Final Determination – Model Non-price Terms and Conditions

October 2003

Preface

This final Determination comprises three Parts.

Part 1 is the **Introductory Section** that provides the background, principles and processes that the Commission has followed in developing this final Determination.

Part 2 of the final Determination is the **Principles – Specific Issues** section that contains the issues as raised by industry and details the Commission's approach to the issues and the principle it has applied in arriving at its Determination. Following the discussion of each issue, there is a reference to the applicable model clauses in Part 3.

Part 3 contains the indicative **Model Clauses** which are intended to reflect the principles as enunciated in Part 2. Generally speaking, each issue within Part 2 is referable to an applicable clause in Part 3.

Part 1. Introductory Section

Introduction

On 19 December 2002, the *Telecommunications Competition Act 2002* came into effect making certain amendments to the telecommunications industry regulatory regime in Parts XIB and XIC of the *Trade Practices Act 1974* ('TPA').[1] Amongst the package of reforms was a new regulatory requirement concerning the establishment of model terms and conditions relating to access to core telecommunications services.[2]

Specifically, the new s152AQB requires the Commission to publish a written determination concerning non-binding model price and non-price terms and conditions of access for each of the "core" services.[3] This final Determination addresses the non-price aspects of this legislative requirement.

Background

Prior to the 2002 amendments, noted above, the Commission had approved an access code developed by the now defunct, Telecommunications Access Forum (TAF). The TAF was officially dissolved on 31 January 2002. Prior to its dissolution, the TAF requested that the Commission consider making a Telecommunications Access Code under Part XIC of the Act to replace and update the existing TAF code.

Section 152BJ of the Act empowers the Commission to make a Telecommunications Access Code. The Commission continues to have the power to make its own access code, even in the absence of the TAF. In this context, the Commission considered that there were a number of issues that could be included in such a code, including more detailed information about non-price terms and conditions. The Commission, however, concluded that under the current legislation, such a code would, like the TAF code, be voluntary and unlikely to be effective. Accordingly, to date, the Commission has not made a Telecommunications Access Code under s152BJ(1). That said, the Commission retains a power to make a telecommunications code, as distinct from making model terms and conditions.

In April 2002, the Government announced a proposed package of measures in response to the Productivity Commission's review of telecommunications competition regulation.[4] A key component of the package was the requirement for the Commission to produce benchmark terms and conditions for core telecommunications services such as Public Switched Telephone Network (PSTN) interconnect, Local Call Resale (LCR) and Unconditioned Local Loop Services (ULLS). These measures were intended to provide greater certainty and encourage the industry to resolve access issues in a more timely manner, as well as reducing the potential for regulatory gaming.[5]

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[1] Telecommunications Competition Act 2002, No 140, 2002

[2] Schedule 2, Part 1 of the Telecommunications Competition Act 2002 inserted a new s152AQB into the Act

[3] Trade Practices Act 1974 s152AQB(1)

[4] Productivity Commission – "Inquiry into Telecommunications Regulation", December 2001

[5] Department of Communications, Information Technology and the Arts (DCITA), Media release, 24 April 2002, "Telecommunications regime to be made more competitive", 97/02.

In anticipation of the requirement to establish benchmark terms and conditions, the Commission wrote to relevant industry participants on 7 August 2002 seeking preliminary views on the development of non-price model terms and conditions. Specifically, the Commission requested views as to what they considered to be the key non-price terms and conditions that should be covered in the proposed regime. This input was a precursor to the more formal process the Commission would undertake in response to the impending enactment of the Telecommunications Competition Bill under which the Commission would be formally required to develop model terms and conditions of access.

Pursuant to industry's response to the Commission's request of 7 August 2002, the Commission was able to develop a set of key contentious non-price issues that would form the basis for developing model non-price terms and conditions. Following this process, the Commission undertook further industry consultation in December 2002. This consultation sought information on these contentious areas and requested that parties make submissions with specific reference to current standards as reflected in access agreements, as well as views on how existing deficiencies should be addressed.

In late December 2002, the *Telecommunications Competition Act 2002* was passed, giving effect to the Government's earlier policy announcements. Incorporated within the amendments were additional requirements relating to non-price terms and conditions under the accounting separation provisions of the Act (see below).

The Commission released its draft Determination in June 2003. There were principally two aspects of the draft Determination on which the Commission sought comment. The first aspect related to the principle applied by the Commission in formulating the model term and condition. This in-principle position was discussed in the position paper and it was requested that parties indicate whether they agree or disagree with the Commission's in principle approach to the concern raised.

The second aspect of the draft Determination on which comment was sought related to the actual drafting of the model terms and conditions. Based on the in-principle position taken by the Commission in respect of a particular issue, the Commission drafted a suggested model term and condition to reflect the principle and which could be easily used in an access undertaking. The model clauses in Part 3, however, were intended as indicative only as the Commission noted that there were a number of ways in which the relevant principle could be reflected in the form of a model clause.

Additionally, the draft Determination expressed views as to possible future action in relation to Australian Communications Industry Forum (ACIF) codes, such as the recommendation that a particular matter be dealt with as part of an ACIF code review.

Key Performance Indicators (KPIs) – non-price terms and conditions

A concurrent and related process is the legislative requirement of Telstra to publish information comparing performance in wholesale and specified retail services through key performance indicators (KPIs).[6] The new accounting separation requirement is designed to improve transparency in terms of the actual performance of Telstra in supplying services to itself as against its wholesale customers, whereas the aim of model terms and conditions is to assist parties to reach commercial agreement on terms and conditions of access.

While the information gathered as a result of the KPI monitoring exercise will to some extent, also be relevant to the development of model non-price terms and conditions going forward, the KPI requirement was progressed separately through the release of a Commission Discussion Paper in April 2003 and the subsequent formulation of a Record Keeping Rule (RKR) in August 2003.

[6] New s151BUAAA allows the Minister for Communications, under clause 6 of the Act, to make a Ministerial Direction directing the ACCC to make Record-Keeping rules under Part XIB and to publish reports on the information gathered. The proposed Ministerial Direction is currently subject to public consultation.

Legislative Requirements

This section sets out some of the key legislative requirements of the Commission under the Act.

The recently inserted section 152AQB of the Act requires the Commission to make a written determination setting out model terms and conditions relating to access to each core service.[7] This written determination must be published by the Commission, including in electronic form.[8] The applicable core services are specified in sub-section (1) as follows:

- the Domestic Public Switched Telephone Network (PSTN) Originating Access Service (PSTN originating service);
- the Domestic Public Switched Telephone Network (PSTN) Terminating Access Service (PSTN terminating service);
- the Unconditioned Local Loop Service (ULLS);
- the Local Carriage Service (LCS); and
- any additional core service specified in regulations by the Minister.

Before making a determination, the Commission must publish a draft of a determination and invite people to make submissions on a draft determination.[9] Additionally, the Commission must consult with the Australian Communications Authority (ACA) before making a determination.[10] The release of this Determination is intended to fulfil the Commission's obligations under the TPA.

A determination will remain in force for a period of 5 years in relation to the particular core service, unless sooner revoked.[11] Finally, the Commission must have regard to a determination made under s152AQB if it is required to arbitrate an access dispute in relation to a core service covered by a determination.[12]

What is the aim of this legislative requirement?

Essentially, the model terms and conditions are intended to directly assist parties to reach commercial agreement on terms and conditions of access, or to submit access undertakings, thus providing more timely access for access seekers to core services.

[7] s152AQB(2)
[8] s152AQB(7)
[9] s152AQB(5)
[10] s152AQB(6)
[11] s152AQB(8)
[12] s152AQB(9)

While these model terms and conditions will be non-binding, they are intended to provide clear guidance about the Commission's views as to what constitute fair terms and conditions of access to these services.

The availability of model terms and conditions is designed to overcome any regulatory uncertainty industry participants may have prior to regulatory arbitration of disputes. If a dispute about terms and conditions arises between parties, the Commission's arbitration determination would likely reflect the model terms and conditions.[13] Parties will therefore have an up-front view of the likely outcome of a particular issue thereby encouraging the parties to reach commercial agreement on access or by access undertaking.[14]

What is meant by 'model terms and conditions'?

Generally speaking, the determination of model terms and conditions requires the Commission to form a view about the appropriate terms of supply of certain declared services, which can then be used as a guide or form of benchmark for industry in the negotiation of commercial agreements or in access undertakings.

The Commission has applied the following general principles in formulating the model terms and conditions.

The model terms and conditions should be consistent with relevant legislation and codes. This includes (but is not limited to) the TPA (for instance, s152AR which sets out an access provider's standard access obligations and 152AYA of the TPA which sets out an ancillary access obligation relating to confidentiality), the *Telecommunications Competition Act*, the *Telecommunications Act 1997* (Cth) and any relevant ACA and ACIF industry codes.

The objective of Part XIC

The requirement to make a determination under s152AQB arises within Part XIC of the TPA. The object of Part XIC is to promote the long-term interests of end-users (LTIE) of carriage services or of services provided by means of carriage services.[15] This will partly be achieved through establishing the rights of third parties to gain access to services which are necessary for competitive services to be supplied to end-users, including through the non-price terms and conditions on which access is provided. Accordingly, in making a determination that sets out model non-price terms and conditions, the Commission is seeking to promote the LTIE.

[13] The statutory obligation on the Commission under ss152AQB(9) is for the Commission to have regard to the model terms and conditions.
[14] Commonwealth, *Telecommunications Competition Bill 2002 Explanatory Memorandum*, House of Representatives (2002), at pages 2 and 32
[15] s152AB(1)

Reasonableness criteria

Although there is no express requirement for it to do so, the Commission believes the model terms and conditions should represent what would be considered "reasonable" terms and conditions of access.[16] The Commission is required to have regard to the reasonableness criteria both in assessing access undertakings and making arbitral determinations.[17] It is therefore appropriate to have regard to these same criteria in making model terms and conditions.

As the Commission is required to have regard to the reasonableness criteria in any arbitral determination, having regard to those criteria in the model terms and conditions will better ensure that model terms are indicative of the position the Commission might adopt in an arbitration.

That said, the Commission notes that the model terms and conditions are intended as indicative and non-binding, and therefore any arbitral determination will depend upon the particular circumstances of the dispute. As such, there will remain the potential for an arbitral determination to depart from the model terms and conditions.

In determining whether terms and conditions are reasonable, the following matters must be considered:

- whether the terms and conditions promote the LTIE of carriage services or of services supplied by means of carriage services;
- the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or provider's investment in facilities used to supply the declared service concerned;
- the interests of persons who have rights to use the declared service concerned;
- the direct cost of providing access to the declared service concerned;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.[18]

This does not, by implication, limit the matters under consideration.[19]

Long-term interests of end-users

The Commission believes 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 telecommunications services to end-users, the Commission is acting consistently with the LTIE criteria, which are:

[16] Section 152AH contains criteria by which to assess the reasonableness of an access undertaking.
[17] s152BV(2)(d) and s152CR
[18] s152AH(1)
[19] s152AH(2)

- the promotion of competition in markets for telecommunications services;
- achieving any-to-any connectivity in relation to carriage services that involve communications between end-users; and
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied.[20]

Legitimate business interests of the carrier or carriage service provider concerned

The non-price terms and conditions of access should respect the access provider's right to conduct its business to a normal commercial standard, free from any undue or unfair interference caused by the right of an access seeker to access the provider's telecommunications services.

