Optus Submission to

the Australian Competition and Consumer Commission

on

Draft Part XIC Procedural Rules 2008

June 2008

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1. Introduction and Executive Summary

1.1 The Australian Competition and Consumer Commission (ACCC) has called for submissions on its proposed Part XIC Procedural Rules, published in May.

1.2 Optus is generally supportive of the ACCC's rationale and objectives in setting up procedural rules. Optus considers procedural rules provide the Commission with the opportunity to address the problems of delay and regulatory gaming. Most of the ACCC's proposed rules are likely to promote the objects of facilitating the Commission's decision making process and creating greater certainty in the regulatory process.

1.3 However, in setting new procedural rules to address the problems caused by regulatory gaming, the ACCC must be very careful that its rules do not have unintended consequences. Optus is concerned that some of the proposed rules may indeed have undesirable side effects, which in some cases may undermine the objects of the Rules themselves and also the object of the ACCC's consultation processes. This issue is discussed generally in section two.

1.4 Optus considers that some of the ACCC's proposed rules are likely to create obligations on participants in the ACCC's consultations that are onerous, time-consuming and/or costly. Such rules are undesirable for several reasons:

- they may delay the regulatory process.
- they are likely to impact on relevant parties in a non-uniform manner because well resourced parties (ie Telstra) are better able to meet time-consuming and costly regulatory obligations than are under-resourced parties (such as access seekers).
- they are likely to deter public participation in the ACCC's regulatory consultation processes.

1.5 These disadvantages are significant. While the proposed rules may well advance certainty or transparency, these gains are achieved at too high a cost. Optus urges the ACCC to subject all its proposed rules to a stringent review for unintended consequences of this nature, which are contrary to the objectives of the Rules and of the ACCC's consultation processes.

1.6 In particular, Optus submits that the ACCC should reconsider the following proposed rules:

- Rules 11 and 12 which require submissions to be accompanied by individually signed declarations as to accuracy and completeness. Optus considers these rules to be unnecessary, onerous and uncertain in their application, and likely to impact in a non-uniform manner on access seekers and suppress public participation; and
- Rule 20 which requires parties submitting confidential information to list reasons for each confidentiality claim. Optus considers this rule has substantial compliance costs which are likely to impact in a non-uniform manner on access seekers.

- Rule 27 which relates to the relative priority of access disputes and undertakings. Optus considers that there should be no 'hard and fast' rule on this issue, and that the decision of which should take priority should depend on the circumstances (as discussed in section three) .

1.7 Our reasons for challenging these rules are set out in more detail in section three, in which we provide comments on each of the proposed rules.

1.8 Finally, Optus believes that confidentiality procedures are an area where the ACCC's attention is urgently required. Optus' submissions on this subject (set out in section 4) may be summarised as follows:

- Telstra's requirements for terms of access to information subject to Telstra claims of commercial sensitivity have become increasingly complex and restrictive.
- The complexity of Telstra's requirements forces access seekers to devote substantial time and resources to understanding the requirements and negotiating the terms of the regime.
- The restrictiveness of the requirements threatens to impede or prevent access seekers from participating fully in the ACCC's public consultations.
- Neither the ACCC's current approach to this issue nor its proposed procedural rules are adequate to address the problem.
- Optus proposes two potential alternative approaches to resolving these concerns on confidentiality.

  i) The first approach is for the ACCC to have regard only to information that has been made publicly available;

  ii) The second approach is for the ACCC to specify a generic confidentiality regime.

  Either approach would be reasonable (although the latter might prove more widely acceptable).

2. Object of the Rules and Unintended Consequences

2.1 In setting new procedural rules to address the problems caused by regulatory gaming, the ACCC must be very careful that its rules do not have unintended consequences. Optus is concerned that some of the proposed rules may indeed have undesirable side effects, which in some cases may undermine the objects of the Rules themselves and also the object of the ACCC's consultation processes.

2.2 The objects of the proposed Rules are discussed at section 3.2 of the discussion paper accompanying the proposed Rules, as follows:

> *The overarching object of the Rules is to promote timeliness and certainty in decision-making by the Commission under Part XIC of the Act.*
>
> *It is intended that the Rules will achieve this objective by:*
>
> - *introducing uniform processes for both access providers and access seekers*
> - *providing transparency and certainty in the Commission's procedures and decision making*
> - *enabling timeliness in the performance of the Commission's functions under Part XIC of the Act.*

2.3 More generally, the ACCC is required by legislation to provide a reasonable opportunity for members of the public to make written submissions in the context of a public inquiry (Telecommunications Act 1997, s.500(1)).

