PUBLIC INQUIRY TO MAKE FINAL ACCESS DETERMINATIONS FOR THE DECLARED FIXED LINE SERVICES

PART B OF TELSTRA'S RESPONSE TO THE COMMISSION'S DISCUSSION PAPER

3 June 2011

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1. INTRODUCTION AND GENERAL APPROACH

1 Telstra welcomes the opportunity to comment on Part B of the Australian Competition and Consumer Commission's (**Commission**) *Public inquiry to make final access determinations for the declared fixed line services, Discussion Paper*, dated April 2011 (**Discussion Paper**).

2 In making the final access determinations (**FADs**), the Commission must take into account:

(a) the mandatory considerations set out in subs 152BCA(1) of the *Competition and Consumer Act 2010* (**CCA**); and

(b) any other relevant considerations that are mandatory by implication from the subject matter, scope and purpose of Part XIC.[1]

3 The Commission may also take into account any other matters that it thinks are relevant.[2]

4 In order to assist the Commission in making the FADs, Telstra sets out below, comments in relation to the mandatory considerations set out in subs 152BCA(1).

1.1. MATTERS THAT THE COMMISSION MUST TAKE INTO ACCOUNT

5 In making FADs the Commission must have regard to each of the mandatory relevant considerations set out in subs 152BCA(1). The Full Court of the Federal Court has provided guidance on the content of this obligation in the following terms:[3]

> *When the expression "… regard must be had to …" is used in a statute in respect of a particular criterion or factor to be considered by a decision maker, the decision maker is bound to treat such a factor as a central or fundamental element in the making of the relevant decision (see the discussion of these principles by Rares J in Telstra Corp Ltd v ACCC [2008] FCA 1758 at [103] to [112]).*

6 In the decision cited by the Full Court, Rares J said, in reference to High Court authorities[4] on obligations expressed in similar terms:[5]

> *I am of opinion that the sense in which the High Court used the expression "fundamental weight" in this context is to require the decision-maker to treat the consideration of the factors, as opposed to the factors themselves, as a central element in the deliberative process: Meneling Station 158 CLR at 338 per Mason J.* (emphasis in original)

7 Thus, the consideration of each matter must be given fundamental weight in order for the Commission to produce a valid decision. Further, in weighing up the mandatory

[1] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, p 39-40 per Mason J.
[2] *CCA,* subs 152BCA(3).
[3] *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 at [267].
[4] Namely *Reg v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 and *The Queen v Toohey; Ex parte Meneling Station Pty Limited* (1982) 158 CLR 327; see *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [103]ff.
[5] *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [110].

relevant considerations, the Commission cannot "jettison or ignore" any mandatory consideration, or "give it cursory consideration only in order to put it to one side".[6]

1.1.1. LONG-TERM INTERESTS OF END-USERS

8 Sub-section 152BCA(1)(a) requires the Commission to take into account the overall object of Part XIC in making a FAD on access to a declared service. Section 152AB provides that regard must be had to three objectives, and the Full Court of the Federal Court has recently confirmed that each one of these objectives is a mandatory relevant consideration in its own right.[7] Those three objectives are:

(a) promoting competition in markets for carriage services and services provided by means of carriage services: subs 152AB(2)(c) (competition objective);

(b) achieving any-to-any connectivity in relation to carriage services that involve communication between end-users: subs 152AB(2)(d); and

(c) encouraging economically efficient use of, and investment, in the infrastructure by which carriage services and services provided by means of carriage services are supplied, are capable of being supplied or are likely to become capable of being supplied: subs 152AB(2)(e) (investment objective).

9 In relation to investment, Rares J observed in *Telstra Corporation Limited v ACCC*[8] that competition cannot be promoted, and thus the long-term interests of end users (**LTIE**) may not be attained, if infrastructure investment is not economically feasible for an efficient service provider to make or support. His Honour went on to find that:[9]

> *[B]y dint of s 152AB(2)(e) the interests of end-users may well include that the service provider is not forced to act in a way which for it is economically unjustifiable. Possibly a monopolist may be forced to lower prices or make way for competition under s 152AB(2)(e), but not to run the business as a charitable exercise or at a loss.*

10 The clear implication of this finding is that the LTIE will not be promoted where the Access Provider is unable to recover all of the costs of providing access to its infrastructure or where it is obliged to act in a way which is economically unjustifiable. This will include the costs of complying with non-price terms on which access must be provided.

1.1.2. THE LEGITIMATE BUSINESS INTERESTS OF THE ACCESS PROVIDER, AND THE CARRIER'S OR PROVIDER'S INVESTMENT IN FACILITIES USED TO SUPPLY THE DECLARED SERVICE

11 Subsection 152BCA(1)(b) requires the Commission to take into account the legitimate business interests of the Access Provider and its investment in facilities used to supply the declared service. An Access Provider would not invest in infrastructure if it was unable to achieve a return that recovers all of its costs and enables it to make a return commensurate with the risk involved. It would instead elect to make its investment (and receive a better return on that investment) elsewhere.

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[6] *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [107], citing *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 244 per Gleeson CJ, Heydon and Crennan JJ.
[7] *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23. See in particular at [260-270] per the Court.
[8] [2008] FCA 1758, referring to the equivalent provisions in the *Trade Practices Act 1974* (Cth).
[9] *Telstra Corporation Limited v ACCC* [2008] FCA 1758 at [111].

12 Similarly, it is not in the Access Provider's legitimate business interests to provide services unless it can ensure that the person to whom those services are supplied is able to both pay for those services and pay in a timely manner. The FADs should not allow an Access Seeker to use an Access Provider as a credit provider. Rather, an appropriate balance needs to be struck between providing access to services to the Access Seeker and ensuring that the Access Provider receives timely payment for those services.

1.1.3. THE DIRECT COSTS OF PROVIDING ACCESS TO THE DECLARED SERVICE

13 Telstra observes the Commission correctly states that *"the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access, and includes the incremental costs of providing access"*.[10] This is consistent with the judgment of Rares J in *Telstra Corporation Limited v ACCC.*[11] In relation to the costs of complying with a FAD in particular, the criterion in subs 152BCA(1)(d) must be read consistently with the Commission's obligation under subs 152BCB(1)(f) of the CCA to refrain from making any determination under which a party would be required to bear an unreasonable amount of the costs associated with extending or enhancing a facility.[12]

14 In order to consider the Access Provider's direct costs, the Commission must give fundamental weight to the Access Provider's direct costs of implementation where it:

(a) imposes new processes;

(b) specifies changes to systems;

(c) identifies additional information that the Access Provider must make available to an Access Seeker; or

(d) imposes any other non-price term that increases costs or risks.

15 This consideration suggests that the Commission should not mandate, via the mechanism of a FAD, that steps be undertaken unnecessarily. In addition, Telstra submits that the consideration militates against the Commission imposing obligations where there are substantial implementation costs or increased risks and the obligations would not promote the LTIE to any significant extent.

16 As noted above, the Commission must also consider whether the costs of implementing the FADs can be recovered. It is not permissible to defer consideration of this issue to a later date.[13]

1.1.4. THE VALUE TO A PARTY OF EXTENSIONS, OR ENHANCEMENT OF CAPABILITY, WHOSE COST IS BORNE BY SOMEONE ELSE

17 Telstra does not accept that it is unlikely that subs 152BCA(1)(e) will be relevant to the FADs. Indeed, Telstra believes that this criterion is relevant to a number of terms and conditions included in the Commission's draft FADs which, if made final, would

[10] Commission, Discussion Paper, p 19.
[11] [2008] FCA 1758.
[12] *Telstra Corporation Limited v ACCC* [2008] FCA 1758 at [123].
[13] *Telstra Corporation Limited v ACCC* [2008] FCA 1758 at [117].

require Telstra to make changes to its IT systems and otherwise, at significant cost, or enhance the capability of its facilities in order to comply.

1.1.5. APPLICATION OF THE STATUTORY CRITERIA

18 The Commission's consideration of the statutory criteria in relation to the non-price terms and conditions in the draft FADs is restricted to whether or not any particular term addresses the matters in subs 152BCA(1). Telstra submits that this approach is inappropriate as it effectively assesses the FADs against the statutory criteria in a vacuum.

19 Telstra submits that the Commission should assess the criteria on a "future with" and "future without" basis.[14] The "future without" the draft FAD terms is not one where there are no terms on the subject matter covered by the FADs. Rather, it is one where commercial agreements which are currently on foot between the parties, or which are being offered by the Access Provider, apply. This analysis has not been conducted by the Commission, which has resulted in the erroneous conclusion that the non-price terms of the FADs are consistent with the statutory criteria.

20 Where the terms and conditions in the draft FADs do not address the matters set out in subs 152BCA(1) any better than they are currently addressed by commercial arrangements, Telstra submits the non-price terms of the FADs should not be made because they impose additional regulatory and compliance burdens for no discernible benefit over and above that which the market is currently providing.

1.2. OTHER MATTERS THE COMMISSION SHOULD TAKE INTO ACCOUNT

21 In addition to the statutory framework set out above, Telstra considers that the Commission should, in making the FADs, take into account the following relevant considerations.

1.2.1. INCORPORATION OF MODEL TERMS AND PREVIOUS FINAL DETERMINATIONS

22 First, the Commission proposes to include terms which are almost identical to those in Schedules 8 to 16 of the Interim Access Determinations (**IADs**). The Commission acknowledged that the "*majority of the non-price terms and conditions in the IADs were drafted in substantively similar terms to the 2008 Model Terms. However, the drafting in some schedules in the IADs were based on terms contained in more recent FDs made in arbitrations in relation to the ULLS and LSS".*[15] Further, the Commission considers that these terms are not controversial because, insofar as these terms are taken from the Model Terms, they have been the subject of industry consultation.

23 Telstra considers that the Commission should not incorporate the Model Terms in to the FADs, given their differences in nature. The Model Terms are non-binding. In that regard, the Commission previously acknowledged that the Model Terms were intended to *"assist parties to reach commercial agreement on the terms and conditions of access, or to submit access undertakings, thus providing more timely access for Access Seekers' to 'core' fixed line network services".*[16]

[14] This approach was recently taken by the Australian Competition Tribunal in *Re AAPT Ltd* [2009] ACompT 5, [5] and *Application by Chime Communications Pty Ltd* (No 2) [2009] ACompT 2, [12] - [14].
[15] Commission, Discussion Paper, p 189.
[16] Commission, *Final Determination - Model Non-price Terms and Conditions*, November 2008, p 3.

24 The Model Terms are a useful starting point for parties when entering into commercial agreements for the supply of services. Their non binding nature reflects that they were not intended - and are not appropriate - to be applicable to all Access Seekers and all Access Providers in all circumstances. The fact that they have largely not been adopted by the industry since their publication reflects this.

25 The FADs, on the other hand, are intended to be a binding set of terms applicable to the Access Provider and the Access Seeker where they are unable to agree on a set of commercial terms. This will be the case regardless of how inappropriate or unsuitable the terms may be.

26 A breach of the FADs, in addition to enlivening any remedies available to the parties at law for breach of contract, constitutes a breach of a carrier licence condition and a service provider rule, which could result in "substantial pecuniary penalties of up to $10 million".[17]

27 Given the different nature of the Model Terms and the FADs, it is not necessarily the case that the industry consultation on the Model Terms means that they are "non-controversial" and should be incorporated into the FADs. That is because the parties may not have raised issues and/or concerns given that it was their understanding that the Model Terms were only a starting point for contractual negotiations. As a result, Telstra has conducted a thorough review of the draft FADs and has suggested alternative drafting for a number of clauses.

28 Unlike some service-specific non-price terms which have been disputed by Access Seekers in the past, the more generic commercial concepts in the Model Terms have neither historically been a matter for dispute between the parties, nor have they been generally incorporated into commercial contracts. Accordingly, it is reasonable to assume that the subject matter covered by the Model Terms are well settled between the parties and that the parties do not have any issues with the equivalent provisions of their commercial agreements.

29 Telstra submits that, for the reasons set out above, the Commission should not incorporate the Model Terms into the FADs.

30 Second, Telstra considers that, as a general rule, it is appropriate that the Commission incorporate provisions contained in more recent final determinations (**FDs**) into the FADs. That is because the parties have had the opportunity to provide submissions on the proposed drafting of those clauses in a context in which the parties knew that the terms would be binding upon them. However, Telstra does not agree with the Commission expanding the application of these terms to services other than those to which the FD applied, given that those terms have not been disputed in respect of those services.

1.2.2. CLARITY, BALANCE AND REASONABLENESS

31 In light of the severe consequences for Access Providers and Access Seekers if they breaches the FADs, and in order to avoid unnecessary disputes regarding the interpretation of various terms of the FADs, the FADs should be clear. Accordingly, Telstra has proposed a number of amendments to clarify parties' rights (and to amend minor drafting errors). For example, Telstra has proposed amendments to Schedule 12 so that the process for contacting an end user of an Access Seeker is clear.

