the proposed reformulation of section 46 should be reconsidered. If, despite the strong views that have been put to the contrary, the Panel continues to believe a compelling case has been made for making any changes to the core wording in section 46, then further consultation with the aim of identifying a more workable set of proposals would be welcomed.