TELSTRA CORPORATION LIMITED

Telstra Submission on ACCC Draft Procedural Rules

23 June 2008

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Overview

Telstra welcomes the opportunity to comment on the Australian Competition and Consumer Commission's *Draft Part XIC Procedural Rules 2008* released on 27 May 2008.

The Draft Rules are deeply flawed. Their object is to improve the operation of Part XIC, but they undermine it. In practice, they will fundamentally change the operation of Part XIC, making bureaucratic convenience more important than ensuring procedures are fair and lead to the right outcome. Many aspects of the Draft Rules go beyond the powers Parliament gave to the Commission and are invalid.

Parliament's stated intention was that granting the rule making power to the Commission would achieve two objects: timeliness of decision making and increased certainty in the procedures of the Commission.

Telstra agrees these are important objectives which could encourage investment and create less contention in the telecommunications industry, but only if they are achieved in a way that ensures decisions are fair, taking all relevant matters into account, and are accountable. This is not what the Draft Rules will achieve. What use is a fast decision if it is wrong? What use is there in being certain the ACCC will act in a particular way, if that way is unfair? There is no value in working to a set of procedural rules if the industry doesn't have confidence in the accuracy of final decisions and doesn't perceive processes as fair or within the Commission's powers. To do so would undermine the overall objective of Part XIC – the promotion of the LTIE.

The initial manifestation of this would be that access providers would be discouraged from initiating voluntary Part XIC processes such as undertakings and exemptions (which Parliament clearly intends should be the preferred ways of providing industry certainty). Further, parties will have no confidence in the fairness and justice of outcomes of Part XIC processes which are not voluntary (such as access disputes notified against them).

But the more pervasive, and ultimately more damaging, effect of the Draft Rules would be the disincentive to invest in infrastructure and services. Investors are already reluctant to make significant investment in the Australian telecommunications industry due to the high level of uncertainty Part XIC already provides. The Commission will be exacerbating this if it introduces procedural rules that make the tools provided by Part XIC to provide regulatory and investment certainty (undertakings and exemptions) even harder to obtain than they currently are. Surely, this was not what Parliament intended when it gave the Commission its rule making power.

As noted at the outset, there are three key problems with the Draft Rules:

- Some of the Draft Rules are not authorised by the enabling legislation and are therefore invalid. Some are contrary to the objects of Part XIC and the intent of Parliament. Many of the Draft Rules inherently deny procedural fairness to the parties (or, at best, leave it to the Commission's discretion whether to accord procedural fairness) and are therefore invalid.

- The Draft Rules would lead to inaccurate decisions – The Draft Rules allow the Commission simply to ignore material regardless of its merits. Any decision which ignores the substance of relevant materials because of an issue of form is inherently the wrong decision. The Draft Rules will also discourage seeking decisions that are subject to review by the Australian Competition Tribunal, meaning the Commission need never be subject to independent oversight of its decisions, and the rigour this brings to its decisions.

- The Draft Rules would not even achieve Parliament's objects of timeliness of decision-making and increased certainty in the Commission's procedures. The Draft Procedural Rules are administratively complex and onerous and provide the Commission with broad and unfettered discretion. How can a right to defer consideration of an undertaking indefinitely promote timely decision making? How can a rule that allows the Commission to decide which rules apply when and to whom promote certainty?

For these reasons, the Commission must make the effort to undertake a full revisiting of the Draft Rules and, following this, to issue a revised draft for consultation. This should be accompanied by a thorough regulatory impact assessment.

Telstra also suggests that the procedural rules should make provision for a public review to be completed within two years of their commencement. This is appropriate and important, given both the complexity of the rules as proposed by the Commission and their impact on the operation of Part XIC. Importantly, the review should measure whether the procedural rules have led to improved attainment of the objects of Part XIC (including encouraging resolution of access issues primarily through commercial negotiation or access undertakings and encouragement of investment in telecommunications infrastructure).

A Introduction

1 Telstra welcomes the opportunity to comment on the Commission's *Draft Part XIC Procedural Rules 2008* ("Draft Rules") released on 27 May 2008.

2 This submission is structured to focus on the main flaws of the Draft Rules:

- The Draft Rules being beyond the Commission's powers and contrary to the requirements of procedural fairness – section B;
- The Draft Rules sacrificing the accuracy of decision making – section C;
- The Draft Rules failing to achieve the objects set by Parliament – section D.

3 Each of these sections is informed by a detailed analysis of the Draft Rules, the results of which are set out in a rule-by-rule commentary in Attachment 1.

4 Telstra's overall conclusion on the Draft Procedural Rules is set out in Section E.

B The Draft Rules turn Part XIC on its head and are beyond power in many respects

5 The Draft Rules essentially change Part XIC from what Parliament intended. Many of the rules are invalid because the Commission was not given any power to make them. Many of them are invalid because the Commission is (directly or indirectly) taking away parties' rights, including the right to procedural fairness and the opportunity for merits review of Commission decisions.

The Draft Rules rewrite Part XIC

6 The clear policy intention of Parliament in enacting Part XIC was to give priority to the determination of access rights and terms and conditions of access by way of commercial negotiations, and if those failed, through industry-wide processes such as undertakings and exemptions that promoted broad consultation. Private bilateral arbitrations were only intended as a last resort.

> *"the ACCC should generally give priority to the consideration of undertakings in preference to arbitrations."*[1]

7 The Draft Rules should therefore be focused on giving effect to the broader legislative intention applicable to Part XIC. In particular, the Draft Rules should be aimed primarily at facilitating (a) the lodgment of access undertakings and exemptions and (b) the process for considering and accepting access undertakings and exemptions. Given the difficulties access providers (not just Telstra) have faced in having undertakings accepted, in particular, there is a pressing need for improvements aimed at facilitating acceptance.

8 However, there is virtually nothing in the Draft Rules that is actually targeted at either one of these objectives. To the contrary, the Commission appears intent on undermining the undertaking process in particular by granting itself broad discretions to defer consideration of undertakings for an indefinite period of time. The Draft Rules provide no guidance or mechanisms whatsoever which might assist access providers to lodge undertakings or exemptions or to be clearer about how the Commission will facilitate the consideration of undertakings or exemptions.

9 Rather than facilitating the lodgment and acceptance of undertakings and exemptions, the Commission instead is making these processes so unworkable, so burdensome, and so uncertain that access providers would simply not use them at all. This might cause the Commission to breathe a sigh of relief for all the work it will save itself (and that there will be no appeals to the Australian Competition Tribunal to keep in mind), but it does not promote the LTIE or achieve Parliament's intent.

10 The Commission is essentially rewriting Part XIC with the Draft Rules by promoting the resolution of all access issues through bilateral access disputes: processes that do not benefit from public scrutiny, industry-wide consultation or the rigour imposed on decision-making by rights of merit review. And lest anyone suggest that that is the current reality anyway, regardless of Parliament's intentions, the Commission is seeking fundamentally to change the

[1] Explanatory Memorandum to the *Telecommunications Competition Bill 2002* at p.88

nature of access disputes, particularly through the rules relating to confidentiality and declarations of completeness, imposing onerous and damaging duties and obligations that are unacceptable in processes to which one party is not a voluntary participant.

11 With respect to the power to defer consideration of access undertakings, in particular, the Commission's explanatory statement for the Draft Rules seems to suggest that this is because access providers sometimes submit undertakings prematurely or they submit "unacceptable" undertakings. In those circumstances, the Commission clearly wishes to have the power simply to refuse to consider the undertaking. Taking such a step is essentially prejudging the merits of an application. It deprives the applicant and all participants the right to consider the undertaking openly and transparently. A decision to defer is not, however, a rejection, and so cannot be appealed to the Australian Competition Tribunal. The Commission therefore seeks to give itself the power to prejudge that certain undertakings are "unacceptable", not consult on them, not consider their merits in any way, and deprive the access provider of its legislated right to a decision and merits review. Furthermore, there is no limitation on the Commission's ability to exercise its power of deferral: the Draft Rule gives the Commission the unilateral right to defer consideration of an access undertaking at any time, for any reason (and one does not have to be provided), simply by giving notice to the party who filed it. One can only ask whether the Commission might be tempted to use this power for the purpose of avoiding having to make a decision, which could then be reviewed by the Australian Competition Tribunal.

12 These points are demonstrated by the following examples:

- The Commission currently makes formal information requests of applicants in undertakings and exemptions which are impossible to answer: information which is not within the applicant's knowledge or control and cannot be obtained by the applicant. In this situation, under the Draft Rules the Commission could reject the undertaking or exemption application, regardless of the relevance or importance of the information to the final decision. Relodging and recommencing the process is not a solution as the Commission can simply make the same unanswerable information request. Even if it were an information request that could be answered, but not in the timeframe specified by the Commission, rejection of the entire application on the grounds of lateness, regardless of the importance or relevance of the information, would require the applicant to recommence the entire process, at considerable inconvenience to everyone involved, including the Commission. (rule 37).

- The Commission can simply decide, for any reason whatsoever, to defer its decision on an undertaking, and at any time. So again, an access provider who has gone to considerable lengths to establish a case before the Commission as to why its terms of a declared service are reasonable and ought to be accepted, can be stymied in ever receiving a decision in that process by the Commission simply deciding to defer its decision. (rule 27). Meanwhile, the power of the Commission to determine the same issues in arbitrations as those that are included in the undertaking, continues unabated, and without the benefit of merits review.

- It seems likely that access providers (who are the parties which must provide the most materials in undertaking and exemption processes) will have real difficulty in providing a declaration of accuracy and completeness for substantial amounts of that material. This is not because it is inherently unreliable or lacking credibility, much less

deliberately seeking to mislead, but because in most cases no person could be expected to open themselves to criminal penalties by asserting the truth and completeness of material they have not themselves prepared. This will mean that access providers are hampered in the material they are able to submit in support of undertakings and exemptions, reducing the likelihood of being able to satisfy the Commission to grant the application. The Draft Rules will make it far less likely that an undertaking or exemption will ever be granted. (rule 11).

- Rule 11 also has the effect of requiring parties to provide the Commission with anything that may impact its case. This is well beyond what any court in Australia demands of parties appearing before it. It is also quite an extraordinary ask of a regulator which, under Part XIC, is expressly not required to observe the rules of evidence. Why should the Commission seek to empower itself with greater powers than a Court? It is a bold leap to equate presenting submissions and evidence that advance one's case as inherently misleading the Commission.