[17] Commission, Discussion Paper, p 188.

32 Indeed, the FADs must be carefully drafted to ensure that they also strike an appropriate balance between two competing considerations. On the one hand, the FADs must contribute to an effective regime for infrastructure sharing that will facilitate competition in the telecommunications market. On the other hand, the FADs must avoid placing undue, onerous or unnecessary costs and burdens on market participants who would otherwise invest in infrastructure, so that infrastructure can continue to be developed and shared between market participants. If the scale is tipped in favour of economic disincentives on Access Providers, then instead of investing in infrastructure that may be shared, Access Providers are likely to invest in other areas. For this reason, Telstra considers it important to bring to the Commission's attention any provisions in the draft FADs which would have the effect of placing undue, onerous or unnecessary costs and burdens on Access Providers.

33 Further, the FADs, where possible, should be balanced in their application to Access Providers and Access Seekers. For example, interest payable by one party to the other party should be calculated in the same way. Telstra has proposed some amendments which seek to more evenly balance the parties' interests.

34 In addition, Access Providers have a number of obligations in respect of Access Seekers in order to protect an Access Seeker's right to access the six declared fixed line services the subject of the FADs. Whilst Access Seekers also have a number of obligations to the Access Provider, the principal obligation is their ability to pay (in a timely manner) for supply of the Service. Although the FADs adequately ensure that the interests of Access Seekers are protected, Telstra considers that the FADs do not do so in respect of this principal obligation owed to Access Providers. Accordingly, Telstra has proposed some amendments to ensure that there is a more balanced approach to the parties' respective interests.

35 Finally, the FADs should be reasonable in their impact on both Access Providers and Access Seekers. The FADs should not impose on Access Providers unduly onerous obligations which have little or no benefit for Access Seekers. Accordingly, where Telstra considers that the burdensome nature of the obligations being proposed is disproportionate to any benefits of such an obligation, Telstra has proposed amendments to the draft FADs to ensure a more reasonable result is achieved.

1.2.3. SCOPE OF THE FADS

36 The FADs must be within the scope of the Commission's powers. Thus, the Commission must not make FADs which would have any of the effects set out in subs 152BCB(1). That is, the FADs must not include provisions which, for example:

(a) require a person (other than an Access Seeker) to bear an unreasonable amount of the costs of extending or enhancing a facility's capability: subs 152BCB(1)(f); or

(b) require the provision of access where there are reasonable grounds to believe that the Access Seeker would fail to comply with the relevant terms and conditions: subs 152BCB(1)(g).

37 Examples of the grounds mentioned in subs 152BCB(1)(g) include evidence that the Access Seeker is not creditworthy[18] or repeated failure by the Access Seeker to comply with terms and conditions on which a Service has been provided.[19]

[18] *CCA*, subs 152BCB(2)(a).
[19] *CCA*, subs 152BCB(2)(b).

38 In addition, the FADs must not apply more broadly than their intended scope. That is, the FADs should apply to the six declared fixed line services, and should apply only in respect of charges for those services which are set out in the FADs. Telstra has proposed amendments to ensure that the FADs are within their intended scope.

39 Further, the Commission should not include provisions relating to iVULLS, liability (risk allocation) and facilities access in the FADs for the reasons set out in section 3 below. However, if the Commission is minded to include provisions on these issues in the FADs, it should not do so without issuing draft provisions and giving persons who are likely to be affected by the provisions a reasonable opportunity to comment.

1.2.4. COMMERCIAL PRACTICE

40 Telstra is concerned that a number of the provisions are either out of step with commercial practice or do not adequately cater for the individual characteristics of each Access Provider and Access Seeker. For example, the terms relating to the meaning of Ongoing Creditworthiness Information (**OCI**) fail to recognise that Access Seekers come in different "shapes and sizes", and some smaller Access Seekers may not be able to provide the types of OCI listed in clause 9.8. Given that the FADs are intended to be default contractual terms and the parties will have to comply with them, they should reflect commercial and practical reality for all Access Seekers and Access Providers.

41 In that regard, adopting terms and conditions which are consistent with commercial practice is preferable because those practices reflect an efficient outcome resulting from balanced negotiations between the parties. As set out in 1.1.5, that efficient outcome should not be overturned without the Commission providing considered reasons why the proposed terms would promote the statutory criteria more than that efficient commercial outcome.

1.2.5. CONSISTENCY WITH OTHER NON-PRICE TERMS AND CONDITIONS IN OTHER CONTEXTS

42 Given that certainty as to the terms and conditions of access to the declared fixed line services is important, and in order to provide a level playing field between Access Providers, the same terms should apply to all Access Providers who compete for customers. For that reason, if the Commission sets terms and conditions in the FADs, similar terms should apply to any service supplied by NBN Co.

1.3. STRUCTURE OF TELSTRA'S SUBMISSIONS

43 Telstra's submissions are structured as follows.

44 In the second section, Telstra sets out its concerns in relation to particular terms of the draft FADs. In addition to the submissions in this section, Telstra has also provided as Schedule B.1, a copy of the draft FADs with the following:

(a) proposed amendments reflecting the concerns set out in the second section of this submission; and

(b) proposed additional amendments reflecting the correction of drafting errors, and other amendments, which in Telstra's view, do not require substantial explanation.

45 Each of the amendments in Schedule B.1 is explained either by reference to the submission or in Schedule B.1.

46 In the third section, Telstra sets out its response to the Commission's proposal to include provisions relating to iVULLS, liability (risk allocation) and facilities access in the FADs.

47 The fourth section deals with the commencement and expiration date.

48 The fifth section sets out Telstra's responses to the Commission's questions.

49 The sixth section sets out Telstra's response to section 15 of the Commission's Discussion Paper.

50 Where these submissions do not respond to a specific part of the draft FADs or the Discussion Paper, this should not be taken as indicating that Telstra agrees with the Commission's approach.

2. PROPOSED APPROACH TO PARTICULAR TERMS OF ACCESS

2.1. ACCESS PROVIDERS' FINANCIAL EXPOSURE UNDER THE FADS

51 Telstra considers that a number of amendments should be made to the draft FADs in respect of the Access Provider's financial exposure.

52 A prime concern for Telstra is that the imposition of the terms in relation to billing and notifications, creditworthiness and security and suspension and termination rights will, in combination, cause the Access Provider to experience a significant increase in financial exposure and risk in respect of the supply of a Service under the FADs.

53 This is demonstrated by the following comparison of Telstra's financial exposure and risk under its current commercial contracts with its financial risk and exposure under the draft FADs.

54 Under Telstra's commercial contracts (and under clauses 8.3 and 8.7 of the FADs), invoices are issued monthly and are generally payable within 30 Calendar Days after the invoice is issued. Therefore, if invoices for a particular customer are issued on the 30th day of every month, and there was an invoice issued for 30 April 2011, that invoice is due for payment on 30 May 2011. However, if the invoice remains unpaid by 15 June 2011, the financial exposure is approximately two and a half invoices; the invoice issued on 30 April 2011, which is overdue for payment, the invoice issued on 30 May 2011, which is not yet due for payment, and any amounts payable for Services supplied between 30 May 2011 and 15 June 2011. For example, if an Access Seeker acquired 20,000 ULLS services in operation (**SIOs**) per month, the monthly amount incurred by that Access Seeker (based only on a monthly charge of $16 per SIO) is $320,000. That is the Access Provider's exposure, for one Access Seeker, for one type of service and for one component of the charges payable for that type of service. Further, any ongoing exposure is of limited duration because the Access Provider would ordinarily have the ability, one day after the due date, to pursue recovery of the invoice and, upon giving 10 Business Days' notice, to suspend the supply of services to the Access Seeker.

55 This exposure is significantly changed by the draft FADs.

56 Clause 8.8 provides that, whilst preserving any other rights that the Access Provider may have at law or under the draft FADs, where an amount remains unpaid at the due date, the Access Provider may only take action to recover such amount as a debt

due after a further 20 Business Days have passed. Telstra considers that there is no reasonable basis for restricting an Access Provider's ability to recover sums owing to it by the Access Seeker, given that the Access Seeker has already had 30 Calendar Days to pay. Furthermore, as indicated above, by the time that a further 20 Business Days have passed, the Access Provider could have potentially issued three invoices to the Access Seeker. Thus, under the draft FADs, the Access Provider's financial exposure and risk is, at least, three months' revenue, which (based on an average-sized Access Seeker)is approximately $960,000 (for one Access Seeker, for one type of service and for one component of the charges payable for that type of service).

57 Further, the suspension rights in clause 14.2 can only be exercised after giving 20 Business Days notice to the Access Seeker.

58 Under Telstra's standard commercial agreements, the billing provisions referred to above are complemented by various security provisions which mitigate against any unnecessary exposure the Access Provider might otherwise face in dealing with non-payment by the Access Seeker. A right to obtain a security from an Access Seeker before supplying services goes some way (although not all of the way) to addressing any concerns with non-payment. However, the concerns relating to the billing terms in the draft FADs are compounded by clause 9.1, which - according to the Commission - means that supply is not conditional on the provision of Security. Thus, the Access Provider will be forced to supply to an Access Seeker even if the Access Seeker is not creditworthy, and will be financially exposed until the Security is provided (if at all).

59 Further, if an Access Seeker does not provide an altered Security, the Access Provider cannot immediately suspend supply of a Service(s). Rather, the Access Provider will have to wait a further 20 Business Days before doing so. If the failure to provide altered Security is a result of the Access Seeker being in financial difficulty, the Access Provider could be exposed for over three months revenue based on the payment obligations discussed above (less any Security that the Access Provider secures). That is because a failure to provide altered Security is often likely to result from a failure to pay invoices by the due date, which is likely to be the event which triggered the review of the Security.

60 Accordingly, Telstra considers that the draft FADs should be amended as set out below in Schedule B.1, which also sets out an explanation for each amendment.

2.2. BILLING AND NOTIFICATIONS

Key points:

- The FADs should only apply to those services and those charges set out in the FADs.
- Billing Disputes should be clearly and narrowly defined, given that Access Seekers may withhold payment if a Billing Dispute is notified.
- Access Providers should be able to take immediate action to recover unpaid amounts as a debt due.
- The time period for escalating a Billing Dispute should be shortened to ensure Billing Disputes are resolved in a timely manner and payment is not withheld for an unnecessarily long period of time.
- The consequences of the inaccurate invoicing provisions are disproportionate to the behaviour it is intended to discourage.

2.2.1. DEFINITIONS OF "SERVICE" AND "CHARGE"

61 In order to ensure that the FADs cover the services and charges intended to be covered, the definitions of "Charge" and "Service" should be more narrowly defined. That is, "Service" should be defined so as to only refer to the services set out in clause 1.1 of the FADs. That is because the services the subject of the FADs are not all of the declared services but only the six declared fixed network services. Furthermore, some adjunct services to the declared services will still continue to be provided under commercial agreements between the parties and it is important that there is no uncertainty as to the terms which apply to those services. For example, IDD and STD calls are not declared services, but both are supplied to Access Seekers using declared services. These services will be supplied under commercial agreements between the parties.

62 Similarly, "Charge" should be confined to a charge set out in the FADs. That is because charges not the subject of the draft FADs (for example, WLR connection charges) will be covered by commercial agreements between the parties.

63 The remainder of the submission assumes that the above amendments to the definitions of "Service" and "Charge" will be made.

2.2.2. DEFINITION OF "BILLING DISPUTE"

64 The definition of "Billing Dispute" should be confined to a dispute about an alleged inaccuracy, omission or error in a Charge in an invoice. These proposed amendments remove any uncertainty as to which disputes fall within the remit of the Billing Dispute procedures and those which are subject to the general dispute resolution procedures in Schedule 10. For the reasons indicated in 2.2.1 above, it is also important that this only relates to a Charge as limited in those paragraphs.

65 The definition of "Billing Dispute" in the draft FADs - defined as "a dispute relating to a Charge or an invoice issued by the Access Provider" - is unclear as to what it may cover, and is excessively broad in its potential scope.

66 First, the words "or an invoice" could be interpreted as covering charges which are not the subject of the FADs (for example, the IDD rates charged for the IDD service which is not a declared service but which is provided by the Access Provider and would appear in an invoice). Any billing dispute in relation to such charges should be covered by the commercial agreements in place between the parties and should not be dealt with by the FADs. This should be clarified in order to avoid uncertainty between the parties as to which terms apply to which services. Such uncertainty is not in the interests of either the Access Provider or the Access Seeker.

