

Telstra's Confidential Response to the Optus Submission on Telstra's Network Modernisation Clause dated July 2006 (Public Version)

- 1 On 23 December 2005, Telstra lodged two access undertakings (“**Undertakings**”) with the Australian Competition and Consumer Commission (“**Commission**”) in relation to the monthly charges for the Unconditioned Local Loop Service (“**ULLS**”). On 15 June 2006 the Commission released its Draft Decision (“**Draft Decision**”) to reject the Undertakings.
- 2 Optus made a submission dated March 2006 on the Undertakings (“**Optus Submission**”). . Optus also made a further submission dated July 2006 on Telstra's Network Modernisation Clause (“**Optus Further Submission**”) in the Undertakings. Telstra made a submission to the Draft Decision dated August 2006 (“**Telstra Submission**”).
- 3 Telstra responds to the Optus Further Submission in respect of clause 6 of the Undertakings (referred to in the Optus Further Submission and this submission as “Network Modernisation Clause”) in the paragraphs below, using the headings set out in the Optus Further Submission.

A. Overview

- 4 Telstra agrees with Optus' statement that clause 6 of the Undertakings deals with certain rights of Telstra in the event it pursues network upgrades. However, Telstra rejects Optus' statement that there have been substantial amendments to the network modernisation provisions from previous ULLS undertakings lodged by Telstra and repeats its submissions in paragraphs 246 to 251 of the Telstra Submission (and the submissions referenced in those paragraphs). In any event, Telstra notes that Optus does not object to any specific amendment and that its objections to the Network Modernisation Clause would apply to the clauses in previous undertakings lodged by Telstra.
- 5 Telstra further rejects Optus' submission that the contractual rights sought by Telstra in the Network Modernisation Clause are unacceptable and would allow Telstra to use its significant market power to force competitors to concede valuable market share to Telstra and to undermine competition in the customer access network. Telstra

reminds Optus that Telstra is restrained in the way that it acts not only by Part IV of the Trade Practices Act 1974 (*Cth*) (“**TPA**”), but also Part XIB of the TPA.

- 6 Telstra notes Optus use of the word “unacceptable” rather than “unreasonable” to describe the Network Modernisation Clause and submits that the test that the Commission must apply to the Undertakings is the one set out in Part XIC of the TPA. That is, as to whether the Undertakings are *reasonable*, not whether they are *acceptable* to an access seeker. Telstra submits that the entire Optus Further Submission is tainted by what appears to be Optus’ understanding that, due to its investment decisions, the natural evolution of the Telstra customer access network to meet customer demands and provide improved services will have an “unacceptable” effect on Optus’ profits.
- 7 Telstra notes that the Optus Further Submission fails to recognise Telstra’s legitimate business interests. The Commission described those interests at page 134 of the Draft Decision as “reasonably free ability to perform upgrades to its network.” As set out in paragraphs 248 to 251 and 313 of the Telstra Submission, the Commission has previously recognised that Telstra has a right to modernise its network. Further, the Optus Further Submission fails to recognise that network modernisation (and its obvious affect on the availability of ULLS) was identified by Telstra and the Commission before the declaration of ULLS. This was well before Optus made any investments in ULLS related infrastructure. Telstra submits that all industry participants have been aware for many years of the technological limitations of the legacy copper network (including interference issues) and the likelihood that the ULLS would be constrained or no longer available due to network modernisation. For Optus to means otherwise suggests that Optus never read the Commission’s final report on the declaration of the ULLS.¹ Also, Telstra repeats its submission in paragraphs 248 to 257 and 264 to 266 of the Telstra Submission.
- 8 Telstra considers that the Optus Further Submission is further compromised due to the significant emphasis given to the possibility of Telstra upgrading its current copper network to a fibre-to-the-node (“**FTTN**”) network. Telstra repeats its submissions at

¹ See, for example, Commission, *Declaration of local telecommunications services - A report on the declaration of an unconditioned local loop service, local PSTN originating and terminating services, and a local carriage service under Part XIC of the Trade Practices Act 1974 - July 1999*, at page 90 where it was made clear in July 1999 that (i) Telstra was reducing the amount of copper in the network and linking RIMs/IRIMs to the Telstra exchange building by means of optical fibre; and (ii) where Telstra introduces a RIM, service providers would no longer be able to interconnect at the former exchange building and would need to interconnect at the street based housing containing the RIM.

paragraphs 252 to 261 of the Telstra Submission regarding the Commission's consideration of FTTN in the Draft Decision. Telstra submits that FTTN and therefore the Allen Consulting Report (as referred to in the Optus Further Submission) or any other documentation and evidence relating to FTTN are irrelevant for the purposes of the assessment of the Undertakings.