Interests of persons who have rights to use the declared service

In the Commission's view, persons who have rights to use the declared service have an interest in competing for the custom of end-users on the basis of their technical and commercial merits. Their ability to compete in the supply of a service in a dependent market should be based on the cost and quality of their service relative to their competitors. For example, non-price terms and conditions of access should not be overly onerous so as to artificially protect a vertically-integrated access provider from being displaced by a more efficient service provider in a downstream market.

The direct costs of providing access

The Commission does not consider this criterion to be directly relevant to non-price terms and conditions

Operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility

Non-price terms and conditions of access should not lead to arrangements between access providers and access seekers that will encourage or result in the unsafe or unreliable operation of a carriage service, telecommunications network or facility.

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

Non-price terms and conditions that facilitate the effective and efficient use of a carriage service and/or telecommunications network or facility by striking an appropriate balance between the rights and interests of the access provider and those of the access seeker may be considered as promoting the economically efficient operation of that service or network.

Also, in its *Analogue Access Undertaking Discussion Paper* issued in December 2002, the Commission gave some indication of what characteristics it would expect to see in

[20] s152AB(2)

'reasonable' non-price terms and conditions. These characteristics include, certainty, fairness and balance, timeliness and the removal of any potential for delaying access.[21]

Explanatory Memorandum

In considering the LTIE and the reasonableness of the model terms and conditions, the Commission has to some extent been guided by the Explanatory Memorandum to the *Telecommunications Competition Act* as to what principles should be reflected in the model terms and conditions.

It is clear from the Explanatory Memorandum that the model terms and conditions must be a reflection of what the Commission considers to be fair terms and conditions of access.[22] In the Commission's view, the concept of 'fair' as used in the context of model terms and conditions means that they be equitable and strike an appropriate balance of the rights and interests of the various parties in terms of access to telecommunications services.

Important is the obligation that the model terms and conditions be based on an assessment of current market conditions. The Commission has consulted and continues to consult with industry parties in relation to the current access arrangements. Therefore the issues and views of the Commission and any model terms and conditions arising from this process will be based on current market conditions. Also, implicit in this requirement is 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 to accord with current market conditions that are evident at the time. The indicative pricing determination is intended to operate for 3 years. Unless the need arises beforehand, this may be the appropriate time at which to review the non-price determination.

The model terms and conditions need not be comprehensive.[23] The Commission can therefore make a determination that deals with any or all of the model terms and conditions relating to the core services. In this Determination, the Commission has chosen to deal with only the key contentious terms and conditions as raised by industry participants.

An important consideration for the Commission in considering what is meant by model terms and conditions, is that parties continue to be encouraged to negotiate bilateral terms and conditions of access in relation to core services. The model terms and conditions can be regarded as <u>fair</u> terms and conditions of access and are not intended to represent a minimum or maximum position. Parties may agree on different or additional provisions where it is considered mutually beneficial to depart from the model terms and conditions. As indicated in the Explanatory Memorandum, the model terms and conditions are there to bring the parties' negotiating position closer together, thus expediting and simplifying the commercial negotiation process.[24]

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[21] see ACCC Discussion Paper on Analogue Pay TV Access Undertakings offered by Telstra Multimedia and Foxtel, December 2002

[22] Explanatory Memorandum at page 32

[23] Id at page 34

[24] Id at page 33

The Commission believes that in seeking to achieve 'fair' model terms and conditions, the Commission will be developing model terms and conditions consistent with the reasonableness criteria and in so doing promoting the LTIE.

For instance, fairness will generally involve finding an appropriate balance between the rights and interests of the access provider and access seeker. This would in effect mean taking account of the legitimate business interests of the access provider and rights of an access seeker to use the declared service as required under the reasonableness criteria. This in turn should translate into an approach that promotes the LTIE by fostering competition and encouraging the economically efficient use of telecommunications services.

Also, the model term and conditions should be in a form that could be easily incorporated into an access undertaking.[25]

Finally, where a contractual term allows for a party to exercise a discretion, as a rule, that discretion should be exercised on an objective, rather than subjective basis.

ACIF Codes

The further dimension that the Commission has been required to consider in this exercise is that a number of the areas covered in this Determination are matters covered by ACIF codes (both registered and unregistered). This means that the Commission is being requested to make a determination over matters that are currently regulated through, in some cases, enforceable mechanisms, as distinct from the Commission's model terms and conditions which are not enforceable (outside of the arbitration context).

The Commission's proposed approach to developing model terms and conditions vis-à-vis ACIF codes is that where an ACIF code covers a particular matter that has been raised by an industry participant, the Commission will treat that particular aspect of the ACIF code as representing the standard for the model term and condition.

The Commission's approach in these instances is based on the rationale that there exists a formal process of industry self regulation that has determined how particular matters should be dealt with between access providers and access seekers. The Commission believes that it must acknowledge this process. First, by respecting the process itself in terms of it being a process by which industry participants can resolve telecommunications issues themselves, and secondly, by not establishing standards through model terms and conditions that potentially conflict or are inconsistent with standards set under the ACIF process. Therefore, if the Commission is satisfied that a particular issue is dealt with in an ACIF code, then this should be reflected in the model term.

Specifically, in Part 2 of the Determination under ACIF Code Standards, the Commission expresses the view that it adopts particular ACIF codes standards where the ACIF Code provisions are considered to adequately deal with the matter under examination.

[25] Id at page 32

In response to the draft Determination, some industry participants expressed the concern that although a particular ACIF code standard was stated to be adopted in the principles (Part 2), effect had not been given to that adopted standard in the model clauses (Part 3).

The Commission does not believe there is a need to expressly reproduce the adopted ACIF code provision in its model clauses (as specified in Part 3 - Model clauses). The same applies to the specific provisions of s152AR, the Standard Access Obligations (SAOs). Where the Commission expresses the view that it adopts as a model term and condition, a particular ACIF code standard, SAO or other provision, that ACIF Code standard, SAO and/or provision should be taken to form part of the model clauses that comprise the Commission's Determination.

Where, however, an ACIF code only partly deals with a particular issue, the Commission may be minded to establish an express model term that complements the ACIF code provisions. This is more fully explained in the discussion concerning the specific issues in the final Determination.

Further, where a particular issue is dealt with by an ACIF code, but which the Commission believes should be further developed and better reflected in the ACIF code to fully address the issue raised, it will highlight the need for industry, through the ACIF, to undertake the necessary work. The discussion below in relation to specific issues, highlights the areas where the Commission suggests further work through the ACIF code review process should be undertaken.

TAF Code

The TAF code was developed by industry participants (access providers and access seekers) and approved by the Commission as an approved telecommunications access code in 1998. [26] The code sets out, inter alia, model terms and conditions in relation to core telecommunications services.

Although there is no longer an *approved TAF telecommunications access code* (as it was then known), the Commission considers parts of the TAF code to be useful in terms of what may be considered fair and reasonable terms and conditions of access. Accordingly, the Commission has to some extent used and/or been guided by the TAF code provisions in developing the model terms and condition in relation to specific issues raised by industry.

The Commission, however, has not used the TAF code in the same way as its approach to ACIF codes. As mentioned above, where an ACIF code applies, the Commission's approach is that the model terms and conditions should accord with the ACIF provisions or should otherwise be improved through this process, as appropriate. The Commission has only used or been guided by the TAF code provisions where it considers that the TAF code provisions represent fair and reasonable terms and conditions of access and are appropriate to address the particular matter raised.

[26] The TAF was abolished pursuant to Part 10 of Schedule 2 of the Telco Competition Act along with references in the TPA to the TAF code. Division 4 of Part XIC of the TPA now only refers to a telecommunications access code that can be made by the ACCC.

Commission's approach to Model non-price terms and conditions

In developing non-price model terms and conditions, the Commission took the view that it first needed to determine the specific matters that should be covered by the Determination.

As previously mentioned, the Explanatory Memorandum supports the view that the Commission does not have to make a determination in respect of each and every term and condition of access. Accordingly, the Commission has adopted a process that allows it to focus on the main issues arising between access providers and access seekers which have been identified by industry participants.

The Commission identified the following areas as key contentious non-price terms and conditions which it decided to examine in detail as part of the process of developing model non-price terms and conditions:

- faults / maintenance;
- billing and notifications;
- service migration;
- suspension and termination;
- access to information systems;
- liability provisions;
- creditworthiness;
- dispute resolution processes;
- confidentiality agreements; and
- communications with end-users.

Limiting the areas that model terms and conditions address in detail was seen as an effective and timely strategy for fulfilling the Government's requirements given the limited timeframes involved. This is also consistent with achieving the underlying objective of providing greater transparency and information to the market place in order to encourage the resolution of disputes through commercial negotiation in those areas which are potentially most contentious.

Telstra Access Agreements

The key contentious issues raised by parties are, for the most part, issues that are generic to all the core services. Generally speaking, terms and conditions of access to these core services are governed by Telstra's General Access Agreements (GAA)[27] and Telstra's Carriage Service Provider Agreement (CSPA).[28] The Commission therefore considered that

[27] The GAA is used in relation to PSTN and ULL services; the CSPA is used in respect of LCS services
[28] Subject to any variations arising out of a bilateral agreement between Telstra and the access seeker

a useful starting point and basis from which to develop the model terms and conditions was the terms and conditions as contained in the GAA and CSPA.

A further rationale for using the GAA and CSPA as a starting point from which to develop model terms and conditions is that these agreements represent current market practices and therefore any model terms and conditions that derive from these agreements should be broadly up-to-date and consistent with current market conditions.[29]

The GAA and CSPA have served as an effective framework for soliciting the views of industry. In this regard, the Commission requested that parties comment on the contentious non-price areas by making specific reference to the relevant clauses as contained in their current GAAs, CSPAs or other relevant agreements. Specifically, the Commission requested that respondents, identify by express reference to clause and/or definition:

- the current standards as specified in existing agreements applicable to the above contentious non-price areas ; and
- any proposed changes to these current standards which the parties consider would enable fair terms of access to the core services, and the reasons for any suggested changes.

In relation to the first point, the Commission considered that existing Service Level Agreements (SLAs) may provide a useful means to gauge the standards which constitute current industry practice. To this end, the Commission requested that parties, in providing their views on the appropriateness of relevant clauses, should make specific reference to their SLAs that are currently in place.

Telco-specific vs industry standard

The Commission considered whether it ought to take a "telco-specific" approach to preparing the model terms and conditions, or whether more general commercial considerations would be sufficient. First, it is important to note that the model terms and conditions will be intended for use only in the telecommunications industry. Therefore to some extent they should be "telco-specific". This would be relevant, for instance, in relation to operational and procedural matters which are "telco-specific" and for which accepted industry-wide practices are in place. However, in relation to a number of the more general commercial provisions in telecommunications wholesale contracts (including, for example, issues such as billing practices, creditworthiness and liability), the Commission considers that it is appropriate to draw on broader commercial experience. The balance between "telco-specific" versus broader commercial considerations will therefore differ from issue to issue.

[29] The Commission notes that Telstra are currently in the process of updating its GAA to conform more with the format adopted in the CSPA.

Process for developing the model terms and conditions

The Commission has considered the nature of the perceived problem as identified by interested parties and examined that problem in the light of the current applicable GAA or CSPA clause. The Commission has then decided whether or not there is any merit in the concern identified and how a change to the applicable clause might address or overcome the concern.

Where the issue was considered to warrant further action, the Commission has explained the nature of the problem in Part 2 and then stated what it considers to be the relevant principle to apply. Accordingly, the related clause has been developed to reflect the principle the Commission considers appropriate. In some cases, it has been necessary to develop a clause without reference to any existing clauses since the GAA or CSPA does not currently deal with the issue at hand. On other occasions, a change to the current clause was not deemed necessary and therefore the existing clause has remained unchanged.

