TELSTRA CORPORATION LIMITED

Submission to the Competition Panel Review in response to the Issues Paper dated 14 April 2014

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IT'S HOW WE CONNECT

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EXECUTIVE SUMMARY

Telstra Corporation Limited ("**Telstra**") welcomes the opportunity to make this submission to the Competition Panel Review in response to the Issues Paper dated 14 April 2014.

As one of Australia's largest publicly listed companies, we support measures that foster greater competition in markets and strengthen the competitive process. Given that it is over 20 years since the Hilmer Report was published, we consider it is appropriate and timely to again consider what reforms can be made to our national competition policy to enhance the process of competition across the Australian economy and thereby maximise benefits to all Australians.

A decade ago, the successes of Australia's post-Hilmer competition policy were plainly evident, with Australia boasting one of the most deregulated economies in the western world and some of the strongest growth rates in the OECD. However, as the pace and impact of Hilmer-related reforms has slowed, this has impacted Australia's competitive advantage. At the same time, new markets have emerged and the nature of more traditional markets continues to evolve due to factors such as technological advancement and in particular the growing importance of digital technology.

It is vital to ensure Australia's competition policy remains 'fit for purpose' and gives businesses the best chance to compete in an increasingly dynamic commercial environment, while also providing the incentives and protections necessary to ensure innovation is encouraged and rewarded. This will in turn promote investment in infrastructure, economic efficiency and improve consumer welfare.

This review is an opportunity to achieve that aim by building on and, where relevant, completing the reforms that commenced with the Hilmer review. In particular, Telstra encourages the Panel to focus on identifying measures to:

- Protect and strengthen the competitive process;
- Increase productivity (which will attract capital and labour, increase economic growth and ultimately improve living standards);
- Boost Australia's international competitiveness; and
- Ensure the correct incentives for businesses to innovate and invest in infrastructure.

Reforms to Australian competition policy that are consistent with these aims will help ensure Australia is well positioned over the next couple of decades for strong economic growth, prosperity and ultimately an increase in living standards for all Australians.

Telstra's submission is focussed on the following three areas relevant to Chapters 5 and 6 of the Issues Paper, where it believes reforms can help achieve the outcomes sought by the Panel:

1) Ensuring efficient regulatory outcomes and appropriate consideration of deregulation opportunities;

2) Measures to ensure greater regulatory predictability, accountability and transparency; and

3) Clear principles to guide discussion on any further reform of Part IV of the *Competition and Consumer Act 2010* (**CCA**).

Ensuring efficient regulatory outcomes and appropriate consideration of deregulation opportunities

The focus of the Hilmer reforms included opening up access to markets and making markets more competitive through regulation. Where these reforms have been successful, consideration needs to be given to pulling back the regulation if this will best help competitive markets to operate efficiently.

The government has recognised this as well as the need to revisit the way regulation is applied in Australia. It has made significant headway in this review and has produced useful guidance for regulators and industry including the Productivity Commission's regulator audit framework[1] and the Australian Government's guide to better regulation[2]. Telstra believes the Harper Panel can contribute to this by recommending key areas of regulatory reform including by:

- Establishing a clear deregulation agenda in the CCA;
- Ensuring clear market failure is established by regulators before intervening in a market, and requiring periodic assessment of persistent market failure in order to justify continued regulatory intervention;
- Measures to ensure regulators always consider whether regulation imposed is proportionate; and
- Ensuring transparent and regular assessment of regulator's performance against the policy objective of greater economic efficiency.

Measures to ensure greater regulatory accountability, transparency and predictability

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 are subject to. 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. Accordingly, Telstra believes that it is appropriate for the Panel to make recommendations to help ensure regulatory accountability, transparency and predictability in relation to the administration of competition law and policy.

Specifically, Telstra submits the Panel should give consideration to the following:

- Reform of the merger review regime, with a view to addressing the deficiencies in the informal and formal clearance mechanisms especially as they relate to complex mergers;
- Making ACCC decisions under Part XIC of the CCA subject to a form of merits review (while also ensuring this is done in a way that adequately addresses previous concerns about the right to such review being 'gamed' by industry participants); and
- Making the scope and issuance of s155 notices subject to a more timely and effective review mechanism.