- The confidentiality regime proposed by the Commission, and which it is able to enforce, does not provide any protection to an access provider's confidential information provided to the Commission. Any member of the public can request access to any confidential information before the Commission, and there is no ability to withhold that information from them (even where the person requesting the information has no interest in the matter concerned, or where the confidential information would be extremely valuable to them commercially). Indeed, the Commission's proposed regime is so impractical that it does not even require anyone to provide signed confidentiality undertakings before the information must be released to them (rules 25(1) and 25(7)). This means that no-one will be prepared to provide their confidential information to the Commission, as there is no ability to control its release. Accordingly, this information will not be provided to the Commission because the risks of commercial harm will be too great, and the quality of decision-making will be reduced accordingly. Even in private bilateral access disputes, the Commission's rules contemplate placing the public versions of parties' submissions on the Commission's website.

13 Each of the examples above on their own are sufficiently devastating to cause significant changes to the way Part XIC operates. However, cumulatively their effect is even greater. There are so many options available for the Commission in just those examples outlined above, for the Commission to either not make a decision, or to defer a process, which could be a significant one for the industry and one where the parties were looking for the potential for Tribunal guidance if any of them were dissatisfied with the Commission's approach, that Part XIC will be unworkable; it will discourage parties from participating in it and thereby increase industry dissatisfaction with the processes; and it will not operate as clearly intended by the legislature. Parliament will be forgiven for no longer recognizing the regime they implemented if these Draft Rules take effect.

The Commission was not given power to make some of the rules

14 The Commission has in many respects gone beyond the scope of its rule-making power. As a result, many of the Commission's Draft Rules would be invalid if made as drafted.

15 For example, the following aspects of the Draft Rules are invalid by virtue of being inconsistent with specific Part XIC provisions:

- the ability of the Commission to not consider exemption and undertaking applications and variations if those applications contain confidential information (rule 19).

- the ability of the Commission to publish a public version of a confidential document submitted in an arbitration on its internet site (rules 22(1) and 23(1)).

- the ability of the Commission to indefinitely defer consideration of access undertakings or access undertaking variations (Part 5).

- the ability of the Commission to join arbitrations (rule 32).

16 In addition, the Commission's rule-making powers are general in nature and do not extend to making procedural rules that would operate to limit rights provided for under the TPA or general law rights. While we have already mentioned above that the Draft Rules effectively take away the limited merits review rights that are available under Part XIC and may deny the parties the right to rely on and enforce their confidentiality rights, the Commission's grant of rule-making power also does not generally extend to making procedural rules that would operate to deny participants in Part XIC processes procedural fairness.

17 The following aspects of the Draft Rules operate to deny procedural fairness in a manner that is beyond the scope of the Commission's rule-making power:

- the obligation that the Commission disregard any document that does not contain a declaration of accuracy and completeness (rule 12).

- the unconfined discretion not to consider submissions and supporting material lodged outside an arbitrarily set time frame in voluntary Part XIC processes (rule 37).

18 Telstra has long been concerned that the Commission's current practices and procedures often fail to accord participants in Part XIC processes with a reasonable opportunity to present their case. In this regard Telstra refers to the following Federal Court proceedings currently on foot: 1560 of 2007; 1743 of 2007 and 1744 of 2007. Many of the Draft Rules will only exacerbate these problems, particularly where the Commission has reserved to itself broad discretions.

C The Draft Rules will increase regulatory error in the Commission's decisions

19 One of the key effects of the procedural rules once implemented will be on the information base that the Commission relies on in its decision-making. If that information base is, as a result of the procedural rules, variously incomplete, inaccurate, untested, or unbalanced, then there is increased potential for regulatory error and inaccurate final decisions.

20 Telstra believes that the Draft Rules suffer from just this problem, in that they systematically favour bureaucratic expediency over decision-making accuracy.

21 This is evident in a number of specific areas of the Draft Rules. For example:

- The requirement to provide a declaration of accuracy and completeness for every document provided to the Commission (Rule 11) is so onerous that it will inevitably lead to fewer documents (and hence less evidence) being voluntarily provided to the Commission - this will weaken the information base available to the Commission in all processes and will discourage access providers from making use of undertaking and exemption processes under Part XIC because they will be unable to meet the associated (and substantial) evidentiary burden. It will also unduly favour access seekers over access providers in all processes (but particularly in arbitrations), because the vast bulk of the evidence relied on by the Commission comes from the access provider;

- As mentioned above, the defects in the confidentiality regime, which result in there being no guarantee that confidential information will be kept confidential, and that access to it will be limited, means that parties will simply elect not to provide that information to the Commission. This will particularly be the case where the information is highly sensitive and commercially valuable. As such, the Commission is unlikely to receive key information that it ordinarily would receive, and therefore be able to consider, if a sound regime was adopted;

- Dispensing with the need for an oral hearing in relation to access arbitrations (Rule 31) will mean that the evidence and arguments provided by the parties to a dispute will be taken on face value rather being subjected to thorough and transparent testing and scrutiny though direct questioning of the parties and their experts by the Commissioners - this dispenses with the tried and true methods that have been used by courts and tribunals through the centuries to satisfy themselves that they have comprehensively addressed and understood the issues in dispute; and

- The time allowed for compliance with an information request in relation to undertakings or exemptions (Rule 34) will apparently be arbitrary rather than being set in some recognition of the time reasonably required to comply, if indeed compliance is possible – in order to avoid the possible consequence under the Draft Rules of the Commission deciding to simply reject the undertaking or exemption following non-compliance with the arbitrary time limit, an access provider would have to rush preparation of its response, which may lead to decision making errors that could have been avoided. More likely though, given that it would have to provide a declaration of accuracy and completeness, an access provider may be forced into non-compliance through the application of arbitrary time limits, which under the Draft Rules may lead to the Commission making

the (wholly uninformed and hence likely inaccurate) decision to reject the undertaking or exemption.

- Taken together, these examples from the Draft Rules together with others as noted in the Appendix would lead to the industry losing confidence in the accuracy of final decisions. Essentially, this is a "garbage in – garbage out" problem and will exacerbate rather than overcome any perceived shortcomings in the way these processes currently operate. If the procedural rules do not work to provide an appropriate information base for the Commission's decision making then it not only stops having any usefulness, it becomes downright harmful and would undermine the very thing that it ultimately exists to promote – the LTIE.

D The Draft Rules will not achieve the objects set by Parliament

22 Parliament intended that two key objects would be achieved by its grant of rule-making power to the Commission: timeliness of decision-making and increased certainty in the procedures of the Commission.[2]

23 The Draft Rules achieve neither. Rather, many of the rules are so administratively complex and onerous that they are likely to prolong decision-making timeframes rather than shorten them. A paramount example of this is the requirement for a signed declaration of accuracy and completeness for *all* documents provided to the Commission, including submissions (rule 11).

24 In addition, by giving the Commission a broad range of unfettered discretions, including the discretion to dispense with compliance with them altogether (rule 5), and the ability for the Commission to decide to defer any decision on an undertaking (rule 27), the Draft Rules substantially *increase* the uncertainty associated with the Commission's processes.

25 More generally, as discussed further below, the Draft Rules will frustrate the objects set by Parliament because they:

- take a one size fits all approach to the diverse range of Part XIC processes;
- are impractical and uncertain, and will substantially increase the cost of compliance; and
- are asymmetrical in their application and principles.

One size does not fit all in the context of procedural rules

26 There are numerous instances in the Draft Rules where the Commission has sought to apply the same practices and procedures to fundamentally different processes.

27 This fails to recognise that, while some rules may be appropriate for voluntary, public processes such as undertakings and exemptions, they will not be suitable for mandatory, private processes such as arbitrations. Equally, rules suited to essentially adversarial processes such as arbitrations, will not be suited to more inquisitorial processes such as exemptions and undertakings.

28 Part 4 of the Draft Rules, which deals with confidentiality, is a clear example of a "one size fits all" approach by the Commission which results in needless complexity and uncertainty. It also yields absurd outcomes such as the requirement to prepare "public" versions of submissions in "private" arbitral processes.

The Draft Rules are impractical and uncertain, and will substantially increase the costs of compliance

[2] Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill* 2005 at 5.

29 In many cases the Commission has failed to think through how the Draft Rules, both individually and collectively, would operate in practice. Furthermore, the additional time and resources required to comply with the Draft Rules has often been simply disregarded in many instances. For example, the Commission seeks to impose strict compliance on timeframes for information requests, and yet at the same time imposes additional obligations upon parties filing material to provide a public version of that material at the same time, as well as requiring individuals signing off on each and every document that it is the truth, the whole truth, and nothing but the truth.

30 A further example of the additional costs and burdens the Draft Rules will place on the industry, and access providers in particular, is the Commission's ability to decide to defer a decision in an undertaking. This decision could be taken at any time, and without any rhyme or reason. Yet an access provider may have spent a considerable amount of time, effort and money (including obtaining expert evidence, external legal advice, etc), in preparing its case – only to have the Commission say "thanks, but no thanks", and not make a decision. Similarly, a party may have gone to considerable expense and effort in obtaining evidence and information critical to its case, only to have the Commission reject it because it is filed one day outside the timeframe specified, or indeed after 5pm on the date the Commission said it was due.

31 The additional layers of complexity that would be imposed by the Draft Rules, coupled with the broad discretions the Commission has sought to accord to itself, will create confusion amongst participants in Part XIC processes about what steps are required to ensure compliance.

32 Accordingly, a thorough revisiting of the Draft Rules, including the preparation of a regulatory impact assessment, is essential, to ensure the Draft Rules are appropriate, and that their impact on the industry and industry processes is fully understood.

Draft Rules are asymmetrical in their application of obligations and principles

33 Regulators, just like companies and individuals, have a responsibility to order their affairs in accordance with sound administrative practices and within the law. Given the powers entrusted to regulators and their ability to make decisions that have significant repercussions upon the rights of individuals and corporations, this responsibility is particularly acute.

34 The Draft Rules would operate to impose a disproportionately high burden of compliance on participants in Part XIC processes when compared with the standards imposed upon the Commission itself. A clear example of this asymmetry is the tight timeframes imposed upon participants in various Draft Rules whereas no limit is placed upon the time taken by the Commission execute subsequent steps in the decision-making process.[3] This approach routinely shifts the burden and costs associated with Part XIC processes to participants. Similarly, when the Commission sets requirements for parties engaging experts, it does not impose the same obligations upon itself and its own experts, nor does it entitle parties to obtain the same information about the engagement of the expert as the Commission may obtain from the parties.