As discussed above, the aim of the draft Determination was to gather views from interested parties on whether:

- the Commission's assessment and in-principle decision in relation to the matter at hand was considered appropriate; and
- the drafting of the model clause effectively reflected the expressed position.

The views of parties in response to the draft Determination have been a key input into the finalisation of this Determination. Further issues raised in relation to the Commission's proposed in-principle position are again discussed in Part 2. Part 3 has been updated to reflect any amendments made to the model clauses since the draft Determination.

The Commission has been assisted throughout the process of developing the relevant principles and particularly the draft clauses by Mr Matthew Nicholls, Technology and Communications Lawyer, Melbourne.

As previously mentioned, where an ACIF code deals with a particular issue raised, the Commission has adopted the ACIF code provisions as the model term and condition. In some cases, however, where an improvement to the ACIF code is considered necessary, the Commission has identified the further work that should be progressed within the ACIF to address the matter.

It should be noted that **the model clause or ACIF code provisions are intended to apply to all the core services unless indicated otherwise.**

Limitations on this process

Where the Commission has not dealt with or considered a particular clause in either of the access agreements, this should not be taken to indicate that the Commission necessarily regards the term or condition dealing with that particular subject matter as adequate or

reasonable, such that it would necessarily accept a party's position on that matter in the event of a Commission arbitration. Any such matter would be assessed on its merits at the time.

This is so for a number of reasons. First, there is no requirement that this exercise be comprehensive. The Commission has, therefore, deliberately focussed on what were perceived as the key contentious access issues. Secondly, further areas of contention may arise in the future which might necessitate a further determination by the Commission. Thirdly, market conditions will likely change that would possibly necessitate a change in model terms and conditions. Fourthly, the Commission has been required to undertake this task within a fairly strict timeframe.[30]

The scope of the task has not enabled it to consider the full range of access arrangements within the available timeframe, and in any case it has been guided by industry views as to the contentious areas which it has tried to address. There are a multitude of terms and conditions to consider and the Commission has been mindful of the need to release a determination as close to the statutory timeframes as possible in order to meet the legislative objectives.

The end result is that the model terms and conditions made pursuant to s152AQB(2) only extend to those matters considered by the Commission in this Determination and should not be taken as Commission endorsement of the remaining GAA and CSPA agreements not considered by the Commission as part of this process.

Further Action

In terms of future conduct, it is essential that the model terms and conditions reflect current market practices. Issues may change and further areas of contention may arise meaning that the Commission's model terms and conditions may need amendment, revision or supplementation. The Commission, therefore, envisages that a determination will not be static and that the model terms and conditions will likely require further consideration at some point.[31] As a consequence, this Determination should not necessarily be viewed as a once-off exhaustive exercise.

[30] Section 15AQB(3) requires that the Commission must take all reasonable steps to ensure that a determination relating to a core service is made within 6 months after the commencement of the section (ie: 19 June 2003).
[31] The Commission considers that the instrument may be varied pursuant to the Acts Interpretation Act (1901).

Part 2. Principles – Specific Issues

A. BILLING AND NOTIFICATIONS

Issues raised

A common theme regarding billing and notifications is the claimed level of incorrect billing provided to access seekers, and the use of retrospective billing. It was submitted that delays in notifying access seekers of incorrect billing and the use of retrospective billing have the potential to affect an access seeker's ability to compete as well as provide billing within ACIF timeframes at the retail level.

Commission's view

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

The Commission considers it reasonable for a payer to withhold disputed amounts if a dispute is notified prior to the due date for payment of the invoice to which such amounts relate. Conversely, however, the Commission does not consider it unreasonable for a payer to be required to make payment of a disputed amount if a dispute is notified after the due date for payment.

However, a number of further considerations are relevant to this issue. Firstly, the payer must be given a reasonable time within which to identify disputed amounts, particularly considering the sometimes complex nature of wholesale telecommunications invoices. The Commission considers that 20 business days is appropriate. Secondly, the payer must be given sufficient billing information to determine whether there is a basis for disputing an invoice. If insufficient billing information is made available, the payer is not in a position to make an informed decision about whether or not the bill should be disputed. Consequently, there cannot be any expectation that payment should be made prior to a dispute being notified.

Finally, the Commission considers it fair and reasonable that an access seeker have reasonable opportunity in terms of timeframe within which to dispute an invoice.

Should there be specific time frames and rules regarding billing enquiries and disputes?

As a general rule, time frames relating to billing enquiries and disputes should be fair and reasonable. To this end, such time frames should enable each party sufficient (but not excessive) time, such as 20 business days, to initiate a dispute process and for the access provider to respond to the access seeker. Dispute (including appeal) rights should not be unreasonably curtailed; and definite time frames should apply to each party.

In addition, if a dispute resolution process results in one party paying money or refunding money to the other party, such payment or refund should occur within a definite and reasonable time, such as 10 business days.

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

The Commission considers that frequent rendering of incorrect invoices can be unnecessarily time consuming and potentially financially damaging to an access seeker and should be addressed in a contract between the parties. A reasonable remedy would be to provide that, if three or more out of any five consecutive invoices for a given service are incorrect by 10% or more, the access seeker is entitled to a rebate equal to 10% of the correct invoiced amounts (in addition to any interest payable). This type of formulation is comparable to what might be found in a commercially negotiated agreement.

In addition, where applicable, parties must comply with the ACIF Call Charging and Billing Accuracy Code.

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

The Commission recognizes that legitimate delays can occur in an access provider invoicing an access seeker. However, unfair or unreasonable delays in notifying access seekers of incorrect billing and the use of retrospective billing have the potential to affect access seekers' ability to compete and to provide billing within timeframes stipulated in the ACIF Billing Code at the retail level.

The Commission considers it fair and reasonable that the access provider be permitted to backbill, but that the right to backbill be limited so as to permit the access seeker to comply with the timeframes in the ACIF Billing Code. In particular, clause 8.2.3(b) of ACIF Billing Code C542 provides,

> "When Charges are billed late, a Supplier must comply with the following Billing timeframes:…(b) any one Supplier within the Billing chain must not delay the Billing of Charges to another Supplier in the Billing chain by more than 95 days from the date the Charge was incurred by the Customer."[32]

What set-off rights should apply?

The TAF Code provides that unless the parties otherwise agree, there will be no setting-off (*i.e.* netting) of invoices except where a Party goes into liquidation, in which case the other Party may set-off.[33]

The Commission considers this position as being fair and reasonable. Any alternative set-off arrangements can be negotiated by the parties, provided that they do not prejudice a party's right to dispute an invoice.

[32] see also clause 8.4 of the ACIF Billing Code, which contains a number of exceptions to this rule.
[33] see for example, clause 3.1(i) of schedule 2 of the Main TAF code

Responses to draft Determination

The draft model terms on Billing and Notifications was generally well received. However, one party in particular had some fundamental problems, as well as some suggested additions, to the proposed model clauses. Accordingly, the Commission has made a number of revisions to the principles and clauses in Section A of Part 2.

Generally speaking, the above party submitted that this was a key area where the proposed clauses had the potential to adversely impact existing industry arrangements to the detriment of the LTIE. It felt that billing and billing disputes were iterative process driven issues involving high volume of transactions and therefore existing and future ACIF codes and guidelines were the most practical and effective approach rather than through the use of model terms. This party felt that the substantial alteration to existing timeframes might require an overhaul of billing systems and infrastructure, thus impacting on the cost of supplying the core services.

This party also felt that the model terms failed to adequately take account of service based distinctions between resale and interconnection services and were therefore inappropriate.

The party also felt that there had been a significantly reduced timeframes for it and excessive periods for access seekers which was unreasonable and likely to increase the number and frequency of billing disputes contrary to the LTIE and legitimate business interests of the access provider.

The party also argued that the rebate clause in particular (see draft Determination model clause A.29), should be deleted as there was already a sufficient number of incentives on the party to discourage incorrect billing. It was considered economically inefficient and wholly unjustified and likely to be a penalty that was void as it was not a pre-estimate of an access seeker's loss but a purely arbitrary figure. Further, the one sided nature of the clause was considered to be open to abuse by access seekers.

The party also submitted that while the general limitation of 6 months on backbilling seemed reasonable there was a need for an exception for services which were being billed for the first time and for certain international services where the access provider was dependent on overseas carriers for billing information.

Another party recommended that complex disputes needed longer time frames and therefore, there needed to be a provision to enable the extension of timeframes where the parties agreed, but with consent not to be unreasonably withheld.

It was submitted that where one party has caused a delay in resolution of a dispute, and the other party was prevented from backbilling a customer because of it, then the first party should be required to compensate the other party for the amount the other party was prevented from recovering from the customer because of the delay.

Commission's view

Contrary to one party's assertions, the Commission believes that incorrect billing is clearly still a problem for access seekers. The Commission notes that existing ACIF billing codes do not apply to intercarrier or wholesale billing practices and any future ACIF billing codes will only be relevant if and when they cover wholesale billing practices. Accordingly the use of existing and future ACIF billing codes is not considered a means of dealing with this highly contentious area. The Commission believes there is a need for clear and definitive processes through model terms and conditions.

In relation to the failure of the model terms to make a service based distinction, it is true that the Commission has adopted a 'one size fits all approach', but it is not clear to the Commission why it is necessary for the model terms to draw a distinction between resale and interconnection services in this regard. A primary purpose of the model terms is to provide a base standard for key issues on core services. It is clear in the Determination that parties may agree on different provisions, therefore, it would be open for a party to propose different provisions to the model terms.

In relation to timeframes as between an access provider and access seeker, the Commission's view is that the draft timeframes were intended to reflect the information asymmetry between the parties and as such, the timeframes applicable to each party might differ. Therefore it is not necessarily relevant that one party has more time than the other. What is important is that the timeframe stated is fair and reasonable for the party concerned according to their particular circumstances.

Nevertheless, in the light of the concern expressed about the timeframes, the Commission has reviewed its draft timeframes and determined that generally speaking, the model terms are fair and reasonable. However, there appears to be some justification for slightly amending the time periods so that the access provider has 25 business days within which to resolve a billing dispute and the access seeker has 25 days within which to escalate the dispute. This still results in an overall period of 50 business days, which is the same net period as in the GAA (and the draft Determination).

In relation to the rebate clause, as the Commission believes that incorrect billing is still a problem for access seekers, it considers it appropriate that there be some incentive for an access provider to provide accurate billing. Further, the Commission is not convinced the proposed billing procedures would encourage spurious or vexatious claims. The Commission maintains there should be a responsibility on the access provider to provide accurate bills.

That said, the Commission believes there is some basis to the legal argument that the rebate in its current form might be held void as a penalty on the grounds that it does not reflect a genuine pre-estimate of loss which the payer could sustain due to the payees incorrect billing conduct. For this reason, the Commission believes that it is appropriate that the clause be revised.

A reasonable remedy would be to provide that, if three or more out of any five consecutive invoices for a given service are incorrect by 5% or more, the access seeker is entitled to additional interest on overpaid amounts. This way, the rebate is linked to the amount of money which the payer has been deprived, due to the incorrect billing. The Commission also

considers it appropriate to expressly provide that the access seeker has a right of damages for breach of contract in such circumstances, so that the access seeker may seek to recover its actual loss arising from repetitive or systemic incorrect invoicing by the access provider.

The Commission considers it fair and reasonable to take into account special circumstances which might arise in the case of services which are being billed for the first time and certain international services.