Clear principles to guide discussion on any further reform of Part IV of the CCA

Telstra considers Part IV of the Act is 'fit for purpose' in that it can be applied in a way that effectively supports competition policy in the future, and that it is appropriate to set a 'high bar' for justifying further changes to the substantive scope of Part IV. The focus should be on ensuring clarity and predictability in the operation of the law (which means a default setting where the law is allowed to develop gradually and by incremental expansion of existing core provisions where possible) and that the benefit of both existing and proposed provisions clearly outweighs any associated burden for business. This will help to minimise the extent to which unjustifiable new compliance costs end up being passed on to consumers, and reduce the risk of over-regulation having the an adverse effect on competition.

[1] http://www.pc.gov.au/__data/assets/pdf_file/0005/134780/regulator-audit-framework.pdf
[2] http://www.cuttingredtape.gov.au/sites/default/files/documents/australian_government_guide_regulation.pdf

In this context, Telstra believes the Panel should be mindful that existing legal - and therefore business - certainty may be compromised if there are further changes to the CCA in areas such as section 46 (the misuse of market power prohibition), Part 2-2 of the Australian Consumer Law (the statutory unconscionable conduct prohibition), and s51(3) (the statutory exemption relating to intellectual property rights). That risks in turn discouraging businesses from engaging in legitimate vigorous competitive activity, which will ultimately be to the detriment of consumers.

Instead, Telstra believes the goals of the Review will be best served by focussing on the legislative changes that will strike a better balance between arming regulators and courts with the necessary tools to identify and address anti-competitive conduct, and ensuring the compliance burden on industry (including individuals sectors) is not disproportionate to this end. Accordingly, Telstra considers that in addition to reform of the merger review regime, the Panel would be justified in considering amendment of section 47 to make all third line forcing subject to a substantial lessening of competition test, as well as removal of the Birdsville amendments and price signalling provisions.

Any further proposed amendments to Part IV should be carefully scrutinised to ensure they are consistent with principles, such as those mentioned above, that can guide prudent legislative development in this area.

01 INTRODUCTION

Telstra is Australia's leading telecommunications and information services company, with one of the best known brands in the country. We are committed to successfully competing in markets by:

- Providing the best products and services;
- Continually improving customer service; and
- Pursuing new ideas and projects that respond to consumer and market demands.

We support measures that foster greater competition in markets and strengthen the competitive process. We consider that competition is a force that drives business to succeed, and helps deliver the best outcomes for customers.

In this context, Telstra welcomes the Harper Review, and agrees that some 20-plus years after the Hilmer Report it is appropriate and timely to again consider what reforms can be made to our national competition policy to maximise the promotion of competition across the Australian economy and delivery of benefits to all Australians.

Telstra believes that the broad reform of Australia's competition policy that occurred as a result of the Hilmer review greatly enhanced the nation's ability to develop the economy through the 1990s and 2000s, and helped deliver strong productivity growth, ongoing job creation and improved living standards. Of particular importance during this period were reforms that facilitated a greater opening up of many sectors of the economy to competition, and removed obstacles that may have otherwise hindered business efforts to take advantage of that greater openness.

The benefits of these developments are evident in the telecommunications sector. Telstra believes that experiences in this sector in the last 20 years in particular demonstrate how effective competition can be crucial to stimulating investment in Australian markets and delivering the best services to customers. For example, the competitive environment in the mobiles market has meant that across many key measures – including investment in infrastructure, uptake of technology, network coverage and capacity, and value for money – the Australian market is performing at a very high level and delivering significant economic benefits and positive outcomes for consumers. A regulatory setting that encourages competition and rewards commercial investment has been a major factor in facilitating these outcomes.

Telstra also agrees with the Panel's comments that the need to examine how we can build on the Hilmer reforms is more pertinent than ever.

A decade ago, the successes of Australia's post-Hilmer competition policy were plainly evident, with Australia boasting some of the strongest growth rates in the OECD due in large part to the reform agenda of that era. However, it is clear that reforms have slowed in recent years and this has impacted investment in infrastructure, economic development and productivity in this country.

Additionally, we have witnessed some significant changes in the last decade to the way in which business and markets work, driven in large part by technological advancements. In particular, digital connectivity has transformed markets, enabling new business models and innovation, and leading to greater global business expansion and market integration. In Australia alone, key indicators show that the business use of broadband internet access, internet presence and e-commerce has been growing substantially since 2009.[3] The value of income derived from the sale of goods or services via the internet has increased by 25%, from $189 billion in 2010-11 to $237 billion in 2011-12.