[3] See for example rules 25, 27, 34 and 35.

35 It is a bad policy outcome if the procedural rules do not ultimately facilitate thorough and timely decision-making by applying obligations associated with sound regulatory and administrative practices to the Commission itself.

36 In addition, the Draft Rules have a disproportionately negative impact upon access providers. Access seekers will tend to experience less adverse impact from excessively onerous and complex processes or a lax confidentiality regime. It is clear that access seekers, who are typically not called upon to substantiate their assertions in Part XIC processes, and who generally do not have to establish the costs involved in providing a particular service or otherwise justify terms and conditions that are offered, will bear less of the administrative and financial burden of compliance with the Draft Rules.

37 Ultimately, good regulation is self-reinforcing because it is possible to understand the good they do and support them. Conversely, bad regulation will only increase costs and frustrate industry participants. The Commission should pride itself on the accountability, fairness, rigour and accuracy of its processes and decisions. In that light, regulators should apply the same standards to themselves as they apply to the rest of the industry and they should do so in a transparent manner.

E Conclusion

38 Telstra considers that the Draft Rules are deeply flawed because they have the effect of completely rewriting the operation of Part XIC, to the extent that they will fundamentally alter the rights of parties participating in these processes – rights which the Parliament has sought to enshrine and which ought to be protected. In addition, the rules inappropriately subordinate the dual imperatives of accurate decision-making and procedural fairness in the empty pursuit of bureaucratic expediency. Furthermore, they will not even achieve their stated objects, and many aspects of the Draft Rules are outside the scope of the Commission's powers.

39 If the Commission were to proceed to finalise the Draft Rules in their current form then this would have the effect of undermining the overall objective of Part XIC – the promotion of the LTIE. If the industry doesn't have confidence in the accuracy of final decisions and doesn't perceive processes as fair or within the scope of the Commission's powers then this would:

- Discourage access providers from voluntarily initiating processes such as undertakings and exemptions - processes which the Parliament had intended should receive priority as they deal with issues (and promote debate on issues) on an industry-wide basis, and which see the Commission accountable for its decisions as these are the only processes which attract merits review; and

- In a more pervasive and ultimately more damaging way, discourage investment in infrastructure and services - investors are already reluctant to make significant investment in the Australian telecommunications industry due to the high level of uncertainty Part XIC already provides. The Commission will be exacerbating this if it introduces procedural rules that give short shrift to access providers. Surely, this was not what Parliament intended when it gave the Commission its rule making power.

40 Given the obvious flaws and the serious consequences that may eventuate if these are not remedied, the Commission must make the effort to undertake a full revisiting of the Draft Rules and, following this, to issue a revised draft for consultation. This should be accompanied by a thorough regulatory impact assessment. In essence, the Commission must:

(a) consider what are the real problems it, and the industry more generally, are experiencing with the operation of Part XIC;

(b) explore what solutions may be available to remedy those problems; and

(c) check whether, individually and as a whole, the proposed solutions would enhance the overall operation of Part XIC, by promoting correct regulatory decision-making, observing the Parliament's clear intention on how the regime is meant to operate, and hopefully resulting in a simpler process for all concerned.

41 Telstra also believes an essential part of any changes of this nature is a set review period in which the Commission and the industry can objectively assess the rules' effectiveness. Telstra therefore suggests that the procedural rules should make provision for a public review to be completed within two years of their commencement. This is appropriate given both the complexity of the rules as proposed by the Commission and their importance to the operation of Part XIC.

42 It is only if this process is undertaken that any procedural rules adopted by the Commission will actually result in accurate regulatory decisions that meet the Parliament's stated objects, and which promote confidence and certainty within the industry as to how this regime will operate. Failure to do this will have a substantial deleterious impact upon investment within the industry, and consequently on the LTIE.

ATTACHMENT 1 Comments on individual rules

A Preliminary issues

Structure of Attachment

1 This section of the submission contains an analysis of the Commission's rule-making power and then addresses Telstra's key concerns with the Draft Rules in each Part. Concerns with the rules addressed in each Part are set out in order of importance.

Scope of the Commission's rule-making power

2 The way in which the Commission has sought to change the operation of Part XIC is beyond the scope of its rule-making power in many respects. As a result, many of the Commission's Draft Rules would be invalid if made as drafted.

3 Determining whether a rule or regulation is valid is a three stage process, which requires construing the terms in which Parliament has conferred the power to make it, ascertaining the scope and legal effect of the regulation, and determining whether having that scope and legal effect is within the ambit of power.[4]

4 The Commission's rule-making power is set out in section 152ELA of the *Trade Practices Act 1974* ("**TPA**") as follows:

> "The Commission may by written instrument make rules:
>
> (a) making provision for or in relation to the ***practice and procedure*** to be followed by the Commission in performing functions, or exercising powers, under this Part; or
>
> (b) making provision for or in relation to all matters and things ***incidental*** to any such practice or procedure, or ***necessary or convenient*** to be prescribed for the ***conduct of any business*** of the Commission under this Part; or
>
> (c) prescribing matters required or permitted by any other provision of this Part to be prescribed by the Procedural Rules." [5]
>
> [emphasis added]

5 In construing the terms of that grant of power, three salient characteristics emerge.

6 First, the Commission is confined to making rules in relation to, or incidental to, its *practice and procedure* or necessary and convenient for the *conduct of its*

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[4] *South Australia v Tanner* (1989) 166 CLR 161 at 173 (Brennan J).

[5] Sections that are subject to modification or displacement are: s152CLA, s152DB, s152DK and s152DMA. Sections that are subject to particular modifications only are: s152AT(2A), s152ATA(2A), ss152AU(2A)-(3), ss152BT(2A)-(3), s 152BU(1A), s152BY(2A), ss152BZ(2A)-(3), ss152CBB(2A)-(3), s152CBC(1A), s152CBG(2A), ss152CBH(2A)-(3) and s152CDA.

business under Part XIC. The grant of power does not extend to the alteration of substantive rights of the parties provided for under Part XIC.

7 Second, section 152ELA is a general grant of rule-making power.[6] Given the general language of section 152ELA, it cannot be said to empower the Commission, either expressly or impliedly, to make procedural rules that would operate to limit rights conferred by either the enabling statute (the TPA) or common law principles.[7]

8 Third, a statute will not be read as authorising an administrative body to act in contravention of the rules of natural justice unless that authorization is expressly made or must be necessarily implied.[8] Section 152ELA (either on its own or when read together with other provisions of the TPA) does not expressly empower the Commission to make procedural rules that would operate to deny participants in Part XIC processes procedural fairness, except in certain limited circumstances. Nor is there a need for any such grant of power to necessarily be implied for the grant of power pursuant to section 152ELA to have effect.

9 The scope and legal effect of many of the Draft Rules go beyond the general grant of rule-making power set out in section 152ELA when read alone or in conjunction with the other relevant provisions of Part XIC.

10 A detailed discussion of the Draft Rules that are beyond the scope of the Commission's grant of rule-making power is set out in the rule-by-rule analysis below.

[6] We note that one exception is section 152ELA(1)(c) when read together with the other provisions of Part XIC which permit or require procedural rules to prescribe certain matters. These specific grants of rule-making power are dealt with, to the extent they are relevant, below.
[7] *Ex parte Aston Investments Pty Ltd; Re Hall* [1960] (SR) (NSW) 620.
[8] *R v City of Whyalla* [1979] 20 SASR 386 at 386 (Wells J).

B Part 1 - Preliminary

- Rule 3 favours speed at the expense of accurate and thorough decision-making and the LTIE
- Rule 5 confers an unconfined discretion upon the Commission which must be qualified to provide greater certainty
- Rule 5 should expressly state that the discretion may only be used in circumstances where the parties' respective positions and rights would not be prejudiced

Rule 3 favours speed over accurate decision-making and the LTIE

11 Rule 3 provides that the object of the procedural rules is to promote timeliness and certainty in decision-making by the Commission under Part XIC of the TPA. While timeliness and certainty are important objectives, Telstra considers that the **promotion of thorough and well-informed decision-making** should be the primary objective of any procedural rules, or indeed of any decision the Commission makes under Part XIC. This objective is notably absent from rule 3. Yet it is critical to the achievement of the overarching object of Part XIC – the promotion of the LTIE.

12 The undue emphasis on the objective of timeliness in the Draft Rules is reinforced by the Draft Explanatory Statement to the Rules ("**Draft ES**"). The notes on rule 3 in the Draft ES focus on the "early provision of information" which will, according to the Draft ES, first, maximise the Commission's time for considering the information, second, allow interested parties to comment on the information, and third, promote more informed decision-making which is in the LTIE. What this plainly ignores is that **early provision of information** is not the same as the provision of the **necessary and accurate** information on the basis of which the Commission needs to make its decisions.

13 Timeliness is only one factor relevant to the promotion of the LTIE. Timeliness is not the most important factor and must not come at the cost of accuracy. Rather, parties should be encouraged to put their best cases before the Commission, and not be actively discouraged by draconian rules and severe penalties (such as rejection of an undertaking or exemption application), in the event of non-compliance.

14 The order of subparagraphs (a), (b) and (c) of rule 3 suggests that the Commission will give priority to form over substance in carrying out its functions under Part XIC. The provision of information to the Commission at the earliest opportunity is placed first, while the objective of promoting the LTIE is placed last. This is very telling and reflects the overall nature of the Procedural Rules themselves - that the Commission is placing bureaucratic convenience over the interests of its constituents and the supposed beneficiaries of this regime, the Australian public. The objective of the procedural rules should be to facilitate the making of accurate decisions by the Commission, not merely quick ones.

15 In any event, without symmetry of operation of time limits between the Commission and participants, the objective of timely decision-making will not be met.

Rule 5 confers an unconfined discretion on the Commission which does not provide participants in Part XIC processes with any certainty

16 Rule 5 confers an extremely broad discretion on the Commission to waive the requirement to comply with the rules. This does not promote certainty in decision-making, which is a key objective of the rules, as set out in the explanatory memorandum.[9] The Draft Rules instead provide for complex, draconian and arbitrary procedures and processes that parties must comply with, only to provide in rule 5 that these requirements can be dispensed with by the Commission at any time, at its discretion, without cause or reason and without explanation to the parties involved. How can this possibly create certainty for parties?