2.4 Optus submits that any procedural rules proposed for introduction should be subject to a basic test: not only should the Rule's primary objective meet one or more of the objects of the proposed Rules as set out above, but also each Rule's broad impact on the consultation process, taken as a whole, should not transgress against any of the objects of the proposed Rules or indeed the object of the ACCC's consultation processes. That is, for each proposed rule, the ACCC should consider whether the rule might:

- impact in a non-uniform manner on access seekers as compared with access providers;
- cause a deterioration in transparency, certainty or timeliness in decision-making; and
- diminish the opportunity for public participation in the ACCC's public inquiries.

2.5 If a proposed Rule will have undesirable consequences in any of these areas, it must be re-evaluated and modified – even if its primary objective would advance one of the objects.

3. Comments on the ACCC's Proposed Rules

3.1 Optus is generally supportive of the ACCC's rationale and objectives in setting up procedural rules.

Rationale for the Rules

3.2 Regulatory gaming has been a serious issue creating uncertainty in the industry. A classic example would be the ULLS, which was first declared by the Commission in 1999. In 2005 the Commission received dispute notifications from Optus and various parties regarding the terms and conditions of access. It was not until 2008 that the Commission issued a final determination on all the disputes. The final determination however is still subject to final review by the Administrative Appeals Tribunal. Optus considers the delay largely resulted from Telstra's gaming tactics. Actions Telstra has taken include:

- Lodging a series of undertakings to the Commission when the undertakings were substantially similar in nature and were clearly contrary to the Commission's Pricing Principles;
- Challenging the Commission's decision on its undertaking to the Australian Competition Tribunal;
- Challenging the ULLS declaration before the High Court on constitutional grounds; and
- At each point in the arbitral process revising matters of a minor procedural nature that required a response from the Commission.

3.3 Telstra has failed in each of the first three actions taken but it has successfully delayed the process for more than 3 years. Delays in the regulatory process could substantially damage access seekers' business as it affects our business plans and how we should set prices for the future.

3.4 Optus considers that most of the ACCC's proposed rules are likely to promote the objects of facilitating the Commission's decision making process and creating greater certainty in the regulatory process.

Commentary on Individual Rules

Rule 3 Objects of the Rule

3.5 Optus accepts the objects of the rule. We believe the proposed rule would provide an opportunity for the Commission to expedite the process and provide greater certainty to the regulatory process.

Rule 7 Provision of documents to Commission, Rule 8 Form of document, Rule 9 Contact Details

3.6 Optus accepts the proposed rule 7, rule 8 and rule 9. Optus submits these rules are non-contentious in nature and would assist the Commission to streamline the decision-making process.

Rule 10 Expert reports

3.7 Optus accepts the proposed rule only to a limited extent. Optus submits that the procedural rules could have an unintended retrospective effect for expert reports that were written before the procedural rules come into force. If the report was written a number of years ago it might be impracticable to request experts to recall clearly all relevant assumptions of fact or the questions they were asked to address.

3.8 Optus acknowledges the proposed rule would assist the Commission in understanding whether the expertise and qualifications of the expert are appropriate in addressing the relevant issues in question and that it reflects the requirements set out in the relevant Federal Court Practice Direction. However, Optus notes that the Federal Court Practice Direction is only advisory in nature. It does not prevent the Court from considering expert evidence that have not complied with the Direction. To do so would mean that the Commission is setting a higher threshold than the Court would apply in its proceedings. Optus would therefore ask the Commission to take these issues into account and amend the proposed rule accordingly.

Rule 11 Declaration of accuracy and completeness and Rule 12 Non-compliance with Part

3.9 Optus has serious concerns about the proposed rules 11 and 12, which require individuals submitting information to sign "*a declaration that the information contained in the document is accurate and complete and that no matters of significance which are considered to be relevant have been withheld.*" Optus submits the rules are unnecessary, onerous and uncertain in their application.