The rise of digital technologies is just one of the factors that has contributed to increasingly dynamic and global markets. With this evolution comes changing needs and expectations of consumers, and

[3] Australian Bureau of Statistics Business Use of Information Technology, 2011-12

exciting new opportunities as well as challenges for our economy and businesses such as Telstra. In particular, it is becoming increasingly important for businesses to have a high degree of flexibility in terms of adapting what they offer, and how it is offered, to evolving market conditions. More specifically, businesses need to be able to keep pace with developing trends not just in what products and services consumers want, but also how they want to be informed about, experience and purchase those products and services.

The power of the internet is a great example. Through access to timely and comprehensive information, consumers are often more knowledgeable of product and service characteristics and this assists them to make informed purchasing decisions. This is influencing and driving broader changes to businesses and markets, leading to greater competition, lower thresholds for market entry, and positive outcomes for consumers.

These developments have been supported by significant investment in broadband and related communications infrastructure – particularly mobiles communications networks and technology.

In recent years mobile carriers have committed billions of dollars to expand and upgrade their networks, delivering increasing data speeds and accommodating innovation in the use of mobile technologies and related devices and applications.

The advantages of this investment to the broader economy and consumers are significant. For example, a recent study put the total value added by the mobile industry at $14.1 billion per annum[4], and this can be expected to grow as a result of continued installation of 4G network infrastructure and utilisation of spectrum recently acquired by network operators.

Investment in this sector has been assisted by a regulatory environment that over the last decade or more has not unduly stifled innovation or the continued commitment of resources to new and/or enhanced network infrastructure.

Reflecting this, economics consultancy firm Covec commented in a recent report titled "Economic drivers and contribution of mobile communications in Australia" that:

> Australia has benefited from a relatively light-handed approach to mobile regulation (e.g. limited retail or wholesale price intervention, no regulation of domestic roaming) and this stance deserves some of the credit for the benefits Australians have enjoyed from the mobiles sector.[5]

Telstra believes there are important lessons that can be drawn from this, in particular regarding how competition and regulatory policy can best allow the business sector to take advantage of opportunities presented by market developments and provide the right environment for investment in infrastructure.

In particular, Telstra believes that there is strong evidence to support the adoption of principles and approaches that will help to avoid undue regulatory intervention in markets, and create a business environment that facilitates innovation and investment and market activity that is driven and shaped by consumer demand more than regulatory constraints.

In this context, it is vital to ensure that Australia's competition policy is 'fit for purpose' and gives businesses the best chance to compete in an increasingly dynamic commercial environment, in traditional and emerging markets here and abroad. This will in turn promote investment in infrastructure, economic efficiency and consumer welfare.

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[4] Australian Mobile Telecommunications Association report *Mobile Nation: The economic and social impacts of mobile technology*.

[5] Covec report prepared for Telstra Corporation Limited, *Economic drivers and contribution of mobile communications in Australia*, February 2014, p.i.

Accordingly, Telstra believes it is important for the Harper Panel to build on (and, where relevant, complete) the reforms that commenced with the Hilmer review. In particular, Telstra encourages the Panel to focus on identifying measures to:

- Protect/strengthen the competitive process;
- Increase productivity, which will attract capital and labour, increase economic growth and ultimately living standards;
- Boost Australia's international competitiveness; and
- Ensure the correct incentives for businesses to innovate and invest in infrastructure.

Reforms to Australian competition policy that are consistent with these aims will help ensure Australia is well positioned over the next couple of decades for strong economic growth, prosperity and ultimately an increase in living standards for all Australians.

We recognise that, given the breadth of the terms of reference for the Review, the Panel has encouraged parties to prioritise what they see as the more fundamental reforms necessary to achieve the review's goals in the context of their industry/market experience. In this context, Telstra's submission focuses on three key areas where we consider practical and timely steps can be taken to facilitate a business and regulatory environment that provides more clarity and certainty for businesses, greater incentives for innovation and investment, and fewer impediments to effective competition in markets. Specifically, we focus on the need for:

1) Ensuring efficient regulatory outcomes and appropriate consideration of deregulation opportunities;

2) Measures to ensure greater regulatory accountability, transparency and predictability; and

3) Clear principles to guide discussion on any further reform of Part IV of the CCA.