67 Second, if the intent is to discourage inaccurate bills, it is arguable that the words "relating to" could include issues which should be subject to the general dispute resolution procedures in Schedule 10, not the Billing Dispute Procedures. Given that an Access Seeker is entitled to withhold payment if it initiates a Billing Dispute (under clause 8.13), the circumstances in which it is entitled to do so should be limited to those set out above.

68 This amendment is consistent with the statutory criteria as the Access Provider's direct costs of providing access will increase if the Access Provider faces the risk of having to wait longer to recover invoiced amounts. For the same reasons, the current drafting is not in the Access Provider's legitimate business interests.

2.2.3. TAKING ACTION FOR UNPAID AMOUNTS

69 As set out in section 2.1 above, clause 8.8 should be amended so that an Access Provider does not have to wait 20 Business Days before taking action to recover an unpaid amount as a debt (in addition to any other rights that the Access Provider may have). In that regard, the 20 Business Days waiting time proposed in the draft FADs is inconsistent with the Commission's rationale for clause 8.8, which is to *"facilitate recovery of payment for services provided in a timely manner".*[20]

70 The Access Provider's direct costs of providing access will increase if the Access Provider faces the risk of having to wait longer to recover invoiced amounts. Unless the other statutory criteria weigh in favour of the clause as drafted, the clause will not be consistent with the statutory criteria. However, the clause is not in the Access Provider's legitimate business interests.It is reasonable for the Access Provider to expect that it is to be paid invoiced amounts in a timely manner and if that does not occur, the Access Provider is entitled to seek to recover such sums without further delay. The clause as drafted also does not promote the LTIE because the inability to promptly recover invoiced amounts (which reduces the risk of non-payment) hinders efficient investment in infrastructure.

2.2.4. TIME PERIOD FOR ESCALATING BILLING DISPUTES

71 Telstra agrees that an Access Seeker should be entitled to escalate a Billing Dispute. However, clause 8.22 allows the Access Seeker 30 Business Days in which to make such a decision. Such a long period of time is unnecessary. Accordingly, Telstra believes that clause 8.22 should be amended to provide that the time period for escalating a Billing Dispute is 5 Business Days.

72 The revised time period reflects the fact that the Access Seeker is likely to be withholding potentially large sums of moneys from the Access Provider, and the fact that the timely resolution of Billing Disputes is preferable for both the Access Provider and the Access Seeker.

[20] Commission, Discussion Paper, p 195.

73 Telstra considers that 5 Business Days gives an Access Seeker sufficient time to review and consider the proposed resolution (and other supporting material), and decide whether or not to escalate the Billing Dispute.

74 Therefore, the shorter time period proposed strikes an appropriate balance between ensuring that Billing Disputes are resolved in a timely manner, and ensuring that an Access Seeker has sufficient time to review and consider the Access Provider's proposed resolution and decide whether or not to escalate the Billing Dispute.

75 A longer Billing Dispute escalation period encourages a slower Billing Dispute resolution process which is neither in the legitimate business interests of the Access Provider (whose interests are in getting paid promptly) or the interests of the Access Seekers (whose interests are to know the outcome so they can bill their end users appropriately).

2.2.5. CONSEQUENCES OF INACCURATE INVOICING

76 Telstra considers that clauses 8.30 and 8.31 should be deleted.

77 The Commission's rationale for identical provisions to clauses 8.30 and 8.31 in the Model Terms was to discourage an Access Provider from frequently issuing incorrect invoices.[21]

78 However, other provisions in Schedule 8 already provide sufficient and proportionate discouragement to Access Providers from issuing incorrect invoices. In that regard:

(a) clause 8.11 provides that an Access Seeker is entitled to invoke the Billing Dispute Procedures;

(b) clause 8.13 provides that an Access Seeker is entitled to withhold payment of the disputed Charge until the Billing Dispute is resolved; and

(c) clause 8.20 provides that interest is payable on any amount refunded to the Access Seeker.

79 In addition, given the potentially severe consequences for an Access Provider arising out of either of the clauses being triggered, clauses 8.30 and 8.31 could, if included in the FADs, have the opposite effect to what is intended, namely the efficient resolution of Billing Disputes. There is little incentive for an Access Provider to agree with an Access Seeker to backdate reductions in Charges if the result is that the Access Provider is potentially in breach of its carrier licence conditions.

80 If, despite Telstra's submission, clause 8.30 is to be retained, the following amendments should be made.

81 Clause 8.30 should not apply if an error is discovered and either the Access Provider was not aware of the error or, having become aware of it, agrees to rectify the error but (for reasons not entirely within its control) the rectification will take some time. Such a limitation on the application of clause 8.30 is reasonable because the Access Seeker should not be able to take advantage of the clause in circumstances where the error is being rectified and the Access Provider has implemented a process to ensure that correct invoices are rendered but such a process will take time to

[21] Commission, *Draft Determination - Model Non-price Terms and Conditions*, September 2008, p 15.

implement. It is inappropriate to penalise the Access Provider for an error of which it is not aware.

82 Furthermore, unless the clause is triggered only if the Access Provider is aware of that error, an Access Seeker will be incented not to notify a Billing Dispute until after clause 8.30 is triggered (ie until after three consecutive invoices are inaccurate) in order to take advantage of the higher interest rate payable by the Access Provider under clause 8.30.

83 In addition, clause 8.30 should be expressed to apply only if an error of the same kind remains in the invoices in question. This will ensure that the operation of the clause is limited to situations where the Access Provider is aware of the inaccuracy.

84 Given that the rationale of such a term is to ensure that the parties behave appropriately and discharge their obligations to each other, and in order for the terms to be more balanced, similar penalty interest should be payable by the Access Seeker if three out of five consecutive Billing Disputes are resolved against it. That is because such a trigger would likely evidence bad faith on the part of the Access Seeker more than is the case on the part of the Access Provider under the current clause 8.30. If clause 8.30 is to remain, it is reasonable that a similar measure should be introduced to deter the inappropriate use of such provisions by the Access Seeker.

85 In addition to the reasons set out above, clause 8.31 should be deleted because its consequences are entirely disproportionate to the error that the clause is intended to discourage. The consequence of an Access Provider breaching a carrier licence condition is - as the Commission acknowledges - *"substantial pecuniary penalties of up to $10 million".*[22] However, clauses 8.30 and 8.31 do not distinguish between inadvertent or unintentional errors and intentional ones. Thus, the consequence of clause 8.31 is that an Access Provider is potentially liable to pay substantial pecuniary penalties for an inadvertent or unintentional error of which it is not aware, or that it is working to rectify. Further, as set out above, the current drafting of Clause 8.30 encourages the Access Seeker to only notify a Billing Dispute when Clauses 8.30 and 8.31 have been triggered in order to take advantage of the high interest rate payable by the Access Provider under clause 8.30. If the Commission is minded to retain clause 8.30 and adopt the amendments proposed by Telstra, this will provide more than enough discouragement to an Access Provider from issuing incorrect invoices.

86 If, despite Telstra's submission, clause 8.31 is to be retained, the following amendments should be made.

87 First, the Access Seeker should bear the onus of triggering clause 8.31 by notifying the Access Provider of the inaccurate invoices and should provide evidence of their inaccuracy. Such an amendment is justified in light of the fact that it is the Access Seeker who is benefited by clause 8.31. Further, imposing a burden on the Access Provider to monitor invoice inaccuracies in respect of each of the six services covered by the FADs in respect of each Access Seeker, will substantially increase the Access Provider's costs.

88 Second, the triggers for clause 8.30 should also apply to clause 8.31. That is, clause 8.31 should be triggered only in the circumstances set out in paragraphs 82-83 above. In addition to the reasons for this amendment set out in paragraphs 82-83 above, the threshold for triggering the clause should reflect the severity of the consequences of clause 8.31 for the Access Provider.

[22] Commission, Discussion Paper, p 188.

89 The above amendments are consistent with the statutory criteria because:

(a) the clauses in the draft FADs do not promote the LTIE. Efficient investment is not encouraged where an Access Provider can be heavily penalised for an inadvertent error;

(b) the clauses are not in the legitimate business interests of the Access Provider. This is because they are triggered by errors that could arise without the Access Provider necessarily being aware of them or errors the Access Provider is attempting to rectify; and

(c) the clauses go far beyond what would be necessary to address Access Seekers' interests because their interests are already taken into account by their ability to withhold payment (clause 8.13) and their entitlement to interest (clause 8.20).

2.3. CREDITWORTHINESS AND SECURITY

Key points:

- Supply should be conditional upon the provision of Security, in order to mitigate the Access Provider's financial exposure and risk.
- The Access Provider should have the right to determine the amount and form of Security (provided that it acts reasonably in doing so).
- The circumstances in which the Access Provider may require the alteration of Security should be consistent with commercial practice.
- In order to determine the amount and form of Security, the Access Provider should have the flexibility to determine what information constitutes OCI in respect of the Access Seeker.
- The Access Provider should be compensated for the Access Seeker's failure to provide OCI or an altered Security.

2.3.1. SUPPLY NOT CONDITIONAL ON PROVISION OF SECURITY

90 The Commission states in the Discussion Paper that *"access is not conditional on the completion of credit checks or the provision of security. Such conditions would have potential to frustrate access and deter entry into telecommunication markets".*[23] Telstra disagrees with this statement.It is inconsistent with both the statutory criteria and the ability of the Access Provider under the CCA not to comply with the Standard Access Obligations (**SAOs**) in circumstances where the Access Seeker is not creditworthy. It is also out of step with normal commercial practice. Instead, Telstra considers that clause 9.1 should be amended to provide that, before the supply of a Service under the FADs, the Access Seeker must provide Security to the Access Provider.

91 Subsection 152BCB(1)(g)(i) of the CCA provides that the Commission must not make a FAD which would have the effect of requiring an Access Provider to provide an

[23] Commission, Discussion Paper, p 198.

Access Seeker with access to a declared service if there are reasonable grounds to believe that the Access Seeker would fail, to a material extent, to comply with the terms and conditions on which the Access Provider provides, or is reasonably likely to provide, that access. Subsection 152BCB(2)(a) provides that one such ground is evidence that the Access Seeker is not creditworthy. Similar provisions also appear in s 152AR of the CCA, which makes it clear that the Access Provider need not supply the Service(s) in those circumstances. If provision of access is not conditional upon the provision of Security, this would oblige the Access Provider to provide access, even if it has evidence that the Access Seeker is not creditworthy. Thus, the Commission cannot make the FADs so as to have that effect.

92 Further, an Access Provider should be able to assess, before supplying a Service, whether or not an Access Seeker creates an unacceptable credit risk. If the Access Seeker does create such a risk, the Access Provider should be entitled to obtain Security to mitigate that risk before any supply commences. If the Access Provider does not have this option, as set out in 2.2.3 above under the current draft FAD terms, it will have to wait 20 Business Days before suspending supply (under clause 14.2).

93 This amendment is consistent with the statutory criteria as:

(a) it is not in the Access Provider's legitimate business interests to supply services when there is no security in place. That is because it increases the Access Provider's financial exposure and risk should the Access Seeker not pay.

(b) the current clause in the draft FADs does not promote efficient investment in infrastructure because it reduces the certainty that the Access Provider has in recouping its investment costs of providing access. This is also not in the LTIE; and

(c) in considering the interests of Access Seekers, Telstra submits that requiring security before supply of the Service is neither "unnecessary" nor "excessive". As the Commission acknowledges in the wording of clause 9.3, an Access Seeker must provide security if it is reasonable to do so and such a requirement is in line with normal commercial practice.

94 However, if the Commission decides that supply should not be conditional upon the provision of Security, clause 14.1 should be amended to allow the Access Provider to immediately suspend supply to the Access Seeker if Security is not provided within 10 Business Days of commencement of supply. The reasons for such an amendment are set out in 2.9.1 below.

2.3.2. AMOUNT AND FORM OF SECURITY

95 Clauses 9.1 and 9.3 should be amended so that the Access Provider, acting reasonably, can determine the amount and form of Security to be provided by the Access Seeker.

96 Such an amendment is necessary because clause 9.3 in the draft FADs does not make clear who, out of the Access Seeker and the Access Provider can determine the amount and form of Security. Given that it is the Access Provider that both bears the financial exposure and risk of supplying the Service to an Access Seeker, and assesses the Access Seeker's creditworthiness, the Access Provider is in the best position to determine the amount and form of Security necessary to mitigate its financial exposure and risk. For example, a security deposit could be the appropriate

form of Security for a particular type of Access Seeker, but not others. Provided that the Access Provider acts reasonably in determining the amount and form of Security to be provided, Telstra submits that such a determination should not be subject to agreement between the parties.