The Commission understands the point that such an exception (to the six month backbilling rule) might be pro-competitive as it would allow for provision of a new type of service prior to all aspects of billing being finalized. At the same time, it is also important to bear in mind that one of the bases for this issue arising is that access seekers claim they have been prevented (either due to commercial factors or the ACIF Billing Code) from passing such backbilled charges on to their customers.

Therefore, the Commission considers that a fair and reasonable outcome is for the access provider to be permitted to backbill such amounts within an extended period (for example, a maximum of 8 months), which should allow enough time for billing problems to be sorted out) subject to agreement with the access seeker, provided such agreement shall not be unreasonably withheld.

In relation to complex disputes, the Commission agrees that the model clauses should be amended to enable the parties to agree to a longer period for the access provider to resolve a billing dispute, but this is with the proviso that such agreement not be unreasonably withheld.

In relation to the payment of refunds where a billing dispute has been resolved, payment should not have to occur within 10 days as stipulated in the draft Determination. Rather, the Commission agrees that payment can occur as soon as practicable for example, the next billing cycle, but within 1 month of the resolution of the dispute.

Where an access seeker is deprived of recovering its charges, the Commission believes that an access seeker should be entitled to be recompensed in circumstances where the access seeker is prevented (due to regulatory restrictions on backbilling) from recovering from its end customer an amount which is the subject of a Billing Dispute, to the extent that it is determined that such loss was due to the access provider unnecessarily delaying the resolution of the Billing Dispute.

(See Part 3, model clauses A.1 to A.29)

B. CREDITWORTHINESS

Issues raised

A common theme regarding creditworthiness is whether an access provider should have a wide discretion to perform creditworthiness reviews. Access seekers submitted that the access provider's decisions as to whether any security, or an increase in security is required, must be based on clear and objective criteria, such as a material adverse change in the access seeker's financial position or a material breach of the agreement, rather than being determined by the access provider at will.

Also, several access seekers contended that security arrangements should also reflect any long-standing relationship between an access seeker and an access provider, particularly good credit history and the size and stability of the access seeker. On the other hand, it was claimed it is reasonable for an access provider to protect its interest in amounts owing to it, for example by way of security, provided the amount of such security is reasonable and is not used in a coercive manner. In this regard, creditworthiness provisions should reflect the legitimate business interests of the access provider.

Commission's view

The Commission considers it reasonable for an access provider to require security from an access seeker and for the parties to review the matter from time to time.[34]

It is important, however, that the amount of security and any creditworthiness review be determined on an objective basis. In this regard, the provisions in the TAF Code are premised on a standard of reasonableness in determining issues relating to creditworthiness and security. Therefore, the Commission considers it appropriate to be guided by the TAF Code on the issue of security and creditworthiness.

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?

The amount of the initial security and any variation to that amount should be determined by the access provider on an objective basis. The Commission considers that the provisions in the TAF Code provide an appropriate point of reference in this regard. If the access seeker considers that the access provider has not acted reasonably in relation to these matters, then it should be entitled to submit the matter to an expedited dispute resolution procedure. However, these are matters which the parties should attempt to resolve by negotiation in the first instance.

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

The Commission considers it unfair and unreasonable for an access provider to be able to require a creditworthiness review or a variation in security at will. However, it is reasonable for an access provider to require a creditworthiness review or a variation in security where the circumstances reasonably require it. Due to the varied and numerous circumstances which may arise in this regard, the Commission considers it appropriate to set out broad principles based on objective criteria, which are subject to dispute resolution procedures under the relevant agreement where necessary. Further, the Commission considers that the access seeker should have an express 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.

[34] s152AR(10)(a) of the TPA provides that evidence that an access seeker is not creditworthy is a reasonable ground on which an access provider may avoid its obligation to comply with the standard access obligations.

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

The Commission considers that the provisions of the TAF Code at clause 4.3.4 are appropriate in this regard.

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

An access seeker would not normally be required to give commercially sensitive information to a credit reporting agency. If, in the event of the matter going to an alternative dispute resolution process, an access seeker is required to provide commercially sensitive information to a third person, then such provision may be made subject to appropriate confidentiality arrangements.

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?

The Commission considers it reasonable that there be a security in place in respect of amounts owing (and to be owed) by an access seeker, as well as an access provider having a right of termination or suspension of services for contractual breaches. Security, on the one hand, protects a creditor's interest in being paid for a debt due. Rights of termination and suspension, on the other hand, inter alia protect a supplier from having to continue to supply a good or service where there is reason to believe that the acquirer will not pay for them.

In making this distinction, however, it is important that a security not be used in a coercive manner and for a purpose other than for which it is retained. That is, a security should only be drawn down for a breach relating to a failure to pay a debt due.

Responses to draft Determination

One party agreed with the draft Determination that an access seeker should have the right to request a reduction in security and any request would be considered by the party with whom the security has been placed. However, that party was concerned that the draft Determination suggested that the access provider had to comply with such request provided it was not unreasonable to do so.

Further, it was submitted that the draft Determination gave an access seeker the discretion to withhold commercially sensitive information to credit reporting agencies and this would prevent the access provider from obtaining an accurate picture of the access seeker's creditworthiness.

Commission's view

In relation to requests to change the level of security, the Commission prefers that the onus remain on the access provider to reduce the level of security unless the request is unreasonable. In the Commission's view, a mere obligation on an access provider to consider a request for reduction is insufficient as there would be little incentive for the access provider to meet the request. Accordingly, no change has been made.

In relation to the issue of disclosure of confidential information, the Commission does not consider that the access seeker has a discretion in relation to this matter. At most, it has a right to require that its information be treated confidentially. The model clauses require that an access seeker "must" supply ongoing creditworthiness information to the access provider following receipt of a request for such information. Further, in relation to credit reporting agencies specifically, an access seeker shall co-operate and provide any information necessary for the credit reporting agency. The model clauses do, however, allow an access seeker to require a confidentiality undertaking to be given by *any* person having access to its information. Accordingly, no change is made to this aspect of the model terms.

(See Part 3, model clauses B.1 to B.10)

C. LIABILITY (RISK ALLOCATION) PROVISIONS

Issues raised

Submissions from access seekers made in respect of liability provisions had a similar premise, being that the liability provisions are one-sided in favour of the access provider. Issues included whether:

- there should be the ability to limit liability for the parties and should this be reciprocal or should risk be allocated on the basis of a party's ability to manage risk. If so, what criteria would be used to assess this ability and whether there was some other allocation principle which may be applicable;
- there should be caps placed on property damage and personal injury;
- there should be an aggregate cap and single event caps on other damages;
- exclusion or limitation of liability should be permitted in relation to meeting specified performance standards if there is another mechanism for compensation; and
- timeframes for connection and fault rectification (CSG standard or otherwise) need to be expressly provided for an access agreement for liability provisions which involve a claim for credit.

Commission's views

The Commission considers that, as a general rule, liability provisions should apply to both parties and should place risk with the party which has the ability to control the risk. Such control measures include, for example, an ability directly to control the actions of a party's

people, internal risk management and due diligence processes, passing risk onto a party's customers (end-users) through appropriate contractual provisions and insurance.

The Commission considers that the liability provisions in the TAF code are broadly sound (subject to the comments below in relation to liability for property damage), as they are reciprocal and endeavour to place risk with the party which has the ability to control the risk (as opposed to any alternative allocation method). In addition, liability provisions in relation to local carriage services should ensure that neither party is prejudiced by the proper application of the customer service guarantee obligations.

Should liability caps apply in relation to property damage?

The Commission considers that it is fair and reasonable that liability in relation to property damage be managed as follows. In relation to property damage to an innocent party or a third person caused by an intentional or negligent act or omission, each party should indemnify the other party for direct and indirect (consequential) loss and damage for an unlimited amount.

In relation to all other property damage to an innocent party or a third person (ie all loss not arising out of an intentional or negligent act or omission, ie accidental), each party should indemnify the other party for only direct (but not indirect (consequential)) loss and damage up to a capped amount. This would include, for instance, damage done by one party (whether an access provider or an access seeker) at the other party's premises or at the premises of a customer of the other party. The cap should be a reflection of the aggregate amount payable by an access seeker to an access provider over a financial year with the uppermost limit of this amount to be agreed by the parties.

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

The Commission considers it fair and reasonable that neither party is prejudiced by the proper application of the customer service guarantee obligations. Accordingly, an access seeker ought to be entitled to pass on (to the access provider) its CSG liabilities for which the access provider is responsible where the failure to comply with the CSG arises due to the fault of the access provider.

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

It is not uncommon for commercial parties to provide for aggregate and single event caps in relation to liability. Such arrangements are particularly amenable to the provision of discrete services on an ongoing basis. The Commission can see no reason for varying this position.

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

There may be several different mechanisms of compensation available for a failure to meet a specified performance standard (such as a failure to commission a service on time or a failure to restore a service within a specified time). These may include, for example, penalty payments, credits and rebates, waiver of service fees or the re-supply of the service.

It is not uncommon for parties to agree that (notwithstanding any other agreed compensation mechanism), the defaulting party's liability is otherwise limited or excluded. In other words, the agreed compensation mechanism is the sole remedy available to the affected party. This is analogous to agreeing to liquidated damages for failure to meet a service level, where the *quid pro quo* for agreeing a liquidated amount is the extinction of any further remedies for failure to meet the service level. Accordingly, the Commission sees no reason why a party should be prevented from limiting or excluding liability provided there is another mechanism for adequate compensation.

Responses to draft Determination

A number of drafting changes were suggested to the draft clauses, some of which have been incorporated into the final Determination. In terms of substantive issues, the following matters were raised.

One party submitted that liability caps should not apply in respect of costs and expenses reasonably incurred in making good loss or damage to property.

The Commission was directed by some parties to s118A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* as the means for apportioning liability in respect of CSG payments between access provider and access seeker.

One party argued that there should not be any liability cap in respect of claims made by third parties against an innocent party. The cap, however, should apply to property damage.

Further, in relation to liability for network interruption caused by certain events, it was submitted that it was not clear how this exclusion clause was intended to interact with the indemnity clauses in relation to third party claims.

Also, there was a concern that the clause in relation to the interruption to the supply of a service did not provide clear guidelines on the timeframes that are measured to determine whether the access provider was liable to pay damages, rebates or penalties.

Commission's view

The Commission agrees that liability caps should not apply in respect of costs and expenses reasonably incurred in making good loss or damage to property.

In relation to s118A, the Commission notes that there was reference to s118A in the draft Determination which attempted to deal with the issue in a shorthand manner. That is, the parties would be required to develop procedures to enable them to comply with s118A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. This approach requires the parties to adopt and give effect to the statutory requirements of s118A but with some flexibility as to exactly how it is done. This is seen as a preferable approach to detailing a prescriptive set of model terms to reflect the requirements of s118A.

In relation to liability caps in respect of claims made by third parties, the Commission considers that there is no right or wrong approach to this issue. In view thereof, the

Commission is inclined to continue to be guided by the Telstra's GAA / CRA standard, which is what is reflected in the model terms.

In relation to liability for network interruption caused by certain events, the Commission acknowledges that there may be a valid issue in relation to reconciling particular indemnity clauses. The Commission considers that the important point to be made here is that a party should in any event be responsible for the conduct of its 'People'. As consequence, to avoid possible uncertainty on this issue, the classes of persons referred to in the relevant clauses has been clarified.

In response to the request that there should be clear guidelines on the timeframes that are measured, the Commission notes that the existing provisions are adapted from the GAA and are consistent with the TAF Code. The Commission considers that the clauses are consistent with the industry practice on this issue and provide the parties with sufficient certainty.