More detailed comments on each of these areas, which are primarily relevant to Chapters 5 and 6 of the Issues Paper, are set out below.

02 ENSURING EFFICIENT REGULATORY OUTCOMES AND APPROPRIATE CONSIDERATION OF DEREGULATION OPPORTUNITES

Telstra welcomes the Panel's decision to include within the scope of its review the institutional framework within which competition policy is administered, and its invitation for comments on whether the current framework and key institutions within it are delivering efficient and appropriate outcomes for business and consumers, and appropriately support a self-sustaining process for continual competition policy reform and review.

As a general matter, Telstra believes the current framework is relatively sound and is affording the key competition-related institutions appropriate powers and flexibility to implement competition policy. However, in light of the government's review of the way regulation is applied in Australia and its recognition that there should be thorough assessments of, and continued enhancements to, the performance and processes of regulators, Telstra considers that it is appropriate and helpful for the Panel to consider whether any reforms to competition law and policy may help to further this goal.

Significant headway has already been made by the government in this area. The Productivity Commission's regulator audit framework[6], the Australian Government's Guide to Better Regulation[7] and 'red tape' reform agenda have set the background for the way regulatory policy should operate

[6] http://www.pc.gov.au/__data/assets/pdf_file/0005/134780/regulator-audit-framework.pdf
[7] http://www.cuttingredtape.gov.au/sites/default/files/documents/australian_government_guide_regulation.pdf

in the coming decades. In order to ensure the regulatory framework is consistent with this focus, Telstra believes a few key reforms could be made to the CCA to systematically encourage efficient regulatory outcomes and appropriate consideration of deregulation opportunities. In particular, this could be done by 'hardwiring' mechanisms into regulatory processes that will assist regulators to, amongst other things, ensure clear market failure exists before intervening in a market.

Specifically, Telstra recommends the Panel consider whether there may be benefit from legislative and related measures that would effectively impose:

- **A clear deregulation agenda in the CCA** so that it is made clear that a regulator's role is both to regulate to stimulate competition and deregulate once a market has become competitive;
- **An obligation on regulators to establish clear market failure** before they can intervene in a market, as well as a requirement that market failure be re-established on an ongoing basis in order to justify the continuance of existing regulatory intervention;
- **An obligation for regulators to consider whether regulation imposed is proportionate** to the regulatory outcomes sought to be achieved; and
- **A requirement for more transparent and regular assessment of regulators' performance against the policy objective of greater economic efficiency** – in particular, directly linking regulators' performance to greater economic efficiency will ensure regulators take into account the costs of regulation and the effect it will have on the overall economy.

Telstra believes that these measures would appropriately ensure efficient regulatory outcomes are achieved and that deregulation opportunities are appropriately considered which will allow markets to operate freely, without regulatory intervention where there is no clear market failure. This is essential to continuing to build on (and, where relevant, complete) the reforms that commenced with the Hilmer review to ensure the correct incentives for businesses to innovate and invest, increase productivity and boost Australia's international competitiveness. This will ultimately result in greater consumer welfare.

03 MEASURES TO ENSURE GREATER REGULATORY PREDICTABILITY, ACCOUNTABILITY AND TRANSPARENCY

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. In particular, a regulatory framework that lacks transparency and fails to facilitate best practice regulatory decision-making can result in sub-optimal market conduct, impede competition and economic growth, and thereby inadequately serve consumer interests. In particular, regulatory predictability is required to provide investors with the right environment to invest in Australia in the longer term, across political cycles. In addition, a regulatory framework that lacks transparency and accountability fails to facilitate best practice regulatory decision-making and can result in sub-optimal market conduct, and impede competition and economic growth. This is invariably detrimental to consumer welfare.

Three areas which Telstra believes could benefit from measures that increase regulatory accountability and transparency (and where relevant predictability) include:

- Merger decisions;
- Decisions under part XIC; and
- The issuance and scope of s155 notices.

We provide further comments on these three areas of potential reform below.

Merger review regime is in need of reform

It is clear that the merger review regime is in need of reform.

The Dawson Review in 2003 found a number of deficiencies in the merger review process and suggested reforms with a view to reducing uncertainty and increasing ACCC accountability for its decisions through providing an appropriate review mechanism.

