Draft Determination - Model Non-price Terms and Conditions

Submission by Telstra Corporation Limited in response to the ACCC Draft Determination on Model Non-price Terms and Conditions of June 2003

21 July 2003

CONTENTS

EXECUTIVE SUMMARY

1 OVERVIEW

Telstra welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission (**"Commission"**) in response to the Commission's Draft Determination of June 2003 titled *"Draft Determination - Model Non-Price Terms and Conditions"* (**"Draft Determination"**).

Telstra's submission follows a similar format to the Draft Determination and has three parts, as follows:

- Part 1 of this submission sets out Telstra's comments on the Commission's Introductory Section (Part 1) of the Draft Determination;
- Part 2 of this submission sets out Telstra's comments on the specific issues dealt with in Part 2 of the Draft Determination;
- Annex A of this submission sets out Telstra's proposed amendments to specific draft model clauses in Part 3 of the Draft Determination, together with a brief explanation of the proposed amendment where it is not explained in Part 2.

2 INTRODUCTORY SECTION

Given that industry practice in the telecommunications sector is constantly evolving, Telstra submits that any model terms and conditions are likely to have little practical effect unless they are tailored to reflect both current and future market conduct. Telstra agrees with the Commission that "if and when a particular model term and condition no longer reflects current market conditions, it will be appropriate for the Commission to revise its view in respect of that particular term and condition".

Telstra also agrees that model terms and conditions should be consistent with relevant legislation and Codes and, in particular, with Part XIC of the Trade Practices Act 1974 ("**TPA**"). Telstra supports the Commission's view that the model terms and conditions should meet the reasonableness criteria in section 152AH of the TPA and, in particular, the long-term interests of end users. Telstra also endorses the Commission's use of standard Telstra agreements as a basis given that the model terms and conditions should reflect current market practices and conditions.

In keeping with the Commission's approach of promoting interaction between the model terms and conditions and the ACIF Codes, Telstra suggests that any changes to the current industry arrangements with regard to matters such as billing and billing disputes are best dealt with by industry bodies such as ACIF. Otherwise, there is a risk of the industry being encumbered by inefficient and overly prescriptive terms and conditions.

3 PRINCIPLES - SPECIFIC ISSUES

1. Billing and Notifications

Telstra submits that unlike concepts such as confidentiality or end user communications, billing and billing disputes are iterative process driven issues involving a high volume of transactions. For this reason, Telstra submits that existing and future ACIF codes and guidelines are the most practical and effective approach for dealing with changes to

current industry arrangements, especially since billing is already covered to some extent by ACIF Codes.

Furthermore the draft model terms and conditions proposed by the Commission are likely to increase, rather than decrease, disputes over billing and impose additional costs on the industry without corresponding benefits to competition or end users. This is particularly the case with the modifications to timeframes and the arbitrary and unjustifiable penalty at draft clause A.29.

2. Creditworthiness

Telstra submits that not only does the need for assessment of creditworthiness of access seekers and obtaining appropriate security have a clear statutory basis in section 152 AR of the TPA, but it is crucial for vigorous and sustainable competition in the industry. In Telstra's view the model terms and conditions must reflect the importance of this industry requirement.

3. Liability (Risk Allocation) Provisions

Telstra agrees with the Commission's view that an access provider should be entitled to limit its liability in a wholesale environment and that as a general matter, liability should lie with the party best able to limit that liability. Telstra also agrees that liability should generally be capped. However there are certain areas such as liability for personal injury and death and for property damage where, in Telstra's view, liability should be uncapped.

4. General Dispute Resolution Procedures

Telstra supports the Commission's proposal to implement measures designed to overcome delays and increase efficient dispute resolution. However, Telstra submits that some of the suggested timeframes for dispute resolution procedures may not achieve this objective.

5. Confidentiality Provisions

Telstra fully supports the need to adequately protect access seekers' and access providers' confidential information. However it submits that the audit provisions proposed by the Commission are unjustified, unworkable and inefficient and should be deleted.

6. Communications with End Users

Telstra agrees with the Commission that, whilst an access seeker is entitled to protect its relationship with its customers, an access provider must also be entitled to "engage in fair marketing in the same manner as its competitors". However, the draft model terms and conditions do not reflect this balance and are, in Telstra's view, contrary to the legislative objectives of promoting competition.

7. Service Migration

Telstra agrees that the access seeker requires sufficient notice of changes to specifications for core services. However Telstra submits that there is no legitimate reason to give notice to the access seeker where changes to a specification will have no effect on the access seeker.

Furthermore, Telstra submits that the proposed clauses regarding relocation of facilities have no clear connection to the core declared services and are best dealt with under a facilities access agreement.

8. Suspension and Termination

Telstra submits that the proposed timeframes for suspension and termination expose the access provider to an unreasonable credit risk. This together with the curtailment of suspension rights will necessarily impact on the quantum of security an access provider may reasonably require and the cost of supplying services.

9. Faults and Maintenance and Ordering and Provisioning

Telstra supports the Commission's approach with regard to these issues. An industry body such as the ACIF is best equipped to deal with changes to industry arrangements for process driven issues such as these.

10. Access to Information Systems

Telstra agrees that there are advantages to be gained in improved efficiencies by industry-wide use of an online system that enables real time transactions. Telstra agrees that EIEnet is one possible option but submits that this system could also be a disadvantage to smaller industry participants because of its implementation costs. Telstra believes that further discussion is required within the industry to reach agreement as to the best system to achieve improved efficiencies and further believes that the internet should be explored as one possible option with fewer disadvantages to smaller industry players.

PART 1: INTRODUCTORY SECTION

1 INTRODUCTORY SECTION

What is meant by "model terms and conditions?

1.1 Telstra agrees with the Commission's view that the model terms and conditions should be consistent with relevant legislation and Codes and, in particular, with Part XIC of the Trade Practices Act 1974 ("**Act**") which contains the requirement for the Commission to determine model terms and conditions.

1.2 Telstra also agrees that it is appropriate for the Commission to ensure that the model terms and conditions reflect the reasonableness criteria set out in section 152 AH of the Act. Section 152 AH provides that, in determining whether particular terms and conditions are reasonable, regard must be had to:

(a) whether they promote the long-term interests of end-users ("**LTIEU**");

(b) the legitimate business interests of the access provider concerned and its investment in facilities used to provide the declared service;

(c) the interests of access seekers;

(d) the direct costs of providing access;

(e) the operational and technical requirements for the safe and reliable operation of a service or network; and

(f) the economically efficient operation of a service or facility.

1.3 Section 152 AB of the Act provides that, in determining whether something promotes LTIEU, regard must be had to the following objectives:

(a) promoting competition;

(b) achieving any-to-any connectivity; and

(c) encouraging the economically efficient use of, and investment in, infrastructure.

Furthermore section 152 AB makes it clear that promotion of LTIEU is the object of Part XIC (and therefore, by implication, of the model terms and conditions).

1.4 Telstra submits that it is crucial that the model terms and conditions determined by the Commission reflect a balance between each of the above requirements so that they can promote the objectives of Part XIC of the Act. A failure by the Commission to accord sufficient weight to each of the criteria would, Telstra submits, result in an outcome which hinders the long-term development of efficient and sustainable competition in markets reliant on the core declared services, to the detriment of industry participants and end-users alike. Telstra's submissions on specific matters raised by the Commission will elaborate on these concerns further.

1.5 Telstra does not agree with the Commission's belief that "by establishing model terms and conditions that facilitate the manner and timing in which access seekers are able to

gain access to and deliver services to end-users", it is necessarily promoting LTIEU. For example, were the Commission to determine terms and conditions which allowed access seekers to obtain services below cost and on superior terms to those on which the access provider supplied services to itself, those terms and conditions may meet the criterion set out by the Commission, but they would fail, Telstra submits, to promote LTIEU because they would **not** promote sustainable, efficient competition. They would also discourage ongoing investment in infrastructure by not allowing the access provider a reasonable return on its investment.

1.6 As far as the Commission's views on the application of the other reasonableness criteria in section 152 AH are concerned, Telstra submits as follows:

Legitimate business interests of access provider

1.7 Telstra agrees with the Commission's view that the model terms and conditions should not impede the access provider's right to conduct its business in a commercial manner free from undue or unfair interference by the access seeker. Telstra submits that such an approach requires fair and reasonable terms and conditions of supply which:

(a) reflect the access provider's processes, particularly where those processes are integral to the delivery of services to multiple access seekers; and

(b) are not unduly burdensome or impractical to comply with.

Interests of persons who have rights to use the declared service

1.8 Telstra agrees that access seekers should be able to compete in downstream markets on the basis of their technical and commercial merits. However it is important to recognise that this requires a minimum level of expertise and sophistication on the part of the access seeker, and a robust and sustainable business model which allows the access seeker to compete on the basis of its quality. Therefore, in addition to not offering artificial protection to an inefficient access provider, the model terms should not artificially protect an inefficient, or financially weak access seeker. Such an outcome may promote the interests of a particular competitor but it will not promote competition (and LTIEU) as a whole.

The direct costs of providing access

1.9 Telstra submits that, contrary to the Commission's view, this criterion *is* directly relevant to the non-price terms and conditions. Onerous or burdensome terms and conditions have a clear and measurable cost of compliance associated with them which cannot be disassociated from the overall cost of providing access to the core declared services. Similarly, costs of compliance with processes which do not reflect current industry norms may also directly impact on the costs of access.

The economically efficient operation of a carriage service, network or facility

1.10 As set out above, Telstra fully supports the Commission's view that the model non-price terms should strike an appropriate balance between the rights and interests of access providers and access seekers. However, Telstra submits that whether or not the model terms promote the economically efficient operation of the core declared services and associated networks and facilities is a distinct threshold issue which must be assessed **before** forming a view as to whether the model terms and conditions strike that balance. For example, terms and conditions which impose costs on access providers which are out of proportion with their likely benefit do not, Telstra submits, promote the efficient use of carriage services or networks. Further, any assessment of this criteria should take into

account the benefits to the industry as a whole (and therefore to end-users) of cost efficient processes and interaction between industry participants.

Explanatory Memorandum

1.11 Telstra agrees that the model terms should reflect current market terms and conditions. Telstra submits that, for this reason, it is important to ensure that the model terms and conditions are not overly prescriptive, but allow for a reasonable degree of flexibility to accommodate new processes, systems and technologies. Telstra also agrees that it may be appropriate to review the non-price determination in approximately three years' time.

1.12 Telstra also agrees with the Commission's assessment that the model terms need not be comprehensive, either in terms of the matters that may be relevant to the supply of a particular core declared service, or the issues arising out of a particular matter. Therefore Telstra supports the Commission's focus on key terms and conditions of supply and submits that the model terms should not seek to cover every aspect of these terms and conditions. Rather, sufficient scope should be left for bilateral negotiations between the parties.

ACIF Codes

1.13 Telstra supports the general thrust of the Commission's views on the interaction between the model terms and conditions process and applicable ACIF Codes. ACIF Codes represent the outcome of industry self regulation processes developed under the auspices of ACIF. As a representative industry body ACIF is, Telstra submits, particularly well suited to developing terms and conditions of supply and guidelines where technical and process driven matters are involved. As the Commission has identified, these include matters such as ordering and provisioning, faults and maintenance, and access to information systems. However they also include matters such as billing and billing dispute processes which involve a high volume of transactions and are therefore process driven.

1.14 Telstra submits that it would be more appropriate for billing and billing dispute terms and conditions to be dealt with under existing and future ACIF Codes and Guidelines than by overly prescriptive model terms and conditions which may not adequately reflect the nature of these processes.

2 COMMISSION'S APPROACH TO MODEL NON-PRICE TERMS

2.1 Telstra supports the Commission's approach of focussing on certain terms and conditions only. However it does not agree that the areas identified by the Commission are necessarily contentious ones. For example, in Telstra's experience, access seekers have rarely sought to negotiate Telstra's standard liability and general dispute resolution processes to any significant extent, particularly where they apply to core declared services.

Telstra Access Agreements

2.2 Telstra also supports the Commission's adoption of Telstra's General Access Agreement and Carriage Service Provider Agreement as the basis for the model terms and conditions. As pointed out by the Commission, these agreements are well established in the market and reflect current market practices and conditions. Importantly, they also reflect the current processes employed by the industry for interaction with Telstra. However Telstra submits that, while there may be scope for amending these agreements in the context of the model terms and conditions process, it is important that their operational integrity be maintained wherever possible. Otherwise the model non-price terms and conditions may

become a set of terms and conditions which do not reflect reasonable process requirements and do not work together as a whole.

2.3 One area where this may become an issue is the distinction between resale services (ie the local carriage service) and interconnect services (ie PSTN originating and terminating access and ULLS) services, particularly from a process point of view. Although these services are sometimes all consumed by a single customer, there are many cases where a customer will seek to acquire local carriage services (perhaps in conjunction with other resale services) but will not acquire PSTN access or ULLS. This may be because the access seeker is not a carrier and does not share the necessary wherewithal and expertise to develop its own network. For this reason many of the provisions in Telstra's CSPA and SPRIT (which covers resale services, including LCS) which relate to process issues differ considerably from the corresponding provisions in Telstra's GAA. Accordingly the relevant model terms and conditions must either seek to address both sets of processes or be sufficiently flexible to allow the access provider and access seeker to do so in individual contracts. The remainder of Telstra's submission will elaborate on these issues further.

Telco-specific vs industry standard

2.4 Telstra supports the Commission's view that the general commercial provisions in its wholesale agreements should reflect broad commercial experience and should not be limited to approaches used in the telecommunications industry. However Telstra submits that some of the model terms proposed by the Commission, particularly as regards billing disputes and confidentiality, do not reflect broad commercial experience but are perhaps directed at issues expressed by individual telco industry participants.