3.10 The ACCC's proposal appears to be aimed at encouraging completeness and accuracy in regulatory proceedings, a worthy goal. However, the ACCC's rule is not required to promote accuracy, since as the ACCC has noted, liability already exists for the making of false statements. The Commission's concern has already been addressed under Part 7.4 of the Criminal Code – giving of false or misleading information to the Commission is a serious offence. Nevertheless, the rule may promote completeness – but at what cost?

3.11 The fear of a penalty associated with making a statutory declaration along the lines suggested by the ACCC is so serious that the proposal is likely to have an effect far from that intended. The proposed Rule could have a 'chilling effect' – that is, the recognised stifling of legitimate speech activity resulting from vague or overbroad laws[1] – that will discourage participation in regulatory

[1] Chilling effects are well recognised in the context of the impact of defamation law on public expression, and in the context of legal harassment of activists via the Strategic Lawsuit Against Public Participation ("SLAPP"): litigation intended to intimidate and silence critics or opponents by burdening them with the cost of a legal defense so that they abandon their criticism or opposition.

proceedings by interested parties. The implied risk of individual liability is likely to prompt self-censorship and therefore hamper the ability of interested parties to participate properly in the ACCC's consultations.

3.12 The ACCC's proposed rule 11 falls into the category of "vague or overbroad laws", since its scope is uncertain. Both the terms "*matters of significance*" and "*relevant*" are open to interpretation. Who will decide whether information not included in a submission is "relevant" or "of significance"? Who will determine whether information not included in a submission was deliberately omitted, accidentally overlooked or deemed to be not of sufficient relevance or importance? These questions are not clear, and as a result parties seeking to participate in the ACCC's process will be taking a serious risk.

3.13 The uncertainty and onerous nature of the proposed rule could deter public participation in the consultation process. The public consultation process is designed to encourage the public and all interested parties to put forward their views to the Commission. The ACCC is required by legislation to provide a reasonable opportunity for members of the public to make written submissions in the context of a public inquiry.[2] The proposed rule however would impose an onerous requirement on individuals and therefore would dampen public participation in the process. Further, given its uncertainty, to require individuals to sign a declaration would appear to be inconsistent with the ACCC's object of improving certainty in procedures and decision making.

3.14 Another potential effect of the proposed rule is that it may induce some parties to submit vast screeds of information, in case some of it may be judged to be omitted relevant information. This is more likely to be Telstra's tactic, since Telstra is well-resourced and can afford to take a more comprehensive approach. The proposed rule will thus be a drain on the time of all parties including the ACCC. Such a result would not "enable timeliness in the performance of the Commission's functions under Part XIC of the Act". The ACCC should be trying to promote succinct, concise contributions to the debate, not telephone books worth of irrelevant data.

3.15 Access seekers, on the other hand, being less well resourced, are less likely to be able to take such a comprehensive approach to submissions and are more likely to submit information that is to hand. This approach appears particularly vulnerable to liability risk caused by the ACCC's proposed rule. Access seekers will therefore be more likely to decide not to participate in a consultation process, rather than incur a risk of uncertain application. As a result, the ACCC's proposed rule is unlikely to have a uniform impact on both access providers and access seekers; rather, it will unduly 'chill' the participation of access seekers.

3.16 Optus submits that the ACCC's proposed Rule regarding a statutory declaration would be counterproductive and would produce an impoverished and legalistic environment for regulatory proceedings. It will encourage carefully hedged submissions drafted by the incumbent's legal professionals and suppress the views of access seekers and other smaller participants who might otherwise make valuable contributions to the regulatory process.

[2] Telecommunications Act 1997, s.500(1)

Rule 13 Specification by Commission, Rule 14 Modifications of a minor nature, 15 Time allowed for giving a modification notice

3.17 Optus accepts the proposed rules 13, 14 and 15. Optus submits an update on the declaration/undertaking/exemption application to correct a typographical, grammatical, arithmetic or other similar error ought not to be considered as example of regulatory gaming and that there is no reason why it would delay the decision-making process.

3.18 Optus further submits the time frame allowed for giving a modification notice is appropriate. Changes to the undertaking/exemption application should be made within 28 days from the date of application. Otherwise the person lodging the undertaking/exemption application could abuse the proposed rule and delay the process.