A key reform was the introduction of the formal merger review process which provides immunity from prosecution under s50, contains set timelines to reduce delays and gives parties the right to appeal the decision to the tribunal. While in theory this process should reduce uncertainty and increase ACCC accountability and transparency, this has not occurred because the formal merger review process has not been used since it came into effect in 2007. While reasons for this vary, it can be said that merger parties generally consider the formal review process to be too prescriptive and burdensome with the potential for delays making it commercially impracticable.

Many of the criticisms of the informal merger review process found by the Dawson Review in 2003 still exist today. In particular, while the process works well in practice for uncontroversial mergers, for complex mergers the lack of transparency, clearly defined timeframes and appropriate review mechanisms can be challenging for the merger parties.

While the ACCC's Informal Merger Process Review Guidelines 2013 indicate that review of complex mergers could take between 18-24 weeks, in reality review of complex mergers regularly takes 12 months or longer. Examples of recent lengthy merger reviews include:

- Foxtel's proposed acquisition of Austar (320 calendar days);
- Gallagher Group's proposed acquisition of Country Electronics Pty Ltd (420 calendar days); and,
- Telstra's proposed acquisition of Adam Internet (267 calendar days).

Where the ACCC decides to oppose a merger, there are limited appeal options available to parties including seeking a declaration from the Federal Court that the merger does not substantially lessen competition or pressing ahead with the merger and defending any injunction proceedings initiated by the ACCC. These options are often impractical in the context of commercial deal timelines. For example, a vendor may prefer to sell to the next highest bidder rather than wait for a lengthy court process which may not ultimately allow the merger to go ahead. Further, the acquirer may decide that the acquisition may not be worth the expense of an appeal relative to the deal value. These difficulties with the appeal process are evidenced by the handful of mergers which have been reviewed by the Federal Court compared to those which the ACCC has opposed. Mergers which have not gone ahead and would not have led to a substantial lessening of competition represent a loss of efficiency and productivity for the Australian economy, and it is ultimately consumers who have lost out as a result.

Recognising the important role mergers play in the efficient functioning of the economy, Telstra considers it would be appropriate for the Panel to recommend a follow-on enquiry focussed on addressing the deficiencies of the merger review regime, with a particular focus on increasing predictability, transparency and accountability for merger parties.

Potential areas of review could include:

- How some of the concerns relating to the utility of the formal merger clearance process could be addressed; and
- What measures would increase ACCC predictability, transparency and accountability, most particularly in the context of the informal review regime.

Regarding informal merger clearance, Telstra notes that it is recognised that this review process works 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. However, it is also considers that it is a process that is failing some of the more complex transactions that are effectively forced down this path due to lack of suitable alternative review options. In this context, Telstra believes there would be merit in considering some adjustments to the informal review regime that would provide merger parties with more access to more information regarding the basis for, and some form of review right relating to the position adopted by the ACCC in, such reviews. Telstra believes that an effective review mechanism would have characteristics such as being timely, transparent, inquisitorial rather than adversarial and conducted as an internal or external peer-review rather than a judicial review. The specific measures via which this type of reform could be achieved would be an appropriate subject of consultation in a separate process.

Regarding issues of predictability, transparency and accountability, we believe it would be beneficial for further consideration to be given to 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 (such as the need for the regulatory focus to be confined to considering whether a proposed transaction would substantially lessen competition, and the level of proof required to demonstrate this) would increase the confidence parties have in merger review processes.

Merits review should be reinstated for Part XIC

As a fundamental principle, decisions by government agencies that affect private interests should be subject to effective review mechanisms.[8] Regulatory best practice recognises that ensuring regulatory decisions are subject to independent scrutiny incentivises best practice regulatory decision making and promotes accountability.

The importance of an effective merits review regime is recognised in other infrastructure access regimes. In its submission to the Productivity Commission's Review of Part IIIA, the ACCC said[9]:

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

The recent energy regulation review also strongly endorsed retention of merits based review[10]:

> *All 'discretionary' regulatory activity is subject to scrutiny and supervision (whether by courts, tribunals or by other administrative agencies), and the greater the discretion at the decision stage the greater tends to be the ex post supervision (by courts, tribunals, etc.) ... well functioning economic and political systems will tend toward establishment of appropriate checks and balances (e.g. judicial supervision, competitive markets).*

Telstra believes it would be beneficial for the Panel to seek to identify and address regulatory regimes where application of these principles is not in evidence. One such area Telstra submits for the Panel's consideration is the telecommunications sector.

