

TELSTRA CORPORATION LIMITED

Fixed line services FAD inquiry

Response to ACCC Consultation Paper on Disclosure of Report provided by
Telstra under the Building Block Model Record Keeping Rule

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1. Introduction

Telstra welcomes the opportunity to comment on the ACCC's *Fixed line services FAD inquiry: Disclosure of report provided by Telstra under the Building Block Model Record Keeping Rule* ("**Consultation Paper**"), published in March 2014. The Consultation Paper relates to confidential information contained in:

- Telstra's response on 25 November 2013 to the ACCC's request for information under the Building Block Model Record Keeping Rule (**BBM RKR**); and
- Telstra's explanatory material on 10 February 2014 to the ACCC to assist it in its understanding of Telstra's 25 November response,

together the **RKR Response**.

This submission sets out Telstra's response to the ACCC's views on the:

- material to be disclosed (Section 2);
- persons to whom material is to be disclosed (Section 3); and
- terms and conditions on which material is to be disclosed (Section 4).

2. Material to be disclosed

The Consultation Paper considers two options for disclosure as part of the fixed line services final access determination inquiry (**FAD Inquiry**):

- the disclosure of all of Telstra's material in its RKR Response to the public; or
- the disclosure of part of Telstra's material in RKR Response to the public.

Telstra agrees with the ACCC that the latter option is preferable.

Telstra understands and supports the importance of transparent regulatory decision-making processes. However, as noted in the "ACCC-AER information policy: the collection use and disclosure of information" (**Guidelines**), an appropriate balance must be struck between transparency (in terms of disclosure of information) and the protection of an information provider's highly commercially sensitive information.

Confidential information which should not be disclosed to the public

The confidential information provided by Telstra to the ACCC in its RKR Response is highly commercially sensitive, the public disclosure of which would be harmful to Telstra's legitimate commercial interests. As noted in the Consultation Paper, Telstra has identified four main categories of commercially sensitive information which should not be disclosed to the public as to do so would cause significant detriment to Telstra.

- Actual capital and operational expenditure and demand data (actuals):** Telstra considers that disclosure of this data would cause significant detriment to Telstra because Telstra's competitors would gain a greater insight into Telstra's expenditure patterns and areas of investment focus. In addition, Telstra is concerned that this information could have an impact on re-negotiations in relation to the NBN, both with respect to Telstra's negotiations with NBN Co and with respect to Telstra competing with other telecommunications providers for contracts to supply services to NBN Co.
- Forecast capital and operational expenditure and demand data (forecasts):** In order for Telstra to make minimal redactions and limited confidentiality claims in the documents forming the RKR Response, it has taken the view that previous

forecasts (with the exception of forecasts for the immediately previous year – i.e. 2013) are not confidential and may be publicly disclosed. However, Telstra considers that the disclosure of forecasts for 2013 and for the next regulatory period (including Telstra's explanations of the key drivers/assumptions on which those forecasts are based) would cause material commercial and competitive detriment to Telstra for the following reasons:

- disclosure would lead to Telstra's competitors gaining a greater insight into Telstra's expenditure patterns and areas of investment focus;
 - disclosure would provide highly commercially sensitive confidential information about Telstra's commercial intentions to competitors and undermine Telstra's ability to compete in the market;
 - disclosure could prejudice Telstra's position in commercial negotiations with suppliers and wholesale customers. Consequently, Telstra's performance in financial markets and its dealings with shareholders, investors and analysts could be affected; and
 - disclosure could have an impact on re-negotiations with NBN Co and with respect to Telstra competing with other telecommunications providers for contracts to supply services to NBN Co.
- c. **Proprietary information:** Telstra is concerned about proprietary information (e.g. formulas for calculating various forecasts, such as demand forecasts). If this information is disclosed (to the extent that the information is not already public), competitors may be able to gain an unfair competitive advantage.
- d. **Fault data:** Telstra is concerned that the disclosure of data relating to network faults could be used by Telstra's competitors to undermine confidence in Telstra's network. In addition, for the reasons set out above, Telstra is concerned that this data could have an impact on re-negotiations with NBN Co.

Telstra does not believe competition would be promoted were this information disclosed to the public, and considers that the detriment it would suffer were this information to be disclosed is not outweighed by any public benefit for the following reasons:¹

- Telstra's competitors would gain an unfair competitive advantage by having access to Telstra's highly commercially sensitive confidential information (if it is disclosed other than pursuant to a confidentiality undertaking). Telstra would, for the reasons set out above, suffer significant commercial detriment if that were the case. Telstra considers that it is not in the public interest for businesses to be competitively disadvantaged by the disclosure of their confidential information in the context of regulatory decision-making processes.
- Telstra is concerned that its confidential information would be used for purposes other than the FAD Inquiry (if it is disclosed other than pursuant to a confidentiality undertaking). As Telstra has set out above, some of the confidential information in the documents could have an impact on re-negotiations with NBN Co and with respect to Telstra competing with other telecommunications providers for contracts to supply services to NBN Co. Telstra considers that it is not in the public interest for confidential information provided in one context to be used – and potentially misused – in another context.
- Telstra is concerned that the public disclosure of complex and highly specific information prepared in the context of the Fixed Services Review and the BBM RKR may be misinterpreted by the general public and lead to confusion and misunderstanding – rather than providing greater clarity with respect to the relevant issues.

¹ The AER Guidelines requests that information providers set out reasons why the harm caused by disclosure would not be outweighed by public benefits.