17 Rule 5 should expressly state that the Commission's ability to dispense with compliance with the rules is confined to situations where the parties' respective positions and rights will not be prejudiced, or where the objectives of Part XIC will be enhanced. It should also impose an obligation upon the Commission to advise parties who are requesting relief from the rules, of any decision to enforce or not enforce the rules within 2 business days or before the time for compliance arises, whichever comes first.

18 Furthermore, if rule 5 is intended to operate as a "saving" provision by which the Commission can waive compliance with the rules where strict compliance would result in the abrogation of procedural fairness, it does not do this. The inherent defects in other rules cannot be cured by simply conferring a further discretion to waive compliance in particular cases on the Commission.

19 Rule 5 should include an express provision that the Commission can grant parties an extension of time for lodging submissions and documents where this is required to accord procedural fairness, or to better achieve the objectives of Part XIC.

20 In addition, Rule 5 enables the Commission to dispense with compliance with the requirements of the procedural rules before or after the occasion for compliance arises. Telstra recognises that, in some circumstances, requiring strict compliance with the Draft Rules may at times lead to a party to a Part XIC process being denied procedural fairness. It will therefore be appropriate in some cases for the Commission to exercise flexibility in applying the rules. However, this can be achieved in a way which better promotes certainty and fairness than rule 5 as currently drafted.

21 A circumstance in which the need to exercise flexibility in enforcing compliance with the rules arises where parties to a Part XIC proceeding require an extension of time in order to provide their submissions to the Commission. In particular, the complexity and breadth of submissions required from an access provider in access arbitrations may necessitate an extension of time in order to be given an opportunity to be heard. The submissions of an access provider frequently involve providing comprehensive, detailed information regarding its costs and operations. This information is essential for the Commission to arrive at an accurate and fair decision which promotes the LTIE. To this end, rule 5 should include an express provision that the Commission may extend (and further

[9] Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005*.

extend) the time period for lodging submissions and documents in Part XIC processes where this is required to provide procedural fairness.

C Part 2 - Documents

- Rule 11 is contrary to the objects of Part XIC, invalid, unfair, unnecessary and unworkable
- Rule 12 would operate to deny parties to Part XIC processes procedural fairness and is beyond power

Part 2 will operate to deny participants procedural fairness

22 Rule 12 provides that a document that does not comply with Part 2 (including rule 11) will not be treated as validly lodged and that the Commission will not have regard to any such document.

23 This rule can, and in many cases will, deny participants in a Part XIC process a reasonable opportunity to be heard, particularly in light of:

(a) the significant problems outlined in relation to rule 11 below; and

(b) the absence of any discretion to consider a document when the principles of procedural fairness require it.

24 However, the Commission is not empowered by section 152ELA, or any other provision of Part XIC to abrogate the requirements of procedural fairness by the operation of its procedural rules. As such, rule 12 is beyond power.

25 Moreover, this inherent defect can not simply be cured by the existence of a further discretion under rule 5 for the Commission to suspend the operation of the rules.

Declaration of accuracy and completeness

26 Rule 11 is contrary to the objects of Part XIC, invalid, unfair, unnecessary and unworkable. The obligations it confers go well beyond what is necessary or appropriate for the Commission to make accurate and timely regulatory decisions, and are out of all proportion with the Commission's role under Part XIC. In addition, the proposed rule is considerably more onerous than obligations imposed in other contexts, such as Federal Court proceedings. The rule should be removed from the Draft Rules and not made by the Commission in any other form.

27 This rule would require that every document submitted to the Commission in the context of an undertaking, exemption application or arbitration include a declaration:

(a) that all information is accurate and complete; and

(b) that no matters of significance have been withheld.

28 Given the existing powers of the Commission, and the obligations that currently apply to the provision of information to the Commission, rule 11 would not improve the capacity of the Commission to make accurate, well informed and timely decisions. What is clear is that the unworkability of, and difficulties

regarding compliance with, rule 11 set out below would frustrate the LTIE by providing a compelling disincentive to lodge access undertakings and exemption applications, and for access providers to be able to establish their case adequately in arbitral contexts or declaration inquiries.

Rule 11 is entirely unworkable

29 The broad scope of rule 11 makes it unworkable for the following reasons:

(a) The requirement that each document provide complete information and not omit any significant matter will be impossible to comply with in many instances. It ignores the fact that while the totality of the information submitted to the Commission by a participant in a Part XIC process may be complete, the individual documents submitted are often interdependent. For example, a witness statement may deal with an aspect of an issue of which a witness has direct knowledge, but may need to be supplemented by additional statements or other material in order to provide complete information in relation to that issue. This supplementation would not be permitted by the proposed rule.

(b) The information in submissions in Part XIC processes is typically drawn from a wide range of sources. In practical terms, this is likely to mean that no single person has the requisite knowledge to make a declaration as to the accuracy and completeness of every piece of information in a submission. This may result in documents requiring multiple declarations, which would prevent parties from providing a complete and comprehensive summary of their case. In addition, given the short time frames generally allowed for the preparation of submissions and the strictness with which time limits may be enforced, this would substantially add to the difficulties and costs associated with meeting Commission deadlines, or lead to unnecessary delays.

(c) Telstra often seeks to rely upon material prepared by third parties in Part XIC processes, for example, academic works, Productivity Commission reports and statistical material, and third-party information relied upon more generally. Participants will simply not be in a position to provide a declaration as to the accuracy and completeness of these categories of information.

(d) In seeking to impose obligations similar to those under the Expert Witness Guidelines in relation to *all* information provided to the Commission, the Commission has failed to acknowledge the fundamental difference between the position of an expert and the employee of a party to a Part XIC process. An expert's role is to form an opinion based on the information and assumptions set out in his or her brief. An employee of Telstra has a full range of corporate knowledge and experience and before he or she could make a declaration of the kind contemplated by rule 11, it would be necessary for that employee to consider every aspect of their knowledge and experience and either reject it as irrelevant or ensure it is included in the document in question. Such an obligation is plainly unworkable.

(e) Information provided to the Commission in Part XIC processes often relates to matters of judgment and opinion, for example, economic submissions. While that information may be both rigorous and considered, it will not be information in relation to which a declaration of accurateness and completeness can be made. Even audited accounts do not typically contain an absolute guarantee of accuracy.

(f) The declaration in rule 11 is not expressly confined to the time at which it is given. As such, it makes no allowance for the correction of inadvertent errors that subsequently come to light or changing circumstances that, over time, may render information inaccurate or incomplete.

Rule 11 is contrary to the objects of Part XIC

30 The obligation proposed under rule 11 is so onerous that, when coupled with other aspects of the Draft Rules, such as the confidentiality regime, it will act as a strong deterrent to participation in voluntary industry-wide Part XIC processes.

31 In discouraging participation in voluntary industry-wide processes, the Draft Rules also increase the likelihood of regulatory error as those processes, unlike arbitrations, are subject to merits review.

32 This result would frustrate the objects of Part XIC and would be contrary to the LTIE. Parliament has seen fit to provide for exemption and undertaking processes. In addition, Part XIC expressly prefers accepted undertakings as a mechanism for determining the terms and conditions of access to declared services over arbitrations, as can be seen from the order of precedent of those alternatives in section 152AY.

33 It is clearly not for the Commission to frustrate the intent of Parliament by making procedural rules that render voluntary processes under Part XIC unworkable. Parties' participation in these processes needs to be encouraged more, not less, in order to best serve the industry and the objectives of the legislation.

Rule 11 impacts on individual rights

34 The effect of rule 11 is to shift responsibility from corporate participants in Part XIC processes to individual employees as indicated by the reference to liability under the Criminal Code in the note to rule 11(1). This is wholly unfair and unreasonable.

35 Telstra has always treated its legal obligations with the utmost seriousness and has devoted substantial time and resources to ensuring that the information it provides to the Commission is correct and thorough. Nevertheless, it is entirely unreasonable to oblige individual employees to accept personal liability for the absolute guarantee required under rule 11.

36 Even with the best of intentions, the potential risks for individuals are huge given:

(a) the fundamental problems with the rule 11 set out in this section; and

(b) the fact that full compliance will be difficult and, in many instances, impossible.

37 Furthermore, it is by no means clear that a company will be able to indemnify its employees in this regard. In addition, the obligation for a company such as Telstra to advise the Commission of the names of all of the key staff who have worked on a particular matter is unreasonable. It goes beyond reasonable information for a regulator to require, particularly where the matter being looked at is not one of a criminal nature, or suspected criminal nature.

38 There is no reasonable basis for requiring a company to individually identify each key staff member involved in a Part XIC process in this way.

Rule 11 is wholly unnecessary

39 Under Part 7.4 of the Criminal Code, giving false or misleading information to the Commission is a serious offence. This is noted in the Commission's Draft Rules.

40 These obligations are coupled with further prohibitions under the TPA relating to false or misleading evidence such as section 152DH.

41 As noted above, Telstra has always treated these obligations with the utmost seriousness.

42 There have been many occasions when Telstra has had concerns about the quality of information provided by other participants in Part XIC processes. However, the existing prohibitions are sufficient to protect the integrity and accuracy of the Commission's decision-making processes. Significantly, the Commission has rarely, if ever, sought to utilise the existing mechanisms available to it.

43 What is proposed in rule 11 would impose extremely onerous obligations upon participants in Part XIC processes in the absence of a commensurate benefit in terms of more accurate or informed decision-making by the Commission.

Rule 11 is inconsistent with the obligations imposed in other processes

44 Rule 11 even goes beyond what is required in Federal Court proceedings. For example, guideline 2.2.6 of the Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia ("**Expert Witness Guidelines**") provides:

> "At the end of a report the expert should declare that "[the expert] has made all the inquires that [the expert] believes are desirable and appropriate and that no matters of significance that [the expert] regards as relevant have, to the [the expert's] knowledge, been withheld from the Court.".

45 The Expert Witness Guidelines impose an entirely appropriate obligation upon an expert to make reasonable inquiries and declare that, to his or her knowledge, no matter of significance has been withheld. Such an obligation may reasonably be imposed upon an expert because his or her role is to offer a view based upon the information and assumptions provided in their brief, rather than to assess the underlying accuracy of the brief itself. However, rule 11 imposes an obligation to provide an entirely unqualified declaration. The result is that it would not be sufficient for a person making a declaration under rule 11 to simply make reasonable inquiries to satisfy him or herself that a document complies. The requirement that the information provided meets the criteria set out in rule 11 is absolute.