3 AIM OF THE DRAFT DETERMINATION

3.1 Telstra supports the Commission's approach in setting out the principles applied in formulating model terms and conditions as well as the indicative terms and conditions themselves. In fact Telstra submits that these principles are likely to be more important than the indicative terms themselves given that, as the Commission points out, the relevant principles may be reflected in any number of ways. Nevertheless Telstra submits that, to the extent that indicative terms and conditions are provided in the determination they should accurately reflect the principles espoused by the Commission in Part 2 of the determination and the LTIEU and reasonableness criteria outlined above.

3.2 Telstra submits that this is not the case in the draft determination as some of the indicative terms and conditions are inconsistent with the principles in Part 2 of the draft and do not, in Telstra's view, satisfy the reasonableness criteria in Section 152AH of the Act. Telstra's detailed submissions on these issues are set out below.

4 FURTHER ACTION

As set out above, Telstra agrees that it is essential that the model terms and conditions reflect current market practice, both in terms of current and future conduct. Accordingly Telstra agrees that the model terms will require periodic review. To a certain extent, the frequency of that review will depend on the degree of flexibility built into the Commission's final determination. Assuming there is a reasonable degree of flexibility, Telstra submits that it may be appropriate to review the determination in approximately 3 years time.

PART 2: PRINCIPLES - SPECIFIC ISSUES

1 BILLING AND NOTIFICATIONS

Preliminary Comments

1.1 Telstra makes the following preliminary comments in respect of billing and notifications before responding to the issues specifically raised by the Commission. Telstra is concerned that this is a key area where the market terms proposed by the Commission have the potential to adversely impact existing industry arrangements to the detriment of LTIEU.

Process Issues

1.2 Telstra submits that billing and billing disputes are distinct from other issues dealt with by the draft model clauses. Unlike concepts such as confidentiality or end user communications, billing and billing disputes are iterative process driven issues involving a high volume of transactions and interaction between access providers and access seekers.

1.3 Given the process driven nature of billing and billing disputes, Telstra submits that the Commission's approach should be similar to that taken with respect to issues such as ordering and provisioning and operations and maintenance. As discussed above at paragraphs 1.13 and 1.14 of Part 1, Telstra submits that existing and future ACIF codes and guidelines are the most practical and effective approach for dealing with billing and billing disputes given the industry wide nature of these issues. Where ACIF codes and guidelines do not deal with an issue, the model terms need to reflect current industry processes as set out in Telstra's standard agreement unless there is a compelling reason to depart from these.

1.4 Telstra submits that not only are some of the proposed model terms and conditions for billing and billing disputes ill-suited to the nature of these processes, but they fail to satisfy the reasonableness criteria in s152AH of the TPA. Telstra submits that the cumbersome nature of many of the proposed provisions (for example the requirement to provide all information reasonably required by the access seeker to understand an invoice and the penalty provisions for incorrect invoices) are likely to increase the direct costs involved in providing the core declared services. Model clauses that do not recognise the process driven nature of these issues and which impose unreasonable and unworkable timeframes on access providers fail to accord sufficient weight to the legitimate business interests of the access provider by imposing costs without commensurate benefits to competition or end users.

1.5 Telstra refers to its comments on cost neutrality in its preliminary submission on the model non-price terms and conditions[1]. Telstra submits that new and costly requirements for billing and billing disputes imposed by the draft model terms and conditions may change the nature of the declared services, thus requiring a new pricing assessment which could impact on the Commission's *Access Pricing Principles*. Telstra further submits that the substantial alterations to timeframes under the new model provisions may require an overhaul of Telstra's billing systems and infrastructure (including significant system upgrades, changes to processes, new internal documentation, training of personnel and/or hiring personnel) impacting the cost of supplying the relevant declared services. Such an increase in costs could also prejudice the access provider's ability to supply the services at

[1] Submission by Telstra to the Commission on preliminary issues relating to the Model non-price terms and conditions for the core declared services dated 29 January 2003 at paragraphs 2.4 to 2.8.

a forward looking efficient cost, consistent with the Commission's *Access Pricing Principles* and the methodology underlying Telstra's access undertaking.

1.6 Telstra agrees that correct and efficient billing is essential to the industry as a whole. For this reason Telstra is eager to ensure that the most efficient and cost-effective means of regulation for billing and billing disputes is introduced.

Service Based Distinctions

1.7 As set out in paragraphs 2.2 and 2.3 of Part 1 above, Telstra submits that it is important that the operational integrity of Telstra's standard agreements is maintained wherever possible. This is particularly the case with respect to the billing of resale services such as LCS, where the billing and billing dispute processes are different from the processes employed for interconnect services such as PSTN originating and terminating access and ULLS.

1.8 Accordingly Telstra's CSPA, which supports the provision of LCS and other resale services and which was specifically developed to address the unique circumstances of telecommunications resale (as opposed to interconnection), contains a number of differences from Telstra's GAA with regard to billing and billing dispute provisions. These reflect the different processes employed for the respective services and the differing nature of the end user relationship in each case. The resale model raises a range of different issues given it is less infrastructure-oriented and more focussed on billing issues and demarcating responsibilities for dealing with network and end customer issues. To some extent the differences also reflect the differing degrees of sophistication between access seekers who only acquire LCS (and other resale services) and access seekers who acquire interconnect services (and often acquire LCS as well). Telstra submits that the model terms proposed by the Commission in relation to billing and billing disputes fail to adequately take account of these differences. More detailed submissions on specific provisions are set out below.

1.9 For these reasons, Telstra submits that the billing and billing disputes model clauses do not adequately cater for the distinctions between telecommunications resale and interconnection services.

Provision of Billing Information

1.10 Telstra certainly agrees that access seekers should have access to billing information in connection with matters associated with, or incidental to, the supply of a declared service pursuant to sections 152 AR (6) & (7) of the TPA. However, Telstra submits that draft model clause A.10, which requires the provision of all information "reasonably required by the access seeker to identify and understand the nature and amount of each component of the invoice", goes substantially beyond this legislative requirement and imposes a significantly higher burden on the access provider. In so doing, it imposes inefficient costs on the access provider by requiring it to effectively "spoon feed" access seekers lacking in the requisite degree of technical sophistication to understand carrier billing processes.

1.11 Accordingly, Telstra submits that draft model clause A.10 should be replaced with an obligation to provide the information required by those standard obligations (or deleted altogether).

The Commission's Views

Should an access seeker be required to pay disputed amounts prior to resolution?

1.12 Telstra agrees that an access seeker should be entitled to withhold disputed amounts until there is a determination by the access provider, provided that the access provider is properly notified of the dispute within a reasonable timeframe and provided that the dispute is notified in good faith. Telstra submits that the access seeker should *not* be able to withhold amounts in respect of disputes which are not notified in good faith and has proposed additional drafting to this effect.

1.13 Telstra submits that notification by the "due date" is not a reasonable timeframe, as it gives access seekers under financial pressure incentive to withhold payments by disputing invoices which cannot be met by the due date. However, Telstra submits that notification within 15 business days of the invoice date would be reasonable. This timeframe allows the access seeker 3 weeks to invoke the billing dispute procedure, but is less likely to encourage delaying tactics from the access seeker, as the notification is required before the payment is due.

1.14 Telstra further submits that the disputed amounts must become payable once the access seeker is provided with a determination of the dispute by the access provider, unless the access seeker disputes that determination in accordance with the billing disputes process. Telstra submits that this obligation is necessary to maintain the integrity of the payment provisions and to ensure that a provision of this type would not be an incentive for the payer to dispute every invoice. For this reason it is also essential that the words "but subject to the outcome of the Billing Disputes Procedure" in model term A.13 be deleted.

Should there be specific timeframes and rules regarding billing enquiries and disputes?

1.15 Telstra submits that the significantly reduced timeframes for dispute resolution imposed on the access provider and the contrasting excessive periods allowed for access seeker escalation (both as compared with current industry arrangements) are unreasonable and are likely to increase the number and frequency of billing disputes contrary to the LTIEU and the legitimate business interests of the access provider.

1.16 In particular, Telstra submits that 20 business days is too short a period for dispute resolution and that such a short period will only impose needless cost on the industry. Further, as discussed at paragraph 1.5 above, substantial alterations to timeframes (such as this) require infrastructure changes that necessarily impact the cost of supplying the relevant service. Furthermore, Telstra submits that the suggested timeframe for access seeker escalation of disputes are altogether out of proportion with timeframes for dispute resolution. The lengthy timeframe for escalation is open to abuse by access seekers and is an incentive to further delay payment to the access provider.

1.17 The lack of balance between these timeframes (and hence of the interests of the access seeker and access provider) is illustrated by the fact that the access provider is required to review, analyse and resolve a billing dispute in two thirds of the time an access seeker has for mere notification of escalation. Clearly the timeframe necessary to consider and determine a billing dispute (which if it is to be done properly, is a relatively time consuming exercise) should be greater than the comparatively straightforward task of escalation.

1.18 Telstra submits that the imbalance of the revised timeframes is further illustrated when reviewed in the context of the current industry arrangements. The Commission has not only reduced the timeframe for dispute resolution under Telstra's standard GAA by more

than half the original timeframe, but has increased the timeframe for access seeker escalation by six times the period allowed for in the GAA. Telstra submits that the Commission has substituted realistic and balanced expectations with impractical and unachievable timeframes that will be virtually impossible for access providers to meet. In contrast the Commission has empowered the access seeker to delay payment for extensive periods of time to the detriment of the access provider.

1.19 Telstra submits that this imbalance favours the access seeker to the detriment of the access provider and is contrary to the LTIEU. Telstra submits that access providers cannot compete effectively when access seekers are armed with incentives to invoke dispute resolution processes as a means of delaying payment.

If an access provider frequently renders incorrect invoices, what measures can be used to address this?

1.20 Telstra submits that industry standard arrangements and indeed model terms A.19 and A.20, already contain sufficient and proportionate disincentives on access providers to issue incorrect invoices. These include a requirement to pay interest on amounts incorrectly invoiced, refund those amounts within strict timeframes, and allocate sufficient resources to resolve consequent billing disputes. Furthermore, based on Telstra's recent investigations the actual number of disputes over incorrect billing (for **all** wholesale services not just the core services) amounts to no more than 0.5% of Telstra's wholesale revenue.

1.21 Accordingly, Telstra strongly submits that model term A.29 should be deleted entirely given that it is economically inefficient and wholly unjustified. This type of clause is highly unusual in comparable commercial contracts and is likely to be void as a penalty, given that the penalty amount can in no way be said to represent a genuine pre-estimate of the access seeker's loss, as it is a purely arbitrary figure. Telstra submits that this type of provision will not help to achieve increased accuracy in billing. Rather, it will only place an unreasonable burden on the access provider by increasing costs of supply.

1.22 Furthermore, Telstra submits that frequent lodgment of incorrect or invalid disputes is similarly time consuming and potentially damaging to the access provider. As it stands the one-sided nature of the provision is open to abuse by access seekers, as there are no consequences for an access seeker who lodges consecutive billing disputes which are determined in favour of the access provider. For this reason if a provision of this kind is to be included by the Commission (and as set out above, Telstra submits that it should not be) it must be made reciprocal to balance the interests of the parties. Telstra submits that without the balance of a reciprocal clause, it is inevitable that the number of spurious or vexatious billing disputes lodged by access seekers will increase, because there is nothing to stop an access seeker "trying its luck" by lodging excessive numbers of dubious billing disputes in the hope that it **may** eventually secure a rebate. Telstra submits that increasing the volume of billing disputes (particularly questionable disputes) is contrary to the LTIEU objectives of the TPA, as well as costly and time consuming for the industry as a whole.

1.23 In summary, model term A.29 exhibits a distinct imbalance between the interests of access seeker and access provider and is therefore unlikely to promote the development of efficient and sustainable competition in markets reliant on the core declared services. Nor does it promote LTIEU.

1.24 However, should the Commission decide to retain this provision, despite all of the above arguments, Telstra submits that, at a minimum, the following issues must be addressed:

(a) the provision must be reciprocal ie There should be a corresponding provision imposing a penalty on access seekers for lodging three consecutive incorrect billing disputes (see paragraph 1.22 above);

(b) the provision must allow for fault to be allocated to the service provider, particularly in circumstances where an access seeker contributes to the error eg where an access provider bills in accordance with a carrier or carriage service provider's instructions which later turn out to be incorrect, the access provider should not be penalised for the access seeker's error;

(c) a rebate under this provision should be limited to 10% of the particular overcharged or undercharged amount (as opposed to the total correct or incorrect invoiced amount) which will usually be a particular charge for a particular service,;

(d) interest should not apply to rebates;

(e) there should be a six-month time limit for access seekers claiming a rebate of this kind to discourage "hoarding" of disputes;

(f) the access seeker must bear some responsibility for verifying the accuracy of the invoice and should be required to notify the access provider immediately if it becomes aware of any errors;

(g) as the Commission's draft clause seems to suggest, any rebate should be to the exclusion of any other liability; and

(h) the rebate should be unavailable if any of the above conditions are not met.

What limits should apply to delays in notifying an access seeker of incorrect invoicing (backbilling)?

1.25 Telstra submits that limits on backbilling should be dictated by what is fair and reasonable in the circumstances and current industry arrangements. They should also be dictated by ACIF Codes and Guidelines (such as the ACIF Billing Code) where these Codes apply.

1.26 Current industry arrangements reflect the fact that timeframes for backbilling may well vary according to the level of impact on the access seeker's ability to onbill its end customers. Where this is not an issue (ie for PSTN, OTA and ULLS) the timeframes need to be less rigorous, although Telstra submits that a general limitation of six months would be reasonable so long as there is an exception for services which are being billed for the first time and for certain international services where the access provider is dependent on overseas carriers for billing information. Such an exception is in fact pro-competitive as it allows for provision of a new type of service prior to all aspects of billing being finalised.