97 Further, the proposed amendment that the Access Provider act reasonably in making its determination addresses concerns that an Access Provider may determine an amount and form of Security which an Access Seeker cannot provide in order to *"frustrate an Access Seeker's ability to acquire services"*.[24]

98 Such an amendment is consistent with the statutory criteria as it is not in the Access Provider's legitimate business interests for its financial exposure and risk to be covered by Security which is of an inadequate form and/or amount. For the reasons set out above, Access Providers are less likely to invest in infrastructure if their investment is not covered by an appropriate amount and form of Security.

2.3.3. ALTERATION OF SECURITY

99 There are a number of circumstances in which it would be appropriate for an Access Provider to require the alteration of the Security held by an Access Seeker. However, clause 9.5 as currently drafted is too restrictive in the circumstances in which it entitles the Access Provider to do so. Thus, clause 9.5 is out of step with commercial practice.

100 The draft FADs limit an Access Provider's right to alter the Security of an Access Seeker to the following three circumstances:

(a) if an Access Seeker provides OCI and, as a result of that OCI, an Access Provider reasonably requires an alteration to the Security;

(b) if an Access Seeker fails to provide OCI; and

(c) if an Access Seeker fails to provide altered Security.

101 Other circumstances which - in commercial practice - entitle the Access Provider to require an alteration of Security include, for example, if an Access Seeker significantly increases the amount of Services supplied to it by the Access Provider under the FADs. In such circumstances, the existing Security will be insufficient to secure the new or increased risk and it would be entirely reasonable for the Access Provider to require alteration of the existing Security. Similarly, if an Access Seeker fails to comply with the terms and conditions of a particular type of Security, an Access Provider may need to alter the form of that Security in order to ensure that the Security sufficiently covers the Access Provider's financial exposure and risk. For example, if an Access Seeker sells property which is subject to a floating charge in favour of the Access Provider, the Access Provider should be entitled to require an alteration of the Security so as to cover its financial exposure and risk.

102 Pursuant to subs 152BCB(1)(g) of the CCA, the Commission cannot make a FAD that would have the effect of requiring an Access Provider to provide access where the Access Seeker is not creditworthy. One such piece of evidence of creditworthiness is that the Access Seeker provides (and continues to provide) adequate Security. It follows that the current drafting of clause 9.5 should be amended to reflect the protection that should be afforded to the Access Provider.

[24] Commission, Discussion Paper, p 197.

103 Such an amendment is consistent with the statutory criteria as it is not in the Access Provider's legitimate business interests for its financial exposure and risk to be insufficiently covered by Security. Further, Access Providers are - understandably - less likely to invest in infrastructure if their investment is insufficiently covered by Security.

2.3.4. MEANING OF ONGOING CREDITWORTHINESS INFORMATION

104 Clause 9.8 should be amended to provide that OCI includes, in addition to those types of information already set out, management prepared balance sheets, profit and loss statements or cash flow statements and any other information reasonably required by the Access Provider to assess the Access Seeker's creditworthiness.

105 Such an amendment is needed because some smaller Access Seekers may not be able to provide the types of OCI listed in clause 9.8 (for example, because they do not have audited balance sheets or profit and loss statements, only management prepared ones). In addition, in light of the fact that Access Seekers come in different shapes and sizes, it is unhelpful to set out an exhaustive list of the types of information which constitute OCI. Rather, it is preferable - and consistent with commercial practice - for the Access Provider and the Access Seeker to have the flexibility to determine which information is the most appropriate for the assessment of that Access Seeker's creditworthiness. Accordingly, clause 9.8 should allow the Access Provider to request "any other information reasonably required to assess the Access Seeker's creditworthiness".

106 This amendment is consistent with an Access Provider's assessment of the creditworthiness of an Access Seeker being based on the best available information, so that the Access Provider determines an appropriate form and amount of Security (or altered Security, as the case may be).

107 Such an amendment is consistent with the statutory criteria as it is not in an Access Provider's legitimate business interests or in the interests of Access Seekers for the Access Provider to have either no - or little - information available to it to assess the Access Seeker's creditworthiness. If the Access Provider cannot satisfactorily assess the creditworthiness of the Access Seeker, it could result in the Access Provider supplying services with inadequate Security or being forced to increase the amount of the Security to a level beyond what it would otherwise require.

2.3.5. CONFIDENTIALITY UNDERTAKING FOR ONGOING CREDITWORTHINESS INFORMATION

108 Telstra agrees that an Access Seeker's confidential information should be protected. However, clause 9.9 is unnecessary and should be deleted. That is because any such confidential OCI would fall within the definition of "Confidential Information" and therefore attracts the protection of Schedule 11.

109 If, however, clause 9.9 is to be retained, in light of the above, it should be amended so that only third parties accessing the Access Seeker's confidential information are required to give a confidentiality undertaking to the Access Seeker. That is because the Access Provider's employees would already be subject to confidentiality obligations as part of their contract of employment and in any event, would be bound by the confidentiality obligations imposed by the Access Provider.

110 This amendment is consistent with the statutory criteria as it is not in the Access Provider's legitimate business interests to execute confidentiality undertakings if it is not necessary to do so. This would increase direct costs.

2.3.6. FAILURE TO PROVIDE ONGOING CREDITWORTHINESS INFORMATION OR ALTERED SECURITY

111 If the Commission remains minded - despite Telstra's submissions - to retain clause 8.31, Telstra considers that clause 9.10 should be amended to provide similar rights to the Access Provider that are provided to the Access Seeker under clause 8.31. That is, the Access Provider should be given a right to recover damages for an Access Seeker's failure to provide OCI or altered Security.

112 The reason for such an amendment is that, if the Commission considers that a person should be compensated for inaccurate invoices (irrespective of whether or not that inaccuracy was deliberately caused), over and above the remedy already available (being the payment of interest), a counterbalance should be included. That counterbalance would be that, if a failure by the Access Seeker to comply with various "key" creditworthiness and security obligations exposes the Access Provider to unnecessary and potentially large financial risk, an equivalent remedy should be available to the Access Provider. That is particularly the case given that the failure to provide OCI or an altered Security is more often than not a deliberate act on the part of the Access Seeker.

113 The amendment is consistent with the statutory criteria as it provides a balance between the rights and interests of the Access Provider and that of the Access Seeker.

2.4. GENERAL DISPUTE RESOLUTION PROCEDURES

114 Telstra agrees with the majority of the provisions in Schedule 10 of the draft FADs and agrees that the general dispute resolution procedures should be *"well defined and balanced".*[25]

115 However, Telstra proposes some amendments to Schedule 10 in order to ensure that:

(a) the application of the general dispute resolution procedures in Schedule 10 is appropriately confined to the terms and conditions of the FADs; and

(b) the appropriate dispute resolution procedure (ie either the Billing Dispute Procedures in Schedule 8 or the general dispute resolution procedures in Schedule 10) is used to resolve the dispute.

[25] Commission, Discussion Paper, p 199.

2.5. CONFIDENTIALITY PROVISIONS

Key points:

- The definition of Confidential Information should be amended to clarify that only certain types of information is confidential and to apply only to information relating to the Services supplied under the FADs.
- The permitted uses of Confidential Information should be broadened.
- Clause 11.5 should cover use and disclosure.
- The application of the clause relating to audit procedures should be clarified.
- The confidentiality undertaking should not include an obligation to destroy or return Confidential Information.

2.5.1. CONFIDENTIAL INFORMATION DEFINITION

116 The definition of Confidential Information should be clarified. It should:

(a) expressly exclude information of an Access Seeker that has been aggregated with similar information such that it cannot be attributed to any particular Access Seeker;

(b) in so far as Confidential Information relates to an end user, be confined to "End User Details"; and

(c) be confined to confidential information "relating to the Services supplied under the FADs".

117 First, the Commission accepts, in its drafting of clause 11.2, that the concept of aggregated information is not something which, by its nature, is confidential information. Given that use of information where its confidentiality status is uncertain will cause issues for the day to day running of businesses, Telstra believes that an express exclusion of such aggregated information from the definition of Confidential Information is the best way to achieve clarity on this point.

118 In terms of the level of aggregation that is necessary to ensure that an individual Access Seeker's confidential information is suitably protected, Telstra considers that the appropriate test should be whether or not it is possible to ascertain the identity of that Access Seeker, or that the information is the Access Seeker's information. So, for example, the number of ULLS services supplied at a particular exchange, aggregated across some, but not all Access Seekers who acquire ULLS, such that the confidential information of any one Access Seeker is not ascertainable (and such that there is no possibility of attribution of any of the information to any particular Access Seeker), will not be confidential information. Clause 11.2 should also be amended to ensure consistency as it currently suggests that only information of all Access Seekers acquiring the services will be excluded.

119 Second, Telstra understands that one of the most sensitive issues around the use of confidential information relates to information regarding an Access Seeker's end users and the extent to which an Access Provider can use such information. Commercial agreements usually contain a number of clauses clearly setting out how and in what

circumstances such information can be used. These terms, however, attempt to recognise that, often, end users are not just end users of that Access Seeker. This is because an end user might, for example, obtain its PSTN services from Optus, its DSL services from Telstra and its mobile services from Vodafone.

120 The Commission has recognised the importance of such information through the introduction of audit provisions where there is a suspected misuse of that information. Given the significance of these provisions, however, it follows that there must be sufficient clarity around which types of information regarding an end user can and cannot be used. The second proposed amendment provides certainty in relation to which types of end user information constitute an Access Seeker's Confidential Information. That is, information about an Access Seeker's end user which is provided by the Access Seeker to the Access Provider, in respect of the Services being provided by the Access Seeker to that end user. Any other information will either be the Access Providers' confidential information (ie in a situation where the end user is a customer of both parties) or it will not fall within the definition of Confidential Information at all.

121 Finally, the Confidential Information definition should only cover information which relates to Services supplied under the FADs. This will ensure that there is no uncertainty as to when the FADs will apply to a particular breach of a confidentiality obligation and when the parties' commercial terms will apply to such a breach.

122 These amendments clarify that the definition of Confidential Information will not cover information which is not confidential, and therefore avoid subjecting such information to unnecessary restrictions. Restricting the use of non-confidential information is not in the Access Provider's legitimate business interests.

2.5.2. PERMITTED USE OF CONFIDENTIAL INFORMATION

123 Clauses 11.4(a) and (b) should be deleted because the limitations on the type of confidential information that can be used by the Access Provider under clause 11.4 are unnecessarily restrictive. The limitations on the categories of Confidential Information which can be used by the Access Provider for the purposes listed in clause 11.4(c) fail to recognise that such information has to be used by an Access Provider on a day to day basis in the normal running of its business. By removing the restrictions in clauses 11.4(a) and (b), the underlying principle of ensuring that an Access Seeker's confidential information is only used for appropriate purposes is retained.

124 For example, forecast information provided by an Access Seeker to the Access Provider is Confidential Information of the Access Seeker which, by its very nature, will *need* to be used by the Access Provider for planning purposes. However, such forecast information does not fall within clauses 11.4(a) or (b) and therefore could not be used by the Access Provider for this purpose.

125 In addition, the use referred to in clause 11.4(c)(ii) should be for the purposes of supplying services (generally) to the Access Seeker. Restricting the use of Confidential Information in clause 11.4(c)(ii) to the purposes of the FAD fails to recognize that the supply arrangement with respect to the particular service may not be the only supply arrangement in place between the parties.

126 Rather, permitting use for the purposes of supplying services generally to the Access Seeker (ie under the FAD and any commercial arrangement in place between the parties) will reflect the fact that the relevant information will need to be legitimately used by the Access Provider for more general purposes, and that there will be no

detriment to the Access Seeker if the information is used in such a way. For example, if an Access Provider has ongoing obligations under its commercial agreement with the Access Seeker to provide quarterly reports on its service level performance, without the amendments, the Access Provider may be precluded from using the service assurance information regarding the relevant declared service, despite the fact that the use of such information would be to the benefit of the Access Seeker. For the same reason, the words, "for the purpose of this FAD" in clause 11.1(a) should be replaced with, "as set out in this FAD".

127 Ensuring that the permitted uses of confidential information are broad enough to cover all legitimate uses related to the supply of services will ensure that the services are provided efficiently, encourage efficient investment and serve the legitimate business interests of both the Access Provider and Access Seekers.

2.5.3. DISCLOSURE OF CONFIDENTIAL INFORMATION

128 Telstra submits that clause 11.5 should not refer solely to disclosure but to both use and disclosure in order to avoid potential uncertainties. For example, clause 11.5(d) provides for disclosure of Confidential Information in connection with legal proceedings, but does it necessarily follow that use can be made of that information for that purpose under clause 11.4? Accordingly, clause 11.5 should expressly incorporate a reference to both use and disclosure.

129 Second, clause 11.5(a) should expressly include contractors and sub-contractors engaged by the parties in the list of persons to whom disclosure can be made. This reflects the reality of how businesses operate and ensures that standard outsourcing arrangements are not hamstrung by the confidentiality provisions of the FADs.