Rule 16 No limitation on other powers, Rule 17 No concession of confidentiality, Rule 18 Application to Commission

3.19 Optus accepts the proposed rule 16, 17 and 18. These rules ensure the Commission's staff and its external consultants are not restricted in anyway to gain access to confidential materials submitted by parties, ensuring the Commission can accurately assess the information submitted by the parties.

Rule 19 Documents that must not contain any confidential information

3.20 Optus accepts the proposed rule 19.

Rule 20 Requests for confidentiality

3.21 Optus does not accept the proposed rule 20 since it is too onerous and is likely to impact in a non-uniform manner on access seekers.

3.22 The ACCC has proposed under Rule 20 that "At the time of providing a confidential document a document provider must provide the Commission with written reasons why the information contained in the document is confidential." Rule 20 also provides for the ACCC to consider these written reasons and decide whether or not to treat the information as confidential.

3.23 The ACCC's proposed approach would give the ACCC a degree of control over confidentiality claims, which would be likely to improve the transparency of its processes. To this extent, the proposal has some merit.

3.24 However the compliance costs of the proposed rule are substantial. It creates substantial new demands on the time and resources of all parties who wish to submit confidential information, including access providers and access seekers, as well as on the time and resources of the Commission. Indeed, conceivably the ACCC's proposed approach could result in secondary 'confidentiality submissions' from Telstra that are as long as the primary submission itself.

3.25 A potential riposte to this complaint is that if parties do not wish to spend time and resources defending their use of confidentiality, then they may instead choose not to submit confidential information, or to submit it publicly.

3.26 However, this answer ignores the imbalance of resources between the incumbent and access seekers. Telstra demonstrably has the legal resources available to defend its decision to seek confidentiality for every piece of information. Access seekers do not have the legal resources available to take this approach. Consequently, a likely outcome is that access seekers will be disadvantaged to a greater extent than Telstra (since they will choose not to submit confidential information, or to submit it publicly). The proposed rule would impair access seekers' ability to participate in the consultation process.

3.27 The ACCC's proposed approach would therefore not impact uniformly on access providers and access seekers, and it would certainly not enable timeliness in the performance of the Commission's functions (rather it would be a drain on the time of ACCC staff). Optus urges the ACCC to reconsider this rule.

3.28 Optus proposes an alternative to Rule 20 which would ensure the document provider does not withhold its information in an unreasonable manner. Optus proposes that the Commission introduce a rule stating that the Commission *may* request an individual document provider to provide a statement of reasons for each piece of confidential information for which the Commission considers the basis for the claim of confidentiality is questionable or in doubt. Where the basis for the claim of confidentiality is clear, the ACCC can choose not to challenge the claim.

3.29 Note that Optus considers confidentiality issues in more detail in the next section (and proposes two further alternative remedies).

Rule 21 Confidential information to be marked

3.30 Optus accepts the proposed rule generally. Optus however submits that under proposed rule 21(3), minor or accidental deviation from subrule (2) such as missing a 'c' when it should be 'c-i-c' should not trigger the result that the Commission treating the information as non confidential.

Rule 22 Public version of a document to be provided at the same time as confidential document

3.31 Optus accepts the proposed rule 22. Optus submits it would be reasonable to supply both the public version and confidential version of a document at the same time.

Rule 23 Publication of public documents, Rule 24 Access to public documents

3.32 Optus accepts the proposed rule 23 and 24.

Rule 25 Access to confidential information

3.33 Optus accepts the proposed rule 25(1), 25(2).

3.34 Optus accepts the proposed rule 25(3) and (4).

3.35 Optus also considers that the ACCC should specify a generic confidentiality regime (which is discussed in more detail in the next section).

Commission can act if parties cannot agree

3.36 Optus accepts the proposed rule 25(5), (6).

Provision of Copy

3.37 Optus does not agree with the proposed rule 25(8). Optus is puzzled as to how the proposed rule would promote the objects of the Rules. Optus submits the proposed rule 25(8) would further delay the decision making process and create greater uncertainty to the process.

3.38 Optus questions the need for the document provider to comply with any request by the requestor. The requestor can ask the document provider "to the extent practicable" to provide the document in a particular format, in electronic or non electronic form. Optus has always been providing documents to the requestor in the format and form which Optus has provided to the Commission. This arrangement has worked well over the years. Optus does not understand why this arrangement should change.