(See Part 3, model clauses C.1 to C.23)

D. GENERAL DISPUTE RESOLUTION PROCEDURES

Issues raised

The common theme relating to current dispute resolution processes is the apparent deficiency in terms of timeframes within which disputes must be resolved. Some access seekers expressed a desire to see a cap placed on the period for dispute resolution processes, after which legal action can be commenced. A further issue raised was the perceived lack of timeframes in access agreements and the use of best endeavours clauses. The broad concern was that open-ended timeframes lacked certainty for access seekers. Some access seekers encouraged the incorporation of the SPAN process for dispute resolution into the model terms and conditions.

Commission's view

The Commission supports measures that are designed to overcome delays and increase the efficiency with which disputes are dealt. The Commission considers it fair and reasonable that dispute resolution procedures be consistent with the following principles. These principles are for most part reflected in the Commission's Dispute Resolution Guidelines[35], which states inter alia that:

- a party should be entitled to unilaterally terminate a dispute resolution procedure and pursue its remedies at law where the other party is not complying with the procedure or where it requires urgent interlocutory relief;
- timeframes for resolution of disputes should be stipulated as part of the dispute resolution procedure to the extent possible. In this regard, parties should have a sufficient (but not excessive) opportunity to research, explore and debate relevant matters. The appropriate time for each step in the dispute resolution procedure may depend upon the nature and

[35] ACCC – "Resolution of telecommunications access disputes – a guide", May 2003

level of escalation of the dispute. For example, a dispute requiring little factual analysis may be resolved fairly expeditiously; the same may apply to disputes which can be resolved without the need for escalation or external assistance. On the other hand, a complex dispute or a matter which goes to expert determination may require detailed factual and/or legal analysis and the preparation of submissions by the parties; these processes can take some time to complete and therefore a longer period may be required;

- parties should conduct any dispute resolution procedure in good faith and on a "without prejudice" basis;
- each party should as early as practicable during a dispute resolution procedure, provide to the other party any relevant materials on which it intends to rely (although this is not intended to impose the same as the obligation to make discovery in litigation);
- the parties may by agreement (where relevant) escalate a dispute to a higher level in the dispute resolution procedure;
- the dispute resolution procedures should to the extent possible:

    (a) be guided by the objects of Part XIC of the TPA;

    (b) be simple, flexible, quick and inexpensive;

    (c) preserve or enhance the relationship between the parties to the dispute;

    (d) take account of the skills and knowledge that are required for the relevant procedure;

    (e) observe the rules of natural justice;

    (f) place emphasis on conflict avoidance;

    (g) encourage resolution of access disputes without undue reliance on legal procedures or recourse to arbitration;

    (h) create certainty of the process through encouraging industry commitment and achieving mutually accepted outcomes by the establishment of clear procedures; and

    (i) protect the confidentiality of the process.

Responses to draft Determination

The main issues raised concerned the right of a party to unilaterally terminate dispute resolution; the timeframes for the dispute resolution procedure; and the ability to notify an arbitration prior to the finalisation of a dispute.

Specifically, one submitter contended that the right of a party to unilaterally terminate dispute resolution should depend on an actual rather than substantial failure to comply with the dispute resolution procedures.

Further, it was submitted that a party should have the right to notify an arbitration prior to the finalisation of the dispute resolution procedure.

In relation to timeframes, it was argued that the "speeding up" of the dispute resolution process, as reflected in the proposed Determination, may have an adverse effect on the efficiency of the process and, as such it was proposed that the model terms and conditions should instead adopt the GAA timeframes.

Commission's view

In relation the right of a party to unilaterally terminate dispute resolution in the instance of an actual failure rather than a substantial failure, the Commission maintains that a substantive breach should be required. The Commission considers that this is a reasonable requirement, otherwise any minor technical breach may be used by a party to prematurely terminate a dispute proceeding.

Furthermore, the Commission considers that the proposed "speeding up" of timeframes is reasonable and conducive to the efficient and timely finalisation of dispute resolution procedures, rather than likely to have an adverse effect, accordingly, the terms should remain unchanged.

Similarly, the Commission considers that no change to the model terms and conditions is warranted with regard to the proposal that parties should be able to notify a dispute for arbitration before the finalisation of the dispute resolution procedure. The Commission believes that such a provision would merely undermine the efficacy of the dispute resolution process which the parties should be bound to follow through to the end.

(See Part 3, model clauses D.1 to D.12)

E. CONFIDENTIALITY PROVISIONS

Issues raised

The Commission notes that the confidentiality provisions typically used in agreements for the core services are reciprocal and otherwise fair and reasonable. However, two main issues of concern have been raised by access seekers; namely:

- the use of a qualification to the effect that confidential information may disclosed in certain circumstances where it is "necessary, desirable or practicable" to do so; and

- whether terms and conditions should be introduced which govern confidentiality issues where an access provider conducts a retail operation in competition with an access seeker. It has been submitted that an independent audit of the access provider's use of an access seeker's confidential information (such as customer information) should be undertaken.

Commission's view

In relation to the first point, the Commission considers that, consistent with normal commercial practice, any exception to the use or disclosure of another party's confidential information should be limited to what is "necessary", not what is "desirable or practicable".

In relation to the second point, in the ordinary course, such a measure should not be necessary or warranted. However, in special circumstances (for example where there is *prima facie* evidence of a misuse of confidential information which is held or used in relation to core services), the Commission considers it appropriate to provide for an independent audit of the way in which such information is held or used. The Commission also refers to section 152AYA of the TPA regarding the use of confidential information and common law remedies for breach of contract and breach of confidence.

Response to draft Determination

The main issues raised by submitters involved the audit provisions concerning the access provider's use of an access seeker's confidential information. One party contended that the proposed audit provisions were unnecessary as well as unworkable for the reasons that:

- they required the visibility of all access seeker information which in turn required multilateral consent for disclosure of the information in auditing process;
- neither an access seeker or auditor would be competent to judge whether there was *prima facie* evidence of a misuse of confidential information;
- audit provisions are likely to lead to an increase in disputes which could be used by access seekers in preparation for litigation where for example, an access seeker was experiencing financial difficulties; and
- the threshold for triggering the audit provisions was not reasonably stringent.

In addition, other submitters queried whether the provision of quarterly information was adequate for all types of audits and whether they should be provided more regularly, and whether it would be possible for numerous access seekers to share the costs (and resulting information) of an engaging an independent auditor.

Commission's view

Given a vertically integrated access provider, the Commission maintains that, in special circumstances, it may be appropriate to provide for an independent audit of the way an access seeker's information is held or used by the access provider. The Commission believes that the model provisions contain an appropriately robust threshold for the exercise of an audit and that the associated terms and conditions are fair and reasonable. In general, the Commission does not consider the propositions in response to the draft Determination to warrant substantial amending the draft audit provisions. Nevertheless, the Commission believes there is some justification to allow an auditor to consult an appropriately qualified and independent person for example, a barrister or solicitor to assist in determining whether there is prima facie evidence of misuse of confidential information.

In addition, the Commission has expanded the draft terms to include the following circumstances under which a party is able to disclose the confidential information of another party:

- to an auditor of the disclosing party to the extent necessary to perform the audit functions; and
- as required by listing rules of any stock exchange where that party's securities are listed or quoted.

(See Part 3, model clauses E.1 to E.9)

F. COMMUNICATIONS WITH END-USERS

Issues raised

In addition to existing provisions relating to communications between an access seeker and end-users, access seekers have submitted that there should be stricter limitations on the ability of an access provider to contact the end-users of an access seeker.

Commission's views

As a general principle, the Commission considers it fair and reasonable that an access seeker be entitled to protection of its confidential information and its relationship with its customers. On the other hand, an access provider is entitled to engage in fair marketing in the same manner as its competitors.

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

The Commission considers it appropriate that some guidance be given to the parties as to what is fair and reasonable for an access provider to discuss with an access seeker's end-users, and in what circumstances. Preferably, these matters should be expressed in narrow, rather than broad, terms.

In addition, an access provider should be required to make and maintain records of its communications with an access seeker's end-users in circumstances where it discusses anything concerning the access seeker or the access seeker's goods or services with the end-user. It should be noted that this obligation would not include an obligation to provide such records to the relevant access seeker (which may be dealt with separately pursuant to any dispute resolution procedure).

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

The Commission does not consider that such a measure is necessary or practical in terms of addressing an access seeker's legitimate concerns in relation to an access provider's contact with the access seeker's end-users.

Should contact between an access provider and end-users of a service provider be specifically limited?

Contact between an access provider and end-users of a service provider should be limited to the following situations; namely:

- to dispatch a technician;
- to organize for a technician to visit the end-user's premises;
- in an emergency; or
- as an unsolicited call to promote retail activities.

The Commission considers that the above situations are fair and reasonable, having regard to the requirements of both parties (and subject to applicable confidentiality provisions). However, an access provider should also be permitted to discuss its goods and/or services with an access seeker's customer where the customer has contacted the access provider for the sole purpose of discussing the access provider's goods and/or services.

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?

The Commission considers that this proposition is fair and reasonable.

Response to draft Determination

A central point raised by parties regarding communications with end-users concerned the issue of contact with end users in the event of insolvency of the access seeker, or termination or expiry of the supply of a service by the access provider to the access seeker.

One party submitted that, at least in respect of LCS, an access provider should be permitted to contact end-users of an access seeker in circumstances where that access seeker had become insolvent and arrangements needed to be put in place to ensure continuity of supply to end users. It was proposed 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.

Conversely, another party stated that the access provider should have no more right to contact the end-users than any other party and should not use confidential information it holds in respect of the failed access seeker's customer database to do so, except in an emergency.

In addition, another submitter disagreed with the Commission's draft view that a code of ethics for technicians is neither necessary nor practical. It proposed that model terms and conditions should recommend that the ACIF develop a code of ethics for technicians visiting access seekers end-users, and that this code should be incorporated into model terms and conditions once it is developed.

One party felt that an access provider and access seeker should agree upon specific terms by which contact can be made by the access provider to the end-user in circumstances where provisioning and service assurance procedures are required.

Commission's view

With regard to the issue of contact with end-users in the event of insolvency of the access seeker or termination or expiry of the supply of a service, the Commission notes that whilst there are a number of industry codes regarding the mechanics of customer transfer (and appropriate selling practices relating thereto), there is no regulation, such as a Universal Service Obligation (USO), relating directly to this matter.

Given this, as a matter of principle, the Commission considers it unfair (and potentially anti-competitive) for an access provider, who is both a wholesaler and a competitor service provider at the retail level, to have a "head start" over other service providers to compete to acquire the customers of a financially distressed service provider, especially in the case of LCS, where one access provider has a considerable market share.

Secondly, the Commission believes that giving the access provider the right to contact an access seeker's affected end-users may adversely impact on the ability of a receiver or liquidator to sell what is often the most valuable asset of a financially distressed service provider (*ie,* its customer base). The value of the service provider's customer base may be substantially devalued if the access provider were to have an "as of right" ability to contact the customers and effectively try to win their custom.

Moreover, the Commission considers that there is no reason why an access provider would, in the ordinary course of events, need to contact customers of a financially distressed or failed service provider (other than in an attempt to win their business). An access provider is able to could do so if an emergency arose (see model clause F.1(b)(v)), or to the extent necessary to carry out its wholesale operations (see model clause F.1(b)(iii)).

Finally, experience has shown that if a service provider fails, other service providers (including the access provider) very quickly start targeting the failed service provider's customer base (either by mass advertising or through acquiring the customer base from the receiver/liquidator). The Commission believes that this can serve as an efficient and competitive means of reallocating the affected customers, rather than giving one service provider, who is also the wholesale carrier, the first right to contact the end-users.