130 Third, the words "for the purposes of this FAD" should be removed from clause 11.5(a) due to the possible limitations that the words impose, as discussed in paragraph 126 above. Telstra submits that the words "reasonably required" alone are sufficient to govern appropriate disclosure of Confidential Information to the persons listed in clause 11.5(a).

131 These amendments promote both certainty for the parties and the efficient use and disclosure of information. Such outcomes are essential in ensuring that services are provided in the most efficient manner, minimising direct costs and promoting the legitimate business interests of the Access Provider.

2.5.4. CONCERNS RELATING TO THE AUDIT PROCEDURES

132 Clause 11.11 contains broad audit rights. Telstra acknowledges the importance of such rights in policing the improper use of Confidential Information relating to end users. However, in proposing the amendments to this clause, Telstra is concerned to ensure that the scope of any such audit procedures is clearly defined, and that the procedures set out in the clause cannot be used inappropriately.

133 In order to address these issues, the opening paragraph of clause 11.11 should be amended to replace the words, "Confidential Information relating to the Access Seeker's end-users" with "End User Details". For the reasons set out in 2.5.1 above, it is important that there is certainty as to what type of end user information is confidential information, and therefore when the clause might be activated. This will further ensure that the Access Provider has a clear understanding of its obligations in respect of an Access Seeker's end user information.

134 Second, the phrase "likely to use" should be omitted from the opening paragraph of clause 11.11, and from all sub-paragraphs where it is found elsewhere in the clause. Telstra considers that this is not an appropriate trigger for these significant audit procedures. Otherwise the procedures may be used by Access Seekers to engage in a "fishing expedition" where the Access Seeker is concerned about the "likely" future unauthorised use by the Access Provider of Confidential Information, rather than actual use. Further, it would be difficult in the extreme for an auditor to determine whether an Access Provider is "likely" to use such Confidential Information inappropriately.

135 Third, clause 11.11 should not be triggered by a *belief* on the part of an Access Seeker that there is prima facie evidence which tends to show a misuse of Confidential Information by the Access Provider, but rather the clause should only be triggered if the Access Seeker *has* (ie can point to) prima facie evidence which tends to show such a misuse of Confidential Information. Otherwise, the audit procedures may be used by Access Seekers to engage in a "fishing expedition" as noted above. Given the significance of the audit procedures, the basis on which they are able to be invoked should be objective.

136 These amendments clarify the application of the audit procedures and ensure that they may only be invoked where the circumstances justify their application. In so doing, the amendments strike an appropriate balance between protecting the interests of Access Seekers, and minimising unnecessary costs and disruption to the Access Provider's business.

2.5.5. FORM OF CONFIDENTIALITY UNDERTAKING

137 Telstra submits that clause 7 of the confidentiality undertaking ought to be deleted on the basis that it does not reflect how most businesses now store their information. Most systems, including back-up systems, do not allow the destruction of documents or information. Thus, in practice, it will be impossible for a party to either delete or return all copies of the relevant information. Further, given that there is an ongoing obligation of confidence in the Annexure 1 undertaking, the information will attract protection beyond the occurrence of any of the scenarios outlined in clause 7. Accordingly, the clause should be removed in light of the fact that compliance with such a clause by most, if not all, parties would be impossible.

138 It is not in the interests of the parties to be subject to an obligation that they cannot perform, especially given the consequences of non-compliance with the FADs. Therefore, this is in the interests of both the Access Provider and Access Seekers.

2.6. COMMUNICATIONS WITH END USERS

Key points:

- Schedule 12 should be amended to clarify the circumstances in which the Access Provider may communicate with end users of the Access Seeker, and what may be communicated.
- Schedule 12 should be amended to clarify that the limitations on the Access Provider marketing its goods and services to end users of an Access Seeker apply on and from the Access Provider being aware that the person is an Access Seeker's end user.

139 The Commission states that the aim of Schedule 12 is to ensure that *"all service providers represent themselves and their services fairly and accurately when dealing with end users",*[26] and *"to place limitations on the ability of Access Seekers to engage in misleading conduct or blame the carrier for faults or maintenance in the network".*[27]

140 Telstra agrees with the Commission's statement and considers that most of the provisions of Schedule 12 reflect that aim. However, Telstra considers that amendments should be made to the following provisions, in order for those provisions to reflect both that aim and commercial practice.

2.6.1. COMMUNICATIONS INITIATED BY ACCESS PROVIDERS

141 Clause 12.2 should be amended so that it allows an Access Provider to communicate with an Access Seeker's end users not only "in" an Emergency, but also in preparation for or following an Emergency. For example, following the Victorian bushfires in 2009, the Emergency Alert system, which sends warning alerts by recorded voice message to landlines and text messages to mobile phones in an Emergency, was launched. In testing that system, Telstra needed to communicate with Access Seekers' end users to confirm that they received the alert. By way of another example, if, following an Emergency, an Access Provider carries out repairs, it may need to communicate with an Access Seeker's end users after the Emergency to confirm that the repair was successful.

142 Telstra also proposes some amendments to Schedule 12 so that an Access Seeker's obligations in - or in connection with an Emergency - are clear. That is because it is not only an Access Provider who will need to act in - or in connection with - an Emergency; the Access Provider will often need the assistance of an Access Seeker (for example, by providing an Access Provider with end user information or assisting the Access Provider to comply with disaster and Emergency management plans). Such clarification will avoid disputes at a time when it is not in anyone's interest for a dispute to occur.

143 Finally, clause 12.2 should clarify which information an Access Provider can and cannot communicate to an Access Seeker's end user if their Service(s) is to be suspended or terminated.

144 The communication of such information is necessary to ensure that:

[26] Commission, Discussion Paper, p 202.
[27] Commission, Discussion paper, p 203.

(a) an end user is able to acquire services from an alternative service provider, and thus have continuity of supply; and

(b) an Access Provider is not wrongly blamed by the end user when it is advised that his or her service has been disconnected due to the Access Provider suspending or terminating the service.

145 However, to allay any concerns of Access Seekers, an Access Provider should not be able to inform the end user of the reasons for the suspension or termination of supply of their Service(s), or suggest or recommend an alternative service provider.

146 In addition, in order to ensure that any such communications are appropriate, the Access Provider should be required to inform the Access Seeker that they have contacted their end user, and should copy the Access Seeker on any written communications.

147 This amendment will aid the efficient operation of a Service and is also in the Access Provider's legitimate business interests.

2.6.2. COMMUNICATIONS INITIATED BY END USERS

148 Clause 12.3 should be amended so that the limitations on the Access Provider only apply on and from the time that the Access Provider becomes aware that the person initiating the communication is an end user of an Access Seeker.

149 Given that the end user may contact the Access Provider's front of house staff, unless the end user identifies him or herself as an end user of an Access Seeker or that fact becomes obvious during the communication, the Access Provider's front of house staff will not know that he or she is an end user of an Access Seeker.

150 The clause as currently drafted is contrary to the statutory criteria, because it is not in the Access Provider's legitimate business interests to be subjected to an obligation in circumstances in which it does not know if it is complying.

2.7. NETWORK MODERNISATION AND UPGRADE PROVISIONS

Key point:

Schedule 13 should apply to LSS and ULLS but should not apply to LCS, WLR, PSTN OA and PSTN TA.

2.7.1. SCHEDULE 13 AND ULLS/LSS

151 The clauses in Schedule 13 are almost identical to the clauses in previous publicly available FDs in respect of both ULLS and LSS.[28] Notwithstanding some differences between the terms of the FDs and the terms of the draft FADs, Telstra accepts the application of Schedule 13 to ULLS and LSS.

[28] See *Access Dispute between Chime Communications Pty Ltd and Telstra Corporation Limited, Final Determination* (ULLS and LSS), both dated 7 April 2010.

2.7.2. SCHEDULE 13 AND WLR, LCS AND PSTN OA AND TA

152 In the draft FADs, Schedule 13 applies not only to ULLS and LSS, but also to WLR, LCS and PSTN OA and TA.

153 Telstra submits that the draft FADs should be amended to expressly apply Schedule 13 to ULLS and LSS only. This is because:

(a) the terms set out in Schedule 13 have not been the subject of a formal dispute or consultation insofar as they relate to WLR, LCS, PSTN OA and PSTN TA;

(b) any modernisation or upgrade of the network will not constitute a "Major Network Modernisation or Upgrade" (**MNMU**) in respect of WLR and LCS in accordance with the definition of MNMU in the draft FADs. That is, the circumstances set out in sub-paragraphs (a) to (c) of that definition are not enlivened with respect to WLR and LCS; and

(c) the circumstances set out in the definition of MNMU are unlikely to be enlivened with respect to PSTN OA and TA.

154 The amendment is consistent with the statutory criteria because it is not in the Access Provider's legitimate business interests to have an unnecessary and unduly onerous obligation imposed upon it. Further, compliance with such an obligation would increase direct costs by requiring the compilation of unnecessary reports.

2.8. SUSPENSION AND TERMINATION

Key point:

Schedule 14 should be amended to clarify the circumstances which give rise to a right to suspend supply, and whether or not that right is an immediate or a remediable right.

155 The Commission states that one of the aims of Schedule 14 is to ensure that Access Seekers' *"businesses are not disrupted for trivial matters".*[29] Telstra agrees.

156 However, if Schedule 14 is included in the FADs as currently drafted, Access Providers will face significant financial exposure and risk, for the reasons set out in section 2.1 above. In that regard, the interaction of clauses 8, 9 and 14 places Access Providers in the untenable position of having to continue to supply for up to 20 Business Days to Access Seekers who are known credit and security risks (because of their failure to comply with the obligations set out in Schedules 8 and 9) before suspending supply of the Service.

157 Accordingly, Telstra considers that the circumstances in which the Access Provider can suspend or terminate supply of a Service(s) to the Access Seeker should be clearly set out. This will also avoid disputes between the parties regarding the Access Provider's exercise of its rights under Schedule 14.

158 Further, Telstra considers that some circumstances should give rise to a right for the Access Provider to immediately suspend or terminate supply of the Service to the

[29] Commission, Discussion Paper, p 207.

Access Seeker. Other circumstances should give rise to a right for the Access Provider to suspend supply following a remediation period.

2.8.1. CIRCUMSTANCES GIVING RISE TO A RIGHT TO SUSPEND

159 Schedule 14 should be amended to clarify that the following circumstances give rise to a right for the Access Provider to suspend supply of a Service(s) to the Access Seeker:

(a) if the Access Seeker breaches a payment obligation and the breach remains unremedied for 10 Business Days. Telstra considers that a shortened remedy period of 10 Business Days is appropriate for payment breaches, because the Access Seeker already has a significant time period within which to discharge its payment obligation, being 30 Calendar Days.

(b) immediately, if the Access Seeker breaches a payment obligation and, in the immediately preceding six Months, the Access Provider issued two or more notices to the Access Seeker requesting a payment breach to be remedied. This reflects the fact that subs 152BCB(1)(g) of the CCA provides that the Commission must not make a FAD which would have the effect of requiring the Access Provider to provide the Access Seeker with access to a declared service if there are reasonable grounds to believe that the Access Seeker would fail, to a material extent, to comply with the terms and conditions on which the Access Provider provides, or is reasonably likely to provide, that access.

In that regard, subs 152BCB(2)(a) provides that one such ground is evidence that the Access Seeker is not creditworthy. Three or more breaches of a payment obligation over a relatively short period of time would constitute such evidence. In addition, subs 152BCB(2)(b) provides that another such ground is the Access Seeker's repeated failure to comply with the terms and conditions on which the same or similar access has been provided. The persistent breach of payment obligations would constitute reasonable grounds for not providing access on both of the bases pursuant to subs 152BCB(2) of the CCA.

(c) immediately, if Telstra's submissions in section 2.3.1 above are not adopted by the Commission. That is, if supply is not conditional on the provision of Security then the Access Provider should be able to suspend the supply of a service if the Access Seeker fails to provide Security within 10 Business Days of commencement of supply(see section 2.3.1 above.

(d) immediately, if the Access Seeker breaches a "key" security or creditworthiness obligation in Schedule 9. For example, if the Access Seeker fails to provide an altered Security if required by the Access Provider to do so, or if the Access Seeker fails to maintain the Security.

Telstra sets out a fulsome list of those obligations it considers fall within this category in clause 14.1(h) and (i) of Schedule B.1. Telstra considers that a right to immediately suspend supply of the Service to the Access Seeker is appropriate in such circumstances for the following reasons.

First, the Access Seeker is given a significant period of time to discharge these obligations. For example, the Access Seeker is given 15 Business Days within which to provide OCI, and 20 Business Days within which to provide altered Security. Thus, if the Access Seeker does not discharge its obligations within those time periods, it is reasonable for the Access Provider to be concerned

about the likelihood of the Access Seeker remedying the breach at all, let alone within a remedy period.