What set-off rights should apply?

1.27 Telstra generally agrees with the Commission's comments with regard to set-off rights. However, Telstra submits that in addition to the right to set-off where a party has become insolvent, there should be a further right to set-off amounts owing where a party has the right to suspend the provision of any or all of the services or terminate the agreement. Telstra has proposed additional drafting to this effect.

2 CREDITWORTHINESS

Commission's View

2.1 Telstra agrees that creditworthiness assessment should be based on clear and objective criteria. Telstra submits that the importance of ensuring the creditworthiness of access seekers also has statutory basis in s 152AR(10)(a). Pursuant to s 152AR (9)(a) an access provider is not subject to the SAOs if there are reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the relevant terms and conditions (including the creditworthiness of the access seeker per s152AR(10)(a)). For this reason Telstra submits that accurate assessment of creditworthiness at first instance is preferable for both the access provider and the access seeker.

2.2 As the Commission has previously commented in its consideration of Telstra's 1997 undertaking (at page 97):[2] "*It is in the legitimate business interests of the access provider to assess the credit worthiness of an access seeker and to seek security requirements*" and "*Telstra indicated that adequate information to assess the credit worthiness of an access seeker is very important to protect its legitimate business interests. The Commission agrees with this position*."

2.3 Access providers need access to sufficient information to assess the creditworthiness of access seekers and need an ability to reassess that creditworthiness (and seek additional security if necessary) as circumstances require. Telstra's experiences with the insolvency of One.Tel and, more recently, NewTel, and the speed and manner in which both entities became insolvent, clearly justify both the existence and strict drafting of creditworthiness provisions.

Should any factors (such as the size, stability and payment history of the access seeker and the duration of the relationship between the parties) be taken into account in determining the amount of security or in a creditworthiness review?

2.4 Telstra submits that these criteria are clearly and properly relevant to an assessment of creditworthiness.

2.5 Telstra agrees that any disputes arising out of or in connection with creditworthiness issues should be dealt with in accordance with the standard dispute resolution procedures (pursuant to clause D of the model terms and conditions). However, Telstra submits that an access seeker should not be armed with the means to block the provision of security by simply referring the matter to dispute resolution at any stage of the process. Telstra submits that any impediment to the provision of security would impose an unreasonable level of financial risk on the access provider contrary to the intention of s152AR(9) of the TPA.

What factors are appropriate to trigger a creditworthiness review or a variation in security?

2.6 Telstra agrees that broad principles based on objective criteria are the most effective way of dealing with creditworthiness issues.

2.7 Telstra also agrees that the access seeker should have a right to request a reduction in the amount of the security and that there should be scope for that amount to be reduced where it is reasonable to do so. Telstra submits that the drafting in model clause B.5 should reflect that the request will be "considered" in light of draft clause B.3 and where the request is reasonable in this context the access provider will reduce the security by an appropriate amount. Telstra submits that as it stands draft clause B.5 implies that any

[2] http://www.accc.gov.au/telco/pstn_undertake.html

request must be complied with **on the access seeker's terms** provided that it is not unreasonable to do so.

2.8 Telstra submits that the current drafting of model clause B.5 does not recognise the risk an access provider necessarily assumes when reducing security and that any reduction should be carefully considered and determined by the access provider (see paragraph 2.3 above for examples of this risks an access provider may be exposed to). Telstra further submits that allowing an access provider to consider and assess such requests will not affect the frequency of reductions of security where it is reasonable to do so, given that from a commercial perspective an access provider would only reject a request where a reduction is not economically viable.

What is a reasonable amount of information for the access provider to obtain about an access seeker's creditworthiness?

2.9 Telstra agrees that the relevant provision in the TAF Code is appropriate in this regard. However, Telstra submits that the timeframe for an access seeker to provide creditworthiness information to the access provider is too long and should be reduced to 10 Business Days. Telstra submits that this is a more balanced timeframe reflecting a reasonable period for an access seeker to gather the relevant information, without unfairly lengthening the access provider's exposure to potential credit risk.

Should access seekers be given more discretion to withhold commercially sensitive information to the reporting agency conducting a creditworthiness review?

2.10 Telstra submits that giving access seekers discretion to withhold commercially sensitive information to credit reporting agencies would prevent the access seeker from obtaining a reasonably accurate picture of the access seeker's creditworthiness, thereby defeating the purpose of these provisions. To a certain extent any information provided by an access seeker to a credit reporting agency is likely to be "commercially sensitive" as it goes to that access seeker's credit rating. However, it would be clearly inappropriate to suggest that an access seeker should not provide any information to the credit reporting agency. Telstra submits that it is essential that access seekers be required to provide sufficient information for the credit reporting agency to be properly able to assess its creditworthiness. This should not involve any significant risk for the access seeker as the agency is required to respect the confidentiality of the access seekers' information.

Is there a duplication of protection afforded to the access provider by holding a security on the one hand and having the ability to suspend or terminate services on the other? Is suspension/termination a legitimate remedy for failure to pay where a security is held as well? Should security be able to be drawn down only in breaches relating to payment of invoices?

2.11 Telstra agrees that it is essential for an access provider to have both security and the ability to suspend or terminate services. Security is to protect the access provider's exposure in respect of services currently being provided and which have been provided and not yet billed. Rights of suspension and termination are needed to address ongoing liability. Without access to both forms of protection, an access provider would not be able to reasonably protect its financial exposure, contrary to sections 152AR (9) and (10) of the Act.

3 LIABILITY (RISK ALLOCATION) PROVISIONS

3.1 Telstra agrees with the Commission's view that as a general rule, liability provisions should be reciprocal and should place risk with the party that has the ability to control that risk. It also submits that both parties should be generally able to limit their liability,

subject to a few well recognised exceptions such as liability for personal injury and death and liability for property damage. While the model terms proposed by the Commission adhere to these principles in most cases, there are a number of notable exceptions, particularly as regards liability for end customer claims. Telstra has proposed marked-up amendments in this regard. There are also some errors in drafting which Telstra has sought to correct.

Should liability caps apply in relation to property damage?

3.2 Telstra submits that liability caps should not apply in respect of costs and expenses reasonably incurred in making good loss of or damage to property. It is fair and reasonable, and consistent with normal commercial practice, that a party responsible for damaging the other party's property should bear responsibility for that loss. This is also the simplest and most economically efficient approach.

In relation to LCS, how should claims relating to the customer service guarantee be managed?

3.3 The Telecommunications (Consumer Protection and Service Standards) Act 1999 ("**CPSS Act**") provides a regime for apportioning liability in respect of CSG payments between access seekers and access providers. Basically, section 118A of the CPSS Act provides for a right of contribution as between carriage service providers where the contravention of a standard in force is attributable to one or more acts or omissions of another carriage service provider.

Telstra submits that the model terms and conditions should reflect a similar approach to the CPSS Act in that there should be a reciprocal right of contribution as between access seekers and access providers where there is a contravention of CSG obligations.

Should there be an aggregate cap and single event caps on damages?

Telstra submits that such an approach is reasonable and appropriate given the wide variety of loss and damage events that may occur in respect of the core services.

Should exclusion or limitation of liability be permitted in relation to meeting specified performance standards if there is another mechanism for compensation?

It is relatively common for parties to agree a liquidated damages regime whereby the parties agree that particular damages or compensation will be the sole remedy for a breach. This is an efficient approach as it gives certainty to the parties and reduces transaction costs. Telstra supports the Commission's endorsement of this approach.

4 GENERAL DISPUTE RESOLUTION PROCEDURES

4.1 Telstra supports the implementation of measures designed to overcome delays and increase efficient dispute resolution.

4.2 Telstra agrees that a party should be entitled to unilaterally terminate a dispute resolution procedure and pursue its remedies at law where the other party fails to comply with the dispute resolution procedure or where urgent interlocutory relief is required. Telstra submits that the right to pursue remedies at law should be triggered where there is an **actual** failure to comply with the dispute resolution procedure, as opposed to a **substantial** failure to comply (pursuant to model clause D.6(b)) which is arguably void for uncertainty.

4.3 Telstra agrees that the parties should have a **sufficient** but not excessive opportunity to investigate and negotiate the outcome of a dispute. Telstra agrees that a reasonable

timeframe for resolution depends on the nature and level of the escalation of the dispute. Telstra submits that the model terms and conditions do not reflect these principles and that the proffered timeframes are insufficient for the parties to properly investigate and resolve disputes. Telstra submits that "speeding up" the process and allowing less time for the proper review of disputes will have a negative impact on the efficiency of the dispute resolution procedure and will only serve to increase the number of unresolved disputes. Telstra suggests that the GAA timeframes balance the interests of the parties and are in line with s 152AH concepts of reasonableness, allowing **reasonable** timeframes in order to achieve best possible results for all parties.

4.4 Telstra agrees that any dispute resolution procedure should be initiated in good faith and on a "without prejudice" basis, to the extent possible in the circumstances.

4.5 Telstra agrees that information may need to be exchanged on an iterative basis and the information should be exchanged as required during the dispute resolution process. However, Telstra submits that the requirement in draft model clause D.9 is so burdensome as to equate with an obligation to make discovery (contrary to the Commission's intention). Telstra submits that this clause should be redrafted to reflect that information will be exchanged between the parties as required, but a "dump" of all relevant information at the outset of the dispute resolution procedure is not mandatory

5 CONFIDENTIALITY PROVISIONS

5.1 Telstra agrees with the Commission's comment that confidentiality provisions typically used in agreements for the core services are reciprocal and otherwise fair and reasonable. Telstra also agrees that disclosure of confidential information should generally be limited to what is necessary, rather than what is desirable or practicable. However Telstra does not agree with the Commission's view on the need for an independent audit provision.

5.2 Telstra submits that the audit provisions introduced by the Commission are unjustified, unworkable and inefficient and should be removed in their entirety. In Telstra's experience, provisions of this kind are certainly not usual in comparable commercial contracts and Telstra submits that they are unreasonable and unnecessary as part of the model terms.

5.3 Telstra submits that model provisions E.1 to E.8 adequately address the specific circumstances in which each party is permitted to disclose the other's confidential information (with some minor exceptions as set out in paragraph 5.6). Telstra submits that these specified exceptions to the fundamental principle of non-disclosure of the other party's confidential information are reasonable and reflect current industry practice.

5.4 Telstra submits that the audit provisions are inefficient and unworkable for the following reasons:

(a) audit provisions of this kind necessarily involve visibility of all other access seekers' confidential information, as well as Telstra's own, and would therefore require their consent (which they would be unlikely to give to the benefit of a competitor). Consent complications of this kind would make practical implementation of such provisions virtually impossible (particularly in view of Telstra's significant customer base);

(b) neither an access seeker, nor an auditor would be competent to judge whether there is "prima facie" evidence of a misuse of confidential information. That is

clearly a matter for a court, which is the appropriate forum for any such dispute to be heard;

(c) audit provisions of this kind are likely to increase disputes and may also be seen as fruitful preparation for litigation in circumstances where an access seeker experiences financial difficulties. Telstra submits that this would clearly be contrary to the intention of Part XIC of the Trade Practices Act 1974 ("**TPA**"); and

(d) there is no requirement for an access seeker to demonstrate any substantial evidence of misuse of confidential information, nor is there a requirement to prove any material impact on the access seeker's business: on the contrary the audit is triggered where the access seeker simply "**believes** there is *prima facie* evidence which **tends** to show…", which is hardly a difficult threshold to satisfy.

Accordingly, Telstra submits that the audit provisions are clearly contrary to the promotion of LTIEU and will simply promote disputes and impair the delivery of services to access seekers as a whole.

5.5 Telstra submits that the one-sided approach of the Commission with respect to the audit provisions is unfair and unreasonable and contrary to the balance of interests required by s 152 AH of the TPA. As the Commission would appreciate, information disclosed by access providers to access seekers is often highly commercially sensitive and warrants the same protection afforded to access seekers. In this respect, Telstra submits that it has an equal interest in ensuring that confidential information is used only for the permitted purpose. However, Telstra does not view draft clause E.9 as the appropriate means of achieving this protection. Telstra submits that even if draft clause E.9 were to be made reciprocal (which would be necessary if the Commission intends to comply with objectives of the LTIEU) it is so unworkable as to hinder the parties rather than aid them in ensuring the correct use of confidential information.

5.6 Telstra also submits that an access provider must be able to disclose confidential information of the other party in the following circumstances:

(a) to an auditor acting for the disclosing party to the extent necessary to perform its audit functions; and

(b) as required by the listing rules of any stock exchange where that Party's securities are listed or quoted.

These standard exceptions appear to have been omitted from the model terms.

6 COMMUNICATIONS WITH END USERS

6.1 Telstra agrees with the Commission that whilst an access seeker is entitled to protect its relationship with its customers, an access provider must also be "entitled to engage in fair marketing in the same manner as its competitors". In line with this approach, the draft terms and conditions for communications with end users should reflect the objectives of s152AB of the TPA. In particular, Telstra submits that the Commission should give weight to the objective of promoting competition. Telstra submits that these objectives can only be met by model terms which clearly recognise that there is no ownership in an end user.

6.2 Whilst Telstra concedes that some elements of the draft terms and conditions regarding communications with end users are reasonable, Telstra is concerned that the Commission has introduced an imbalance which hinders competition and favours the interests of the access seeker over those of the access provider.

Should restrictions be placed on acceptable questions and issues that an access provider may raise with an access seekers' end- user?