3.39 Further, Optus does not consider word document format is appropriate as the requestor could change the content of our submission.

3.40 In considering the terms "to the extent practicable", Optus considers the term is uncertain. It is unclear what is "practicable". The document provider and the requestor could end up wasting their resources and time in arguing the particular request is practicable or not. Considering there is only a one business day turnaround to provide the document to the requestor as listed under the proposed rule 25(7), the document provider could risk breaching the procedural rules.

3.41 Optus therefore submits the proposed rule 25(8) provides an opportunity for the requestor to game the process. As mentioned elsewhere, not all companies are as resourceful as Telstra is. It would add another regulatory burden on the document provider to comply with the request when our staff time should be used to assess the substantive issues.

3.42 Similarly, Optus does not accept the proposed rule 25(9). Optus considers the document provider and the requestor would end up wasting their time and resources in negotiating the reasonable costs in providing the copy.

3.43 Optus questions the practicality of this rule. Optus has always been providing documents to other requestors in an electronic form or in a CD. Optus considers the main costs involved in copying the submissions and documents to the requestor is in fact the staff costs which Optus believes is difficult to value and assess. It would therefore be very difficult to charge the requestor for costs.

Rule 26 Application to access disputes

3.44 Optus accepts the proposed rule.

Rule 27 Deferral of consideration of an access undertaking

3.45 Optus considers there is genuine scope to game the system in the relationship between access disputes and undertakings. Gaming can occur in both the access provider and access seeker side and that the Commission should not assume the cause of the problem lies solely with the undertaking lodged by the access provider.

3.46 The proposed rule however seems to impose a blanket rule that access dispute should give priority over undertakings. The proposed rule only confirms the Commission's power to defer consideration of access undertaking but not access disputes.

3.47 Optus reiterates the position set out in our letter of March 2006. Optus considers that the Commission should defer assessment of an undertaking and proceed quickly to issue a final determination in any relevant access dispute in circumstances where the undertaking:

- Is similar to a previous undertaking that has been rejected;
- Does not on preliminary assessment appear to satisfy criteria under s152BV of the Trade Practices Act; and
- On preliminary assessment appears inconsistent with applicable model terms and conditions relating to access to the relevant core services set by the Commission pursuant to s152AQB of the TPA.

3.48 Optus however considers it would be logical for the Commission to defer the access disputes and direct its resources in assessing the undertaking in circumstance where none of the points in paragraph 3.48 apply and where the undertaking:

- Is directly relevant to the access dispute;
- Is supported by a detailed cost model; and/or
- Is supported by significant new information.

3.49 Optus therefore considers the Commission should ensure the procedural rule also confirms the Commission's power to defer access disputes.

Rule 28 Purported limitations, Rule 29 Using information in Part XIC processes

3.50 Optus accepts the proposed rule 28 and rule 29. The proposed rule provides the Commission with the flexibility to use information provided by parties in one process to the other.

Rule 30 Procedure of the Commission

3.51 Optus accepts the proposed rule 30.

Rule 31 Oral Hearings

3.52 Optus accepts the proposed rule 31. Optus agrees that it may sometimes be more efficient to conduct hearings through written submissions.

Rule 32 When Arbitrations can be Joined

3.53 Optus does not accept the proposed rule 32. Optus understands the rationale for joining the disputes as it could streamline the Commission's decision-making process.

3.54 Optus however believes in certain circumstances, both parties might object to joining the disputes together. To join the disputes together would be against the wishes of the parties.

3.55 Optus therefore submits the Commission should only join the disputes if at least one party agree to join the disputes together.

Rule 33 Application, Rule 34 Time for compliance, Rule 35 Rejection of principal document

3.56 Optus accepts rule 33 and rule 34. Optus however considers under rule 35, minor/accidental deviation from the said timeframe should not trigger the Commission from rejecting a principal document.

Rule 36 Extending time for compliance

3.57 Optus accepts rule 36.

Rule 37 Time for submissions and supporting documents

3.58 Optus accepts rule 37.

Rule 38 Applications to new Part XIC processes, Part 39 Applications to existing Part XIC processes

3.59 Optus accepts rule 38 and rule 39.

4. Confidentiality undertakings

Problems with Telstra confidentiality arrangements

4.1 The confidentiality arrangements that set out Telstra's requirements for terms of access to information subject to Telstra claims of commercial sensitivity have become increasingly complex and restrictive. Some of these issues are set out in the following paragraphs.