As Telstra stated in its April submission to the Vertigan Panel (**Vertigan submission**)[11], there is no reason why telecommunications – a complex, highly technical and dynamic industry in which there are no straight forward regulatory solutions – should be treated as differently to other sectors of the

[8] See Administrative Review Council, 'Administrative Accountability in Business Areas Subject to Complex and Specific Regulation' (November 2008).
[9] ACCC submission to the Productivity Commission Review of the National Access Regime, February 2013 at p 56 (**ACCC February Submission**).
[10] ACCC February Submission at p 57.
[11] Telstra, Submission to the NBN Panel Experts Cost-Benefit Analysis and Review of Regulation: Response to Telecommunications Regulatory Arrangements Paper, 16 April 2014 at p5-6.

economy, as it currently is, when it comes to the right of parties affected by regulatory decisions to seek review.

Merits review was removed from the access regime in Part XIC of the CCA because of criticisms that it was costly, open to 'gaming' and frequently subject to delay. However, we believe these criticisms can be addressed by learning from the experiences of the past and designing a more efficient review process. Accordingly, we believe it would be appropriate for the Panel to consider whether the interests of relevant market participants may be better balanced by restoring merits review rights but applying additional safeguards to ensure they are not used inappropriately and do not result in unjustifiably lengthy delays or uncertainty for affected parties.

Telstra described a possible model for a more efficient merits review regime for Part XIC in its Vertigan submission. This was designed around the following principles which we believe could provide an effective low cost solution to improve accountability:

- A merits review application would have to meet threshold requirements e.g. the materiality of the issues in the application or whether the issues identified were likely to result in a material improvement in the long term interests of end-users (i.e. a 'gating' mechanism to guard against gaming or overuse);

- Once through the gate, review of the application would be conducted using an inquisitorial model rather than an adversarial or quasi-judicial model, with a peer review process conducted by a panel of experts rather than a judge and lawyer-led tribunal process;

- The review could take an 'open book' approach – all materials which were before the ACCC, including staff papers, should be available to the panel and the parties in the course of the review;

- Timeframes should be specified for the review; and

- The review body could be encouraged to provide constructive feedback to the ACCC in relevant cases on any measures or principles that could be adopted by the regulator to ensure continual enhancements to substantive or procedural aspects of its decision-making processes.

The benefits of merits review are significant and extend to factors such as:

- Increasing the rigour and accuracy of regulatory decision making, and thereby promoting public confidence in regulators and the broader system of regulatory accountability; and

- Providing investors with the confidence that they will have avenues to challenge regulatory outcomes that unfairly erode the value of their investments.

The importance of these benefits cannot be underplayed and more than compensate for the fact merits review necessarily involves some costs and delays in decision-making processes. This is especially true when we consider the improvements to the standard of regulatory decision-making that can be expected to result should in turn progressively reduce the volume of cases where a review right is exercised.

In this context, Telstra believes the Panel should consider whether it remains appropriate for a key part of the CCA to directly exclude a right of merits review for parties affected by such significant regulatory decisions.

The issuance of s155 notices

Telstra recognises that the ACCC requires information from parties to carry out its competition law enforcement functions and to exercise its powers appropriately. While Telstra believes the ACCC's powers under section 155 of the CCA are an important part of the regulatory regime and should be

retained, in Telstra's experience the ACCC has a tendency to be conservative in setting the scope of, and deciding whether to issue, a section 155 notice. This may be imposing unnecessarily high costs on firms.

A typical section 155 notice is expensive to respond to with costs including external legal fees, document management fees, and employee and management time. Telstra also notes section 155 notices have been issued to Telstra in relation to investigations and transactions which Telstra has no part in. Considerable savings could be achieved by small changes to the notices while ensuring the information captured still suits the ACCC's objectives (for example, a 5-year time series of weekly data can be substantially more costly to produce than a 5-year time series of monthly data, but not provide any incremental benefit to the ACCC).

While a review mechanism to the Federal Court exists to challenge the validity and scope of s155 notices, Telstra believes that a less formal, more easily accessible review mechanism may increase ACCC accountability and impose more rigour on the ACCC when drafting notices.