6.3 Telstra submits that an access provider should be able to contact and discuss matters with an access seeker's customers to the extent permitted by law. To seek to constrain the access provider's ability to make lawful communications is contrary to the LTIEU as it will not promote healthy and sustainable competition but will rather artificially protect an access seeker. Accordingly Telstra submits that model clause F.1 should be amended to make it clear that, in addition, the access provider may communicate and deal with the access seeker's end users as permitted by law.

6.4 Furthermore Telstra submits that, in an emergency, it is essential that an access provider be able to act in accordance with its reasonable belief. In this regard Telstra submits that draft model clause F.1(b) should reflect the intention of s 152AR(9)(b) of the TPA which relieves an access provider of its obligations under the SAOs in accordance with the access provider's *reasonable belief* that there is a threat to the integrity of the network or to the safety of individuals. Similarly, an access provider should be empowered under the model terms and conditions to act in accordance with its *reasonable belief* in an emergency.

6.5 Draft clause F.1(d) imposes a reciprocal obligation on the parties to make and maintain records of communication with the other party's end users. However the Commission's commentary on this point seems to indicate that the obligation is specific to the access provider. Whilst the Commission does not refer to the access seeker's obligations in this regard, presumably draft clause F.1(d) is intended to indicate that the obligation is imposed on both parties. Telstra agrees that it is essential for this obligation to be imposed on both parties.

6.6 Furthermore, pursuant to the Commission's comments at page 28 of the Draft Determination draft clause F.2(c) should be deleted as it is irrelevant given that none of the core declared services are provided under Telstra's standard form of agreement.

6.7 Telstra submits that an access provider should be able to advise end customers that it provides services to the access seeker. Draft clause F.2(d) implies that an access provider is prohibited from advising the end customer of this fact. For this reason Telstra submits that draft clause F.2(d) should be deleted, or amended accordingly.

6.8 In addition, Telstra submits that the requirement that an access provider's staff make and maintain records of their communications with an access seeker's end users is simply unworkable. For example, if an access seeker's end user calls Telstra front-of-house staff but does not have a contractual relationship with Telstra, there will be no "screen" on which front-of-house can record what is discussed in the enquiry. Furthermore, where a technician makes a site visit, recording information (by hand on a note pad?) and then ensuring it is later transferred to an electronic file becomes even more difficult. Requirements of this nature are contrary to the legitimate business interests of access providers and LTIEU as they impose unjustified and inefficient costs on the access provider which must ultimately be passed on to access seekers and consumers. Telstra submits that the costs to the industry as a whole must be carefully weighed by the Commission against any benefit that this type of provision may afford.

Should a code of ethics be introduced for technicians visiting an access seeker's end-users?

6.9 Telstra agrees with the Commission's view that such a code is unnecessary. An access provider's technicians will often be "blind" as to whether an end user is a customer of an access seeker or of Telstra. For example, Telstra technical staff conducting maintenance on an end user's residential telephone line are generally unaware of the identity of that end user's service provider. As the Commission would be aware this is, in part, to ensure that customers of Telstra and other service providers are treated in an equivalent manner consistent with Telstra's standard access obligations and LTIEU.

Should contact between an access provider and end-users of a service provider be specifically limited to the following situations:

- *to dispatch a technician;*
- *to organise for a technician to visit the end-user's premises;*
- *in an emergency; or*
- *as a 'cold call' to promote retail activities?*

6.10 Telstra submits that it is impractical and unreasonable to require the access provider's staff to determine whether a customer's purpose is the "sole" purpose or a partial purpose. This is a legal question. It would also place an inefficient burden on the access provider with respect to the training of staff and the recording of telephone enquiries. From an end user's perspective, it would necessitate additional questions which would have the result of lengthening the enquiry process which is designed to be as customer-focussed and fast as possible.

Should an access provider face a reciprocal obligation not to engage in any unethical, misleading or deceptive behaviour, especially in an access provider's dealings with an access seeker's end-user?

6.11 Telstra submits that the model terms and conditions do not adequately address the negative impact that an access seeker's direct relationship with end users may have on the access provider, given that the access seeker is in a position to misrepresent the nature of their relationship or to portray the access provider in a poor light. For this reason, Telstra submits that draft clause F.3 is unclear and that "best endeavours" is superfluous given that the matter is clearly within the party's control.

6.12 Furthermore, Telstra submits that draft clause F.6 is unnecessary, given that bilateral agreements have priority over industry codes as long as they are not inconsistent with those codes.

6.13 Finally, one further issue that must be addressed, at least in respect of LCS, is the access provider's need to contact end users of an access seeker in circumstances where that access seeker has become insolvent and arrangements need to be put in place to ensure continuity of supply to end users. Telstra submits that the Commission should include specific provisions to deal with this eventuality in the interests of protecting consumers and reducing the need for a cessation of supply. Telstra has proposed additional drafting to this effect.

7 SERVICE MIGRATION

What notice period should an access provider provide to access seekers in relation to changes to specifications for core services?

7.1 Telstra agrees that the access seeker requires sufficient notice of changes to specifications for core services and agrees that 40 business days is a reasonable notice period.

7.2 However, Telstra submits that there is no legitimate reason to give notice to the access seeker where changes to a specification will have no effect, or only a minor effect on the access seeker. Where the access seeker is unaffected by an amendment, it would be contrary to the s 152AH concept of reasonableness to impose this additional burden on the access provider. Telstra submits that the very concept of unnecessary notification obligations is contrary to the LTIEU objectives given that it will impose needless costs on the access provider contrary to the access provider's legitimate business interests.

What notice period should an access provider provide to access seekers in relation to relocation of facilities used for core services?

7.3 Telstra submits that these provisions impose an unnecessary and impractical burden on the access provider. Draft model clauses G.10 to G.14 effectively give the access seeker a right of veto over the relocation of a Facility even where the change will have only a minor impact or even no impact on the access seeker. Telstra fails to see how this onerous requirement is justified, particularly in circumstances where the access seeker is not impacted by the variation. Telstra submits that there is no legitimate reason to give the access seeker a right of notification in such circumstances.

7.4 Telstra further submits, that these provisions are of, at best, limited relevance to the core declared services. Provisions of this kind cover facilities access issues which are best dealt with under a facilities access agreement.

7.5 Notwithstanding Telstra's submission that these provisions are superfluous and irrelevant if the Commission is still minded to include provisions of this kind, Telstra submits that these provisions should be limited to ULLS services only.

Should an access seeker be entitled to an indemnity for costs incurred by an access seeker due to having to re-locate facilities?

7.6 The Commission states that it does not consider an indemnity for costs incurred by an access seeker due to having to re-locate its facilities, because the notification requirements in the draft terms and conditions obviate any need for an indemnity. As discussed above at paragraph 7.3, Telstra submits that provisions G.10 to G.14 are superfluous and should be deleted entirely. Telstra also submits that in the absence of these provisions there is still no justification for an access seeker's entitlement to an indemnity where facilities are re-located.

7.7 In keeping with the concepts of reasonableness pursuant to s 152AH, an access provider must be able to manage its network efficiently and to have regard to its own legitimate business interests. Telstra submits that an indemnity of the kind proposed by the Commission would increase the cost of supplying the core declared services and discourage access providers from improving and updating their networks.

7.8 As suggested by the Commission at page 26 of the Draft Determination "an access provider requires flexibility to modify, change or substitute the underlying technology used to provide declared service" and "to improve the functioning and performance" of these services. Telstra submits that by entitling the access seeker to an indemnity for

costs associated with facility re-location would restrict access provider's flexibility in this respect.

What notice period should an access provider provide to access seekers in relation to variations to its standard form of agreement, where such variations may result in a variation to the terms on which the access seeker provides services to its customers (including a variation to a service, a specification or price)?

7.9 Telstra agrees with the Commission's view that as none of the core services are provided under the terms of Telstra's standard form of agreement, such a requirement is therefore irrelevant.

8 SUSPENSION AND TERMINATION

8.1 Telstra agrees with the Commission's view that the access provider should be able to immediately:

(a) suspend a service in an emergency or a threat to property or persons; and

(b) suspend a service or terminate the agreement where a force majeure event occurs or where "there is a reasonable likelihood of the access seeker being in jeopardy of becoming insolvent".

However it submits that the Commission's proposed timeframe for rectification of 20 business days for all other events giving rise to suspension or termination rights is simply too long in view of the fact that those events are likely to include the failure to pay overdue amounts which have not been disputed. As has become plain to Telstra in recent industry insolvency situations, such a failure to pay is a fairly strong indication of an access seeker approaching insolvency.

8.2 Telstra submits that the time period for access seekers to remedy in these circumstances is intended to enable access seekers to obtain interlocutory relief in respect of the threatened suspension or termination: it is not intended to allow access seekers a lengthy period to seek to reorganise their finances. It is Telstra's strong submission that notice within 10 business days of the suspension event and a further 10 business days to institute remedial action is a more than adequate timeframe for the access seeker to obtain interlocutory relief. Any extension on this timeframe is imposing an unfair burden and risk on the access provider and is contrary to LTIEU. It is also likely to require the access provider to extend its security coverage to protect itself against the additional risk which is, in Telstra's view, a less efficient remedy.

8.3 The matters giving rise to a right to suspend a service or terminate the agreement (if the breach is not or cannot be rectified) should also include persistent breaches of an agreement which, although they may be individually minor, have a cumulative effect on the access provider which is material. An example of this is a persistent failure to comply with a process requirement which means that extra resources are spent to monitor and rectify the situation. Telstra has proposed drafting to this effect.

8.4 Telstra further submits that the suspension rights in the draft model terms are unreasonably curtailed and will only force the access provider to require more security or terminate the agreement. Specifically, the access provider should not be restricted to suspending the services the subject of the breach as this will prevent the access provider from protecting its ongoing exposure.

8.5 Finally, Telstra submits that either party must be able to terminate immediately at any time by giving written notice of termination to the other party if:

(a) the other party ceases to be a carrier or carriage service provider;

(b) the other party breaches a term or condition of a security provided under a security requirement; or

(c) the other party ceases to carry on business for a period of more than 10 consecutive business days without prior written consent of the notifying party.

9 FAULTS AND MAINTENANCE

Telstra agrees with the Commission's approach in adopting relevant provisions of ACIF codes into the model terms and conditions, thereby ensuring the input of the industry as a whole in developing workable and efficient processes.

Is there a need for more specific timeframes for fault rectification?

9.1 Telstra agrees that these matters are best dealt with via industry bodies such as the ACIF which are representative of the industry's views as a whole. The relevant ACIF Codes and Guidelines (C513 and G572) are being updated and are not yet finalised. However, Telstra supports the approaches and the timeframes currently outlined in them.

Should service level standards be non-discriminatory?

9.2 Telstra supports the adoption of clause 6.1.9 of ACIF C513 into the model terms and conditions. Of course, where a customer has purchased an enhanced product (eg offering a 4 hour restoration time as opposed to a 12 hour restoration time), that customer will be entitled to be prioritised as against those who have purchased the standard offering. However this is not inconsistent with clause 6.1.9 and is also pro-competitive. Certain customers are also required to be prioritised by law, for example, emergency services. Telstra submits that these issues may need to be addressed in the provisions.

Should there be an obligation on C/CSPs to inform faults in another carrier's network?

9.3 Telstra agrees with the inclusion of relevant parts of C513 and G572 into the model terms and conditions. However it submits that a CSP should test its own Network prior to notifying another CSP of a Fault believed to be in that CSP's Network to minimise erroneous notifications.

Should fault clearance codes be included in access agreements?

9.4 Telstra also supports the inclusion of the provision contained in ACIF C513 *Customer and Network Fault Management* Industry Code which outlines the information required for Customer Fault Clearance Reconciliations as proposed by the Commission.

Should fault reporting processes be agreed between the parties?

9.5 Telstra agrees with the inclusion of clause 9 of G572 in the model terms and conditions.

10 ORDERING AND PROVISIONING

Telstra agrees with the Commission's approach in adopting relevant provisions of ACIF codes into the model terms and conditions and allowing ACIF to progress the issues of real time interfacing and ULLS lead-ins.

Real time interface

10.1 Telstra agrees with the Commission that issues relating to ordering and provisioning through real-time interfaces and the issues around access to information systems should continue to be progressed through ACIF. As a representative industry body with the requisite level of technical expertise, ACIF is well placed to develop workable and enduring processes which will not impose inefficient costs on access seekers or access providers.

Non-discriminatory ordering and provisioning

10.2 Telstra agrees that clause 8.1 of the ACIF C569:2001 *Unconditioned Local Loop - Ordering, Provision and Customer Transfer* Industry Code should be adopted into the model terms and conditions.

Provisioning timeframes

10.3 Telstra agrees that clause 11.10 of ACIF C569:2001 *Unconditioned Local Loop - Ordering, Provision and Customer Transfer* Industry Code should be adopted into the model terms and conditions.

Acknowledgment advices

10.4 Telstra agrees that all provisions in the ACIF C569:2001 *Unconditioned Local Loop - Ordering, Provision and Customer Transfer* Industry Code relating to acknowledgment advices should be adopted into the model terms and conditions.

Network conditioning requests

10.5 Telstra agrees that all provisions in the ACIF C569:2001 *Unconditioned Local Loop - Ordering, Provision and Customer Transfer* Industry Code relating to network conditioning requests should be adopted into the model terms and conditions.

Service qualification ULL requests

10.6 Telstra agrees that all provisions in the ACIF C569:2001 *Unconditioned Local Loop - Ordering, Provision and Customer Transfer* Industry Code relating to service qualification ULL requests should be adopted into the model terms and conditions.

Lead-in

10.7 Telstra is willing to participate in any ACIF review of the applicable provisions in C569:2001 relating to the provision or otherwise of lead-in information as part of the service qualification requirements. However, it queries whether a requirement to provide lead-in information would be workable given the difficulty for the access provider in obtaining it in many cases.