46 In addition, rule 11 introduces a requirement of completeness not contemplated by the Expert Witness Guidelines. While this may, on its face, appear to be desirable, it will be extremely difficult to comply with in practice because there is rarely a clear line to be drawn around the outer bounds of information on a given topic. This is particularly so when dealing with matters of economic theory or costs as is often required in the Part XIC context.

47 Furthermore, the definition of "document" in the rules is extremely broad and includes "any document provided to the Commission in an electronic or non-electronic form in connection with a Part XIC process". Unlike the Expert Witness Guidelines which apply only to the evidence of expert witnesses, rule 11 applies to every single document submitted to the Commission. On its face, this would

include submissions, cost models and academic articles upon which parties seek to rely and any other material that may be relevant to a Part XIC process.

Rule 10 - Experts reports: general comments

48 Under rule 10(8) the use of the word "provisional" is not necessary or appropriate. An expert's report may be contingent on certain research findings being made out, or it might be based on assumptions, which may or may not be established. However, "provisional" is not the correct characterisation of such a report.

49 Rule 10(10) requires an expert to provide the Commission with "details" of extrinsic material. This obligation should be qualified by: "to the extent practicable" and additional time to provide that material should be allowed. As is often the case, it may take additional time to substantiate (in the appropriate form) all the material relied on by an expert due to last minute changes by that expert. Additional time may be required to do this and there may be reasons why the expert report should go in before the other materials. In addition the meaning of "details" is unclear. Is the Commission requiring a description of the material or the content itself?

50 The term "or other extrinsic matter" is exceptionally broad. Rule 10(10) could be construed as meaning that the Commission requires everything that the expert relied on. The rule also appears to duplicate the provisions of rule 10(6) which requires a party who had retained an expert to provide a list of the documents and any other material relied upon that the expert has been instructed to consider.

Asymmetry of obligations regarding Commission experts

51 Rules 10(6) and 10(7) would impose obligations upon participants in Part XIC processes that are not imposed upon the Commission with regard to its own experts.

(a) Rule 10(6) empowers the Commission to obtain details of the information relied upon by an expert retained by a participant, but does not allow a participant to obtain the same information regarding an expert retained by the Commission.

(b) Rule 10(7) imposes an obligation on participants requiring them to notify any change in the views of their experts, while the Commission is not obliged to advise the participants of any change in its experts' views.

52 The result is that the Commission's experts' views cannot be tested and scrutinised in the same manner as parties' experts. This is inappropriate, and does not promote transparent and accurate decision-making, as it places the Commission's experts on a separate and uneven footing to the parties' experts.

The obligation to inform the Commission if an expert changes an opinion is also unduly onerous and impractical

53 Rule 10(7) obliges a person who provides the Commission with an expert report to advise the Commission if the expert changes a material opinion. This obligation is unduly onerous and unworkable because it:

(a) continues indefinitely; and

(b) would require the person who tenders the report to the Commission to be continually aware of the state of mind of the expert.

54 There is no sound justification for imposing an obligation of this kind beyond completion of the Part XIC process in which the expert report is submitted.

55 Furthermore, rule 12 goes beyond what is contemplated in court processes where a failure to provide the declaration will go to weight, but will not permit a court to disregard the evidence altogether.

The obligations in relation to the form of documents are unduly onerous and impractical

56 Rule 8(2) requires that any electronic document provided to the Commission be text searchable, in a readable format, capable of being printed and allow text and images to be copied from the document.[10] This will not be possible in all circumstances. For example, cost models may often be in an electronic format. Typically such material is capable of being reviewed on screen, but there may be complications associated with printing it. Furthermore, in some instances, printing material subject to intellectual property rights would constitute a breach of those rights.

Contact details should be kept private

57 Rule 9 requires participants to Part XIC processes to provide contact details of two nominated people. Telstra trusts that this information would not be published on the Commission's website by virtue of the operation of rules 22(1) and/or 23(1) as this would give anyone searching the internet these details. If these contact details are to be published, then only an email address is required, not a telephone number.

[10] In addition, Telstra is aware that some PDFs are not accessible to screen readers. Apart from the use of some very old screen readers by people who wish to access online documents (Telstra understands that there are very few of these still in use), the prime current reason PDFs are not accessible to screen readers is that they are not created in such a way to be accessible.

To that end, Telstra acknowledges that many Telstra letters and other correspondence sent/submitted in PDF format in the past have been facsimile versions of printed and signed documents, and have not therefore been very accessible to screen readers. This has been done for document security.

Going forward, Telstra proposes to produce the PDFs of our correspondence to the Commission in such a way as to make them as accessible as possible to screen readers, that is, from the original text or word document, using Adobe Acrobat.

D Part 3 - Variations and modifications of a minor nature

- The scope of "*minor nature*" is unclear and requires clarification
- The 28 day timeframe is too short
- The scope of "*minor nature*" is unclear

58 Under rules 13 and 14 the Commission has the power to make variations or modifications to:

(a) declarations;

(b) applications for exemption orders;

(c) access undertakings; or

(d) access undertaking variations

that, under the Draft Rules, are taken to be of a "minor nature".[11]

59 The words "that, under the Procedural Rules, is taken to be of a minor nature" used in the relevant sections of the TPA contemplate that the procedural rules will clarify what types of variations or modifications will be deemed to be of a "minor nature". However, the Draft Rules provide no real guidance on this. Rule 13(2)(b) and 14(4)(b) state that in determining whether a variation or modification is of a minor nature regard must be had to whether the variation involves a "material change in the effect" of the instrument. Presumably, they intend that variations or modifications that involve material changes to the relevant instruments will not be deemed to be of a "minor nature". However, this is not expressed clearly in rules 13 or 14. There is no indication of the criteria or threshold that the Commission will use in determining whether the variation or modification does involve a material change to the affect of the instrument.

60 More importantly, the Draft Rules do not provide any guidance as to what constitutes a material change in this context. Comparatively small changes to the description of declared services could have very significant effects. Therefore such an unconfined scope as to what changes can be made by the Commission is of great concern.

61 Given the complex, factually sensitive and interdependent nature of the economic arguments upon which Part XIC processes are based, the effect of what may, to the Commission, seem like a "minor" change could be extremely hard to determine and could be much more significant than anticipated. Rather than promoting certainty of process, these rules promote uncertainty and are thus contrary to the objects of Part XIC. This is particularly true as the Draft Rules do not provide for any process of consultation between relevant parties before the decision is made, nor do they provide any real limitation on what can be classified as a variation of a "minor nature".

[11] See s152AO(3), s152AT(2A), s152ATA(2A), s152BU(1A), s152BY(2A), s152CBC(1A), and s152CBG(2A) of the TPA.

62 The scope of "minor" should be expressly confined to the correction of typographical, grammatical, arithmetic, or other similarly obvious errors. The Commission's power to vary the declaration definition should also be restricted to a timeframe that mirrors that proposed under rule 15, thereby maintaining a consistent approach across all instruments, and for all participants within the industry.

The 28 day timeframe is too short

63 Under rule 15 a modification notice must be given to the Commission within 28 days from the date that the relevant application is given to the Commission. This timeframe is too short. Instead, it should allow for a modification notice to be given, for example, at any time until a draft decision is made.

64 By contrast, under section 152AT(10) the Commission has 6 months in which to make a decision on applications for exemptions subject to "stop the clock" mechanisms. Under section 152AT(12) the Commission can extend that 6 month period but only with reasons and if that extension is for a period of not more than 3 months.[12] Furthermore, the Commission may vary a declaration at any time.

65 The 28 day time frame is unduly restrictive. This is particularly the case given that modification notices will only take effect if the Commission determines the modification to be of a minor nature. If the modification is of a minor nature, it will not substantially affect the Commission's decision or thinking in relation to the exemption, undertaking or undertaking variation. There can therefore be no prejudice to the Commission or the industry in allowing a more reasonable timeframe for the modification notice to be filed.

[12] With regards to undertakings, the relevant sections of the TPA are sections 152BU(5), (6) & (7) respectively.

E Part 4 - Confidential information

- Rules 19, 22(1), 23(1) & 25(6) are invalid
- Operation of Part 4 is uncertain
- Part 4 is impractical and unworkable

Rules 22(1), 23(1) & 19 are invalid

66 Telstra refers to its discussion of the Commission's rule-making power at A.2.

Rules 22(1) and 23(1)

67 Rule 22(1) provides that a public version of a confidential document is a version which may be published on the Commission's internet site. Similarly, rule 23(1) provides that the Commission may make a public document (including submissions in access disputes) available on its Internet site. On their face, both rules apply to access disputes.

68 To that extent the rules are inconsistent with section 152CZ of the TPA, which provides that access disputes are to be heard in private, unless the parties consent otherwise. There is no express provision for the procedural rules to modify and/or displace section 152CZ. Thus, insofar as rules 22(1) and 23(1) purport to modify and effectively override section 152CZ, they are invalid.

Rule 19

69 Similarly, rule 19 provides that if an exemption, undertaking, undertaking variation application or modification notice contains any confidential information, it will be treated by the Commission as invalidly lodged (rule 19(2)) and the Commission will not have regard to it (rule 19(3)). However, sections 152AT(3), 152BU(2), 152BY(3) exhaustively set out what constitutes a valid exemption, undertaking or variation, and the Commission's obligations upon receipt of one of those documents: the Commission is obliged to either accept the document or reject it. It cannot merely refuse to have regard to it or ignore it. In addition, there is no express provision for the Commission to make procedural rules which modify and/or displace those sections of the TPA. To that extent, rule 19(3) is invalid.

Rule 25(6)

70 Rule 25(6) does not accord the parties an opportunity to be heard on whether or not the Commission should withhold commercially sensitive confidential information. That abrogation of procedural fairness is not permitted by sections 152ELA or 152DK(5).

Part 4 does not allow for a consultative process for withholding information submitted by one party from another party to an arbitration

71 Part 4 does not provide for any process by which the parties are given an opportunity to be heard on the issue of whether or not particularly sensitive information should be disclosed (either at all, or to a particular requestor)[13]. That is, in establishing its proposed confidentiality regime, the Commission has assumed that all individuals participating in all Part XIC processes need to obtain access to each and every piece of information put before the Commission, irrespective of its sensitivity; the value of that information to the individual requesting access (and therefore its ability to misuse that information to the detriment of the party supplying it); and whether in fact parties are able to make informed and valuable responses to other parties' submissions without actually accessing all of the confidential information. This is a further example of the Commission simply proposing a blanket rule and assuming that it should apply in all of the circumstances, irrespective of its merits and applicability to particular cases. This creates a regime which will be extremely deleterious to the overall operation of Part XIC, and will only serve to substantially damage access providers' ability to establish their cases before the Commission, for fear of the significant commercial harm that could arise from the inappropriate and unnecessary disclosure of their confidential information to third parties.