Second, the Access Provider's financial exposure and risk if the Access Seeker does not discharge its obligations is likely to be so significant as to justify immediate suspension. Telstra refers to and relies upon section 2.1.

In addition, clause 9.1 suggests that if the Access Seeker does not provide the altered Security, it is possible to notify a dispute. However, clause 10.7 appears to require the Access Provider to continue to fulfill its obligations under the FADs. Therefore, clause 9.11 should be amended to clarify that the right to notify a dispute is without prejudice to the Access Provider's rights in Schedule 14.

(e) immediately, if the Access Provider believes on reasonable grounds that an insolvency event of the kind set out in clause 14.8 is likely to occur. The Access Seeker being on the brink of insolvency would constitute reasonable grounds for ceasing supply pursuant to subs 152BCB(2) of the CCA. In addition, an immediate suspension right is appropriate given the financial consequences for the Access Provider of continuing to supply in such circumstances, as set out in section 2.1 above.

(f) if the Access Seeker's use of its or the Access Provider's facilities or the Service(s) is in contravention of any law. In this regard, Telstra proposes that a contravention of a law which would place the Access Provider in breach of a law, should give rise to an immediate right to suspend supply. This is because the FADs should not force an Access Provider to continue to supply if to do so would mean that the Access Provider is in contravention of any law. To the extent that the Access Seeker's contravention of a law would not result in the Access Provider itself being immediately in breach of a law, right of suspension should follow a notice period.

160 None of the circumstances set out above are trivial. Further, the circumstances set out in (a) to (f) above expose the Access Provider to substantial financial exposure and risk. Thus, in order to protect the Access Provider's legitimate business interests, a right to suspend supply of the Service to the Access Seeker (and sometimes, the right to do so immediately) should be available in such circumstances.

161 It is not in the Access Provider's legitimate business interests not to be able to suspend supply in the above circumstances, as those circumstances either increase the Access Provider's financial exposure and risk or could result in the Access Provider being in breach of the law. Those increased risks will in turn increase direct costs. In addition, the current clause in the draft FADs does not promote efficient investment in infrastructure because an Access Provider will not invest in infrastructure if doing so exposes it to financial risk which it is unlikely to recover.

2.8.2. SERVICE NO LONGER SUPPLIED

162 Schedule 14 does not contemplate the situation in which, for various reasons, the Access Provider is no longer required to supply the Service(s). For example the Access Provider may not be required to supply the Service by reason of an undertaking given by the Access Provider and accepted by a regulator. Schedule 14 ought to be amended to contemplate cessation of service in these circumstances.

2.9. CHANGES TO OPERATING MANUALS

Key points:

- Telstra agrees with clauses 15.1 and 15.2.
- Clause 15.3 is unnecessary, is inconsistent with the rationale of clauses 15.1 and 15.2 and should be deleted.

163 Telstra agrees with the inclusion of clauses 15.1 and 15.2 of the draft FADs, given that equivalent clauses were included in a previous publicly available FD.[30]

164 However, clause 15.3 is unnecessary and should be deleted.

165 Clause 15.1 already provides that the Access Seeker is to have a reasonable opportunity (ie 20 Business Days) to comment on the Access Provider's proposed amendment and that the Access Provider is to give reasonable consideration to such comments.

166 Further, clauses 15.1 and 15.2 are consistent with the Commission's stated rationale for Schedule 15, which is to *"allow the Access Provider to alter its network, where necessary, without the risk that Access Seekers may argue that there has been a breach or change in service levels, or otherwise inappropriately constrain investment".*[31]

167 Clause 15.3 is inconsistent with such a rationale for the following reasons.

168 First, the operational processes in an Access Provider's operational documents should be the same for all Access Seekers. Any alternative to this is likely to be inefficient from both a cost and operational perspective.

169 If clause 15.3 was to be retained, it would create unnecessary uncertainty. Clauses 15.1 and 15.2 strike an appropriate balance between the Access Provider's interest in managing its own network (including amending its operational processes) and the Access Seeker's interest in raising any concerns regarding those processes which could have an effect on it before those changes come into effect. If an Access Seeker or multiple Access Seekers are still able to dispute different aspects of the proposed amendments after such changes come into effect, it is contrary to the rationale and certainty which clauses 15.1 and 15.2 are intended to achieve.

170 In the alternative, if clause 15.3 is to be retained, the circumstances in which the dispute resolution procedures are invoked should be subject to the following constraints.

171 First, the dispute resolution procedures should only be invoked on an objective (rather than subjective) basis. Such an amendment to clause 15.3 is justified in light of the effect that such a dispute could have on the whole industry, as well as the associated costs and administrative burden set out above. In addition, such an amendment would be consistent with other provisions of the draft FADs which import an objective element (such as clauses 8.10 and 9.1).

[30] Commission, *Access Dispute between Optus Pty Ltd and Telstra Corporation Limited, Final Determination* (ULLS) dated *21 April 2008*.
[31] Commission, Discussion Paper, p 209.

172 Second, in determining whether or not the proposed amendment is unreasonable, regard should be had to, among others, two factors:

(a) the legitimate interests of the Access Provider in ensuring that the terms and conditions relating to the ULLS supplied to more than one Access Seeker are consistent; and

(b) the impact of the amendment across all Access Seekers (not just a particular Access Seeker).

173 Third, clause 15.3 should state that the dispute resolution procedures must be invoked within 15 Business Days of receiving the notice set out in clause 15.1(a)(i). Such an amendment to clause 15.3 is justified in light of the fact that the Access Provider will need to know as soon as possible, and before any proposed changes come into effect, that there is an issue with what is being proposed. This will allow the Access Provider to defer making the changes, if necessary.

174 The deletion of clause 15.3 (or, in the alternative, its amendment) is consistent with the statutory criteria as:

(a) Clause 15.3 is not in the legitimate business interests of the Access Provider as it unduly restricts its business operations. In addition, where operational and technical updates are necessary, it is neither in the Access Provider nor Access Seekers' interests that these are delayed. In that regard, Telstra submits that the Access Seekers' interests are sufficiently taken into account by the notice requirement in clause 15.1; and

(b) the restrictions on the Access Provider's ability to alter its operational documents will not promote the efficient operation of the service.

2.10. ULLS ORDERING AND PROVISIONING

2.10.1. LIMITS ON NUMBER OF EXCHANGES PER STATE PER DAY AT WHICH MNM CUTOVERS CAN BE PERFORMED

Key point:

Clauses 16.9 to 16.14 should be amended to impose a national limit on the number of exchanges per day on which MNM cutovers can performed. This recognises the fact that the constraint on performing cutovers is a national constraint.

175 Clause 16.9 should be amended to provide that, except where the parties agree otherwise, the Access Provider must not refuse to schedule a cutover for a managed network migration (**MNM**) at an Exchange on a day requested by the Access Seeker, unless the Access Seeker has already requested MNM cutovers at five Exchanges on that day. As a consequence, the Limitation Notice provisions can be deleted.

176 The constraints faced by Telstra in relation to performing MNMs at numerous exchanges are not only at the local level. While the number of technicians available to perform MNMs in a particular area is one constraint, Telstra faces an additional, national, constraint on the number of MNMs performed on any given day. This is because its resources at the Data Activation Centre (**DAC**) cannot be readily upscaled to deal with large peaks in cutovers. DAC resources are highly specialised and the training of new DAC recruits takes some time. Further, large peaks in cutovers do not arise regularly enough to justify upscaling the DAC resources on a permanent

basis. The current proposal in the draft FADs will impose a large administrative burden - and thus complexity and cost - on the management of the ULLS and LSS MNM processes, with little benefit for Access Seekers.

177 Telstra considers that its DAC resources could cope with MNMs being performed in up to five exchanges, nationally, per day. This would do away with the administrative burden of Limitation Notices.

178 This amendment is consistent with the statutory criteria as it is not in the Access Provider's legitimate business interests to have an unnecessary obligation imposed on it, compliance with which would significantly increase direct costs with no discernible benefit. Further, the current draft FADs do not encourage the efficient operation of a Service.

2.10.2. CAPACITY LIMITS ON ULLS PROVISIONING

Key point:

Clause 16.16 should be amended to require the Access Provider to use reasonable endeavours to perform a rescheduled cutover at the next available cutover date/time, or as reasonably requested by the Access Seeker.

179 Clause 16.16 should be amended so that the Access Provider's right to refuse to perform a cutover is subject to the Access Provider using its reasonable endeavours to perform that cutover at either the next available cutover date/time, or at another date/time as reasonably requested by the Access Seeker.

180 The proposal that an Access Provider's right to refuse a requested cutover for a Service be subject to it performing the cutover the following Business Day is unworkable and undermines the rationale for such a term.

181 The term, as currently drafted, ignores the fact that the Access Provider is likely to have already scheduled other cutovers for the following Business Day. If the cutovers are to be performed on the following Business Day, the cutovers planned for that day could be at risk of not being performed. This could have a "flow on" effect for the following day and the day after that, such that neither Access Seekers nor the Access Provider would know if their cutovers will be performed on the scheduled day. Such an effect is clearly contrary to the rationale for such a term, which is to ensure that cutovers are performed as soon as practicable.[32]

182 The Commission, in the context of the Model Terms, acknowledged that *"some limits can be necessary from time to time where resources are scarce"*.[33] It appears that the Commission was concerned that limits *"should remain only until additional resources can be made available, and should not entrench poor service levels"*.[34] Telstra agrees. However, it is neither possible - nor desirable for the reasons set out above - to fix a period of time within which rescheduled cutovers must be performed. Rather, it is more appropriate to perform rescheduled cutovers at the next available opportunity, or if that does not suit the parties, at another time as reasonably requested by the Access Seeker.

[32] Commission, *Final Determination - Model Non-price Terms and Conditions*, November 2008, p 50.
[33] Commission, *Final Determination - Model Non-price Terms and Conditions*, November 2008, p 50.
[34] Commission, *Final Determination - Model Non-price Terms and Conditions*, November 2008, p 50.

183 Notwithstanding the above, generally Telstra has had to reschedule cutovers in less than 1% of cases. By comparison, Access Seekers reschedule their cutovers in 4% of cases. Further, if Telstra does need to reschedule cutovers, it reschedules them for the following Business Day in the vast majority of cases. For example, in April 2011, Telstra did so in approximately 98% of cases.

184 Telstra's suggested amendment is consistent with the statutory criteria as it is neither in the legitimate business interests of the Access Provider nor the interests of the Access Seeker to have cutovers continually deferred.

2.10.3. ADVICE REGARDING COMPLEX SERVICES

Key points:

- Clause 16.17 should be amended so that the Access Provider is required to provide details of Complex Services to the Access Seeker at the time of rejecting the ULLS request.
- In order for Telstra to have sufficient time to develop and implement such a process, and for Access Seekers to have sufficient time to develop and implement systems changes to receive the additional information, clause 16.17 should be expressed to apply four months from the date that the ULLS FAD is made.

185 Telstra has approved funding to develop a process which will provide the details of any Complex Services on the line at the time the ULLS request is rejected due to the presence of Complex Services.

186 However, the following amendments should be made to clause 16.17.

187 First, clause 16.17 should be amended so that if a ULLS request is rejected due to the presence of Complex Services, the Access Provider will provide to the Access Seeker a list of the Complex Services present on the line at the time that it advises the Access Seeker of the rejection.

188 Such an amendment is necessary because a check for the presence of Complex Services on a line is performed during the validation stage (for an in-use ULLS Request) which precedes Service Qualification.

189 Second, clause 16.17 of the draft FAD should be amended so that clause 16.17 commences four months from the date that the FAD for ULLS is made.

190 Such an amendment is necessary because - understandably - it will take some time to develop, test and implement such a process. In addition, Access Seekers may need to change their IT systems (depending on how their IT systems are configured) in order to receive the additional information following Telstra's implementation of such a process. Telstra estimates the process will take (from development to implementation) approximately four months. That should also provide Access Seekers with sufficient time to change their IT systems (if necessary).

191 Finally, Telstra considers that its disclosure of the Complex Services on a line will not be in breach of any of its confidentiality obligations if it complies with the FADs in doing so. That is because disclosure of confidential information is permitted if such disclosure is required by law.

192 The above amendments are in the legitimate business interests of the Access Provider and the interests of the Access Seekers. That is because they give effect to the Commission's intention for the clause, which is to ensure that that type of information is received by Access Seekers at the appropriate time.

2.10.4. CONNECT OUTSTANDING PROCESS FOR ULLS ORDERS

Key points:

- The connect outstanding process in the FADs should be consistent with that set out in the *ACIF C617:2005 Connect Outstanding Industry Code* (**Connect Outstanding Code**), as it applies to ULLS.
- Clause 16.25 should be amended so that the Access Provider's obligation applies if the Access Seeker warrants that it has obtained and verified the Proof of Occupancy.