11 ACCESS TO INFORMATION SYSTEMS

Common information system interface

11.1 Telstra agrees that there are many advantages in streamlining the delivery of services to end users and that this will be enhanced with the use of an online system that enables immediate access through real time transactions. However, there appears to be a degree of reluctance on the part of the industry to embrace EIEnet for that purpose, perhaps for some of the reasons set out below. Telstra is also concerned that EIEnet may not be the most cost effective way of delivering the desired outcomes. Accordingly, Telstra is currently exploring particular business to business or "B2B" systems with other industry participants in addition to EIEnet.

11.2 Telstra submits that institution of a common information interface requires further discussion amongst telecommunications industry participants due to the considerable cost involved with the development and maintenance of particular systems and the effect that this may have on smaller participants, particularly from a competition perspective. Telstra estimates that system development alone for EIEnet would cost between $500,000 and $2 million per access seeker. Maintenance costs would be in addition to this. Telstra submits that B2B systems may offer a much more cost effective option for industry participants.

11.3 Also, while Telstra sees the advantages of a common information system interface in relation to the request and response transactions, this does not necessarily translate into an increase in efficiency for the entire process. Accordingly there may not be a sufficient improvement to warrant the considerable cost of EIEnet for many industry participants.

11.4 Given the potential cost issues with the EIEnet system which requires all participants to pay a percentage of the running costs, Telstra believes that the public internet should also be explored as it is the mode of operation of many industries and organisation for the exchange of information. Meanwhile Telstra proposes to continue consulting with the industry and ACIF on these issues and pilot different information interface systems with service providers.

Telstra Corporation Limited
18 July 2003

ANNEX A - DRAFT MODEL CLAUSES

Part 3. Draft Model Clauses

MODEL NON-PRICE TERMS AND CONDITIONS

[Telstra's proposed amendments to the model terms are marked up in revision mode. Most of the proposed changes are explained further in Part 2 of Telstra's submission. Brief explanations are provided under the mark-ups where this is not the case.]

Important Notice: The model clauses herein are intended to be indicative only and to be used as a guide. Their application and suitability may differ from case to case and therefore persons wishing to use or rely on the model clauses should obtain independent professional advice. The Commission disclaims any responsibility in relation to any loss or damage arising as a result of the use of or reliance on the model clauses.

A. BILLING AND NOTIFICATIONS

A.1 The access seeker's liability to pay Charges for a Service to the access provider arises at the time the Service is supplied by the access provider to the access seeker, unless the parties agree otherwise.

A.2 The access seeker must pay Charges in accordance with this agreement, including but not limited to this clause A.

A.3 Subject to clause A.4, the access provider shall provide the access seeker with an invoice in respect of Charges payable for Services and associated work supplied in each billing period. A billing period shall be a period of one calendar month, unless the parties agree otherwise. Other charges shall be invoiced by the access provider at the following times:

(a) as stated in an applicable price list;

(b) as stated in any applicable billing and settlement procedures;

(c) as stated in or incurred under this agreement; or

(d) as otherwise agreed by the access provider and the access seeker or, failing agreement, at the option of the access provider, on completion of the relevant work or when the outstanding amount reaches $50,000 (as the case requires).

A.4 As a statement of general principle, the access provider may invoice the access seeker more frequently than once a month, where there has been a decline in the access seeker's creditworthiness as assessed in accordance with clause B.

A.5 The access provider shall be entitled to invoice the access seeker for Charges which have been previously uninvoiced or Charges which were understated in a previous invoice, provided that:

(a) the Charges to be retrospectively invoiced can be reasonably substantiated to the access seeker by the access provider; and

(b) subject to clause A.6, no more than 6 months have elapsed since the date the relevant amount was incurred by the access seeker's customer, unless the access seeker gives written consent to a longer period (such consent not to be unreasonably withheld) or the invoice for a Service is being billed for the first time, in which case there shall be no restriction on the period which may have elapsed since the relevant amount was incurred, provided the access provider gives notice to the access seeker as soon as practicable after becoming aware that invoicing will be delayed and that the Service will be invoiced retrospectively at a later time.

A.6 The parties must comply with any applicable industry standard made by the ACA pursuant to Part 6 of the *Telecommunications Act* 1997 (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act* 1997 (Cth) in relation to billing.

A.7 Subject to any Billing Dispute validly notified in accordance with this Agreement, an invoice is payable in full on the due date for that invoice or such other date as agreed between the parties and the access seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the access provider. All amounts owing and unpaid after the due date shall incur a liability for interest at the rate per annum of the 90 day authorized dealers bank bill rate published in the Australian Financial Review on the first Business day following the due date for payment, plus 2.5%.

A.8 In addition to charging interest in accordance with clause A.7 or exercising any other rights the access provider has at law or under this agreement, where an amount is outstanding and remains unpaid more than 20 business days after it is due for payment, the access provider reserves the right to take action, without further notice to the access seeker, to recover any such amount as a debt due to the access provider.

A.9 Unless the parties otherwise agree, there shall be no setting-off (i.e. netting) of invoices except where:

(a) a party goes into liquidation; or

(b) a party has the right to suspend provision of a service or terminate this Agreement,

in which case the solvent party or the party with the right to suspend services or terminate the agreement may set-off. However, in order to minimize the administration and financial costs of the settlement process, the parties shall consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.

A.10 The access provider must, at the time of issuing an invoice, provide to the access seeker all information ~~reasonably~~ required by ~~the access seeker to identify and understand the nature and amount of each component of the invoice. Nothing in the last preceding sentence is intended to limit~~ sub-sections 152AR(6) and 152AR(7) of the *Trade Practices Act* 1974 (Cth). ***[See comments in paragraphs 1.10 and 1.11 in Part 2 above.]***

~~***access***~~

A.11 If the access seeker believes a Billing Dispute exists, it may, by written notice to the access provider, invoke the Billing Dispute Procedures. A Billing Dispute must be initiated only in good faith. If the access provider believes, acting reasonably, that a Billing Dispute was not initiated in good faith, it may terminate the Billing Dispute Procedures on five business days' notice to the access seeker, at which point the withheld amount shall become immediately due and payable. ***[See comments in paragraph 1.12 of Part 2 above.]***

A.12 Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked and properly terminated under A.25(b) before either party may begin legal or regulatory (for example, initiates an arbitration under Part XIC TPA) proceedings in relation to any Billing Dispute.

[Telstra submits that the current drafting of this clause allows a party to commence legal/regulatory action before the Billing Dispute Process is concluded, rendering the provision virtually worthless.]

A.13 If a Billing Dispute Notice is given to the access provider within 15 Business Days of the relevant invoice date ~~by the due date for payment of the invoice containing the Charge which is being disputed~~, the access seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been ~~resolved~~determined. Otherwise, the access seeker must pay the invoice in full in accordance with this agreement ~~(but subject to the outcome of the Billing Dispute Procedures)~~.

[As discussed at paragraph 1.13 of Part 2 above, Telstra submits that notification within 15 Business Days of the relevant invoice date is reasonable and is less likely to encourage delaying tactics from the access seeker because notification is required before the payment is due. Telstra also submits that the phrase "but subject to the outcome of the Billing Dispute Procedures" would negate the primary obligation on the access seeker to pay invoices. Telstra submits that this obligation is necessary for the integrity of the payment provisions in the agreement. Without this obligation access seekers will have a clear incentive to simply dispute every invoice.]

A.14 Except where payment is withheld in accordance with clause A.13, the access ~~seeker~~ provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full. ***[Presumed drafting error.]***

A.15 A Billing Dispute Notice may not be given to the access provider in relation to a Charge later than 6 months after the due date for the Charge.

A.16 The access provider shall acknowledge receipt of a Billing Dispute Notice within 2 Business Days by providing the access seeker with a reference number.

A.17 The Parties acknowledge that investigation of a Billing Dispute may require information to be exchanged on an iterative basis.~~Each party shall, as early as practicable after the notification of a Billing Dispute pursuant to clause A.11, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).~~

[Whilst Telstra agrees that investigation of a Billing Dispute may require information to be exchanged on an iterative basis, Telstra submits that draft model clause A.17 is so burdensome as to equate with an obligation to make discovery (contrary to the Commission's intention). Telstra suggests the above drafting, which reflects that

information will be exchanged between the parties as required, but a "dump" of all relevant information at the outset of the dispute resolution process is not mandatory.]

A.18 The access provider shall try to resolve any Billing Dispute as soon as practicable and in any event within ~~20~~ 30 Business Days of receipt of a Billing Dispute Notice, by notifying the access seeker in writing of its ~~proposed resolution~~determination ~~of a Billing Dispute~~. That notice shall explain the access provider's ~~proposed resolution~~determination and any action to be taken by:

(a) the access provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or

(b) the access seeker (e.g. payment of the disputed Charge).

[See detailed comments in paragraph 1.16 Part 2 above.]

A.19 Any withdrawal, adjustment or refund of the disputed Charge by the access provider or payment of the disputed Charge by the access seeker (as the case may be) must occur within 10 Business Days of the access provider's notice, unless the access seeker escalates the Billing Dispute under clause A.23.

A.20 Where the access provider is to refund a disputed Charge, the access provider shall pay interest (at the rate set out in clause A.7) on any refund. Interest shall accrue daily from the date on which each relevant amount to be refunded was paid to the access provider, until the date the refund is paid.

A.21 Where the access seeker is to pay a disputed Charge, the access seeker shall pay interest (at the rate set out in clause A.7) on the amount to be paid. Interest shall accrue daily from the date on which each relevant amount was originally due to be paid to the access provider, until the date the amount is paid.

A.22 If the access seeker is not satisfied with the access provider's determination in relation to a Billing Dispute, or if the access provider has not provided the access seeker with a determination to the Billing Dispute within the timeframe set out in clause A.18, the access seeker may escalate the matter under clause A.23. If the access seeker does not do so within ~~30~~ 10 Business Days of being notified of the access provider's proposed resolution, the access seeker shall be deemed to have accepted the access provider's proposed resolution and clauses A.19 and A.20 shall apply.

A.23 If the access seeker wishes to escalate a Billing Dispute, the access seeker must give the access provider a written notice:

(a) stating why it does not agree with the access provider's ~~proposed resolution~~determination; and

(b) seeking escalation of the ~~payment~~ Billing D~~d~~ispute.

A.24 A notice under clause A.23 must be submitted to the nominated billing manager for the access provider within 10 Business Days of being notified of the access provider's determination under clause A.18, who shall discuss how best to resolve the payment dispute with his or her counterpart in the access seeker's organization as nominated and made available by the access seeker for that purpose.

[Telstra submits that this process must have certainty and closure at each stage. Defined timeframes are essential and must be consistent with the Commission's objectives for certainty as set out in Part 1 of the Draft Determination.]

A.25 If the escalated matter cannot be resolved under clause A.24 within 5 Business Days of notice being given under clause A.23:

(a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation shall be conducted in accordance with the mediation guidelines of the ACDC; or

(b) if the parties either do not agree to proceed to mediation or are unable to resolve the entire payment dispute by mediation within 10 Business Days of the determination under clause A.18, either party may terminate the Dispute Resolution Process by written notice and commence legal proceedings to resolve the matter including, in the case of the access provider, taking action to recover the amount determined under clause A.18 as a debt due.

[See comments above regarding model clause A.24.]

A.26 Each party must continue to fulfil its obligations under this agreement during the pendency of a Billing Dispute and the Billing Dispute Procedures.

A.27 All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause A.24 (or their respective nominees).

A.28 There shall be a presumption that all communications between the parties during the course of a Billing Dispute are made on a "without prejudice" and confidential basis.

~~A.29 If it is determined (by the Billing Dispute Procedures or by any other dispute resolution procedure (including litigation) or by agreement between the parties) that three or more out of any five consecutive invoices for a given Service are incorrect by 10% or more, the access provider shall, within 10 Business Days of such determination, pay to the access seeker a rebate equal to 10% of the incorrect amount of the invoices in question, together with interest at the rate set out in clause A.7. The remedy set out in this clause A.29 shall be without prejudice to any other right or the sole remedy available to the access seeker in respect of the incorrect invoicing. This clause shall have effect only if and when the access seeker (by written notice to the access provider) elects to avail itself of the remedy in this clause.~~

[See Telstra's comments under paragraphs 1.20 to 1.24 of Part 2 above.]

B. CREDITWORTHINESS AND SECURITY

B.1 Unless otherwise agreed by the access provider, the access seeker must (at the access seeker's sole cost and expense) provide to the access provider and maintain for the term of this agreement, on terms and conditions reasonably required by the access provider and subject to clause B.2, the Security (as shall be determined having regard to clause B.3 and as may be varied pursuant to clause B.4) in respect of amounts owing by the access seeker to the access provider under this agreement.

B.2 The access seeker acknowledges that unless otherwise agreed by the access provider, it must maintain (and the access provider need not release) the Security specified in clause

B.1 for a period of 6 months following the last to occur of termination of this agreement and payment of all outstanding amounts under this agreement.

B.3 The Security (including any varied Security) shall be of an amount and in a form which is reasonable in all the circumstances. As a statement of general principle the amount of any Security shall be calculated by reference to the aggregate value of all Services likely to be provided to the access seeker under this agreement over a reasonable period or the value of amounts invoiced under this agreement but unpaid (excluding any amounts in respect of which there is a current Billing Dispute). For the avoidance of doubt any estimates, forecasts or other statements made or provided by the access seeker may be used by the access provider in determining the amount of a Security. Examples of appropriate forms of security, having regard to the factors referred to in this clause B.3, may include without limitation:

(a) fixed and floating charges;

(b) personal guarantees from directors;

(c) bank guarantees;

(d) letters of comfort; (e) mortgages;

(e) a right of set off; or

(f) a combination of the forms of security referred to in paragraphs (a) to (f) above.