4.2 ***Definition of information as confidential on spurious grounds.*** For example, regarding Telstra's proposed exemption for the supply of tail-end and inter-exchange domestic transmission capacity services in a number of capital city, metropolitan and regional centre exchange service areas, Optus notes that while it wished to assist the Commission to the best of its ability, it was prevented from responding fully by Telstra's ongoing refusal to allow Optus' internal experts to assess its confidential supporting evidence (which related to the extent of existing infrastructure in the relevant exchange service areas). This issue was raised in our letters of 1 February, 8 February and 3 April 2008. Telstra was able to use confidentiality requirements (justified by a spurious concern that commercial advantage might somehow be obtained) frustrate the ability of its competitors to participate properly in this consultation.

4.3 ***A definition of commercial and non-commercial roles*** which excludes practically all access seeker employees from viewing the information and is inconsistent with the ordinary English meaning of words. For example, in respect of "the TEA model" – Telstra's new cost model provided in support of its ULLS undertaking – a staff member's role is defined as 'commercial' if they "have a degree of contact with Optus' commercial areas". Note that this condition is unnecessary since employees in "commercial" roles would be legally prohibited (by the terms of the undertaking) from communicating confidential information to commercial staff with which they have "a degree of contact". Note also that staff in "commercial" roles are able to sign a version of Telstra's undertaking which according to Telstra, "facilitates access to Category 1 Confidential Material", however also according to Telstra, "there is currently no Category 1 Confidential Material".[3]

4.4 ***Conditions which impose obligations that do not relate to confidentiality*** (eg, in the case of the TEA model, a condition imposed on an individual access seeker staff member to "bring any suggested changes to the model to Telstra's attention"). We attach a letter from Optus to the ACCC dated 28 March 2008 which identifies a number of unreasonable confidentiality conditions for access to the TEA model. The letter notes that some of the terms of the confidentiality undertakings that set out the proposed terms of access to the model are unreasonable, not related to confidentiality issues, inconsistent with the law and/or put Telstra's commercial interests ahead of the ACCC's obligation to implement the required undertaking process.

4.5 ***Conditions which restrict communications between access seekers and their consultants*** and impair consultants' ability to communicate findings to access

[3] Telstra e-mail to Optus, 17 June 2008, "RE: TEA Model access - confidentiality undertakings"

seekers (eg, in the case of the TEA model, provision of two different versions of the information, where information provided for use by access seeker employees – but not consultants – has some information masked). For example, Optus has been informed by an external consultant that Telstra's confidentiality undertaking regarding the TEA model is likely to cause practical problems, since "In both confidentiality undertakings, information is identified that is not to be revealed to Optus. This raises the question how the findings of the examination of the model can be reported to Optus in a meaningful way without revealing anything of the nature of the underlying information and data. To spell this out more concretely: The output of the model, i.e. the cost of the ULLS, will be largely determined by values of the input data and parameters to which Optus is supposed to have no access. A finding may be that the cost for the ULLS is too high because the values of particular parameters are judged by us to be wrong. When reporting this finding and giving the reason, revealing in the process only information that [the consultant] knows from other sources, could perhaps already be construed as a breach of confidentiality. There would appear to be a grey area of wording, of ways of describing our findings, where the [consultant's] employees concerned would always feel to be under the risk of having violated the undertaking."

4.6 ***Imposition of multiple confidentiality undertakings*** in respect of the same matter (there are at least four undertakings that currently apply in the case of the TEA model). A related concern is the replacement of confidentiality undertakings with new versions, requiring the same individual to sign numerous times (eg, TEA model).

4.7 Optus considers that these problems are likely to detrimentally affect the operation of the access regime. The complexity of the regime is often such that access seekers must devote substantial time and resources to understanding the requirements and negotiating the terms of the regime. Further, the restrictiveness of the confidentiality requirements imposed by Telstra is becoming so severe that it threatens to impede or prevent access seekers from participating fully in the ACCC's public consultations.