193 A connect outstanding process is already set out in the Connect Outstanding Code. Telstra considers that the Connect Outstanding Code applies to ULLS. That is because the Connect Outstanding Code applies if a standard telephone service (**STS**) will be provided on the line. The Connect Outstanding Code does not distinguish between the underlying service over which a STS is provided and the underlying service.

194 Telstra considers that, in order to ensure that it is compliant with the connect outstanding process in the FADs, that process should apply to the same extent as the process in the Connect Outstanding Code. Clause 16.25, as currently drafted, states that the connect outstanding process for ULLS must support the cancellation of an existing service on a line upon the Access Provider receiving Proof of Occupancy. However, Telstra cannot cancel an existing service on a line if a STS will not be provided over the line. That is because Telstra cannot require the Access Seeker with the existing resale service to hand back the line. Telstra is entitled to do so only if (in accordance with the Connect Outstanding Code) a STS will be provided over the line. That is because Access Seekers have to comply with the Connect Outstanding Code, and could not object to handing back the line in such circumstances.

195 In order to ensure that Telstra is able to comply with the connect outstanding process in the FADs, clause 16.25 should be amended so that the Access Provider's obligation applies if a STS is to be provided over the ULLS.

196 For that reason, Clauses 16.24 and 16.25 should be limited to the circumstances in which the Connect Outstanding Code applies. That is, where the Access Seeker warrants that the end user service to be supplied using the ULLS is a STS.

197 In that regard, it is not in the legitimate business interests of the Access Provider to be bound by an obligation with which it cannot comply.

198 Clause 16.24 should also be amended to provide that the Access Provider must support cancellation of an existing service on a line upon receiving a warranty from the Access Seeker that it has obtained Proof of Occupancy.

199 This amendment will save time and cost - given that Proof of Occupancy is to be obtained and verified by the Access Seeker - and thus is more efficient from an economic point of view. It is therefore in the Access Provider's legitimate business interest.

3. IVULLS PROCESS, LIABILITY (RISK ALLOCATION) PROVISIONS AND FACILITIES ACCESS PROVISIONS

Key points:

- It is unnecessary to include provisions in relation to the iVULLS process, liability and facilities access in the FADs.
- If the Commission is minded to do so, it should be by way of variation to the FADs. That process should be comprehensive and consultative.

3.1. INCLUSION OF IVULLS PROCESS, LIABILITY OR FACILITIES ACCESS PROVISIONS IN THE FADS

200 The Commission seeks views regarding whether or not provisions in respect of the above three issues should be included in the FADs.

201 Telstra considers that it would be inappropriate and unnecessary to include provisions on these issues in the FADs for the following reasons.

202 First, because these issues have either not been the subject of a formal dispute by Access Seekers (being the liability provisions) or, to the extent that they have, they no longer are and the Commission is aware of the status of those access disputes.

203 Second, in respect of iVULLS, the Commission states in the Discussion Paper that *"when it made the IADs, the Commission understood that there may have been an alternative iVULLS process currently being used by the industry than that contained in the 2008 Model Terms"*.[35]

204 On 18 February 2011, Telstra announced the launch of the Enhanced Vacant Unconditioned Local Loop (**eVULL**) process. This new process removes the previous requirement for a workforce appointment at an end user's premises.

205 Following Telstra's announcement of the eVULL process, four Access Seekers have entered into agreements to use that process. Those Access Seekers' customers constitute approximately 87% of all current vacant ULLS connections.

206 Given that Telstra has already implemented the eVULL process, mandating an iVULLS process in the FADs is unnecessary.

207 Third, in respect of facilities access, the provisions set out in the Model Terms have been superseded by the following recent developments:

(a) Improvement of Telstra's facilities access processes

Telstra's current facilities access processes are set out in various Telstra policy documents including:

(i) Telstra's Queuing Policy – Access to Telecommunications Equipment Buildings (TAF0001-333374);

[35] Commission, Discussion Paper, p 192.

(ii) Telstra's TEBA Allocation Guidelines (005747-335493); and

(iii) Telstra's Facilities Access: TEBA Management & Provisioning (TAF0001-333859).

These policy documents were updated by Telstra following its review of capped exchanges that occurred between October 2007 and April 2008, prompted by the Commission's query regarding Telstra's introduction of an "exchange capping" process.

Telstra's current facilities access processes are overseen by the Telstra Governance Committee, which was created in February 2008 to supervise proposed rejections of access requests, including any proposed "capping" of an exchange.

Telstra's facilities access processes have evolved over time, including as a result of changes requested by the Commission and Access Seekers. For example, Telstra has recently introduced a dual build process (discussed in more detail below), based upon requests for such a process from Access Seekers.

Despite the Commission's lengthy and comprehensive examination of Telstra's current facilities access processes in the context of the Federal Court proceedings, the Commission has not criticised Telstra's current facilities access processes.[36]

*(b) The Commission's issue of a Record Keeping and Reporting Rule regarding Access to Telstra's Exchange Facilities (**RKR**)*

Telstra's RKR reports are available publicly, and the Commission has recently agreed for Telstra to publish the majority of the information in its RKR report on the Telstra Wholesale website at the time that report is lodged with the Commission (information regarding the work being performed at "potential sites" is not published). This removed the delay that previously existed between Telstra's submission of its RKR report and the publishing of that RKR report to Access Seekers.

Telstra's RKR report provides Access Seekers with a wide variety of information, updated monthly, in relation to facilities access at Telstra's exchanges.

(c) Telstra's approval of an additional power contractor permitted to perform work in Telstra's exchanges

At the request of Access Seekers, Telstra has recently approved a second contractor to perform power-related works in Telstra's exchanges. This approved contractor is CPS National. The appointment of a second approved power contractor should assist the reduction of queue waiting times for Access Seekers, as well as reducing the cost of power-related works.

(d) The implementation of Telstra's "dual build" process for TEBA works

Telstra's dual build"' process was implemented at the request of Access Seekers, and is designed to reduce queue waiting times for Access Seekers that are willing to consolidate the work they collectively require into a single job. The dual build process enables multiple Access Seekers occupying consecutive queue positions at an exchange to agree that one of them will construct common infrastructure for all of the participating Access Seekers.

[36] This was also noted by Middleton J of the Federal Court in *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2010] FCA 790 at [284].

Telstra's dual build process provides a useful example of a recent innovation in relation to facilities access. As a result, the provisions set out in the Model Terms are out of date and not reflective of the changes made in recent years and the current processes available for Access Seekers.

(e) The continuation of Telstra's "parallel build" process for TEBA works

This permits more than one Access Seeker to perform work in an exchange concurrently, where the simultaneous pursuit of the relevant works will not raise health, safety or technical issues. This process should assist to avoid, or reduce, queue waiting times for Access Seekers.

3.2. INCLUSION BY WAY OF A VARIATION TO THE FADS

208 If, despite Telstra's submissions, the Commission is minded to include provisions on iVULLS, liability or facilities access in the FADs, it should consult on any new draft provisions, having taken into account the comments received in response to the Discussion Paper.

209 Given that the FADs are binding and a breach of them constitutes a breach of the Access Provider's carrier licence conditions, Access Seekers and Access Providers should be given a reasonable opportunity to comment upon the draft provisions before they are made.

210 In that context, the Commission will need to consider the extent to which making FADs on these issues will require amendments to other Schedules of the draft FADs. For example, consideration will need to be given to the extent to which the general dispute resolution procedures set out in Schedule 10 and the dispute resolution procedures set out in the Commission's *Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities,* dated October 1999, interact, and whether or not any consequential amendments to Schedule 10 should be made.

211 It is not possible to make comprehensive submissions on these issues in the relatively short timeframe provided by the Commission in which to respond to the Discussion Paper. Accordingly, the appropriate way in which to include provisions in respect of these issues in the FADs (if necessary) is by way of a variation to the FADs following the Commission holding a public inquiry into the variation in accordance with s 152BCBN of the CCA.

3.3. SPECIFIC COMMENTS ON THE MODEL TERMS

212 In order to provide the Commission with some initial information in relation to the Model Terms, Telstra sets out below a small number of examples of the types of problems with the Model Terms that would make it inappropriate for the Commission to include provisions on these issues in the FADs before a comprehensive consultative process is held.

3.3.1. LIABILITY (RISK ALLOCATION) PROVISIONS

Specific liability cap for facilities access

213 If facilities access terms are included as part of the non-price terms, clause C.3 would need to include a separate liability cap in respect of facilities access. Such a cap would be an event-based liability cap and would need to be significantly higher than

the more general liability cap in order to reflect the different level of risk that arises in relation to an Access Provider's facilities. For example, if damage is caused to one of Telstra's exchanges as a result of an Access Seeker's negligence, the amount of such damage is likely to be significantly greater than the amount of the Annual Liability Cap calculated in accordance with clause C.3.

The time at which liability arises

214 Clause C.3 does not state the time at which Liability arises. For example, does the liability arise when the act or omission giving rise to the liability occurs, or when the claim is made? The lack of clarity on this point makes the clause unclear.

Access Provider's obligation to indemnify Access Seeker

215 If clause C.22 were to be included, it should be amended so that an Access Provider's obligation to indemnify an Access Seeker is subject to the limitations set out in s 118A of the *Telecommunications (Consumer Protection and Service Standards Act 1999* (Cth) (**TCPSS Act**) and any applicable Customer Service Guarantee (**CSG**) Standard.

216 In that regard, the obligation on an Access Provider to indemnify an Access Seeker for any liability in respect of an Access Seeker's obligation to pay compensation under the CSG Standard in clause C.22 is expressed to be absolute in nature. However, s 118A of the TCPSS Act sets out a number of limitations regarding when such a claim for indemnity may be made. For example, subs 118A(5) requires that an action under s 118A must be instituted within two years after the Access Seeker discharged the liability for primary damages.

217 Further, clause C.22 does not set out how an Access Provider's obligation to indemnify an Access Seeker is to be proved. In that regard, proving an Access Provider's obligation to indemnify requires the consideration of a number of factors set out in s 118A of the TCPSS Act and applicable CSG Standards.

3.3.2. FACILITIES ACCESS

218 Telstra's position on the 2008 Model Terms has consistently been that they are beyond power to the extent that they seek to deal with access to Telstra's exchanges. Telstra does not resile from that position here.

219 Telstra also submits that, in light of the developments set out above, the Model Terms do not fully reflect, and in some instances are inconsistent with, what constitutes "best practice" facilities access processes.

220 Accordingly, if facilities access provisions are to be included in the FADs, those provisions should reflect current processes regarding facilities access.

221 Telstra's current facilities access processes have been developed and improved over time based on feedback from Access Seekers and the Commission, and they reflect a practical, fair and commercial approach to balancing the competing interests of Access Seekers and Access Providers.

222 If the Model Terms were adopted in their current form, this would represent a retrograde step, as it would:

(a) undo innovations in facilities access that have occurred since the Model Terms were proposed, many of which have occurred at the suggestion of Access Seekers and the Commission; and

(b) introduce uncertainty and inconsistency in certain respects, as well as imposing additional costs upon both Access Seekers and Access Providers, due to the changes the Model Terms would impose.

223 The Model Terms are also silent on the Access Provider's ability to recover the significant capital and operational costs that would have to be incurred if the facilities access terms were incorporated into the FADs.

224 The Commission must give fundamental weight to Telstra's direct costs of complying with such requirements. It must also consider whether those costs can be recovered. This consideration suggests that the Commission should not mandate, via the mechanism of a FAD, that steps be undertaken unnecessarily. In addition, Telstra submits, this consideration militates against the Commission imposing obligations where there are substantial implementation costs and the obligations would not promote the LTIE to any significant extent.

Consideration of forecast demand

225 A common theme through the Model Terms is the requirement that the Access Provider consider forecast demand of the Access Seeker (for example, in clause K.2).

226 In order to take forecast demand into account when assessing access requests, Telstra would likely need to:

(a) collect and collate for every one of its exchanges, on a regular basis, information from all Access Seekers about their forecast demand for facilities access; and

(b) keep up to date, for every exchange, details of:

(i) the available capacity of existing facilities (including floor and MDF space), building services (including power and air conditioning) and utilisation by both Access Seekers and Telstra; and

(ii) works that are underway by Access Seekers or Telstra; and

(c) be able to readily compare and combine the information in (a) and (b) in decision-making about access to its exchanges.

227 The most efficient and effective means by which Telstra could carry out the activities described above would be to establish and maintain a central database of relevant information. In the time permitted, Telstra has not been able to fully estimate the costs that would be associated with such a database.