In this context, Telstra suggest the Panel consider the utility of potential reforms such as subjecting every notice that is issued to a pre-issuance expedited review. This may provide additional incentives for those drafting the notice to reduce the scope and cost of compliance wherever possible. Additionally, the panel could consider the utility of a post-issuance peer-review mechanism where parties are able to request a fast-track review of the notice to a panel of experts internal or external to the ACCC.

04 CLEAR PRINCIPLES TO GUIDE DISCUSSION ON ANY FURTHER REFORM OF PART IV OF THE CCA

Chapter 5 of the Issues Paper includes a series of questions regarding the effectiveness of relevant competition legislation and in particular key provisions in the CCA. Many of the questions relate directly or indirectly to the operation of Part IV of the CCA.

As a general matter, Telstra considers Part IV of the Act is 'fit for purpose' in terms of its ability to be applied in a way that effectively supports competition policy going forward:

- The scope of the Part IV provisions is sufficiently broad to address a wide scope of anti-competitive conduct, whether that conduct be unilateral or in the form of an agreement, arrangement or understanding.

- Most of the provisions in Part IV have now been in place for a number of years, and the business sector has the benefit of extensive guidance on their practical operation and effect. This is most notably in the form of relevant caselaw, as well as ACCC publications on its approach to the provisions and enforcement priorities. The legal certainty and clarity this provides to the business sector facilities an environment conducive to investment and innovation. It also helps business allocate their resources to activities more efficiently.

In this context, Telstra believes it is appropriate to set a 'high bar' for justifying further changes to the substantive scope of Part IV. Adopting this approach should also help to minimise the risk of unduly politicised or ill-conceived amendments to the law – such as may be argued to have occurred in more recent years in the form of introduction of specific price signalling and (Birdsville) below cost pricing prohibitions. It will also help to minimise the extent to which unjustifiable new compliance costs end up being passed on to consumers, and reduce the risk of over-regulation having the effect of chilling pro-competitive conduct and thereby detrimentally impacting consumer welfare.

Instead, Telstra believes that in the context of Part IV of the CCA the goals of the Review would be best served by focussing on where changes can be made to the existing provisions to strike a better balance between ensuring anti-competitive conduct can be identified and addressed, while not imposing a compliance burden on the business sector generally (or specific sectors individually) that is disproportionate to this end.

In this context, we think that consideration of any reforms to Part IV of the CCA should occur within the framework of the following principles:

1. **Clarity and predictability in the operation of the law is vital**. Changes to the law which risk creating greater uncertainty for business must be avoided. If further changes to the law are deemed necessary to address legitimate and significant competition concerns or 'gaps' in the existing legislation, the default approach should be to seek to do so by incremental expansion of existing core provisions where possible, to minimise the risk of over-regulation and maximise certainty.

2. **Competition laws should have a benefit that outweighs the burden imposed on the business sector**. In particular, competition laws should seek to avoid unduly adding to the costs of operation for 'compliant' businesses, noting that such costs are invariably also felt by consumers.

3. **Competition law should be cross-sector in application**, unless there are compelling reasons to adopt a sector-specific approach on particular issues.

When considering the threshold question of whether further reforms should be made to Part IV of the CCA, we consider the first and second principles are particularly relevant. It is generally accepted that any substantive changes to the scope of the Part IV provisions, however well-intentioned, will invariably create new uncertainties and compliance costs for business. This alone is not a reason to avoid any legislative reform, however it does support the approach of only supporting substantive changes to the scope of Part IV that have a compelling justification.

This is particularly the case when it comes to any proposed reforms to the core components of both the misuse of market power prohibition and the statutory unconscionable conduct prohibition, where the application and effect of the provisions is less 'intuitive' and more grounded in years of caselaw – the continued relevance of which could potentially be undermined by further legislative changes. Telstra believes the Panel should be mindful of the risks and uncertainties likely to arise from adoption of any calls for further changes in these areas.

Similarly, Telstra considers that any calls for removal of the statutory exemption for intellectual property (IP) licences in s.51(3) of the CCA need to be closely scrutinized. S.51(3) is not a general exemption (e.g. it excludes s.46, 46A & 48) and its removal would very likely increase costs and undermine investment incentives. It is difficult to see how any diminution of the certainty and predictability of application of intellectual property rights resulting from removal of this exemption would be justified, particularly as it is not obvious that such a step would result in any significant competition benefits.

In contrast, and consistent with the same principles set out, we consider that reforms which do not substantively alter the scope of anti-competitive conduct but do assist to better balance the benefit/burden of the laws, or address existing unfairness in their application, should be looked at.