72 It is no answer to this concern to simply respond "but the party getting access to confidential information will have to agree to keep it confidential". Once information is disclosed, the risk is there. And often it is extremely difficult to prove a breach – and of course this only seeks to lay blame after the problem has arisen and the damage has been done. It is no good shutting the door after the horse has bolted. The Commission needs to firstly ask itself whether it is necessary to open the door in the first place. It has not done this.

73 Section 152DK of the TPA allows a party to an arbitration to request that the Commission keep specified information in a document confidential, and not to provide that information to another party to that access dispute.[14] In providing for that information to be withheld, the TPA recognises that parties to an access dispute should be free to participate in the arbitral process and provide the Commission with the information necessary for it to make an informed determination, without fearing that commercially sensitive information will be disclosed to a competitor. It would be contrary to the objects of Part XIC to require a party to disclose to its competitors information which may be market sensitive, and which, if disclosed, may prejudice that party's competitive standing. Indeed, the Commission itself acknowledges that "the requirements of procedural fairness…[may] be modified by the need for confidentiality".[15]

74 Similarly, in an undertaking or an exemption context, there is no reason why a participant's commercially sensitive confidential information should be disclosed to any and all persons (irrespective of whether or not they are a participant in that process). There is no requirement under the TPA that this should occur.

75 Rule 25(6) provides that if parties cannot agree on terms of access to confidential information, the Commission *may* determine the terms on which the document provider will provide the requestor with a copy of that document. Rule 25(6) does not even require the Commission to consult with the parties before

[13] Explanatory Memorandum to the *Telecommunications Legislation (Competition and Consumer Issues) Bill 2005,* at 66.
[14] Explanatory Memorandum to the *Telecommunications Legislation (Competition and Consumer Issues) Bill 2005,* at 66.
[15] Commission, *Resolution of telecommunications access disputes - a guide,* March 2004 (Revised), p 40.

determining whether or not to withhold any confidential information of one party from another, let alone the factors the Commission would take into account in determining whether access should be granted. How can the Commission determine what information is to be withheld and what is not?

Meaning of "requestor" undefined

76 In voluntary Part XIC processes, such as exemptions and undertakings, rule 25(1) does not define who a "requestor" is. Thus, any member of the public could request access to confidential information, irrespective of whether or not they were a participant in the relevant process. For example, a competitor for supplying products to Telstra could request confidential information relating to the prices charged by the current supplier of that product, and could use that information to undercut the current supplier. Or, a person could request information relating to the location of Telstra's exchanges for the furtherance of criminal activities.

77 In addition, in any Part XIC process, a party may have good reasons for not wanting to provide confidential documents to an individual. For example, what if that party previously did not comply with the terms of confidentiality undertakings? A party may also wish to limit disclosure of commercially sensitive information, so that it is only provided to "identified external representatives of the other party (usually legal advisers or technical experts, subject to the execution of satisfactory confidentiality undertakings)".[16] In that regard, for both voluntary and mandatory processes, the information provider should have the opportunity to oppose providing confidential information to particular requestors. This is not accommodated in the Draft Rules, but should be.

The confidentiality regime combined with rule 11 is unfair

78 Given that the voluntary Part XIC processes (such as undertakings and exemptions) are the only processes under Part XIC which still provide for merits review of the Commission's decisions, the effect of rule 11 and the draft confidentiality regime is to deter parties from participating in those processes for which merits review by the Australian Competition Tribunal is available. Thus, through its own Draft Rules, the Commission is rewriting the operation of Part XIC by pursuing an outcome in which it is less accountable for its decisions, and which makes it less likely that parties will be able to seek merits review of its decisions. This is completely contrary to the stated objectives of Part XIC, where Parliament clearly intended that priority should be given to industry-wide processes (such as undertakings and exemptions).[17] The Commission does not have the power, to use - or rather misuse - its rule-making power to so significantly alter the operation of Part XIC and Parliament's stated intention in this manner.

The confidentiality regime does not accord an information provider the opportunity to withdraw commercially sensitive information should the Commission be minded to disclose it

79 Part 4 should expressly allow an information provider who provides commercially sensitive information (other than pursuant to a direction of the

[16] Commission, *Resolution of telecommunications access disputes - a guide*, March 2004 (Revised), p 44.
[17] See section 152AY.

Commission) to withdraw that information if the Commission rejects its request to withhold it from other parties. This would be consistent with the objects of Part XIC as it facilitates the Commission's scrutiny of sensitive information that otherwise would not be available to it. However, it is by no means an answer to the concerns outlined above – as mentioned earlier, the Commission must promote and facilitate the provision of relevant information to it, and in the case of confidential information, must allow a regime that gives confidence to those parties submitting such information that its confidential nature will be protected so as to minimise commercial harm that may arise from participating in the regime.

Treating information as confidential

80 Part 4 seems to be going to lengths to make it clear that the Commission will not actually make a finding as to whether particular confidential information is confidential or not. And rightly so, this is a question of law, and the Commission is not qualified or empowered to decide and adjudicate legal questions of this sort.

81 Nevertheless, Part 4 then proceeds to allow the Commission to treat certain confidential material as if it isn't confidential (for example, rule 20 potentially allows the Commission to treat material as not confidential, despite the provider of the information claiming it was confidential, and whether or not the Commission has formed the "opinion" that it is confidential or not). If the Commission is not empowered to decide the legal question of whether material is confidential, it cannot and should not make a rule that allows it to pretend it had the power and ignore (and essentially defeat) the parties' legal rights.

The treatment of confidential information of third parties is uncertain

82 Often, confidential information which is provided by Telstra belongs to a third party. However, how the confidentiality regime applies to third party confidential information is woefully uncertain, and creates practical difficulties for parties who are required to provide that information.

83 For example, if a party were to file confidential information with the Commission that was subject to obligations of confidence to the third party, the consent of these third parties would need to be obtained by Telstra before that information was provided to the requestor. Three business days is simply insufficient time in which to notify the third party, obtain their consent, and liaise with the requestor in relation to terms of access.

84 Nor do the Draft Rules recognise the situation, which may well arise, where the third party does not consent to providing the confidential information to the requestor. This is simply uncatered for in the rules, and presumably may place the party giving the information in a situation where they are required to hand over information to a requestor in breach of an obligation of confidence to the third party. This should not be a process that is promoted, let alone required, by the Commission.

The treatment of documents which are wholly confidential is uncertain

85 Rule 22(4) provides that the Commission may refuse to accept a public version of a confidential document if it considers the redactions are so substantial as to render it "incomprehensible". However, if a document is wholly confidential, it is impossible to provide a public version of it, or, if a public version were to be provided, it would most probably be "incomprehensible". It is highly likely that

some key documents, such as parties' cost models, are wholly confidential. The Commission could not have intended to completely and utterly fail to provide procedures for the protection of such information. Nor could it have intended that failure to provide a "comprehensible" public version of such documents would stall the consideration of an undertaking or a variation to an undertaking.

86 Further, rule 22(6) provides that the Commission will return such an "invalidly lodged" document. The effect of this is uncertain. Is it that the Commission simply will not have regard to the document, or will the Commission give the party further time in which to provide a "valid" version of that document? Again, the Draft Rules serve only to create confusion in the process, rather than promote certainty and confidence in it, and are promoting the form of materials over their substance.

The consequences of the Commission treating information as not confidential are uncertain

87 Rule 20(4) renders the already deficient confidentiality regime even more uncertain because it does not set out what the consequences are of the Commission treating information as not confidential. By such an omission, the Commission's proposed confidentiality regime is completely uncertain for parties, as it carries with it unknown risks. For example, if the Commission decides that particular information is not confidential, will it publish it? Given that risk, parties will simply not provide commercially sensitive confidential information to the Commission. This will increase regulatory error by preventing informed decision making by the Commission.

The confidentiality regime is impractical and unworkable

88 The confidentiality regime in Part 4 is riddled with impracticalities. Telstra identifies the key ones below.

89 First, one of the objectives in empowering the Commission to make procedural rules, was to "provide a mechanism to overcome delays... caused by disputes over access to and supply of confidential information".[18] However, parts of the confidentiality regime undermine this objective, rather than giving effect to it. For example, pursuant to rule 20(2), the information provider must, at the time of providing the information, provide written reasons why the information in the document is confidential. Presumably, submissions would have to be made in respect of each and every piece of confidential information in a document. This is time consuming, costly, unnecessary, and places an unnecessary burden on parties. For example, in responding to a request from the Commission for further information under section 152BT(2), a party may have only 28 days in which to gather all of that information, identify any confidential information contained in that document and then make submissions as to why that information is confidential. This is virtually impossible.

90 Second, the period within which parties must negotiate terms of access to confidential information - three business days - is ridiculously short. If the requestor is not minded to accept Telstra's terms of access, it would be easier for that party to not respond or negotiate within that time period, and then request that the Commission determine terms of access. The short time period

[18] Explanatory Memorandum to the *Telecommunications Legislation (Competition and Consumer Issues) Bill* 2005, at 66.

encourages recalcitrance on the part of some parties. By way of example, in Telstra's recent ULLS undertaking, some parties did not respond in relation to negotiation and execution of confidentiality undertakings for several months.

91 Third, the time period within which the information must be provided - 1 business day - is likewise ridiculously short. This is because the requestor may specify a particular format for the document, and a party may not be able to reformat the document and deliver it to the requestor within one day. In addition, the requestor may request a method of delivery (eg a courier to Western Australia) and a party may simply be unable to deliver the document within one day.

92 Fourth, disclosure does not even require receipt of correctly signed confidentiality undertakings prior to the release of the information to the requestor. Rules 25(7) and (10) state that the information provider must provide the confidential document within one business day of either the parties or the Commission determining terms of access (which itself is a ridiculously short timeframe), not the provision of correctly signed confidentiality undertakings. This makes the entire process proposed by the Commission a nonsense, as it affords no protection for confidential information.

93 Fifth, where the Commission determines terms on which the information is to be provided, under the current drafting, those terms need not even include a confidentiality undertaking. For example, the Commission's terms could state that the information is to be provided on a particular day, but not pursuant to a signed confidentiality undertaking.