B.4 The access provider may from time to time where the circumstances reasonably require, request from the access seeker Ongoing Creditworthiness Information to determine the ongoing creditworthiness of the access seeker. The access seeker must supply Ongoing Creditworthiness Information to the access provider within ~~15~~ 10 Business Days of receipt of a request from the access provider for such information. The access provider may, as a result of such Ongoing Creditworthiness Information, having regard to clause B.3 and subject to clause B.6, reasonably require the access seeker to alter the Security, and the access seeker must provide that altered Security within 20 Business Days of being notified by the access provider in writing of that altered requirement.

B.5 The access seeker may from time to time request the access provider to consent (in writing) to a decrease in the required Security and/or alter the form of the Security. The access provider must, within 15 Business Days of the access seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to clause B.3). The access provider may request, and the access seeker shall promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause B.5.

B.6 In the event that the access seeker provides Ongoing Creditworthiness Information to the access provider as required by this clause B, the access seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the access provider.

B.7 For the purposes of this clause B, "Ongoing Creditworthiness Information" means:

(a) a copy of the access seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);

(b) a credit report in respect of the access seeker or, where reasonably necessary in the circumstances, any of its owners or directors ("Principals") from any credit reporting agency, credit provider or other independent party. The access seeker shall co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the access seeker's creditworthiness. To that end, the access seeker agrees to procure written consents (as required under the Privacy Act 1988 (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the access provider to:

(i) obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;

(ii) disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and

(iii) obtain and use a consumer credit report;

(c) a letter, signed by the company secretary or duly authorized officer of the access seeker, stating that the access seeker is not insolvent and not under any external administration (as defined in the Corporations Act) or under similar form of administration under any laws applicable to it in any jurisdiction; and

(d) the access seeker's credit rating, if any has been assigned to it.

B.8 The access seeker may require a confidentiality undertaking to be given by any person having access to its Ongoing Creditworthiness Information prior to such information being provided to that person.

B.9 Subject to this clause B, the access provider may, in its absolute discretion, deem a failure by the access seeker to provide Ongoing Creditworthiness Information or an altered Security in accordance with clause B.4 as:

(a) an event entitling the access provider to alter the Security of the access seeker; or

(b) a breach of a material term or condition of this agreement.

B.10 Any disputes arising out of or in connection with clause B shall be dealt with in accordance with the procedures in clause D.

C. LIABILITY (RISK ALLOCATION) PROVISIONS

C.1 Except to the extent expressly set out in this agreement this clause C shall regulate the Liability of one party to the other party under and in relation to this agreement.

C.2 [Deleted.]~~Other remedies and exclusions and limitations of liability relating to services other than Core Services (if applicable) shall be set out in a relevant service module.~~

[Telstra submits that this is irrelevant as the model terms only cover Core Services.]

C.3 If a party breaches any condition or warranty implied by law which cannot lawfully be excluded, to the extent permitted by law the liability of that party is limited, at its option, to:

(a) in the case of services, the re-supply of, or payment of the cost of re-supplying, the service; and

(b) in the case of goods:

(i) the replacement of the goods or the supply of equivalent goods;

(ii) the repair of the goods;

(iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or

(iv) the payment of the cost of having the goods repaired.

C.4 Except as otherwise expressly provided in this clause C, a party has no Liability to the other party:

(a) for or in respect of any consequential, special or indirect liability, loss, damage, cost, charge or expense, including without limitation any loss of profits or data;

(b) for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any end customer of ~~the first~~a party or any third person not under the direct control of the first party;~~,~~ or

[Drafting change required because access seeker is already access provider's customer.]

C.5 The aggregate Liability of a party to the other party at any time ("Relevant time"):

(a) in any 12 month period ending on the day before an anniversary of the date of execution of this agreement; or

(b) in a period of less than 12 months from the date of execution of this agreement or an anniversary of the date of execution of this agreement to the date of termination of this agreement,

shall not in any circumstances exceed a cap ("Annual Liability Cap"), being the greater of:

(c) the aggregate amount paid or payable by the access seeker to the access provider under the agreement during the financial year which ended immediately prior to the Relevant Time (if any); and

(d) where applicable, the aggregate amount paid or payable by the access provider to the access seeker under this agreement during the financial year which ended immediately prior to the Relevant Time (if any); and

(e) ***$[insert agreed amount]*** million.

C.6 The Annual Liability Cap shall not apply to any obligation of a party under this agreement to pay Charges for Services or to liability under clauses C.8~~, or~~ C.9, C.12 or C.13. The Annual Liability Cap shall not apply to liability under clause C.11 to the extent that the claim relates to death or personal injury or the making good of property

damage. ***[See comments in paragraph 3.1 of Part 2 above relating to uncapped liability for personal injury, death and property damage.]***

C.7 Subject to clause C.6, t~~T~~he Liability of the Indemnifying Party to the Innocent Party for an Event described in any of clauses C.8 to C.~~11~~ 13 shall, unless otherwise agreed between the parties, be limited to the remedies identified in those clauses respectively. However clause C.4(a) shall not apply to such Liability.

C.8 Each party indemnifies the other party against all awards, judgments, costs, charges and expenses directly and reasonably incurred by the other party as a result of a claim against it arising out of a death of or personal injury to the People of the Innocent Party, to the extent that such damage or loss is caused by a negligent act or omission or an act or omission intended to cause death or personal injury, by the Indemnifying Party or any of the Indemnifying Party's People.

C.9 Each party indemnifies the other party against all Loss (including consequential and indirect loss and damage) arising from or relating to any damage to or loss of any equipment, Network or other tangible property of the Innocent Party or any third person to the extent that such Loss is caused by an ~~negligent~~ act or omission or an act or omission intended to cause Loss by the Indemnifying Party or any of its People.

C.10 [Not required.] ***[See comments in paragraph 3.2 of Part 2 above relating to uncapped liability for property damage.]*** ~~Each party indemnifies the other party against all costs, charges and expenses directly and reasonably incurred in relation to making good any damage to or loss of equipment, facilities, Network or other tangible property of the Innocent Party or any third person to the extent that such damage or loss is caused by any act or omission of the Indemnifying Party or any of its People.~~

C.11 Subject to clauses C.12 and C.13, each party indemnifies the other party against all Loss arising directly from or incurred in connection with a claim by a third person against the Innocent Party to the extent that the claim relates to any negligent act or omission of the Indemnifying Party or any of its People in relation to this agreement. ***[Exclusion of C.13 presumably a drafting oversight.]***

C.12 The access seeker indemnifies the access provider against all Loss arising out of the reproduction, broadcast, use, transmission, communication or making available of any material (including data and information of any sort) by the access seeker or an end user of the access seeker using a Service.

C.13 The access seeker indemnifies the access provider against all Loss arising out of any breach of a person's rights or defamation of a person (or allegation of such a breach or defamation) involving use of a Service.

C.14 The Indemnifying Party is not liable to the Innocent Party for or in respect of a claim brought against the Innocent Party by an End User of the Innocent Party or a third person with whom the Innocent Party has a contractual relationship (including a Standard Form of Agreement) to the extent that the Loss under such claim could ~~reasonably~~ have been excluded or reduced (regardless of whether such liability actually was excluded or reduced), by the Innocent Party in its contract with such End User or third person. ***[Telstra submits that it will be very difficult to determine what is "reasonable" in each case.]***

C.15 The Indemnifying Party is not obliged to indemnify the Innocent Party under this clause C to the extent that the Liability the subject of the indemnity claim is the direct result of a breach of this agreement, or a negligent act or omission, by the Innocent Party.

C.16 The Innocent Party must take all reasonable steps to minimize the Loss it has suffered or is likely to suffer as a result of the Event giving rise to an indemnity under this clause C. If the Innocent Party does not take reasonable steps to minimize such Loss then the damages payable by the Indemnifying Party shall be reduced as is appropriate in each case.

C.17 A party's liability to the other party for Loss of any kind arising out of this agreement or in connection with the relationship established by it is reduced to the extent (if any) that the other party causes or contributes to the Loss. This reduction applies whether the first party's liability is in contract, tort (including negligence), under any statute or otherwise.

C.18 Except as expressly provided in clauses C.19~~8~~ to C.22, a party ("first party") shall have no Liability to the other party ("second party") in relation to any Event or series of related Events relating to or arising out of this agreement:

(a) for any act or omission of

(i) any Correspondent of the first party; or

(ii) any third person involved in the operation or maintenance of any equipment or Network used in connection with an international carriage service;

(b) for:

(i) any delay in the initial supply of, any failure to supply or any interruption in the supply of a Service by the first party;

(ii) any failure of the first party's Network or any part of that Network; or

(iii) any error in or omission from information transmitted through either party's Network.

[Presumably the reference to C.18 is a drafting error - otherwise the clause is circular.]

C.19 If the access provider delays in establishing a POI, the sole remedy available to the access seeker is:

(a) if practicable the access provider must provide a temporary alternative POI during the period of delay, in which case:

(i) the access seeker shall not be required to bear any additional costs caused by the use of the temporary alternative POI (rather than the proposed POI) during the period of delay; and

(ii) the parties shall consult in relation to the location of any temporary alternative POI with a view to minimizing the costs to be borne by the access provider in providing the temporary alternative POI;

(b) if it is not practicable for the access provider to provide a temporary alternative POI, once the delayed POI has been established the access provider must, for the Fee

Waiver Period, waive the Applicable Percentage of the Recurring Charges for the supply by it of Domestic Interconnection at the delayed POI.

C.20 If the access provider delays the original supply of an interconnection service which is supplied in connection with a Service, (other than a delay covered by clause C.19), the sole remedy available to the access seeker is:

(a) the access provider may provide temporary alternative arrangements which provide the access seeker with a comparable service at no additional cost to the access seeker;

(b) if the access provider does not provide temporary alternative arrangements:

(i) the access provider must not charge for Services which cannot be provided to the access seeker due to the delay; and

(ii) once the delayed interconnection service has been provided, the access provider must, for the Fee Waiver Period, waive the Applicable Percentage of the Recurring Charges for the access provider's delayed interconnection service and any charges applicable to operations and maintenance support specific to the delayed interconnection service.

C.21 If the access provider delays in the original supply of any Service (not covered by clauses C.19 or C.20), the sole remedy available to the access seeker is:

(a) the access provider may elect to provide temporary alternative arrangements which provide to the access seeker with a comparable Service at no additional cost to the access seeker; or

(b) if the access provider does not provide temporary alternative arrangements, once the delayed Service has been provided the access provider must, for the Fee Waiver Period, waive the Applicable Percentage of the Recurring Charges for the delayed Service in the affected service area.

C.22 In relation to any interruption to the supply of a Service (measured from the time of the giving of notice of the interruption by the access seeker to the access provider), in excess of the Outage Period for that Service, the sole remedy available to the access seeker shall be a pro rata reduction in any Recurring Charges for the Service attributable to the period of such interruption in excess of the Outage Period. Accordingly:

(a) subject to clause C.3, there shall be no additional remedy available to the access seeker in relation to any interruption of a period within the Outage Period; and

(b) the access provider shall not be required to waive any charges in respect of an interrupted Service in relation to any period after the restoration of the interrupted Service.

C.23 Clause CA(a) does not apply to Liability under clauses C.1~~9~~8 to C.22.

[See comments under clause C.19 above - presumably the reference to C.18 is a drafting error.]

C.24 The parties shall jointly develop procedures to enable them to comply with section 118A of the *Telecommunications (Consumer Protection and Service Standards) Act* 1999 (Cth) in respect of any Specified CSG Service.

D. GENERAL DISPUTE RESOLUTION PROCEDURES

D.1 If a dispute arises between the parties in connection with or arising from this agreement, the dispute shall be managed as follows:

(a) in the case of a Billing Dispute, the dispute shall be managed in accordance with the Billing Dispute Procedures; or

(b) subject to clause D.2, in the case of a Non-Billing Dispute, the dispute shall be managed in accordance with the procedures set out in this clause D.

D.2 To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless the access provider otherwise determines, that Non-Billing Dispute shall be resolved in accordance with the Billing Dispute Procedures.

D.3 If a Non-Billing Dispute arises, either party may, by written notice to the other, refer the Non-Billing Dispute for resolution under this clause D. A Non-Billing Dispute must be initiated only in good faith.

D.4 Any Non-Billing Dispute notified under clause D.3 shall be referred:

(a) initially to the nominated manager (or managers) for each party, who shall endeavour to resolve the dispute within ~~5~~ 10 Business Days of the giving of the notice referred to in clause D.3 or such other time agreed by the parties; and

(b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then unless the parties agree in writing within a further 10~~5~~ Business Days to refer the Non-Billing Dispute to an Expert Committee under clause D.12, either party may submit it to mediation in accordance with clause D.11.

D.5 If:

(a) under clause D.11(f), the mediation is terminated; and

(b) after a period of 10~~5~~ Business Days after the mediation is terminated as referred to in paragraph (a), the parties have not been able to resolve the Non-Billing Dispute or agree in writing on an alternative process to resolve the Non-Billing Dispute (whether by further mediation, reference to the Expert Committee, arbitration or otherwise), either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.

[See comments re timeframes in paragraph 4.3 of Part 2 above.]

D.6 A party may not commence legal proceedings in any court or commence any arbitration whether pursuant to Part XIC of the TPA or otherwise (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:

(a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this clause D or clause D.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause D.5; or

(b) the other party has failed to ~~substantially~~ comply with the dispute resolution procedure set out in this clause D or clause D.2 (if applicable).

D.7 Each party must continue to fulfil its obligations under this agreement during the pendency of a Non-Billing Dispute and any dispute resolution process under this clause D.

D.8 There shall be a presumption that all communications between the parties during the course of a Non-Billing Dispute are made on a "without prejudice" and confidential basis.