For example, we believe there are strong grounds for the Panel to recommend the following:

- **Amendment of section 47 to make all third line forcing subject to a substantial lessening of competition test**

  The current *per se* approach creates unjustifiable high compliance costs for business, who are required to notify or seek authorisation for conduct that is neutral in its competitive impact or even pro-competitive and beneficial to consumers. Not only do these processes involve payment of a fee, but notifying parties must also delay the relevant conduct until immunity from prosecution is confirmed. It is difficult to see how the financial, administrative and time burden this form of competition regulation imposes on business can be considered to be justified when the ACCC opposes very few of the hundreds of third line forcing notifications it receives annually. Both the Hilmer (1993) and Dawson (2003) committees considered that the *per se*

element of the prohibition should be replaced with a competition test, and Telstra believes this remains an appropriate recommendation and would mean the financial, administrative and time burden of notification would be largely avoided[12]. It would also be consistent both with the principles Telstra has put forward to guide reform to Part IV of the CCA, and with the Panel's policy priority (stated in the Terms of Reference and repeated in the Issues Paper) of being "mindful of removing wherever possible, the regulatory burden on business when assessing the costs and benefits of competition regulation."

- **Reform of the merger review regime**

  As noted in section 3 above, Telstra considers it would be appropriate for the Panel to recommend a follow-on enquiry focussed on addressing the deficiencies of the merger review regime, with a particular focus on increasing transparency, accountability and certainty for merger parties.

- **Removal of the Birdsville amendments and price signalling provisions**

  As noted above, Telstra considers that clarity and predictability in the operation of competition laws is vital, and that where 'gaps' are identified in the existing legislation, they should be addressed by incremental expansion of existing core provisions where possible.

  The introduction into Part IV of the CCA of a new below-cost pricing prohibition in 2007, and the new price signalling provisions in 2012, can be seen to be the antithesis of these principles at work. In both cases the new provisions deviated from established approaches to anti-competitive conduct prohibitions and in so doing employing legally untested and uncertain language.

  For example, the so-called Birdsville amendment in the form of s.46(1AA) attempts to curb the potential for a particular form of abuse of market strength, but does so in a way that is inconsistent with the broader 'misuse of market power' prohibition (s.46) it relates to[13], and it contains several important terms which are not defined[14] and can therefore be given a number of competing interpretations. In this context, Telstra notes and agrees with the recommendation of the OECD in its 2010 review of regulatory reform in Australia recommended, that this provision be repealed[15].

  Similarly, the price signalling provisions introduced into Division 1A of Part IV of the CCA represent an attempt to address a perceived gap (not universally recognised) in the ability of the law to deal with tacit collusion. In seeking to deal with this issue via introduction of a new form of prohibition rather than other more incremental adjustments to the law[16], there was a significant risk of regulatory overreach. It is arguable that is what has occurred. Additionally, the provisions only apply to banking services, which is inconsistent with the commonly accepted principle (espoused by Telstra above) that, absent strong reasons to support a different approach, competition law should be cross-sector in application.

  Accordingly, Telstra considers a good case can be made for removing these provisions. That will help to bring Part IV back into line with a more established orthodoxy for competition law provisions, and reduce the uncertainty (and related costs) for business. To the extent that consideration then needs to be given to how conduct such as predatory pricing and tacit

[12] While notification would still be available to parties requiring assurance that a proposed course of conduct involving third line forcing did not result in a substantial lessening of competition, it is likely most parties- would be able to 'self-assess' and thereby avoid further regulatory processes.
[13] In focussing on 'market share' rather than market power, and not requiring any causal connection between this market position and the conduct which may then be held unlawful under the prohibition.
[14] Specifically, the terms are "substantial share of a market", "sustained period" and "relevant cost".
[15] OECD Reviews of Regulatory Reform – Australia: Towards a Seamless National Economy (2010).
[16] Such as revisiting what constitutes an 'understanding' for the purposes of Part IV, or what constitutes a prosecutable attempt to enter into a prohibited agreement, arrangement or understanding.

collusion can be better addressed via more incremental reforms to Part IV, these would be appropriate subjects of further consultation. Any further proposed amendments to Part IV should be carefully scrutinized to ensure they are consistent with principles, such as those mentioned above, that can guide prudent legislative development in this area.