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## TELSTRA CORPORATION LIMITED

### Response to Department of Infrastructure, Transport, Regional Development and Communications consultation on *Draft Online Safety (Basic Online Safety Expectations) Determination 2021*

Public version

November 2021

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## 01 Introduction

Telstra supports the intent of the Online Safety (Basic Online Safety Expectations) Determination 2021 (BOSE) and is aligned with Government in seeking a digital environment in which users can interact with services in the online environment in a safe way.

We also support a flexible, outcomes-based approach to regulation and appreciate the e-Safety Commissioner adopting this approach.

However, we continue to have concerns relating to:

- the broad definition of relevant electronic services and designated internet services in the *Online Safety Act 2021 (Cth)*. Specifically, the application of the BOSE to services provided by Telstra, such as SMS and MMS, given the technical limitations of these services;
- the current timing of the BOSE implementation and how this aligns with other compliance frameworks being developed; and
- expectations regarding complaint processes about material covered by the BOSE and associated record keeping requirements.

## 02 BOSE applying to Relevant Electronic Services (RES) and Designated Internet Service (DIS)

The purpose of the BOSE is to 'articulate the Government's minimum safety expectations of online providers to take proactive steps to prevent abusive content and harmful content online'. The expectations are that providers of services captured by the BOSE will be able to identify and limit such material and, subsequently, remove, record and report on instances of such material being identified or complained about.

The BOSE is intended to apply to providers of social media services, RES and DIS. Relevant to Telstra are the definitions of RES and DIS, which capture certain services we provide in our capacity as a carriage service provider, such as email, MMS and SMS. It is one of the core expectations of the BOSE that the provider of a service takes reasonable steps to minimise the extent to which certain material is provided on their service<sup>1</sup>.

As we have stated in previous submissions, it is problematic to apply this core expectation to SMS, MMS and email services because: (a) it is not technically possible to inspect, moderate, detect or remove content from these services; and (b) even if it was, to do so may contravene other relevant legislative obligations (Division 2, Part 13 of the *Telecommunications Act 1997 (Cth)*) ("Telco Act") that we must comply with. Telstra is prohibited from intercepting communications without the knowledge of the person making the communication under the *Telecommunications (Interception and Access) Act 1979 (Cth)* ("TIA Act"). There are exceptions to the prohibition on interception and we would need to first consider whether Telstra can rely on any exceptions before intercepting and blocking communications.

Expectation (8) requires that 'providers will take reasonable steps regarding encrypted services'. For the same reasons given above, it is problematic for us to develop and implement processes to detect and address material or activity on a service that is or may be unlawful or harmful due to both technical limitations and legal obligations. As such, we are unable to meet this expectation for email, SMS, MMS services or encrypted web traffic.

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<sup>1</sup> BOSE, Core expectation 11

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The question then becomes, what are appropriate processes to put in place to meet the BOSE in these circumstances? The BOSE (Division 2(7)) expects service providers will consult with or refer to the Commissioner's guidance in determining reasonable steps. We would appreciate the e-Safety Commissioner's guidance on this.

It would be helpful if the BOSE include reference to the technical and other limitations of some services and for the e-Safety Commissioner to provide appropriate guidance to the providers of services with these technical and legal limitations. It would be helpful if such guidance would set out examples of reasonable steps that could be taken which are within the control of these service providers. We would be very happy to meet with the e-Safety Commissioner to discuss further.

### 03 BOSE implementation and timing

The BOSE requires providers of services captured by the BOSE to consult with the e-Safety Commissioner (or refer to e-Safety Commissioner guidance) in determining reasonable steps. Given there are continuing uncertainties regarding what will be expected of certain services (such as MMS, SMS, and email) captured by the BOSE, we will be relying on guidance from the e-Safety Commissioner to ensure our compliance approach meets the e-Safety Commissioner's expectations.

Once we have the guidance, implementation of the BOSE will require a review of current compliance processes and associated compliance gap analysis and, if required, the development of additional processes to meet the minimum requirements of the BOSE.