ACCC's existing approach

4.8 The ACCC may take the view that confidentiality requirements are a private matter, to be addressed through negotiation between the parties involved. Indeed, it is possible to identify instances where confidentiality requirements issues appear to have been at least partially resolved through negotiation. However, there are two problems with this approach.

4.9 First, even if such negotiations did successfully resolve an issue, the time and resources required to achieve this result are likely to be substantial. Well resourced parties, primarily the incumbent, are better able to afford this time and resources than are less resourced parties, that is access seekers. It is relevant to observe in this regard that Telstra employs specialist regulatory lawyers whose primary tasks are to engage in regulatory procedural matters. Access seekers, by contrast, tend to employ more generalist regulatory staff who must divide their time between procedural and substantive matters. In a very real sense, each hour an access seeker must spend negotiating a

confidentiality agreement is one less hour spent considering the substantive issues the ACCC has sought comment on. This imbalance of resources provides Telstra with the ability and incentive to engage in regulatory gaming, for example, spinning out negotiations on confidentiality for as long as possible. Telstra is able to outspend access seekers and divert their limited time and resources into negotiations on ever more convoluted points of confidentiality, and away from the substantive issues. For example, Optus has been engaged in addressing confidentiality issues regarding access to the TEA model for a number of months. Optus requested access to the TEA model on the 8th January 2008, and, after protracted negotiations on confidentiality issues (which resolved some but not all of the problems), received access to a limited version of the model on the 23rd May 2008.

4.10 Second, there is a serious imbalance of power in such negotiations. As is often the case in "negotiation" between incumbent and access seeker, all the cards are held by the incumbent. It is (usually) the incumbent who possesses the confidential information (or at least the bulk of it), and the incumbent who has the power to decide the terms on which it is prepared to give access. Access seekers have very little means at their disposal to induce the incumbent to make any concessions in this area, since they have no bargaining chips: access seekers have little to offer in return for the information they require from the incumbent, and are thus vulnerable to the incumbent adopting a 'take-it-or-leave-it' approach.

4.11 The one 'outside option' available to access seekers faced with an unpalatable confidentiality regime is to refuse the terms offered by the incumbent, then make submissions in ignorance of the confidential information, and submit that the ACCC should have no regard to the inaccessible confidential information in making its decision.

4.12 However, the ACCC's power to *have no regard* to confidential information (if it considers that the information has not been widely reviewed) is a blunt instrument for addressing this problem. In particular, a decision to have no regard to some crucial piece of information on the basis of confidentiality regime issues would appear to be such a draconian and arbitrary use of power that it is unlikely ever to be used. Thus the ACCC's power to have no regard to confidential information in fact provides no comfort to access seekers, and is of little use as a bargaining chip with Telstra.

4.13 Alternatively, any ACCC suggestion that it will '*have less regard*' to some piece of confidential information (if it considers that the information has not been widely reviewed) is difficult to understand and as a result it is difficult to imagine what the actual consequences would be of the ACCC taking this position. If Telstra wishes to submit, for example, evidence consisting of numerical estimates produced by a cost model, what could it mean for the ACCC to 'have less regard' to these numerical estimates? Either the estimates are taken into account in determining the price of the service or they are not. The suspicion must be that in fact the evidence will be taken into account, regardless of the difficulties access seekers may have had in reviewing it. Thus the ACCC's power to 'have less regard' to confidential information also provides no comfort to access seekers, and is of little use as a bargaining chip with Telstra.

4.14 Nevertheless, the ACCC is not without the power to address this problem. As noted above, the chief reason that the ACCC's power to have no regard to confidential information is unlikely ever to be used is that such a position could appear arbitrary. If the ACCC can address this appearance of arbitrariness, it can increase the likelihood that the power can be used, and used legitimately. Optus submits that the ACCC should set out in advance a clear procedural rule specifying the circumstances in which it will use its power to have no regard to confidential information. Such a rule would enhance the ACCC's leverage over the providers of confidential information and ensure that such information is subject to rigorous public scrutiny. Optus proposes such a rule below.

ACCC's proposed remedy

4.15 The ACCC has itself proposed a procedural rule (Rule 20) which appears to be intended to address concerns around abuse of confidentiality regimes, by requiring a document provider to provide the Commission with written reasons why the information contained in the document is confidential.