In relation to a code of ethics, the Commission notes a party can initiate a proposal for ACIF to develop a code of ethics without Commission support. The Commission remains, at this time, unconvinced of the need nor practicality of such a code and therefore is not inclined to make a recommendation for an ACIF code on this matter. However if there is sufficient support among access seekers, this proposal can be progressed through ACIF upon the initiative of the submitting party. The Commission could then endorse such code as a model term given that there would be industry support for such a code.

In relation to an access provider and access seeker agreeing upon specific terms, this contingency would appear to be already covered by model clause F.1(b)(iv) (and through the parties' common law right to agree to additional terms or to vary their agreement).

(See Part 3, model clauses F.1 to F.6)

G. SERVICE MIGRATION

Issues raised

Access seekers are generally in favour of terms and conditions which place a requirement on access providers to give substantial prior notice to access seekers when service migration is anticipated. Further, agreement with access seekers prior to any changes being made was also proposed. The counter view is that an access provider requires flexibility to modify, change or substitute the underlying technology used to provide declared services; to improve the functioning and performance of services; and to ensure that the service supplied is consistent with the Commission's definition of declared services.

It is also important to note that in many cases an access provider may provide a core service to multiple access seekers and it will therefore be more timely and efficient to reach a compromise as to the needs of all users of the service (including the access provider), rather than having separate arrangements with all users of the service. As a rule, while access providers require flexibility to change their network systems and equipment, access seekers similarly require sufficient notice to adapt to such changes.

The submissions also revealed a grey area between variation to a service and variation to the specifications for a service. In addition, re-location of facilities (which may have a substantial impact on an access seeker) has arisen as a separate issue which ought to be addressed in the model terms and conditions.

Commission's view

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

The Commission considers that, in relation to changes to specifications for a core service (including any matter relating to an applicable standard access obligation), an access provider should provide an access seeker with an equivalent period of notice to that which it provides itself. At a minimum, the notice period should be 40 business days. Further, for changes which (in the access provider's opinion, acting reasonably) would have no or only a minor effect on the access seeker, the access provider should provide the access seeker with 10 business days' notice. If the parties cannot agree as to whether a change would have no or only a minor effect on the access seeker, then they should each have recourse to the dispute resolution procedures under the agreement. In discussing any such changes, the parties should have regard to any need that the access provider may have to ensure consistency

amongst the specifications for services which the access provider supplies to more than one access seeker.

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

The Commission considers that, in relation to re-location of facilities used for core services, an access provider should provide an access seeker an equivalent period of notice to that which it provides itself. At a minimum, the notice period should be 60 business days and the matter should be subject to any dispute resolution procedure invoked by either party. In the case of interconnection services, the parties must in particular comply with section 152AR(5)(d)(i) of the TPA, which requires the access provider to take all reasonable steps to ensure that the technical and operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself. The Commission considers that in some cases the re-location of facilities will be part of the *operational timing* of interconnection.

Re-location of facilities which affect an access seeker, should only occur where it is reasonably necessary for the access provider to do so. If the parties cannot agree upon such matters, then they should each have recourse to the dispute resolution procedures under the agreement.

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

The Commission does not consider an indemnity for costs incurred by an access seeker due to having to re-locate facilities is necessary. This is due to the requirement in the model terms and conditions that a access provider must provide prior notice to the access seeker of an impending re-location of facilities and because of the requirement that an access provider should only re-locate such facilities where it is reasonably necessary for it to do so. These requirements should therefore obviate any need for an indemnity.

Should an access provider provide access seekers with notice 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)?

As the model terms and conditions only apply to core services, they are not intended to apply to services that are provided pursuant to the standard form of agreement. Accordingly, the Commission does not consider that such a requirement should be imposed.

Responses to draft determination

One party submitted that there should be no need to give notice for relocations where the access seeker is barely affected or not at all. At any rate, these service migration issues should be covered in facilities access agreements.

Another party was concerned that the notice period for major relocations was too short, and as such submitted that there should be an extension of the proposed period.

Commission's view

The Commission's view is that there is no requirement on an access provider to give notice where the relocation of the facility will not affect the access seeker's services. However, even if the proposed relocation would affect the access seeker in a minimal way, the access provider should be under an obligation to notify the access seeker.

The overriding issue is that affected access seekers need to be given prior notice so that they can plan for any necessary changes to their networks and services. The provisions do not give the access seeker a right of veto, and notwithstanding any negotiations between the parties, a relocation will nevertheless proceed at the time specified by the access provider.

In relation to the relocation of facilities clauses, the Commission considers that some limit ought to be placed on which facilities are to be affected by such provisions. Therefore, it has limited the application of the clauses to facilities which are owned or operated by the access provider and used in connection with supplying a core service to the access seeker, the relocation of which would or would be likely to affect the access seeker's network arrangements.

Regarding the notice period to be given to an access seeker for a relocation, the Commission proposes that the notice period be extended for major relocations. Interruption to business services caused by relocations is a major concern for service providers and therefore adequate adjustment timeframes are essential. The model clauses are only about how much notice needs to be given, and not about whether the relocation will or will not proceed. Accordingly, this change should not unduly inconvenience the access provider.

(See Part 3, model clauses G.1 to G.13)

H. SUSPENSION AND TERMINATION

Issues raised

It was submitted that suspension or termination of a core service ought to require 30 days prior notice.

Commission's view

The Commission considers that the following notification provision for suspension and termination of services as modelled on the TAF Code is fair and reasonable, having regard to the interests of access providers and access seekers:

- in the case of an emergency or a matter which is reasonably likely to pose a threat to property or persons, the access provider may immediately suspend a service, provided it notifies the access seeker where practicable and provides the access seeker with as much notice as is reasonably practicable;

- in the case of a force majeure or a reasonable likelihood of a party being in jeopardy of becoming insolvent (or a like event),[36] the other party may immediately suspend a service or terminate the agreement; and
- in the case of other events giving rise to a right to suspend a service or terminate the agreement, the access seeker should have 20 business days to rectify the matter.[37]

Responses to draft Determination

One party submitted that the proposed rectification timeframe of 20 business days was excessive and exposed an access provider to the risk of possible insolvency of an access seeker. It proposed 10 business days as adequate for an access seeker to seek a remedy and obtain interlocutory relief.

Additionally the submitter proposed that persistent breaches of an agreement (irrespective of how minor these may be) should give rise to a right to suspend a service or terminate the agreement, and that there should be a right to suspend services beyond the subject of the particular breach to protect against on-going exposure.

Another party submitted that while the general principles were reasonable, the model terms and conditions should provide more distinction between the suspension or termination of an 'individual service in operation' versus an entire 'core service'.

Commission's view

The Commission believes that the rectification timeframe of 20 business days is fair and reasonable and therefore retains this provision as part of the model terms and conditions. In addition, the Commission does not consider that persistent breaches of an agreement should give rise to a right to suspend a service or terminate the agreement, or that there should be a right to suspend services beyond the subject of the particular breach.

The underlying concern in relation to these propositions appears to be the exposure of an access provider to the risk of possible insolvency of an access seeker and the subsequent recoupment of unpaid monies. Whilst acknowledging the importance of this issue, the Commission believes that these considerations need to be weighed against the possible risk that the access provider might use the termination and suspension provisions in a coercive manner against its retail competitors. Moreover, the Commission considers that these concerns are adequately dealt with by model clause B (creditworthiness and security), as a primary purpose of the security in favour of the access provider is to provide a fund out of which unpaid debts can be paid.

In relation to the argument that the model terms and conditions should provide a clearer distinction between the suspension or termination of an 'individual service in operation' versus an entire 'core service', the Commission believes that this is essentially a question of balance and degree. In particular, the extent of the suspension/termination (*i.e.* whether it

[36] Including the matters set out in clause 14.7 of the TAF Code.
[37] See, *e.g.*, clauses 14.3 and 14.5 of the TAF Code. See also paragraph 152AR(10)(b) of the TPA.

should cover a single service in operation (SIO) or an entire core service) ought to depend upon the nature of the alleged breach. For example, the use of a single SIO (by an access seeker's customer) to perpetrate an offence might justify suspension (by the access provider) of that SIO, but it would certainly not justify suspension of the entire core service. Conversely, an insolvency event might justify suspension of an entire core service, not just the SIOs relating to that service.

On balance, the Commission considers that an access provider is unlikely to suspend/terminate an entire core service for a trifling or isolated breach. Also, the access seeker would be likely to have recourse to common law rights in this regard (in relation to *de minimus* breaches) and also protection under Part XIC of the Act. Accordingly, no change is made in terms of a distinction between the suspension or termination of an individual services versus an entire core service.

(See Part 3, model clauses H.1 to H.9)

The following matters are dealt with through the proposed application of ACIF code standards and relevant legislative provisions.

FAULTS AND MAINTENANCE

Timeframes

A number of submitters suggested that there is a need for more specific timeframes for fault rectification.

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

ACIF C513 *Customer and Network Fault Management* Industry Code and ACIF G572 *Unconditioned Local Loop Service Fault Management* Industry Guideline address this issue. For example ACIF C513, Appendix D use the CSG timeframes for fault rectification and this standard is reinforced by ACIF G572 clause 7.1.15. The Commission also notes that clause 9.2(e) of the guideline provides for the establishment of rectification timeframes by bilateral agreement.

In relation to where network faults are reported from the service provider which have not emanated from the end-user of the service provider, the Commission notes the following ACIF clauses.

Clause 6.1.6 of ACIF C513 provides:

> "When a C/CSP reasonably believes that the source of a fault is within the Telecommunications Network owned or operated by another C/CSP, then the C/CSP must immediately advise the other C/CSP of the fault details as set in Clause 6.5.3…"

Clause 6.1.4 of the same code provides:

> "A C/CSP who becomes aware of a fault in its own network which may affect interconnected C/CSPs must promptly inform those C/CSPs of fault status, repair, progress and estimated restoration time."

The Commission considers that the above ACIF code and guideline adequately deal with the issues pertaining to fault rectification timeframes. Accordingly, the Commission adopts the above timeframe standards and all provisions relating thereto as part of its model non-price terms and conditions.

Service level standards

Should service level standards be non-discriminatory?

The Commission notes that clause 6.1.9 of ACIF C513: *Customer and Network Fault Management* provides that "a*ll customer faults must be repaired in a non-discriminatory manner*". The Commission considers that this code provision adequately addresses the issue of non-discrimination in relation to service level standards and therefore the Commission adopts this provision and all provisions relating thereto as part of its model non-price terms and conditions.

Obligation to report network faults

The obligation of C/CSPs to inform faults in another carrier's network was a further issue raised by submitters.

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

The Commission has examined this issue and concluded that there are various obligations within ACIF C513 and ACIF G572 on C/CSPs to provide immediate advice to the other party of fault status, repair progress and estimated restoration time. For example, ACIF C513 clause 6.1.6 provides that one CSP must immediately advise the other CSP of the fault details in its network.

The Commission, therefore, considers that this issue is adequately addressed by the above ACIF code provision. Accordingly, the Commission adopts this provision and all provisions relating thereto as part of its model non-price terms and conditions.

Fault clearance codes

The absence of fault clearance codes in Telstra's access agreements was another issue raised by submitters.

Should fault clearance codes be included in access agreements?