We note that the BOSE is set to come into force in January 2022, at the same time as the Online Safety Act 2021 commences. As such, the timeframes for referencing guidance and implementing any new processes is incredibly tight at any time, let alone over the Christmas/New Year break, during which time within Telstra any IT changes are embargoed, and many staff are on leave.

Additionally, this implementation is expected at a time in which associated Code rules are still being developed. The e-Safety Commissioner has noted the potential overlap between expectations set out in the BOSE and Code rules (which apply only to Class 1 and Class 2 material)<sup>2</sup>. It is important that, in places where these expectations or obligations overlap, they are consistent.

Given the supplementary compliance frameworks are still in development and therefore subject to change e.g. industry codes, RAS Declaration, age verification roadmap, we think it would be of significant value for additional time to be provided to implement the BOSE and for this to align with Code implementation timelines, that is an additional 6 months. This will also provide an opportunity for us and other service providers to review any further guidance received from the e-Safety Commissioner in the coming weeks, implement any new processes and ensure consistency between the Codes and compliance with the BOSE.

### 04 Expectations to make Reports and Complaints

Telstra customers have an opportunity to make complaints about our services. However, in relation to inappropriate material (at Division 4(13)) on services offered by Telstra and captured by the BOSE (e.g. email, SMS or MMS) it is unclear what mechanisms the e-Safety Commissioner would consider appropriate for dealing with these complaints. That is, we are unlikely to be able to investigate and assess whether the material is inappropriate due to our legal obligations under the Telco Act and the TIA Act, and the technical limitations of our services such as SMS, MMS or email prevent us from removing it. While we can have clear and readily identifiable mechanisms that enable end users to report and

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<sup>2</sup> The e-Safety Commissioner's 'Development of Industry Codes: position paper' states that *In addition to industry codes and/or standards and the other provisions of the Online Content Scheme, matters relating to class 1 and class 2 material may also be addressed by the Basic Online Safety Expectations (BOSE), a regime under the Act that sets out the Government's expectations for online safety.*



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make complaints about certain material, there is a subjective component attached to assessing whether the material is, for example, cyber-bullying material or any other of the material types covered in the BOSE. It is not Telstra's role to make such a determination. We would appreciate the e-Safety Commissioner's guidance on the best approach here.

We can advise a customer that they can make a complaint to the e-Safety Commissioner. However, if that complaint became the subject of a Removal Notice sent to us by the e-Safety Commissioner, due to technical limitations we would still be unable to act on the removal of that content.

In our view, the need to enable customers to make complaints about content described at clause (13) on services such as SMS, MMS and email – as well as keep records and make these available to the e-Safety Commissioner – is regulatory burdensome and likely to result in confusion for the customer rather than provide any additional user safety. That is, if we accept complaints about content but are not able to review or remove the content, this is likely to be confusing to customers as there is no clear path to achieve what the customer is likely to request in order to resolve an issue. Further, if we are required to keep records of receipt of these specific complaints, these are unlikely to be of any value and just be an additional cost to business.

We think it should be made clear in the BOSE, or related guidance, that keeping records in circumstances in which technical limitations prevent any action, does not apply and are unnecessary.

## 05 Providing updates to customers about Cyber Safety

Additional Expectation 18 requires providers to provide regular reminders of information about policies, terms and conditions and cyber safety, including through in-service communications. Providing information to our customers about cyber safety is important, but in-service messaging via SMS and MMS is not a practical way of reaching our customers for education purposes. Providing in-service messages via SMS communications is usually reserved for emergency situations, such as bushfires. We support the requirement to provide regular reminders, but the method of doing so should not be prescribed. There should be flexibility regarding how providers choose to make information available to end-users of updates in policies, terms and conditions etc.

## Conclusion

We reiterate our support of the intent of the Basic Online Safety Expectations (BOSE) and want to ensure Telstra can be compliant and ready once it comes into effect.

To this end, it would be helpful to have an additional 6 months to implement processes and ensure consistency between the supplementary compliance frameworks. We believe the BOSE must provide clear guidance on reasonable steps for all social media services, relevant electronic services and designated internet service providers to get clarity and reach agreement on measures to take to create and maintain a safe online environment.