- Finally, Telstra considers that information providers (including access seekers) may be more cautious about the nature of information that they disclose to Government departments and agencies if they know that there is a likelihood that that information may be disclosed publicly, especially commercially sensitive confidential information. Telstra considers that there is a public interest in enabling the free flow of information between Government departments and agencies in order to enable them to make decisions based on the best available information. To the extent that the free flow of information is impeded, that is contrary to the public interest.

Discloseable information

Telstra agrees with the ACCC that information that is not commercially sensitive to Telstra and which will not harm the interests of an individual person is information of a kind which can be disclosed to the public under section 151 BUA of the *Competition and Consumer Act 2010*.

Telstra agrees with the ACCC that information that is already in the public domain (provided that it has not become public as a result of the breach of an existing confidentiality arrangement/undertaking) is not commercially sensitive for the purposes of the BBM RKR confidentiality regime and can be made available to the public.

Telstra has considered the ACCC's comments on information pertaining to national economic factors. Telstra agrees that, so far as this information is not specific to Telstra (e.g. CPI estimates) or does not pertain to Telstra's confidential information, it is unlikely to be commercially sensitive information. However where the information is being used in a section of Telstra's RKR Response to explain confidential information (e.g. operating expenditure forecasts) and the entire section would be confidential except for the specific CPI estimate figures, it seems appropriate to redact the entire section. Alternatively, the words in the section could be redacted bar the CPI estimates themselves. However, this approach seems more confusing for a reader.

3. Persons to whom material is to be disclosed

Telstra is prepared to make its confidential information available to approved access seeker personnel (and their legal representatives and consultants) who have executed appropriate confidentiality undertakings. Telstra considers that this approach strikes an appropriate balance between protecting the commercial sensitivity and confidentiality of this information and enabling interested persons to understand and assess the substance of Telstra's documents.

In general terms, and consistent with current practice, Telstra considers that in order to strike an appropriate balance between transparent decision-making and protecting confidential information, access to confidential information in the documents should be granted to persons *approved by the information provider* (and subject to those approved persons executing a confidentiality undertaking in a form acceptable to Telstra). Telstra considers that if an information provider is not able to control whom its confidential information is provided to, this could result in information providers exercising a greater degree of caution providing information to the ACCC. Telstra notes that in ACCC regulatory processes it has accepted the vast majority of access seeker personnel proposed to it, and access seekers have, in most cases, been similarly accepting. In the event that Telstra or an access seeker refuses to give access to a person, it is usually on the grounds that that person holds a commercial role within the organisation and accordingly there is a real risk that the person could use the information in their commercial role and dealings, to the information provider's commercial detriment.

In this particular instance, Telstra agrees with the ACCC's view of whom to limit the disclosure of confidential information, i.e. to specified classes of persons with a legitimate interest in the FAD Inquiry. Telstra is concerned that organisations without a legitimate interest may seek to use the information for a purpose other than to participate in the FAD Inquiry. Telstra agrees with the classes identified by the ACCC as legitimate recipients of the information, being:

- access seeker personnel in legal and regulatory roles (who do not have dual commercial or operational responsibilities); and
- consultants or advisors engaged by an access seeker to assist in the production and provision of submissions in the FAD Inquiry.

Telstra considers it extremely important that its commercially sensitive information is not accessed by persons with commercial or operational roles in competitive organisations. The confidential information provided as part of the RKR response is highly commercially sensitive and includes information that could provide Telstra's competitors with a competitive advantage because, for example, it:

- would provide information about Telstra's commercial intentions; and/or
- could be used by competitors to obtain a greater insight into Telstra's expenditure patterns and areas of investment focus.

In addition, and in line with the ACCCs' views, Telstra considers it extremely important that the commercially sensitive information provided to the ACCC as part of the RKR process is not accessed by potential suppliers and contractors to Telstra or by NBN Co and its related bodies corporate. The confidential information includes highly sensitive information in respect of commercial agreements with others, including:

- information that could prejudice Telstra's position in commercial negotiations with suppliers and wholesale customers and, hence, affect Telstra's performance in financial markets and its dealings with shareholders, investors and analysts; and
- information that could impact on re-negotiations with NBN Co and with respect to Telstra competing with other telecommunications providers for contracts to supply services to NBN Co.

It would therefore be harmful to Telstra's legitimate commercial interests to disclose its commercially sensitive information to staff at competitor organisations with operational or commercial roles, potential suppliers and contractors to Telstra and NBN Co.

4. Terms and conditions on which material is to be disclosed

Telstra agrees with the ACCC that disclosure should be subject to approved persons having executed a confidentiality undertaking.

In general, Telstra is of the view that information providers and interested persons should develop and agree their own confidentiality arrangements with respect to confidential information. Telstra notes, however, that the ACCC's proposed undertaking (in Appendix B to the Consultation Paper) is similar to that agreed to by the industry in previous regulatory processes (as adapted for this particular process).

Telstra notes that there is one novel clause in the undertaking. Clause 6 provides that a recipient of confidential information can disclose recommendations to executive management or the Board based on the confidential information, if those recommendations are for the purpose of obtaining approval to make a submission to the ACCC in the FAD Inquiry. This is caveated by the requirement that the confidential information cannot be identified or derived from those recommendations. Telstra is amenable to this clause, noting that the caveat is particularly important and must be observed – it is important that the confidential information of Telstra's cannot be derived or identified from any recommendation for approval of a submission. The Board and executive management (who make decisions in respect of commercial and operational units of businesses) should not have access to Telstra's confidential information for the reasons set out in section 3 above. Therefore any submission

which incorporates Telstra's confidential information should not be made available to the board without required redactions.