The Commission notes that ACIF C513, clause 6.10.2(d) requires that information required for customer fault clearance reconciliation should include fault clearance codes (as per Appendix B of the code). As such, the Commission considers that this issue is adequately dealt with by the code. Accordingly, the Commission adopts this provision and all provisions relating thereto as part of its model non-price terms and conditions.

Fault reporting processes

A further issue raised by submitters was the need for parties to agree to fault reporting procedures.

Should fault reporting processes be agreed between the parties?

The Commission notes ACIF G572, clause 9 in relation to ULL fault management and interference problems, which provides that:

> *"whilst parties may enter into bilateral agreements in respect of matters covered by the guideline, such agreements must not diminish requirements contained in this guideline".*

The guideline sets minimum requirements regarding fault reporting processes. The Commission is of the view that parties should be free to bilaterally negotiate fault reporting processes. If processes cannot be agreed, then it is important that the process determined at least meets the minimum requirements as set out in the guideline.

The Commission considers that this issue is adequately dealt with by the guideline. Accordingly, the Commission adopts the principle and standards regarding fault reporting processes and all provisions relating thereto as part of its model non-price terms and conditions.

(ULLS only)

Responses to draft Determination

Some of the access seekers submitted that in respect of faults and maintenance that Telstra's access arrangements have the potential to discriminate against access seekers vis-à-vis the services Telstra provides to its own retail operations. It was argued, however, that Telstra currently avoids a requirement to provide non-discriminatory services by claiming that it does not provide ULLS (and other core services) to itself. The argument then being that it must provide the services to the same standard that it provides those services to other access seekers in order to meet the non-discrimination standard.

The access seekers submitted that it was essential that the model terms and conditions include a clause to address this issue as a host of matters relating to fault rectification flowed from a non-discrimination clause.

It was also specifically pointed out that while the ACIF Code C513:2002 does have a set of industry agreed fault symptom and fault clearance codes, this code does not apply in the case of the LCS, which is a particular area of contention for the party concerned.

Another party indicated that they would like progress reports on fault rectification from the access provider so as to assist the access seeker in better managing its relationship with its end-user customers.

Commission's views on response to draft Determination

The Commission notes that the SAOs provide a non-discrimination standard in respect of faults and maintenance. Section 152AR(3)(c) relevantly provides that an access provider must take all reasonable steps to ensure that the access seeker receives, in relation to the service supplied to the access seeker, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

In respect of interconnection, s152AR(5)(e) relevantly requires an access provider to ensure the access seeker receives, in relation to the interconnection, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

The Commission believes that there is quite clearly a legislative and ACIF code obligation upon access providers to provide faults rectification and maintenance to the same service level as that which it provides to itself. The spirit and intent of the legislation is concerned with achieving non-discriminatory outcomes as between an access provider and an access seeker, as opposed to the provision of non-discriminatory levels of service by an access provider between different access seekers. The Commission believes that such non-discriminatory behaviour is necessary to facilitate competition in contestable downstream markets and that this interpretation accords with the overall objective of promoting the LTIE as stipulated under Part XIC of the Act.

Accordingly, the Commission adopts these SAO requirements as part of its model terms and conditions for faults and maintenance standards.

(Also refer to the Commission's discussion in the next section on Ordering and Provisioning)

In relation to fault symptom and fault clearance codes, the Commission notes that ACIF C513:2003 appears to exclude fault management issues pertaining to the provision of LCS services. Although ACIF C513:2003 does not specifically apply to the LCS, the Commission adopts as model terms, the principles and requirements in relation to fault symptoms and fault clearance codes in respect of the LCS. Accordingly, whatever code provisions apply in respect of fault symptoms and clearance codes to the interconnection services, they also apply (to the extent relevant) to the LCS by virtue of being adopted as model terms.

In relation to progressive fault management reporting, the Commission understands that apart from an obligation to meet CSG timeframes and informing an end-user that a fault has been rectified, an access provider does not provide a fault management update and progress

reporting service to its end-user customers. Accordingly, the Commission does not feel that it is appropriate to impose such a condition on an access provider in respect of an access seeker's customer base where an access provider does not provide such service to its own end-users.

ORDERING AND PROVISIONING

Issues raised

Submitters raised a number of issues in relation to ordering and provisioning. These included:

- the need for real time interfaces;
- non-discriminatory ordering and provisioning;
- clearer indications of provisioning timeframes;
- acknowledgement of ordered services, updates of progress and confirmation of completed orders;
- the ability to request network conditioning to proceed prior to the agreement of charges; and
- service qualification ULL requests should be made using a process consistent with that for vacant ULL requests regarding the service activation point.

Is there a need for real-time interfaces?

The need for real-time interface for processing and communicating requests is an issue that is broadly addressed in the ACIF C569:2001 Unconditional Local Loop Service – Ordering, Provisioning and Customer Transfer Industry Code. The explanatory statement of the ACIF code provides that:

> *"Parties to this Code agree to jointly progress the development and implementation of a real time interface (e.g. XML) in relation to the IT transactions… This work must commence immediately upon publication of this Code…"*

The Commission considers the issue relating to ordering and provisioning through real-time interface and the broader issue of access to information systems should continue to be progressed through ACIF consistent with the above statement. This general approach is applicable for all the core services (refer to below section on Access to Information Systems).

Should ordering and provisioning be provided in a non-discriminatory manner?

The Commission notes that clause 8.1 ACIF C569:2001 *Unconditional Local Loop Service – Ordering, Provisioning and Customer Transfer*, requires access providers to treat ordering and provisioning of ULLS in a non-discriminatory manner.

The Commission adopts this provision and all provisions relating thereto as part of its model non-price terms and conditions.

As a matter of general policy, the Commission notes that under s152AR of the TPA, ordering and provisioning of all active declared services must be provided to an access seeker in a non-discriminatory manner.[38] The Commission would be concerned if access agreements were not providing for ordering and provisioning to be in a non-discriminatory manner pursuant to the standard access obligation under 152AR of the TPA.

The KPIs exercise referred to earlier in this determination is intended to shed some light on whether or not this is occurring. The results of that exercise may lead to future action being taken by the Commission in relation to discrimination in the ordering and provisioning of ULLS services.

Should provisioning timeframes be clearly stated?

Submitters stated that there are no clear provisioning timeframes in order to manage customer expectations and meet CSG obligations.

Commission's views

The Commission notes that ACIF C569:2001 *Unconditional Local Loop Service – Ordering, Provisioning and Customer Transfer*, clause 11.10 deals with standard cutover timeframes but does provide any further provisioning timeframes.

The Commission adopts the standard contained in clause 11.10 for ULLS cutover notifications as a model term and condition together with all related provisions.

While the Commission recognises that clarity around provisioning timeframes would be highly desirable, one view is that it may be impracticable to devise a "one size fits all" model term and condition for service provisioning, unless the timeframes were based on the lowest common denominator (that is, a set of provisioning timeframes for complex services). This is because of the potential diversity and complexity of provisioning different services and therefore the difficulty in attaching timeframes to the variety of situations.

Moreover, the Commission understands that all parties, including affected customers, need to agree to particular timeframes and that these timeframes need to be flexible to take account of changing circumstances. The Commission considers that while there are CSG timeframes used for the provisioning of retail services, it may be impracticable to adopt these timeframes for wholesale services.

The Commission considers that the most practical and effective approach to this issue would be for ACIF to develop specific timeframes for core services for application in the relevant ACIF codes.

[38] See s152AR(b) and s152AR(4)(a) of the TPA.

Should access providers be required to provide acknowledgement advices?

Another issue raised by submitters is the lack of acknowledgement advices for ordered services, updates of progress and confirmation of completed services.

Commission's views

The Commission notes that ACIF C569:2001 *Unconditional Local Loop Service – Ordering, Provisioning and Customer Transfer* places various obligations on parties to inform other parties (that is, the provision of receipt advices and acknowledgements of ULLS requests). In addition, there are obligations to keep parties informed of the progress of provisioning of ULLS. However, these obligations do not exist in relation to the provisioning of other services.

For example, clause 9.1.6 provide that on receipt of a valid ULLS request or ULLS transfer request, that the access provider must provide a receipt advice to the gaining access seeker within 1 clear business day. Clause 9.1.7 provides that on receipt of a valid ULLS or ULLS transfer request, the access provider must also provide a ULLS confirmation advice or ULLS rejection advice to the gaining access seeker within 3 clear business days.

The Commission, therefore, considers that this issue is adequately addressed by the ACIF code provisions in relation to ULLS. Accordingly, the Commission adopts as model terms and conditions, all relevant clauses in the code concerned with the obligation to provide acknowledgement of ordered services and updates of progress and confirmation of completed orders.

(ULLS only)

Should network conditioning work commence prior to agreement of charges?

Some submitters stated that access seekers should be able to request network conditioning work to proceed before charges are agreed.

Commission's views

The Commission notes that ACIF codes provide no direction on this issue. The Commission is of the view that this is a matter for commercial negotiation between the parties and therefore the Commission does not consider there should a model term and condition mandating that network conditioning proceed before charges are agreed.

Should a consistent process be used for service qualification ULL requests?

One submitter stated that service qualification ULL requests should be made using a process that is consistent with that for vacant ULL requests regarding service activation point.

Commission's views

The Commission notes that ACIF C569:2001 *Unconditional Local Loop Service – Ordering, Provisioning and Customer Transfer* outlines the agreed industry processes for ordering and provisioning ULLS. For example clause 11.6 details the process for service qualification as part of ordering and provisioning of ULLS. The Commission considers that if there is to be a different service qualification process based on vacant ULL requests, that change in process should be developed through the ACIF and the relevant code.

(ULLS only)

Should there be a requirement to provide information on lead-in cable in the service qualification process?

The Commission notes, that the service qualification process under clause 11.6, excludes information about the lead-in cable. The lack of information in relation to the existence or otherwise of a lead-in cable in the service qualification process was an issue raised by one submitter. The Commission believes that this information, where available, should form part of the service qualification as it would facilitate the delivery of ULLS to end-users if a service provider has prior knowledge of the existence or not of a lead-in cable. Accordingly, the Commission recommends that ACIF review the applicable ACIF code to incorporate information on lead-in cable as part of the service qualification requirements.

(ULLS only)

Responses to draft Determination

Service provision and the need for appropriate service level standards was again commented upon, in response to the draft Determination, as being the key issue for access seekers, not only in respect of ordering and provisioning, but across several areas of operation.

In its draft Determination, the Commission stated that it would be concerned if access agreements did not ensure that ordering and provisioning arrangements were provided in a non-discriminatory manner. To this end, the Commission in respect of ordering and provisioning, adopted as part of its model terms, clause 8.1 of ACIF C569:2001 Unconditioned Local Loop Service- Ordering, Provisioning and Customer Transfer, which requires access providers to treat ordering and provisioning of ULLS in a non-discriminatory manner.

Access seekers submitted, however, that despite the above statement, the Commission failed to act on this point. Some access seekers submitted that in respect of faults and maintenance and ordering and provisioning, Telstra's access arrangements have the potential to discriminate against access seekers and that Telstra avoids this provision by arguing that it does not provide the core services to itself. Thus it was argued that it was essential that the model terms and conditions include a clause to address this issue as a host of matters relating to fault rectification and ordering and provisioning flowed from the effect of a non-discrimination clause.

Commission's views on responses to draft Determination

As discussed above in relation to the issue of faults and maintenance, the Commission is of the view that there is an express legislative and ACIF code obligation upon access providers to provide ordering and provisioning to the same service level as that which it provides to itself.

The Commission confirms its draft position that ordering and provisioning and faults and maintenance, in particular, should be provided to access seekers in a non-discriminatory manner. This position is consistent with the SAOs applicable to C/CSP's.