94 When considered as a whole, it is clear that the confidentiality regime proposed in the Draft Rules is fundamentally flawed, unworkable, beyond the Commission's rule-making powers, and undermines the operation of Part XIC such that it will constrain parties from providing confidential information in Part XIC processes. This will have a significant and detrimental impact upon the quality of the Commission's decision, and will minimise opportunities for review (due to the fact that the confidentiality regime effectively operates so as to deter participation in those Part XIC processes which attract merits review).

95 The confidentiality regime must be changed, so that it is:

- within the grant of the Commission's rule-making powers;
- consistent with the objects Part XIC, including the legislative intent of prioritising voluntary industry-wide processes such as undertakings and exemptions over mandatory processes such as arbitrations; and
- adequately protects parties' confidential information.

96 Unless the Procedural Rules provide adequate protection for parties' confidential information, the processes established by Part XIC will collapse. The risk of confidential information being disclosed more broadly (which may have significant detrimental consequences commercially), will simply be too great. The procedural rules therefore need to acknowledge that there is harm in commercial information being too broadly disclosed, and that adequate controls regarding whether access is granted, to whom, and on what basis, must be provided in order to protect that information. At a minimum:

- The Draft Rules need to acknowledge that there may be some information which needs to be disclosed only to the Commission and which does not need to be disclosed to other parties;

- The party filing the confidential information should have the ability to refuse access to individuals on reasonable grounds (eg because of a reasonable risk that the confidential information may be misused or inappropriately disclosed; or that an individual previously did not comply with similar obligations in other processes; or that the individual does not require access to the confidential information in order to make a proper and informed submission to the Commission in the relevant process);

- The party providing the confidential information should have the ability to determine the appropriate and reasonable terms of access to the confidential information; and

- The party providing the confidential information should have the ability to immediately suspend approval of access to the information in the event of a breach or reasonable suspicion of a breach of the confidentiality undertaking, including the immediate return of all confidential material.

97 Otherwise, parties will be effectively deterred from participating in voluntary Part XIC processes, and submitting their confidential information to the Commission, thereby resulting in the Commission not receiving the information it needs to make accurate decisions.

F Part 5 - Deferrals

- Indefinite deferral of consideration of access undertakings and variations is beyond power
- The basis upon which the Draft Rules allow the Commission to defer consideration is unreasonably broad

Deferral of consideration of access undertakings and undertaking variations is beyond the scope of the Commission's rule-making power

98 Under section 152CDA of the TPA, the Procedural Rules may authorise the Commission to defer consideration of:

(a) an access undertaking; or

(b) a variation of an access undertaking.

However, the indefinite deferral period, the lack of a process to initiate reconsideration and the broad basis upon which the Commission may defer consideration of access undertakings or access undertaking variations under Part 5 of the Draft Rules, is completely beyond the scope of the Commission's rule-making power. It only frustrates the objectives of timely decision-making and certainty, which the Procedural Rules are meant to address.

99 It also undermines the availability of merits review of undertaking decisions, such that a party providing an undertaking could never be confident of receiving a decision from the Commission on that undertaking that could be reviewed by the Australian Competition Tribunal. It therefore seeks to rewrite Part XIC and the legislative processes that are currently available to the industry, making the Commission less accountable for its decisions. This is particularly the case when it is considered that the Commission may continue to make arbitral decisions on matters included in a party's undertaking, at the same time as the Commission indefinitely suspends its decision on the undertaking. Thus, it puts merits review of any decision it may eventually make on the undertaking out of reach, while in the meantime it presses on regardless, making arbitral decisions that do not attract merits review.

100 The Draft Rule also discourages participation in the voluntary undertaking process, contrary to the objectives of Part XIC. It is extraordinary that the Commission is attempting to give itself the power to unilaterally decide to defer having to make a decision on an undertaking – a process which is not initiated lightly, and which often involves the preparation of a considerable amount of evidence and supporting material, at considerable expense to the party providing the undertaking. For the Commission to decide that it is simply not convenient for it to make a decision; or that because of some technical non-compliance with the confidentiality regime (whether that non-compliance is by the party filing the undertaking or by a third party in whose interest it may be that the undertaking is not considered), it is not obliged to make a decision on the undertaking, is completely inappropriate. Furthermore, for the Commission to prejudge that a particular undertaking is "unacceptable" and therefore to defer consideration of it indefinitely is an effective decision to reject, made without any reference to the merits of the undertaking or the evidence, without consulting the access provider or the industry, and depriving the access provider of its rights to appeal a decision to reject the undertaking.

101 The TPA exhaustively sets out timeframes within which the Commission must make a decision, and the circumstances in which the "clock is stopped" during the Commission's decision-making process. Provisions which allow extension of the decision-making period only allow extensions for set periods. For example, under section 152BU(7) the Commission may only extend the decision-making period for 3 months. It is clear that the TPA in no way intends the Commission to have complete discretion to simply never make a decision. The point of the procedural rules is to improve the efficiency of decision-making, not to allow decisions to be avoided altogether.

102 The ability under Part 5 of the Draft Rules for the Commission to defer decision-making for an indefinite period is inconsistent with sections 152BU(5), (6) and (7), 152BY(7), (8) and (9), 152CBC(5), (6) and (7) and 152CBG(7), (8) and (9) of the TPA, and beyond the scope of the Commission's rule-making power.

G Part 6 - Use of information

- Rule 28 prevents limitations on use of information that arises as a result of the operation of law
- Rules 28 and 29 are invalid because they are inconsistent with section 152DBA
- Rule 28 restricts or delays the provision of information to the Commission, contrary to the LTIE
- External advisers engaged by the Commission should be subject to the same confidentiality arrangements as those engaged by access seekers and providers

Rule 28 should not be construed so as to abrogate general law rights or copyright

103 Rule 28 denies parties to Part XIC processes the right to impose limitations on the Commission's use of information, subject to certain "permitted limitations" – namely, an accepted confidentiality claim under Part 4 of the Draft Rules, or a limitation agreed to by the Commission in writing.

104 This ignores the fact that certain limitations on use arise as a result of the operation of law. In particular, notwithstanding rule 28, the Commission remains bound to comply with any equitable obligation to protect specific information because of the nature of the information and the circumstances in which it was provided.

105 The Commission's use of information provided in Part XIC proceedings is also limited by rights arising under the *Copyright Act 1968* (Cth). Material provided to the Commission in a Part XIC process may be protected by copyright, which the Commission cannot infringe without the licence of the owner.

106 Neither an equitable obligation of confidence nor the rights of copyright are limitations on use that are imposed by "a person", as described in rule 28. Rather, they are imposed by the operation of general law and copyright. Nothing in section 152ELA of the TPA authorises the Draft Rules to abrogate rights arising under the general law or under the *Copyright Act 1968*. Rule 28 needs to be clarified in this regard.

Rule 28 restricts or delays the provision of information to the Commission, which would be contrary to the LTIE

107 It is bad policy for the Commission to use highly confidential, commercially sensitive information for a purpose other than carrying out the function for which the information was provided in good faith. Rule 28 could result in parties exercising greater caution in providing sensitive information to the Commission in the knowledge that the information could be disclosed to their competitors in a separate proceeding. This would not promote the fully informed decision making which is in the LTIE.

108 In addition, as a matter of procedural fairness, if the Commission proposes to have regard to material gathered from another process, the parties to the arbitration must have an opportunity to respond and address the relevance of such material to that process.

Rules 28 and 29 are inconsistent with section 152DBA and thus invalid

109 In the context of arbitrations, rules 28 and 29 are beyond power because they are inconsistent with section 152DBA of the TPA. Section 152DBA exhaustively sets out the circumstances and processes by which information provided in one arbitration may be used in another arbitration; it provides:

> "(1) For the purposes of an arbitration (the ***current arbitration***) of an access dispute, the Commission may give any of the following:
>
> (a) a party to the current arbitration;
>
> (b) a representative of a party to the current arbitration;
>
> (c) any other person who provides advice or assistance to a party to the current arbitration or to the Commission;
>
> any information, or any document or part of a document, given to the Commission by a person (the ***contributor***) in the course of any other arbitration under this Division.
>
> (2) The Commission may do so only if it considers this would be likely to result in the current arbitration being conducted in a more efficient and timely manner."

110 There is no provision in section 152DBA which allows it to be displaced or modified by Procedural Rules. This view is reinforced when regard is had to section 152CZ, as set out in the above submissions, regarding rules 22(1) and 23(1). The Draft Rules must therefore be amended to be consistent with the legislation.

Rule 29 should require external advisers and legal practitioners engaged by the Commission to be subject to confidentiality arrangements before accessing information provided to the Commission

111 Rule 29(2)(d) enables the Commission to permit consultants engaged by the Commission to have access to information provided to the Commission in connection with any Part XIC process, Part XIB processes, or the Commission's other powers and functions. Rule 29(3) makes similar provision in relation to legal practitioners engaged by the Commission.

112 External consultants and legal practitioners engaged by the Commission are frequently retained to provide advice or services to access seekers in other Part XIC processes. For example, the Commission has previously engaged Gibson Quai, who were also engaged by Primus Telecommunications Pty Ltd. The Commission has also engaged NERA Economic Consulting, who were subsequently engaged by Optus Pty Ltd. Legal practitioners and external advisers engaged by the Commission must be subject to the same confidentiality arrangements as legal practitioners and external advisers of access seekers.

113 It is appropriate and necessary that the regime proposed by the Commission in relation to the engagement of experts and external advisers of parties, must be mirrored by the Commission in relation to its experts.

Interaction with rule 11

114 The problems associated with Part 6 will be exacerbated by its interaction with rule 11, which requires the supply of complete information. By virtue of Part 6, this information can be used by the Commission for other purposes, including in public processes, regardless of whether or not that information is commercially sensitive, confidential information.

H Part 7 - Access disputes

- Rule 31 favours a "behind closed doors" approach over a thoroughly considered and informed one, and minimises scrutiny of the arguments and evidence of the parties. This will lead to regulatory error
- Rule 32 confuses joint arbitrations with joinder of parties and joint hearing of arbitrations

Oral hearings

115 Rule 31 requires submissions and evidence in arbitrations to be in writing, unless the Commission decides otherwise. This indicates a clear reluctance to hold oral hearings before the Commissioners deciding the dispute. It prefers "behind closed doors" determinations to a thorough and transparent testing and scrutiny of the arguments and evidence of the parties and their experts.