D.9 [Deleted.] ***[See comments in paragraph 4.5 of Part 2 above.]*** ~~Each party shall, as early as practicable after the notification of a Non-Billing Dispute pursuant to clause D.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).~~

D.10 Subject to clauses D.6 and D.12(k), nothing in this agreement precludes or limits the right of a party (if any) to seek arbitration of a dispute by the ACCC under the arbitration provisions set out in Division 8 of Part XIC of the TPA. This clause does not constitute a general agreement to arbitration of a Non-Billing Dispute.

D.11

(a) Any referral of a Non-Billing Dispute to mediation shall be made by written notice, including a statement of the matters in the Non-Billing Dispute. The mediation must take place within 15 Business Days of such notice.

(b) The mediation must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time ("ACDC Guidelines") and the provisions of this clause D.11. In the event of any inconsistency between them, the provisions of this clause D.11 shall prevail.

(c) Mediations are to be conducted in private.

(d) In addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator should:

(i) have an understanding of the relevant aspects of the telecommunications industry (or have the capacity quickly to come to such an understanding);

(ii) have an appreciation of the competition law implications of his/her decisions; and

(iii) not be an officer, director or employee of a telecommunications company or otherwise have a potential for conflict of interest.

(e) The parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who shall attend the mediation. Nothing in this sub-clause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation.

(f) The mediation shall terminate in accordance with the ACDC Guidelines.

(g) The parties shall bear their own costs of the mediation including the costs of any representatives and shall each bear half the costs of the mediator.

(h) Any agreement resulting from mediation shall bind the parties on its terms.

D.12

(a) The parties may by written agreement in accordance with clauses DA(b) or D.5(b), submit a Non-Billing Dispute for resolution by an Expert Committee (in this clause D.12, an "Initiating Notice"), in which case the provisions of this clause D.12 shall apply.

(b) The terms of reference of the Expert Committee shall be as agreed by the parties. In the absence of agreement on the terms of reference within 5 Business Days after date of the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee shall be deemed to be terminated. An Expert Committee shall act as an expert and not as an arbitrator.

(c) The parties shall each be represented on the Expert Committee by one appointee.

(d) The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs D.11(d)(i), (ii) and (iii).

(e) Each party shall be given an equal opportunity to present its submissions and make representations to the Expert Committee.

(f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.

(g) The parties shall ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which terms of reference are agreed and the final member of the Expert Committee is appointed (whichever is the later) and the parties undertake to co-operate reasonably with the Expert Committee to achieve that timetable.

(h) If the dispute is not resolved within the timeframe referred to in clause D.12(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.

(i) The Expert Committee shall have the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.

(j) The Expert Committee must give written reasons for its decisions.

(k) A decision of the Expert Committee is final and binding on the parties in the absence of manifest error or a mistake of law.

(l) Each party shall bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties shall each bear half the costs of the independent member of the Expert Committee.

E. CONFIDENTIALITY PROVISIONS

E.1 Subject to clause E.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:

(a) use or copy such Confidential Information except for the purposes of this agreement; or

(b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.

E.2

(a) For the sake of clarification, information generated within the access provider's Network as a result of or in connection with the supply of the relevant Service to the access seeker or the interconnection of the access provider's Network with the access seeker's Network (other than the aggregate Network information of the access provider and all access seekers to whom the relevant service is supplied) is the Confidential Information of the access seeker.

(b) The access provider shall upon request from the access seeker, disclose to the access seeker quarterly aggregate traffic flow information generated within the access provider's Network in respect of a particular Service provided to the access seeker, if the access provider measures and provides this information to itself. The access seeker must pay the reasonable costs of the access provider providing that information.

E.3 Subject to clause E.4, Confidential Information of the access seeker:

(a) referred to in paragraph E.2(a); or

(b) relating to or concerning the access seeker's end-users,

may be:

(c) used by the access provider only for the purpose of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network, for the purposes of this agreement or for the purpose of billing; and

(d) disclosed only to personnel directly involved in the purposes referred to in paragraph (c) above.

E.4 A party ("disclosing party") may to the extent necessary disclose the Confidential Information of the other party:

(a) to those of its directors, officers, employees, agents and representatives to whom the Confidential Information is reasonably required to be disclosed for the purposes of this agreement;

(b) to any professional person acting for the disclosing party to permit that person to protect or advise on the rights of the disclosing party in respect of the obligations of the disclosing party under this agreement;

(c) to an auditor acting for the disclosing party to the extent necessary to permit that auditor to perform its audit functions;

~~(c)~~(d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this agreement or for the purpose of seeking advice from a professional person in relation thereto;

~~(d)~~(e) as required by law provided that the disclosing party has first notified the other party in writing that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information;

~~(e)~~(f) with the written consent of the other party provided that if required by the other party as a condition of giving its consent, the disclosing party must comply with clause E.5;

~~(f)~~(g) in accordance with a lawful and binding directive issued by regulatory authority which is duly authorized to do so; ~~or~~

(h) if reasonably required to protect the safety of personnel or property; or

(i) as required by the listing rules of any stock exchange where that Party's securities are listed or quoted.

[See comments in paragraph 5.6 of Part 2 above.]

E.5 If required by another party as a condition of giving its consent to the disclosure of the Confidential Information of that other party, the disclosing party, before disclosing Confidential Information to a third person, must:

(a) impose an obligation upon the disclosee:

(i) to use the Confidential Information disclosed solely for the purposes for which the disclosure is made and to observe appropriate confidentiality requirements in relation to such information; and

(ii) (ii) not to disclose the Confidential Information without the prior written consent of the other party;

(b) obtain an acknowledgment from such a disclosee that:

(i) the Confidential Information is and at all times remains proprietary to the other party; and

(ii) that misuse or unauthorised disclosure of the Confidential Information may cause serious harm to the other party.

E.6 Each party must co-operate in any action taken by the other party to:

(a) protect the confidentiality of the other party's Confidential Information; or

(b) enforce the rights in relation to its Confidential Information.

E.7 Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the disclosing party that the Confidential Information is or will be correct.

E.8 Each party acknowledges that a breach of this clause by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this clause E.

~~E.9~~

~~(a)If the access seeker believes there is prima facie evidence which tends to show that the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.3, the access seeker may invoke the audit procedures set out in this clause E.9. The audit procedures in this clause E.9 must be initiated only in good faith.~~

~~(b)The access seeker shall give the access provider a written notice that it intends to initiate an audit in accordance with this clause E.9.~~

~~(c)The access seeker shall nominate an independent auditor to conduct an audit of the access provider's systems for the purpose of determining whether the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.3. If the access provider objects to the person nominated by the access seeker or the parties have not agreed an independent auditor within 5 Business Days of the notice give under clause E.9(b), then the independent auditor shall be a person nominated by the President for the time being of the Institute of Chartered Accountants in the state in which the access provider holds its registered office.~~

~~(d)The access seeker shall bear all reasonable costs of the access provider relating to the audit, as well as the costs of the Independent Auditor.~~

~~(e)The Independent Auditor shall be required to give a confidentiality undertaking to the access provider in terms reasonably required by the access provider.~~

~~(f)The Independent Auditor's first task shall be to determine whether there is prima facie evidence of the type referred to in clause E.9(a). If the Independent Auditor so determines, then he/she shall be required to proceed with the audit.~~

~~(g)If the Independent Auditor is required to proceed with the audit in accordance with clause E.9(f), then the Independent Auditor shall be required to conduct an audit of the access provider's systems (including but not limited to its computer systems, databases, records and processes) for the purpose specified in clause E.9(c).~~

~~(h)The audit shall be conducted expeditiously and in any event for no longer than 20 Business Days (excluding any delays caused by the access provider).~~

~~(i)The access provider must permit the Independent Auditor to audit and inspect its systems (including but not limited to its computer systems, databases, records and processes) and the access provider must provide the Independent Auditor with such assistance as he/she reasonably requires in order to conduct the audit.~~

~~(j)At the conclusion of the audit, the Independent Auditor shall be required to provide a report to both parties setting out his/her findings and conclusions as to whether the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.3. If the Independent Auditor's report contains Confidential Information of the access provider, then he/she shall mask such information in the version of the report provided to the access seeker, provided that the access seeker's solicitors shall be provided with an unmasked copy of the report (subject to them first giving confidentiality undertakings to the access provider in a form reasonably required by the access provider).~~

~~(k)The parties acknowledge that the audit report shall be prima facie evidence of the matters contained in the report and (subject to any obligation of confidence attaching to the report or the information contained therein) may be used in connection with any dispute concerning whether the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.3.~~

[See Telstra's comments on this clause at paragraphs 5.2 to 5.5 of Part 2 above.]

F. COMMUNICATIONS WITH END USERS

F.1

(a) The access provider may communicate and deal with the access seeker's end-users ~~only~~ in accordance with this clause F.1 and as otherwise permitted by law.

[See comments in paragraph 6.3 of Part 2 above.]

(b) Subject to clause F.1(c), the access provider may communicate and deal with the access seeker's end-users:

(i) in relation to goods and services which the access provider currently supplies or previously supplied to the end-user;

(ii) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;

(iii) where the access provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;

(iv) in a manner or in circumstances agreed by the parties; or

(v) in an Emergency, to the extent it reasonably believes necessary to protect the safety or persons or property; or ***[See comments in paragraph 6.4 of Part 2 above.]***

(vi) where there is a suspension or termination of services under this Agreement, as required to ensure continuity of supply of basic telephone services to end users.

[See comments in paragraph 6.13 of Part 2 above.]

(c) If:

(i) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access seeker, the access provider must advise the end-user that they should discuss any matter concerning the access seeker's goods and/or services with the access seeker ~~and the access provider must not engage in any form of marketing or discussion of the access provider's goods and/or services~~;

(ii) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access provider, the access provider may engage in any form of marketing or discussion of the access provider's goods and/or services; and

(iii) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access provider and by the access seeker, the access provider must advise the end-user that they should discuss any matter concerning the access seeker's goods and/or services, with the access seeker, but may otherwise engage in any form of marketing or discussion of the access provider's goods and/or services.

~~where a party communicates with the end-user of the other party, that first mentioned party must make and maintain records of that communication with the other party's end-user in circumstances where that communication discusses anything concerning the other party's goods or services with the end-user. For the avoidance of doubt, the obligation in this paragraph does not include a requirement to provide such records to the other party (however such a requirement may arise pursuant to any dispute resolution procedure).~~

[See comments in paragraphs 6.1 and 6.8 of Part 2 above.]

~~(e)~~(d) For the purposes of this clause F.1, a "communication" shall include any form of communication, including without limitation telephone discussions and correspondence.

F.2 Neither party may represent that:

(a) it has any special relationship with or special arrangements with the other party; or

(b) there are consequences for an end-user when an end-user signs an authority to transfer their accounts or services.~~;~~

~~(c) a service has any characteristics or functionality other than as specified in a relevant standard form of agreement or the service description for the service or in any specifications, collateral or brochures published in relation to the service; or~~

~~(d)the other party participates in the provision of the first mentioned party's services, provided that a party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other party.~~

[Telstra submits that F.2(c) should be deleted as references to the standard form of agreement are irrelevant pursuant to the Commission's comments at page 28 of the Draft Determination. Further, Telstra submits that F.2(d) should be deleted as the meaning of "participates in" is unclear.]

F.3 Where a party communicates with an end-user of either party, the first mentioned party shall ~~use its best endeavours to ensure that it does~~ not attribute to the other party:

(a) blame for a Fault or other circumstance; or

(b) the need for maintenance of a Network; or

(c) the suspension of a Service,

provided that this requirement does not require a party to engage in unethical, misleading or deceptive conduct.

[Telstra submits that the phrase "use its best endeavours to ensure that it does not" is unnecessary, given that the matter is clearly within that party's control.]

~~F.6 This clause F shall be subject to any applicable industry standard made by the ACA pursuant to Part 6 of the *Telecommunications Act* 1997 (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act* 1997 (Cth) in relation to communications or dealings with end-users.~~

[Telstra submits that this provision is unnecessary, in view of the fact that bilateral agreements have priority over ACIF Codes as long as there is no inconsistency.]

G. SERVICE MIGRATION

G.1 Subject to clause G5, the access provider may amend the specification (including adding a new specification) for a Service or the manner in which a Service is to be delivered to the access seeker:

(a) by giving the access seeker an equivalent period of notice (in writing) to that which it provides itself (and in any event not less than 40 Business Days' written notice) before any such amendment or addition is scheduled to take effect; and

(b) provided that the access provider shall consult with the access seeker and negotiate in good faith in relation to any reasonable concerns of the access seeker, in relation to the proposed amendment.

G.2 If the access seeker seeks an amendment to a Specification, the access provider shall consider in good faith the amendment sought by the access seeker and shall negotiate in good faith with the access seeker in relation to such amendment.

G.3 In attempting to reach a mutually acceptable resolution in relation to the amendment of a specification for a Service, the parties must recognize any need that the access provider may have to ensure that the specifications for Services which the access provider supplies to more than one of its customers need to be consistent (including without limitation having regard to the incorporation by the access provider of any relevant international standards).

G.4 Notwithstanding any negotiations between the access provider and the access seeker, an amendment or addition proposed by the access provider shall come into effect at the time stated in clause G.1(a), unless the access provider and the access seeker agree otherwise.

G.5 If an amendment proposed by the access provider is one which, in the reasonable opinion of the access provider (having regard to any current or planned standard uses of the

affected Service of which the access seeker has notified the access provider in writing) would have no, or only a minor, effect on the access seeker, then the access provider ~~must give the access seeker not less than 10 Business Days'~~is not required to give written notice of the proposed amendment.

[See comments under paragraph 7.2 of Part 2 above.]