Section 152AR(3)(b) relevantly provides that an access provider must take all reasonable steps to ensure the technical and operational quality of the declared service supplied to the access seeker is equivalent to that which the access provider provides to itself. Section 152AR(4)(A) provides that ordering and provisioning are taken to be aspects of technical and operational quality.

Further, in relation to interconnection, s152AR(5)(d)(i) provides that an access provider must take all reasonable steps to ensure that the technical and operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself.

The Commission believes that there is quite clearly an obligation upon access providers to provide ordering and provisioning to the same service level as that which it provides to itself. The spirit and intent of the legislation is concerned with achieving non-discriminatory outcomes as between an access provider and an access seeker, as opposed to the provision of non-discriminatory levels of service by an access provider between different access seekers. The Commission believes that such non-discriminatory behaviour is necessary to facilitate competition in contestable downstream markets and that this interpretation accords with the overall objective of promoting the LTIE as stipulated under Part XIC of the Act.

The Commission adopts as model clauses, the above statutory ordering and provisioning requirements, in addition to ACIF Code clause 8.1

Accordingly, the Commission has attempted to address to the issue of service level standards by the adoption and application of a non-discrimination standard that provides a broad principle approach to the issue of ordering and provisioning, faults and maintenance and the like. The Commission still maintains the view that it is too problematic, as well as potentially undesirable, to apply an approach beyond a generic level standard. The generic standard adopted (of non-discrimination), however, should make it clear that the Commission would be expecting that an access provider will provide a level of service comparable to that which it provides to itself.

Further, the Commission believes that its approach to the above non-discrimination issue in combination with the KPI monitoring exercise, should in part address the concerns about service level standards that access seekers hold.

ACCESS TO INFORMATION SYSTEMS

Issued raised

Access to information systems was found to be relevant to a number of areas of concern of access seekers.

Should there be a common information system interface?

Submitters raised a number of issues in relation to the issue of access to information systems. These submissions identified the need for an online information system which provides immediate access through real-time transactions. It was submitted that an online system would increase the competitiveness and efficiency of access seekers and thereby streamline the delivery of services to end-users by improving timeframes and other operational matters in relation to a range of matters including:

- ordering and provisioning (for all wholesale products);
- fault maintenance;
- service qualifications; and
- service availability.

The call for a common information system interface arises due to the belief among access seekers that the current disparate industry information systems are not meeting the needs of the telecommunications industry. It was suggested by submitters that a common real-time interface between wholesale parties was essential to removing discriminatory treatment and required for improving process associated with ordering and provisioning, fault maintenance and service qualification and availability.

Commission's view

The Commission agrees with these comments and has actively supported more integrated and efficient information systems that improve business to business transactions. The Commission is of the view that such systems would reduce the costs of inter-carrier transactions, improve transaction security and reduce errors as well as improve product implementation timeframes.

The recently created Electronic Information Exchange Network ("EIEnet"), which has been developed through ACIF by industry participants, is designed to meet such purposes. The EIEnet has the ability to support applications that would form the basis for an integrated online information system incorporating real-time transactions to improve wholesale operations, improve fault reporting and rectification systems and improve service qualification and availability reporting.

The Commission fully supports the emerging EIEnet infrastructure and sees it as a viable and suitable network to support the requirements of many integrated information systems.

Accordingly, parties should consider utilising the EIEnet to improve access to information systems. In building any new systems, access seekers and access providers should attempt to closely match or exceed the principles and provisions advocated in the ACIF G608 EIE Infrastructure Common Network Specification Guideline.

The Commission therefore recommends and expects that development and implementation of a common system interface, whether it be through the EIEnet project or some other means, occur as a priority so that the concerns of access seekers in relation to timeframes and other areas of concern, are addressed.

The Commission recommends that this project continues under the auspices of ACIF and any agreed outcome or standard be reflected in an ACIF code/guideline. At this point, the Commission will not mandate a model term and condition requiring the development and implementation of a common system interface, however, it will consider such model terms and conditions should there be any unreasonable delays in the development and implementation of such a system.

Responses to draft Determination

One party contended that the EIEnet may not be the most cost effective means for facilitating integrated online information systems which provide real-time transactions. It was stated that, at this point in time, the establishment of a common information interface utilising the EIEnet would require extensive industry consultation as well as significant capital outlays for systems development by all industry participants. In light of these circumstances, it was suggested that the public internet may be a more appropriate and timely means for the purpose of inter-carrier information exchange.

Commission's views on responses to draft Determination

While the Commission fully endorses the use of the emerging EIEnet infrastructure to support information exchange, it is cognisant that there may currently be various impediments to the timely establishment of integrated information systems using this platform. In light of these circumstances, it considers that any other more immediate and appropriate options for enabling real-time transactions should also be pursued, where this best meets the more immediate needs of the parties concerned in a more timely manner. However, any such initiatives (including in relation to FuturEDGE – see below) should not undermine in any way the on-going development of the broad EIEnet platform to facilitate the real-time exchange of information between carriers and service providers in order to fulfil its objective of becoming the information exchange standard for the industry within a reasonable period.

The Commission understands that Telstra is currently in the process of deploying a particular business-to-business system called FuturEDGE, which may potentially address some of the concerns regarding access to information identified by industry participants in the shorter-term. The Commission intends to monitor the implementation of this new system going forward and would expect that industry participants and the ACIF be consulted in this development process.

General Comment

As a general comment in respect of the application of ACIF codes to access agreements, the Commission would expect that access agreements reflect all applicable ACIF code obligations. The only time that an ACIF code standard should not be followed is where there has been bilateral agreement to adopt some other standard. The practical implication of this principle is that access agreements should constantly be updated to take account of any applicable changes to or new ACIF code provisions.

As noted above, where a matter is dealt with by an ACIF code, the Commission's model terms and conditions will adopt that standard. As a consequence, access agreements that fail to incorporate ACIF codes standards will fail to meet the Commission's model non-price terms and conditions.

Part 3. Draft Model Clauses

MODEL NON-PRICE TERMS AND CONDITIONS

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 shall 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, except:

(i) where the access seeker gives written consent to a longer period (such consent not to be unreasonably withheld); or

(ii) to the extent that the Charges relate to a new Service being billed for the first time, in which case such Charges may be invoiced up to 8 months after the relevant amount was incurred by the access seeker's customer, subject to agreement with the access seeker (such agreement not to be unreasonably withheld); or

(iii) to the extent that the Charges relate to services supplied by an overseas carrier and the access provider has no control over the settlement arrangements as between it and the overseas carrier, in which case the access provider shall invoice such amounts as soon as is reasonably practicable.

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, 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. For the avoidance of doubt, this clause A.8 shall be subject to the Billing Dispute Procedures.

A.9 Unless the parties otherwise agree, there shall be no setting-off (*i.e.* netting) of invoices except where a party goes into liquidation, in which case the other party 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).

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.

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

A.13 If a Billing Dispute Notice is given to the access provider 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. 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).

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

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 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).

A.18 The access provider shall try to resolve any Billing Dispute as soon as practicable and in any event within 25 Business Days of receipt of a Billing Dispute Notice (or a longer period if agreed by the parties), by notifying the access seeker in writing of its proposed resolution of a Billing Dispute. That notice shall explain the access provider's proposed resolution 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).

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 as soon as is practicable and in any event within 1 month 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 25 Business Days of being notified of the access provider's proposed resolution (or a longer period if agreed by the parties), 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; and

(b) seeking escalation of the Billing Dispute.

A.24 A notice under clause A.23 must be submitted to the nominated billing manager for the access provider, 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.

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, either party may commence legal proceedings to resolve the matter.

A.26 The Parties shall ensure that any person appointed or required to resolve a Billing Dispute shall take into account the principle that the access seeker shall be entitled to be recompensed in circumstances where the access seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end customer an amount which is the subject of a Billing Dispute (a "**Backbilling Loss**"), provided that:

(a) such principle shall apply only to the extent to which the Billing Dispute is resolved against the access provider; and

(b) such principle shall apply only to the extent to which it is determined that the Backbilling Loss was due to the access provider unnecessarily delaying the resolution of the Billing Dispute.

A.27 Each party must continue to fulfill its obligations under this agreement during the pendency of a Billing Dispute and the Billing Dispute Procedures.

A.28 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.29 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.30 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 5% or more, then, for the purposes of clause A.20, the interest payable by the access provider in respect of the incorrect amount of the invoices in question shall be the rate set out in clause A.7, plus 2%. The remedy set out in this clause A.30 shall be without prejudice to any other right or remedy available to the access seeker.

A.31 If three or more out of any five consecutive invoices for a given Service are incorrect by 5% or more, then without prejudice to any other right or remedy available to the access seeker, the access provider shall be deemed to have breached this agreement and the seeker shall have a right of damages for such breach.

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;

(f) a right of set off; or

(g) 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 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 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.3 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 a party or any third person not under the direct control of the first party.

C.4 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.5 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.7, C.8, C.11 or C.12. The Annual Liability Cap shall not apply to liability under clause C.10 to the extent that the claim relates to death or personal injury or the making good of property damage.

C.6 Subject to clause C.5, the Liability of the Indemnifying Party to the Innocent Party for an Event described in any of clauses C.7 to C.12 shall, unless otherwise agreed between the parties, be limited to the remedies identified in those clauses respectively.

C.7 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 any person, 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 its People.

C.8 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, facilities, Network or other tangible property of the Innocent Party or any third person to the extent that such Loss is caused by a negligent act or omission or an act or omission intended to cause Loss by the Indemnifying Party or any of its People.

C.9 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 any 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.10 Subject to clause C.11, 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.

C.11 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.12 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.13 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 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.

C.14 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.15 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.16 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.17 Except as expressly provided in clauses C.18 to C.21, 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 (other than the first party's People); or

(ii) any third person involved in the operation or maintenance of any equipment or Network used in connection with an international carriage service (other than the first party's People);

(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.

C.18 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.19 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.18), 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.20 If the access provider delays in the original supply of any Service (not covered by clauses C.18 or C.19), 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.21 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.2, 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.22 Clause C.3(a) does not apply to Liability under clauses C.18 to C.21.

C.23 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 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 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 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.

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 fulfill 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 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 D.4(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;

(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;

(e) as required by law provided that the disclosing party has first given as much notice (in writing) as is reasonably practicable to the other party, 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;

(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;

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

(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.

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) 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). The Independent Auditor may obtain advice from a barrister or solicitor (who does not act for and has not acted for either of the parties in relation to any matter in question) in determining whether such *prima facie* evidence exists. 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.

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.

(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.

(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.

(d) 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).

(e) 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;

(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.

F.3 Where a party communicates with an end-user of either party, the first mentioned party shall 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.

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.

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' written notice of the proposed amendment.

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 re-locate 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 120 Business Days' written notice) before any such re-location 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 re-location; and

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

G.10 If the access seeker seeks a re-location 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 re-location.

G.11 Notwithstanding any negotiations between the access provider and the access seeker, a re-location 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 re-location 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, the re-location of which would or would be likely to affect the access seeker's Network arrangements.

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,

("**Suspension Event**") and:

(e) within 20 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 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 Service:

(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.

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) a party ceases to carry on business for a period of more than 10 consecutive Business Days without the prior written consent of the other party (such consent not to be unreasonably withheld);

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

(d) a party breaches a material obligation under this agreement and:

(i) that breach materially impairs or is 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) the other party fails to institute remedial action as specified in the Breach Notice within 20 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).

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 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

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

(i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

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.29;

"**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, willful 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).