116 It is only by presiding over an oral hearing (and conducting case management meetings with the parties throughout the course of the access dispute) that the Commissioners themselves - and those staff members responsible for the day to day conduct of the access dispute - can gain a thorough understanding of the issues in dispute because they are then able to ask questions directly of the parties. Indeed, without such interaction between the Commission and the parties, the chance of error in the Commission's decisions are far greater. This is particularly problematic given the fact that because parties are discouraged from participating in voluntary Part XIC processes, arbitrations become the first - rather than the last - port of call for determining terms and conditions of access to declared services.

117 Given the significant financial consequences to the parties of a final determination and the Commission's strong preference for publishing final determinations (thereby giving them wider normative effect) the Commissioners must satisfy themselves that the issues in dispute have been comprehensively addressed and understood. As courts and tribunals have successfully done through the centuries, this is best (and perhaps can only be) done in a way which allows for direct interaction between the Commissioners and the parties. This is imperative because the Commission's arbitral determinations are not subject to merits review, yet they have a direct, immediate, and often irreversible impact on the industry.

Joint arbitrations

118 Rule 32 confuses joint arbitrations with joinder of parties and joint hearing of arbitrations. Rule 32 is beyond the scope of the Commission's rule-making power as it modifies not only section 152DMA, which concerns joint hearings of arbitrations, but also section 152CO which deals with joinder of parties, in circumstances where no modification or displacement of section 152CO is permitted. Moreover, the confusion created by rule 32 puts in doubt the operation of several provisions in Division 8 by confusing notions of joined parties (who are not entitled to the benefit of a final determination) and parties to arbitrations which may be *heard* jointly, which are.

Confidentiality issues

119 Holding joint arbitrations would also raise serious problems regarding confidential information, and the legitimate commercial interests of the parties concerned.

120 Currently, when arbitrations are heard together, parties exchange submissions only on the issues in dispute between the relevant parties. However, if arbitrations are joined, then each party would be served with each submission of every party involved in the joint arbitration, including submissions on issues which are not relevant to those parties.

121 This raises significant confidentiality issues because it makes it necessary for access providers (such as Telstra) to provide access seekers with confidential information which is irrelevant to their particular access dispute, meaning commercially sensitive information is being disclosed unnecessarily and inappropriately. This cannot be in the interests of the parties concerned, nor can it possibly promote competition within the industry.

122 These confidentiality issues are only exacerbated by the unsound confidentiality regime proposed under Part 4 of the Draft Rules and the lack of protection it provides to parties who have legitimate interests in protecting their confidential information.

123 If Rule 32 is to remain, it must be amended to preserve confidentiality and the privacy of the arbitral process.

I Part 8 - Other Part XIC processes

- Rule 37 denies procedural fairness by removing the Commission's obligation to consider any documents received after the determined date
- There is no provision for dialogue between the Commission, the information provider and the person from whom the information is requested

The Commission's approach to information requests is not sound policy

124 Each of sections 152AU(2A), 152BT(2A), 152BZ(2A), 152CBB(2A) and 152CBH(2A) provide that where the procedural rules make provision for, or in relation to, a time limit for giving information, and the applicant does not provide that information within that specified time limit, the Commission may reject the principal document (exemption application, undertaking etc).

125 Rule 37 makes provision for arbitrary time limits for responses to information requests, thus enlivening those sections of the TPA. This will enable the Commission to reject the principal document (eg the undertaking or exemption application) on the basis of non-compliance with the specified time limit.

126 However, there may be a number of reasons why a person is unable to comply with a request for information at all, let alone within a specified time limit. For example:

(a) the Commission may request information which a person either does not have or is unable to obtain (eg the Commission may request information from Telstra about its competitors as it has done in relation to exemption applications - this is often information which Telstra simply does not possess);

(b) the Commission may request information be provided in a particular form (eg on a disaggregated basis) which a person cannot provide, either because of confidentiality concerns, or simply because it does not exist in that form; or

(c) the Commission's information request is so extensive that it cannot be complied with within the specified time limit.

127 Similarly, the rule does not acknowledge that information which the Commission is seeking in the information request might be available more readily, or more easily, from another source. If this is the case, then why should the Commission be able to reject the principal document (such as the undertaking or exemption application), simply because it does not look to that other source for information? The Commission, as a regulator, ought to properly investigate matters that are put before it, and be required to make a decision on them. The Draft Rules are simply a further example of the Commission seeking to abrogate its responsibilities to the industry, and under the Act, by unilaterally deciding to reject applications that are before it, thereby avoiding having to make a decision, notwithstanding that it may well be capable of making such a decision. The fact that the processes to which this power relates (undertakings and exemptions) attract merits review of the Commission's decision, further emphasises the importance that these processes are respected by the Commission, and that the Commission should be doing its utmost to make decisions in these matters.

128 Rule 37 must be deleted, or at the very least, exclude circumstances such as those listed above from its operation, including where the Commission has sufficient information before it, or available to it, to make a proper consideration on the merits. Otherwise, the rule could prevent an access provider from even having an undertaking or exemption considered due to factors which do not justify the Commission being able to reject that document.

129 In addition, the rule is pointless, in that if the party is able to provide the relevant information (albeit not within that timeframe), it would force the applicant to merely re-lodge the principal document after rejection. This would only delay the relevant Part XIC process and is inefficient and inconsistent with the objects of Part XIC. Rather, the Commission (and the rules) should recognise that a person submitting an undertaking or exemption already has a strong commercial incentive to provide the Commission (and the Tribunal on review) the information it requires for acceptance. A further incentive is created by the "stop the clock" mechanism in Part XIC.

130 The default time limit of 28 days prescribed by rule 34 is so short as to preclude compliance in many instances, particularly given the extensive nature of many of the information requests made by the Commission and the unduly burdensome declaration requirements in rule 11. It will simply operate to deny a person procedural fairness in many instances.

131 For all of these reasons rule 37 is inappropriate, as it discourages voluntary Part XIC processes, it permits the Commission avoiding having to make decisions which are subject to merits review, and it thereby will increase regulatory error and is contrary to the objects and operation of Part XIC.

Procedural fairness

132 As foreshadowed above, rule 37 denies participants procedural fairness, as it states that the Commission is not obliged to consider any document which it receives after the date specified under rule 37(1). This would effectively deny the parties the opportunity to fully present their case.

133 There is no language in section 152ELA or Divisions 3 or 5 of Part XIC which enables the Commission to make rules that abrogate procedural fairness.

134 Accordingly, rule 37 is beyond the Commission's rule-making power. It will also increase regulatory error in any decisions that are made, as information which is relevant to a party's case can be ignored by the Commission (at its complete discretion), thereby allowing the Commission to pick and choose the information that is before it.

J Part 9 - Transitional

- The transitional arrangements are uncertain in their operation
- The Draft Rules should not apply to Part XIC processes currently on foot

Transitional arrangements are uncertain in their operation

135 Rule 39(1) would operate to apply particular parts of the Draft Rules to existing Part XIC processes (ie Parts 3, 5, 6 and 8, either in whole or in part). In addition, rule 39(1)(e) would apply "the other provisions of these rules so far as they relate to [those Parts of the Draft Rules]" to existing Part XIC processes.

136 This creates a high level of uncertainty about the application of the Draft Rules to existing Part XIC processes. It may be assumed that rule 39(1)(e) would result in the schedule of definitions applying to existing Part XIC processes. However, a range of substantive rules may also "relate to" the relevant parts of the Draft Rules. This is clearly illustrated by the interaction between Parts 4 and 5 of the Draft Rules.

137 Part 5 of the Draft Rules is expressed to apply to existing Part XIC processes. Rule 27(2) provides that the Commission may defer consideration of an undertaking if a person has not complied with Part 4 of the Draft Rules. On its face, Part 4 appears to be "related to" Part 5 and enlivened with respect to existing access undertakings and undertaking variations. Part 4 is likewise referred to in Part 6 of the Draft Rules, which is also expressed to apply to existing Part XIC processes.

138 The interdependent nature of many of the provisions of the Draft Rules makes identification of those rules that will and will not apply to existing Part XIC processes, extremely difficult.

139 The transitional arrangements are therefore at odds with one of the principal objects in granting rule-making powers to the Commission, namely increased certainty in relation to the Commission's processes.

140 There are a range of policy and legal reasons why the Commission should not seek to apply its procedural rules to existing Part XIC processes. These are addressed in detail below. However, the Commission should, at the very least, expressly identify each rule and sub-rule that is to apply to existing processes to prevent such a high degree of uncertainty in the operation of the transitional arrangements.

Transitional arrangements are bad policy and invalid

141 The transitional arrangements in rule 39(1) are bad policy and will adversely affect the existing rights of participants in Part XIC processes. A significant example of this relates to the provision of information.

142 Participants in existing Part XIC processes have submitted a range of highly sensitive confidential information on the basis that:

(a) Part XIC exhaustively sets out how and for what purpose that information could be used in other processes, and that current and previous practices relating to the protection of confidential information that have been adopted under Part XIC will apply to that information; and

(b) in the case of arbitrations, the confidentiality regime provided for under Part XIC (and in particular section 152DK) would apply to the information provided.

143 To the extent that Part 6 and Part 4 (by virtue of being "related to" Parts 5 and 6) apply to existing access disputes, this will fundamentally change the manner in which information that has already been submitted may be used in other contexts and the confidentiality regime to apply to that information.

144 This is manifestly bad policy, as it demonstrates a lack of recognition on the part of the Commission of the importance of protecting commercially sensitive information and the significant detriment that may result in inappropriate use and disclosure of that information. This will discourage the provision of sensitive information in the future and is likely to have a chilling effect on participation in voluntary Part XIC processes.

145 In addition, in instances where a representation has been made that information will only be used and/or disclosed in particular circumstances, and participants in Part XIC processes have relied upon those representations to their detriment (for example by disclosing commercially sensitive information to the Commission), equitable obligations of confidence have arisen which cannot be displaced by the making of Procedural Rules in the absence of an express grant of power to do so.

146 Finally, s 12(2) of the *Legislative Instruments Act 2003* provides that legislative instruments (which the Commission's rules are expressed to be under s 152ELA(8)) have no effect if they operate retrospectively to affect the rights of a person and thereby disadvantage that person. Arguably Parts 4, 6 and 9 would operate in such a manner, and would be of no effect on that basis.