228 In any case, however, the costs of an Access Provider taking unconfirmed forecasts into account when assessing access requests are likely to far outweigh any benefit that may be expected to result from the operation of a clause such as K.2. The effect of requiring Telstra to have regard to Access Seekers' demand forecasts in making decisions about exchange access is likely to be preliminary study requests (**PSRs**) being rejected and exchanges being listed as capped when there is in fact space available.

229 In addition, Telstra estimates that it would take a considerable period to design, build and integrate the database described into Telstra's Network Planning process, gather and input initial data and recruit and train the necessary staff.

Queuing of access requests

230 Clause K.5 of the Model Terms prohibits an Access Provider from queuing access orders, except in the limited circumstances specified in clause K.6.

231 Telstra submits that the exceptions in clause K.6 are too narrow and do not properly address relevant factors that may require an Access Seeker's works to be queued. In addition to threats to the safe and reliable operation of a Network or Facility, it will also be necessary to queue works for reasons including:

(a) an Access Seeker's inability or unwillingness to participate in a dual build (as referred to above);

(b) dependencies between common infrastructure works; or

(c) to address health and safety issues.

232 Dependencies between common infrastructure works is the key reason for queuing Access Seekers' works at exchanges and is a matter of practical reality. For example, if Access Seeker A is undertaking common infrastructure works to install new superstructure ironwork and cable trays required by Access Seeker B, Access Seeker B cannot reasonably begin its installation until the work being undertaken by Access Seeker A has been completed and inspected to confirm its compliance with all applicable requirements.

233 Safety concerns, and the occupational and health and safety (**OHS**) requirements that apply to Telstra, may also prevent Telstra from authorising concurrent builds at an exchange. The OHS principles and requirements that apply to builds within an exchange are clear and are applied consistently by Telstra to its own builds, as well as building by Access Seekers. Telstra must have the ability to queue Access Seekers where this is reasonably necessary to ensure compliance with OHS principles and requirements.

Confidentiality issues regarding disclosures contemplated by the Model Terms

234 The Model Terms contemplate various disclosures of information that are likely to be confidential by an Access Provider, including:

(a) disclosures relating to Access Seeker forecasts, as well as requests for access received from other parties, in the context of an Access Seeker considering Common Infrastructure Works (clause K.14); and

(b) the disclosure of the works being undertaken by an Access Seeker to other Access Seekers in a queue at that exchange, where the first Access Seeker requests an extension of time for its works (clause K.22).

235 Telstra is generally prohibited under the terms of its agreements with Access Seekers from disclosing to another Access Seeker, or using, the confidential information of an Access Seeker. The execution of a confidentiality undertaking by another Access Seeker does not overcome this prohibition. The confidentiality obligations will need to be assessed on a case by case basis (including having regard to whether the preparation of any information to be disclosed constitutes a prohibited "use" of

confidential information). In any event, any obligation to provide information relating to other Access Seekers, including their forecasts or PSRs, must be limited to aggregated information that masks the identity of those Access Seekers and from which the identity of those Access Seekers is not ascertainable.

4. COMMENCEMENT AND EXPIRY DATE

Key points:

- Telstra agrees with the Commission's proposed expiry date.
- Telstra does not agree with the Commission's proposed commencement date: non-price terms and conditions should not and often cannot apply retrospectively.

236 Telstra agrees with the proposed expiry date of the FADs.

237 However, Telstra does not consider it appropriate for the non-price terms and conditions of the FADs to apply retrospectively. That is because, if the non-price terms and conditions of the FADs applied retrospectively, an Access Provider could automatically be in breach of those terms and conditions (to the extent that they differ from those in the IADs). Further, an Access Provider cannot "cure" such a breach by way of, for example, back payment.

238 Accordingly, Telstra submits that those non-price terms and conditions that do not have a specific commencement date already specified in the draft FADs, should commence 21 days after the date on which the FADs are made by the Commission. This will give the Access Provider sufficient time to implement the various non-price terms and conditions.

5. RESPONSES TO THE COMMISSION'S QUESTIONS

Telstra's response to the Commission's questions in Part B of the Discussion Paper are set out in the table below.

Commission's question	Telstra's response
Should liability (risk allocation) provisions be included in the FADs for all or any of the declared fixed line services?[37]	No - given that liability (risk allocation) has not been the subject of a formal dispute between Telstra and Access Seekers, mandating liability (risk allocation) provisions in the FADs is unnecessary. In addition, these terms have not been the subject of a comprehensive consultative process.
Should an iVULLS ordering and provisioning process be included in the FAD for ULLS?[38]	No - given that Telstra has already implemented an eVULLs process, and four Access Seekers have already entered into agreements to use the eVULLS process. Those Access Seekers' customers constitute approximately 87% of all current vacant ULLS connections. Thus, mandating an eVULLs process in the FADs is unnecessary. In addition, this process has not been the subject of a comprehensive consultative process.
Should the FADs for all the declared fixed line services include terms and conditions relating to facilities access?[39]	No - given that the following recent developments superseded the Commission's facilities access provisions: • the improvement of Telstra's facilities access processes, guided by updated versions of various Telstra policy documents and overseen by the Telstra Governance Committee; • the Commission's issue of a Record Keeping and Reporting Rule regarding Access to Telstra Exchange Facilities; • Telstra's approval of an additional power contractor permitted to perform work in Telstra's exchanges; • the implementation of Telstra's "dual build" process for TEBA works, pursuant to which multiple Access Seekers occupying consecutive queue positions for an exchange may agree that one of the Access Seekers will construct common infrastructure for all of the participating

[37] Commission, Discussion Paper p 192.
[38] Commission, Discussion Paper, p 193.
[39] Commission, Discussion Paper, p 194.

	Access Seekers; and • the continuation of Telstra's "parallel build" process for TEBA works, which permits more than one Access Seeker to perform work in an exchange concurrently, where the simultaneous pursuit of the relevant works will not raise health, safety or technical issues. Thus, mandating facilities access provisions in the FADs is unnecessary. In addition, these terms have not been the subject of a comprehensive consultative process.
Please provide comments on any of the proposed non-price terms and conditions and any appropriate amendments to them.[40]	Telstra considers that a number of amendments should be made to the proposed non-price terms and conditions in the draft FADs in order for them to be clear, balanced and reasonable. Telstra's proposed amendments to the draft FADs are set out in Schedule B.1.
Are there any additional non-price terms and conditions that are appropriate to be included in the FADs?[41]	No - given that the parties have commercial agreements in place, and the terms in these agreements have not been disputed, it is unnecessary to include additional non-price terms in the FADs.
Should any non-price terms and conditions be included in fixed principal provisions in the FADs? If yes, give details.[42]	No - given that the parties have commercial agreements in place, and the terms in these agreements have not been disputed, it is unnecessary to include non-price terms and conditions in fixed principle provisions in the FADs.

[40] Commission, Discussion Paper, p 194.
[41] Commission, Discussion Paper, p 194.
[42] Commission, Discussion Paper, p 259.

6. CONNECTIONS/DISCONNECTIONS CHARGES

239 In this section, Telstra responds to Chapter 15 of the Discussion Paper.

Key points:

- Single disconnection charges should be payable where the Access Seeker is participating in the Telstra LSS churn process and BigPond is not.
- A provision should not be included requiring MNM jumpering work to be completed within a specified timeframe.
- No charges should be set in band 4 for LSS single disconnections, ULLS MNM connections, ULLS cancellations, ULLS minimum exchange and ULLS Call Diversion.

6.1. DISCONNECTION CHARGES

240 Clause 2.1 in Schedule 2 to the draft FADs provides that single disconnection charges are not payable for:

(a) a disconnection made pursuant to a Telstra churn process by which services can be transferred between LSS, and between LSS and DSL services; or

(b) any period in which the Access Seeker was participating in the Telstra LSS churn process and Telstra (BigPond) was not participating in the Telstra LSS churn process.

241 Telstra does not object to the Commission's proposal to disallow a disconnection charge in the first scenario, where disconnections take place within the Telstra LSS churn process.

242 However, Telstra does object to the Commission's proposal to disallow a disconnection charge where the Access Seeker is participating in the Telstra LSS churn process and BigPond is not. This is because it prevents Telstra from recouping its direct and efficiently incurred costs in undertaking disconnections. Telstra highlights the following three points.

243 First, the operation of this clause in the draft FADs is uncertain. Telstra assumes that it does not disallow the levying of a disconnection charge for an end user churn involving an Access Seeker if that Access Seeker is a participant in the Telstra LSS churn process and BigPond is not, when BigPond was not in fact involved in that churn.

244 Second, the Commission's approach is not in accordance with the statutory criteria. The Commission's task is to make an access determination with respect to the terms and conditions of access that apply between Telstra and the relevant Access Seeker. The object of creating incentives for BigPond to participate in the Telstra churn process is not encompassed within this task and Part XIC of the CCA does not provide that FADs can be punitive in nature.

245 Third, if the Commission makes an access determination in the terms proposed it will have failed to give fundamental weight to a number of the statutory criteria, including

Telstra's legitimate business interests[43] and the direct costs of providing access to the declared service.[44] Ultimately, it is not consistent with the statutory criteria to require an Access Provider to supply a service without recovering its direct costs of doing so.

6.2. AFTER-HOURS MNMS

246 In 15.3.4 of the Discussion Paper, the Commission seeks submissions on whether a provision should be made requiring Telstra to complete the jumpering work necessary for an MNM within a specified timeframe, such as 20 Business Days.

247 Telstra assumes that this relates to the timeframe in which the jumpering work is to be performed and not to the forecasting timeframe, which has been agreed between the parties.

248 Telstra submits that the provision of a time limit in which the jumpering work must be completed is unnecessary in the current context. The issue has never been raised by an Access Seeker or been the subject of a previous dispute.

249 The reason for this is that Access Seekers do not request the provision of after hours MNMs in order to speed up the jumpering work. They do so in order to minimise disruption to their end users.

250 In addition, Telstra submits that if the Commission were to consider the inclusion of such a provision, consultation on the topic would be required with reply submissions on proposals being provided to the Commission.

251 In that regard, Telstra would need to consider and submit evidence in relation to:

(a) the feasibility of meeting any proposed timeframe, such as the 20 Business Days raised in the discussion paper; and

(b) the associated costs.

252 The time frame on the current consultation does not allow for this.

[43] Subs 152BCA(1)(b).
[44] Subs 152BCA(1)(d).

6.3. LSS MNM CANCELLATION CHARGES

253 Telstra does not object to LSS MNM Cancellation charges being included in the FADs.

254 Using the Telstra/Chime April 2010 LSS FD figures and applying the indexation methodology used for all other charges in 15.3.1 of the Discussion Paper, Telstra submits that the following charge schedule should apply for LSS MNM cancellation charges:

	FD RATES	PROPOSED CHARGES ($) TO INCLUDE IN FAD					
	Jan 2010-Dec 2010	Jan 2011-Dec 2011	Jul 2011-Jun 2012	Jul 2012-Jun 2013	Jul 2013-Jun 2014	Jul 2014-Jun 2015	Jul 2015-Jun 2016
PER SERVICE WHERE PRE-JUMPERING HAS OCCURRED	25.10	25.78	26.10	26.82	27.62	28.31	29.02
WHERE ENTIRE MNM IS CANCELLED	140.10	143.88	145.68	149.69	154.18	158.03	161.98
INDEXATION APPLIED - FROM TABLE 15.1 DISCUSSION PAPER		2.70%	1.25%	2.75%	3.00%	2.50%	2.50%

6.4. MINIMUM EXCHANGE CHARGES IN BAND 4

255 Consistent with previous FDs, Telstra submits that there is no need for minimum exchange charges in Band 4. This is because there is virtually no demand for ULLS or LSS in Band 4, let alone demand for MNMs in Band 4.

6.5. CONSISTENCY OF PRICING BETWEEN FDS AND FADS

256 In Schedules 2 and 6 of the draft FADs, the Commission has set the following charges in Band 4:

(a) LSS single disconnections

(b) ULLS MNM connections;

(c) ULLS cancellations; and

(d) ULLS Call Diversion.

257 This is inconsistent with the charges in the published 2010 FDs.[45]

[45] Commission, *LSS Access Dispute - Telstra/Chime - Final Determination*, April 2010; Commission, *LSS Access Dispute - EFTel/Telstra - Final Determination, April 2010;* Commission, *ULLS Access Dispute - Amcom/Telstra - Final Determination, April 2010;* Commission, *ULLS Access Dispute - Chime/Telstra - Final Determination, April 2010*.

258 Given that the Commission has not previously substantially considered these charges, the FADs should be amended to reflect the application of the prices set in the 2010 FDs.

259 Telstra also submits that the word 'indicative' should be removed from the notes in Schedule 6 to make it clear that the note relates to the charges set in the FADs.

7. SCHEDULE B.1

Schedule B.1 is included in a separate document.