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## **TELSTRA LIMITED**

### **Proposed affirmation about collusion for the 3.4/3.7 GHz bands auction**

**Public submission**

**22 May 2023**



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## Introduction

Telstra appreciates the opportunity to provide comments on the proposed “non-collusion” statement to be added to the Deed of Acknowledgement as a condition of participation in the forthcoming 3.4/3.7 GHz auction.

Consistent with our submission to the ACMA’s consultation on the draft instruments for the auction, Telstra supports the innovation of requiring applicants to provide a general statement warranting compliance with a key aspect of competitive spectrum auctions, namely that they are acting independently of all other auction participants and are not sharing sensitive information with one another nor engaging in other conduct which would undermine the integrity of the auction process. The proposed warrant would also, as the ACMA notes, be retrospective in its application to the period prior to an applicant providing the Deed of Confidentiality, so that there could not be an exchange of information or other conduct on the eve of the application deadline which might affect the auction outcome.

The risk of pre-auction communication between parties who may be competing bidders in a spectrum auction, being subsequently found to be in breach of the cartel conduct offences (i.e. as defined in Division 1 of Part IV of the *Competition and Consumer Act 2010*), is obviously a matter which Telstra and any other auction applicant must very carefully consider as a matter of general compliance with Australian law. The proposed requirement by the ACMA for a warrant to this effect by auction applicants does not change their obligations at law. However, Telstra recognises that confidence in the integrity of the auction would be strengthened by applicants providing an express warranty to this effect.

We additionally noted in our previous submission that such a statement could, with some limited additional text to cover proxy bidding, also obviate the need for the cumbersome “associates” disclosure process. While the ACMA does not appear to have taken this additional step for the 3.4/3.7 GHz auction, we encourage the ACMA to seriously consider our proposal for further auctions it will conduct after the forthcoming auction. Our comments below on the proposed text of the “non-collusion” statement are provided on the basis that there is a realistic possibility of it becoming a future replacement for the “associates” disclosure process and therefore needs to be sufficiently expansive in its drafting. While we consider the proposed “non-collusion” statement may be in part duplicative of protections that already exist in the “associates” disclosure process at present, we are not commenting on that duplication in this submission.

## Inclusion of the “non-collusion” statement in the Deed of Acknowledgment

Telstra supports the inclusion of the “non-collusion” statement in the Deed of Acknowledgment. There are already a number of forms which applicants need to complete using various formalities and it is not necessary to create a separate document for the “non-collusion” statement.

## Requirement for applicants to warrant they will not engage in conduct which “might reasonably be construed” as cartel conduct, should be amended to “would reasonably ...”

Telstra notes that the proposed warrant which applicants will be required to provide, is not restricted to actual cartel conduct. The warrant extends to conduct which the applicant considers, “might reasonably be construed” to be cartel conduct. While the ACMA has not provided detailed explanation of the various elements of the proposed drafting, we think (based on our reading of the text) the intention is that applicants should allow a wide “safety margin” around their own conduct at risk of being considered cartel conduct, and that the test for this assessment should be an objective test carried out in the shoes of the applicant in possession of the information known to itself (which will usually be significantly more



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information than that known to an external observer). That said, the requirement is widening the obligation upon applicants to not only have desisted from conduct preceding lodgement of the Deed of Confidentiality which would be in breach of the relevant provisions of the CCA, but additionally to have desisted from behaviour that may not ultimately be found to constitute cartel conduct.

As the ACMA is aware, current industry participants such as Telstra must, of necessity, participate in various forums in which their competitors are present. These include meetings convened by Ministerial departments on issues of policy priority for the Australian government (cybersecurity, LEO Sats, etc.), providing collective input to Australian participation in International Telecommunications Union meetings, as well as involvement in Technical Liaison Groups convened by the ACMA itself and which help define technical standards applicable to the spectrum to be allocated in the forthcoming auction. To some external observers, it “might reasonably be construed” that proposing or agreeing particular technical standards for use of the spectrum to be allocated by licensees, may exclude certain potential uses and/or particular technologies which might otherwise be deployed, and thereby be a form of cartel conduct. Telstra would strongly disagree with such an allegation for a variety of reasons that are beyond the scope of this submission, however we note this example to demonstrate the challenges inherent in asking a party to provide a warrant regarding its conduct that “might” have a particular outcome.

Telstra suggests the ACMA consider whether the “might reasonably be construed” limb runs the risk of discouraging future participation by industry in beneficial activity of the kind mentioned above, e.g. determining technical standards for newly released spectrum through expert input from potential future licensees of the spectrum. These are processes ultimately beneficial to the community as a whole and in which the ACMA has a significant interest. Therefore, an overbroad warranty requirement has potential implications for the ACMA’s own discharge of its functions. In Telstra’s view the primary commitment in the proposed statement, namely that the applicant has not engaged in cartel conduct concerning the spectrum being auctioned, should be sufficient; but to the extent that the ACMA wishes to prescribe that applicants adopt a “safety margin” approach as a condition for auction participation, Telstra proposes that the word “might” be replaced by “would” – in other words, “or would reasonably be construed to contravene ...”. In our view, the use of the word “would” sets a more appropriate limit on applicants’ pre-auction conduct than the word “might”.

### **Potential inconsistency of notice obligation with confidentiality provision in Auction Determination**

As the ACMA has observed in its consultation notes, the confidentiality rules in the Auction Determination prohibit the disclosure of information that can impact the auction outcome. However, the process following receipt of notice by an applicant/bidder in the auction differs from that applicable under the “non-collusion” warranty: under subsection 31(2) of the draft Determination the applicant/bidder has five days in which to make submissions about the allegation in the notice; whereas in the case of an applicant being put on notice under proposed clause 1.2 of the “non-collusion” statement the applicant/bidder is only provided with 48 hours to notify the ACMA.

Telstra recognises that there are differences between the two instances, in that under the confidentiality rules it can only be the ACMA providing the notification whereas under the proposed clause 1.2 of the “non-collusion” statement the applicant/bidder is being “put on notice” (this could be for example through a media report, an email from an external person, or an internal whistle-blower report). However, in substance both instances may concern a suspicion or allegation rather than an actual breach, and they could feasibly overlap and refer to the same alleged conduct. In that case there will be inconsistency between the two provisions, and it is not clear which would prevail. To address this potential inconsistency, Telstra suggests the applicant/bidder be provided with a period of up to five days to make representations to the ACMA regarding a notice it has given under the proposed clause 1.2 of the “non-



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collusion” statement, subsequent to giving that notice. This will ensure alignment with the Auction Determination period. As a matter of substance, it will also enable the applicant/bidder to better assess an allegation of suspected cartel conduct which may have appeared to have substance at first blush, but upon closer review (beyond that which can be carried out within 48 hours) does not meet the materiality/likelihood test in the “non-collusion” statement.