G.6 If a dispute arises in relation to whether a proposed amendment would have no, or only a minor, effect on the access seeker, then the matter shall be resolved in accordance with the dispute resolution procedures in clause D.

G.7 A reference in this clause G to amending the specification for a Service shall include amending any matter or thing relating to an applicable standard access obligation under section 152AR of the TPA.

G.8 For the avoidance of doubt, nothing in this clause G is intended to give the access provider a right to amend the definition or service description of a Service (as set out in the then current service declaration for that Service).

~~G.9 The access provider may relocate a Facility:~~

~~(a) by giving the access seeker an equivalent period of notice (in writing) to that which it provides itself (and in any event not less than 60 Business Days' written notice) before any such relocation is scheduled to take effect;~~

~~(b) provided that the access provider shall consult with the access seeker and negotiate in good faith in relation to any reasonable concerns of the access seeker, in relation to the proposed relocation; and~~

~~(c) provided that the access provider may relocate a Facility only where it is reasonably necessary to do so.~~

~~G.10 If the access seeker seeks a relocation of a Facility, the access provider shall consider in good faith the amendment sought by the access seeker and shall negotiate in good faith with the access seeker in relation to such relocation.~~

~~G.11 Notwithstanding any negotiations between the access provider and the access seeker, a relocation proposed by the access provider shall come into effect at the time stated in clause G.9(a), unless the access provider and the access seeker agree otherwise.~~

~~G.12 If a dispute arises in relation to the relocation of a Facility, then the matter shall be resolved in accordance with the dispute resolution procedures in clause D.~~

~~G.13 A reference in this clause G to a "Facility" means a Facility owned or operated by the access provider and used in connection with supplying a Service to the access seeker.~~

[As set out in paragraphs 7.3 and 7.5 of Part 2 above, Telstra submits that clauses G.9 to G.13 should be deleted in their entirety as they appear to be facilities access issues which should be dealt with under a facilities access agreement.]

H. SUSPENSION AND TERMINATION

H.1 The access provider may immediately suspend the supply of a Service or access to the access provider's Network, provided it notifies the access seeker where practicable and provides the access seeker with as much notice as is reasonably practicable:

(a) during an Emergency; or

(b) where in the reasonable opinion of the access provider, the supply of that Service or access to the access provider's Network may pose a threat to safety of persons, hazard to equipment, threat to Network security or is likely to impede the activities of authorized persons responding to an Emergency; or

(c) where, in the reasonable opinion of the access provider, the access seeker's Network or equipment adversely affects or threatens to affect the normal operation of the access provider's Network or access to the access provider's Network or equipment (including for the avoidance of doubt, where the access seeker has delivered Prohibited Traffic onto the access provider's Network),

and is entitled to continue such suspension until (as the case requires) the relevant Emergency or threat has passed or until the normal operation of the access provider's Network or access to the access provider's Network or equipment is no longer adversely affected or threatened.

H.2 If:

(a) the access seeker has failed to pay monies owing under this agreement;

(b) the access seeker's use either of its Facilities or the access provider's Facilities is in contravention of any law;

(c) the access seeker breaches a material obligation under this Agreement; or

(d) ~~any of the events described in clause H.7 occurs in respect of~~ the access seeker breaches three or more obligations of this Agreement which collectively have a material impact on the access provider, ***[See comments in paragraph 8.3 of Part 2 above.]***

("Suspension Event") and:

(e) within ~~20~~ 10 Business Days after becoming aware of the Suspension Event, the access provider gives a written notice to the access seeker:

(i) citing this clause;

(ii) specifying the Suspension Event and the Service in respect of which the event has occurred;

(iii) requiring the access seeker to institute remedial action (if any) in respect of that event; and

(iv) specifying the action which may follow due to a failure to comply with the notice,

("**Suspension Notice**") and:

(f) the access seeker fails to institute remedial action as specified in the Suspension Notice within ~~20~~ 10 Business Days after receiving the Suspension Notice (in this clause H.2, the "Remedy Period"),

the access provider may, by written notice given to the access seeker ~~within 20 Business Days after the expiry of the Remedy Period~~:

(g) refuse to provide the access seeker with ~~the~~ Services until the remedial action specified in the suspension Notice is taken; and~~:~~

~~(i)of the kind in respect of which the Suspension Event has occurred; and~~

~~(ii)a request for which is made after the date of the breach,~~

~~until the remedial action specified in the Suspension Notice is taken; and~~

(h) suspend the provision of any Service of the kind in respect of which the Suspension Event has occurred, until the remedial action specified in the Suspension Notice is taken.

[See comments in paragraph 8.3 of Part 2 above.]

H.3 In the case of a suspension pursuant to clause H.2, the access provider shall reconnect the access seeker to the access provider's Network and recommence the supply of any suspended Services as soon as practicable after there no longer exists a reason for suspension and the access provider shall do so subject to payment by the access seeker of the access provider's reasonable costs of suspension and reconnection.

H.4 If:

(a) a party ceases to be a carrier or carriage service provider; or

(b) in the case of the access seeker, any of the reasonable grounds specified in section 152AR(9) of the TPA apply; or

(c) a party breaches a material obligation under this agreement or three or more obligations which collectively have a material impact on the access provider and:

(i) that breach or those breaches materially impair(s) or is/are likely to materially impair the ability of the other party to deliver Listed Carriage Services to its customers; and

~~(ii)the other party has given a written notice to the access seeker within 20 Business Days of becoming aware of the breach ("Breach Notice"); and~~

~~(iii)~~(ii) the other party fails to institute remedial action as specified in the Breach Notice within ~~20~~ 10 Business Days after receiving the Breach Notice (in this clause H.4, the "Remedy Period"),

the other party may terminate all or any part of this agreement by written notice given to the first mentioned party ~~within 20 Business Days after becoming aware of the cessation,~~

~~reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be)~~.

[See comments in paragraphs 8.2 and 8.3 of Part 2 above.]

H.5 A party must not give the other party both a Suspension Notice under clause H.2 and a Breach Notice under clause H.4 in respect of:

(a) the same breach; or

(b) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events,

except where a Suspension Notice has previously been given to the access seeker by the access provider in accordance with clause H.2 in respect of a Suspension Event and the Suspension Event has not been rectified by the access seeker within the relevant Remedy Period specified in clause H.2.

H.6 For the avoidance of doubt, a party shall not be required to provide a Suspension Notice under clause H.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause H.4.

H.7 Notwithstanding any other provision of this agreement, either party ("Notifying Party") may at any time immediately terminate all or any part of this agreement (including terminating the supply of one or more Services) by giving written notice of termination to the other party if:

(a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other party and the order or resolution remains in effect for a continuous period of 5 Business Days; or

(b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the whole or a substantial part of the undertaking and property of the other party and the appointment remains in effect for a continuous period of 5 Business Days; or

(c) a holder of an encumbrance takes possession of the whole or any substantial part of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or

(d) the other party is or likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the Corporations Act; or

(e) as a result of the operation of section 459F or any other section of the Corporations Act, the other party is taken to have failed to comply with a statutory demand; or

(f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of 3 months; or

(g) the other party ceases to be a carrier or a carriage service provider; or

~~(g)~~(h) the other party breaches any of the terms of any of its loan, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to this agreement; or

(i) the other party breaches a term or condition of a security provided under a Security; or

~~(h)~~(j) the other party seeks or is granted protection from its creditors under any applicable legislation; or

(k) the other party ceases to carry on business for a period of more than 10 consecutive Business Days without the prior written consent of the Notifying Party; or

~~(i)~~(l) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party. ***[See comments in paragraph 8.5 of Part 2 above.]***

H.8 Termination or expiry of this agreement for any reason:

(a) shall not operate as a waiver of any breach by a party of any of its provisions;

(b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of the termination or expiry, including a right of indemnity; and

(c) shall not extinguish or otherwise affect the provisions of this agreement which by their nature survive termination.

H.9 Without prejudice to the parties' rights upon termination or expiry of this agreement the access provider must refund to the access seeker a fair and equitable proportion of those sums paid under this agreement by the access seeker which are periodic in nature and have been paid for a Service for a period extending beyond the date on which this agreement terminates or expires, subject to any invoices or other amounts outstanding from the access seeker to the access provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in this agreement.

I. DEFINITIONS

"**ACDC**" means the Australian Commercial Disputes Centre Limited;

"**Annual Liability Cap**" has the meaning given in clause C.5;

"**Applicable Percentage**" means:

(a) during the first and second months of the Fee Waiver Period, 50%;

(b) during the third and fourth month of the Fee Waiver Period, 75%; and

(c) in the fifth and subsequent months of the Fee Waiver Period, 100%;

"**Billing Dispute**" means a dispute relating to a Charge or an invoice issued by the access provider;

"**Billing Dispute Notice**" means a notice given pursuant to clause A.11;

"**Billing Dispute Procedures**" means the procedures set out in clauses A.11 to A.28;

"**Business Day**" means any day other than Saturday or Sunday or a day which is a gazetted public holiday in the place concerned;

"**Carriage Service**" has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth);

"**Charge**" means a charge for the supply of a Core Service;

"**Confidential Information**" means all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form and whether coming into existence before or after the commencement of this agreement) relating to or developed in connection with or in support of the business of a party (the "first mentioned party") but does not include:

(a) information which is or becomes part of the public domain (other than through any breach of this agreement);

(b) information rightfully received by the other party from a third person without a duty of confidentiality being owed by the other party to the third person, except where the other party has knowledge that the third person has obtained that information either directly or indirectly as a result of a breach of any duty of confidence owed to the first mentioned party; or

(c) information which has been independently developed or obtained by the other party;

"**Core Service**" means a "core service" for the purposes of section 152AQB of the TPA;

"**Correspondent**" means an international telecommunications operator to whom a party's international network is connected and from whom traffic is sourced and/or to whom international traffic is provided;

"**CSG Standard**" means the *Telecommunications (Customer Service Guarantee) Standard* 2000 *(No.* 2) and the *Telecommunications (Customer Service Guarantee) Amendment Standard* 2001 *(No. 1),* as amended from time to time (including without limitation the *Telecommunications (Performance Standards) Determination* 2002);

"**Emergency**" means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war-like action) which:

(a) endangers or threatens to endanger the safety or health of persons; or

(b) destroys or damages, or threatens to destroy or damage property,

being an emergency which requires a significant and co-ordinated response;

"**Event**" means an act, omission or event relating to or arising out of this agreement or part of this agreement;

"**Exchange**" means telephone switching equipment of the access provider or access seeker;

"**Expert Committee**" means a committee established under clause D.11;

"**Facility**" has the same meaning given to that term in section 7 of the *Telecommunications Act* 1997 (Cth);

"**Fault**" means:

(a) a failure in the normal operation of a Network or in the delivery of a Service; or

(b) any issue as to the availability or quality of a Service supplied to an end-user via the access seeker, notified by the end-user to the access seeker's help desk,

that has been reasonably assessed by the access provider as being the access provider's responsibility to repair;

"**Fee Waiver Period**" means a period which is equal to the period of delay in supplying a Service or establishing a POI;

"**Indemnifying Party**" means the party giving an indemnity under this agreement;

~~"**Independent Auditor**" means a person appointed as an independent auditor in accordance with clause E.9(c);~~

"**Innocent Party**" means the party receiving the benefit of an indemnity under this agreement;

"**Interconnect Gateway Exchange**" means an Exchange nominated by the access provider for provision of interconnection of the access provider's Network with that of the access seeker;

"**International POI**" means an agreed location which:

(a) is a physical point of demarcation between the access provider's international Network and the access seeker's domestic Network, or, if agreed as an alternative, is between the access provider's international Network and the access seeker's international Network; and

(b) is associated (but not necessarily co-located) with one or more of the access provider's international gateway exchanges,

but does not include a POI;

"**Liability**" (of a party) means any liability of that party (whether in contract, in tort, under statute or in any other way and whether due to negligence, wilful or deliberate breach or any other cause) under or in relation to this agreement, or part of this agreement or in relation to any Event or series of related Events;

"**Listed Carriage Service**" has the same meaning given to that term in section 7 of the *Telecommunications Act* 1997 (Cth);

"**Loss**" means loss, liability, costs or expenses (including legal costs);

"**Network**" of a party, means that party's system, or series of systems, that carries, or is capable of carrying communications by means of guided or unguided electromagnetic or optical energy;

"**Non-Billing Dispute**" means a dispute other than a Billing Dispute;

"**Outage Period**" in relation to a Service means the Repair Time for that Service as specified in any applicable Service schedule;

"**People**" of a party, means each of that party's directors, officers, employees, agents, contractors, advisers and representatives but does not include that party's end users or the other party;

"**POI**" means an agreed location which:

(a) is a physical point of demarcation between the Networks nominated by the access seeker and the access provider; and

(b) is associated (but not necessarily co-located) with one or more of the access provider's Interconnect Gateway Exchanges,

but does not include an International POI;

"**Prohibited Traffic**" means traffic offered across a point of interconnection for which there is no agreement between the access provider and the access seeker that the access provider will carry such traffic or provide a related service to the access seeker;

"**Recurring Charges**" means Charges of a recurring nature payable periodically for the supply or usage of a Service as listed in an applicable price list and includes annual service charges to cover operating costs;

"**Repair Time**" means the period of time between the access provider determining that a reported failure in the normal operation of a Service or service provided to an end-user is a Fault and repair of the Fault by the access provider, as set out in any relevant Service schedule;

"**Security**" means the amount and type of security provided, or required to be provided, to the access provider in respect of the provision by the access provider of Services, as set out at ***[insert a reference to the location in the agreement where the amount of the security is specified]***;

"**Service**" means a Core Service;

"**Specified CSG Service**" means a "specified service" within the meaning of the CSG Standard;

"**TPA**" means the Trade Practices Act 1974 (Cth).