4.16 However, the approach would not address the problems that we have outlined above. It does not prevent Telstra, for example, from arbitrarily defining access seekers' regulatory and legal personnel as being in 'commercial roles', from imposing onerous obligations unrelated to confidentiality in confidentiality undertakings and it does not seem likely to reduce the time and resources access seekers would need to devote to procedural issues.

4.17 Rather, the ACCC's proposed approach would actually create new problems for access seekers (which are noted in the previous section under Rule 20) and increase the time and resources access seekers would need to devote to procedural issues.

Optus' proposed remedies

4.18 Optus proposes two potential alternative procedural rules on confidentiality, one stronger and one weaker.

4.19 The first approach is for the ACCC to set out a procedural rule specifying that it will have regard only to information that has been made publicly available as part of the ACCC's consultation process. That is, under such a rule carriers could no longer submit confidential documents to ACCC inquiries or disputes.

4.20 This approach has clear merits:

- It is clear and unambiguous. It would provide greater certainty about the procedures that will apply to the Commission's exercise of its powers under Part XIC of the Act. All access providers and access seekers will understand the rule in advance and understand the terms on which information can be provided and had regard to.
- It would apply to and impact uniformly on both access providers and access seekers.

- It is administratively simple. It minimises demands on the time and resources of all parties including access providers, access seekers and the Commission (and thus promotes timeliness in the performance of the Commission's functions under Part XIC).

- It promotes full consideration of all information by all parties equally. The opportunities for regulatory gaming will be reduced and the playing field between access seekers and access providers will be levelled.

- It is consistent with the principles of freedom of information and transparency. Public participation in decision-making will be promoted. The public and all parties will clearly understand the reasons for the ACCC's decisions, and there will be less opportunity for any party to abuse the system in its own interest.

- It is consistent with the principle of open justice, ie the common law rule that generally, the administration of justice must be open to full public scrutiny and comment, in order to maintain public confidence in the system of justice and to safeguard against judicial arbitrariness.[4] In John Fairfax and Sons v Police Tribunal, McHugh JA said at 476: *"The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule."*

4.21 The approach also has drawbacks, in that parties may be reluctant to submit some information due to its commercial sensitivity. This problem will affect access seekers as well as the incumbent. Optus itself frequently classifies information as commercial-in-confidence, so the suggested approach would clearly cause us some difficulties. Nevertheless, the clear advantages outlined above appear likely to outweigh such concerns. The approach can be justified on the grounds that parties must accept that if they wish to participate in a regulated industry and have decisions made which take into account their commercial information, they must be prepared to accept public scrutiny of that information. We would anticipate that Telstra would agree to such an approach, given its frequent use of the Freedom of Information legislation.

4.22 The second proposed approach is for the ACCC to specify a generic confidentiality regime to apply in consideration of access exemptions, access undertakings and access disputes, and to set out a procedural rule specifying that it will have regard only to information that has been made available subject to that confidentiality regime. The ACCC's regime should specify in detail matters including:

- The type of information which may be subject to confidentiality;

- Parties who are to be allowed access, including a reasonable definition of commercial and non-commercial roles (if appropriate); and

[4] For example, McPherson v McPherson [1936] AC 177; Russell v Russell [1976] 134 CLR 495; R v Tait [1979] 46 FLR 386.

- Allowed conditions (relating only to confidentiality and not to extraneous matters, with restrictions on obligations allowed to be placed on individuals).

4.23 In particular, the ACCC's regime should specify that *all* material in submissions will be available to staff of access seekers in regulatory and legal roles (as defined by the ACCC). It should also specify the types of material which should always be public.

4.24 The ACCC's regime should seek to be clear and unambiguous in its terms, in order to minimise required correspondence and negotiations. It should be administratively simple and minimise compliance costs. To the extent it meets these goals a generic regime would impact uniformly on both access providers and access seekers, and reduce the time and resources access seekers would need to devote to procedural issues.

4.25 While less consistent with the principles of freedom of information and transparency than the first approach proposed, a generic regime would at least address the worst excesses of Telstra's confidentiality regimes and would not impose an undue burden on under-resourced access seekers.

Attachment 1

Optus, 28 March 2008, Letter to ACCC, *Telstra ULLS Undertaking – Unreasonable Confidentiality Conditions for Access to the Telstra Efficient Access Model*