- 9 Notwithstanding this, Telstra notes Optus' claim that an FTTN network roll-out would harm competition and the LTIE regardless of the terms and conditions of any FTTN roll-out. Telstra contrasts this with the clear recognition by the Commission of the benefits of a FTTN roll-out in terms of higher speed broadband and submits that this is a further indication of the biased nature of the Optus Further Submission.
- 10 Telstra rejects Optus' claim that the Network Modernisation Clause comprises a broad series of authorisations for Telstra to do whatever it deems appropriate in upgrading its network regardless of the impact on its competitors and their end user customers. Again, Telstra reminds the Commission that Telstra is constrained in its behaviour in undertaking network upgrades by Parts IV and XIB of the TPA. This is acknowledged by the Commission in the Draft Decision. Telstra also notes that none of the Commission's alternative proposals set out in the Draft Decision include an additional contractual requirement for Telstra to take into account the impact on competitors and their end user customers. Telstra repeats its submissions at paragraphs 281 to 284 of the Telstra Submission.
- 11 Telstra also rejects Optus' claim that the Commission would be conceding regulatory oversight to Telstra if it accepted the Undertakings and submits that it is entirely appropriate and reasonable for Telstra to include the Network Modernisation Clause in the Undertaking. Telstra notes that the Commission included terms relating to network modernisation in its model terms and conditions.² Telstra submits that the Commission should consider the Undertakings in light of criteria in section 152AH of the TPA. Telstra submits that the Commission would be acting contrary to law if did not assess the Undertakings on their merits because it believed that an access dispute arbitration was a more appropriate forum to assess the reasonableness of a network modernisation clause.
- 12 Telstra notes the extensive public consultation that has occurred with the Undertakings and rejects Optus' submission that any network modernisation clause

² Commission, *Final Determination - Model Non-price Terms and Conditions, October 2003*

needs to be developed in a more “considered consultative manner, over the long term.” Telstra refers to paragraph 6 above and submits that Optus and all other access seekers have had over seven years to make submissions or representations to the Commission regarding network modernisation. Telstra also notes that network modernisation clauses have been present in Telstra’s standard access arrangements for the supply of ULLS, the model terms and conditions, and all previous ULLS undertakings by Telstra. Telstra submits that Telstra is not dictating these terms to the Commission, it is merely requesting that the Commission perform its statutory duty in assessing the reasonableness of these terms.

- 13 Telstra rejects Optus’ submission that Telstra would not include the Network Modernisation Clause in any access arrangements for ULLS if it did not have significant market power in an access market. Telstra rejects Optus’ implication that the Network Modernisation Clause is of itself is a misuse of market power. Telstra notes that the test that the Commission must apply in assessing the Undertakings is not whether Telstra is taking advantage of its significant market power. That is a test that is to be applied under section 46 of the TPA, not Part XIC. Telstra repeats its submissions at paragraphs 294 to 313 of the Telstra Submission regarding the reasonableness of the Network Modernisation Clause in light of Telstra’s legitimate business interests in upgrading its network. Telstra submits that Optus’ submission is irrelevant. Telstra considers that a reasonable access provider in a competitive market would be unlikely to provide access to a service such as ULLS if such access constrained its ability to upgrade its network and meet changes in demand.
- 14 Telstra notes Optus’ claim that its decisions to make ULLS investments “have been premised on ubiquitous and continuing access to Telstra ULLS, on the basis of existing network configurations and equipment”. Telstra repeats its submissions in paragraphs 248 to 250 and 264 to 266 of the Telstra Submission and submits that Optus is not guaranteed ubiquitous and continuing access to Telstra ULLS under section 152AR of the TPA or by the application of the reasonableness criteria of section 152AH of the TPA. Telstra is surprised that Optus has failed to take network modernisation into account in its investment decisions when it was able to do so, despite the fact that Optus has known, or ought to have known (see in particular paragraph 7 above), of the impacts of network modernisation and the impact of changing end-user demands. Telstra submits that the investment decisions of Optus should therefore be given very

little weight in considering the reasonableness of the Network Modernisation Clause under the section 152AH criteria.

- 15 Telstra rejects the suggestion that Telstra would not have regard to the effect of any network upgrades on competition. Telstra takes its obligations under Part IV and Part XIB of the TPA very seriously. Telstra repeats its submissions in paragraphs 323 to 330 of the Telstra Submission regarding the effect of the Network Modernisation Clause on investment. Telstra submits that without the Network Modernisation Clause, and if the Optus Further Submission regarding network upgrades in general is accepted, network upgrades would be unlikely to occur and Australian end-users would be limited to current levels and quality of service.
- 16 Telstra strongly rejects Optus' submission that the Network Modernisation Clause or any network modernisation clause should only be considered as part of the complete terms and conditions for the supply of a FTTN based access product. Telstra refers to its submissions in paragraph 8 above (and the submissions referenced in that paragraph). Telstra also refers to page 135 of the Draft Decision where the Commission explicitly recognises that alternative access services were beyond the scope of assessment of the Undertakings. Therefore, Telstra submits that any consideration of the availability or unavailability of alternative access services is an irrelevant consideration for the purposes of the Commission's assessment. Telstra repeats its submissions in paragraphs 248 to 250 and 264 to 266 regarding the clear recognition by the Commission of Telstra's right to modernise its network despite the presence of existing access seekers.
- 17 Telstra rejects Optus' claim in the penultimate paragraph of Section 1 of the Optus Further Submission and submits that Telstra has met its onus of proving the reasonableness of the Network Modernisation Clause. In addition, Telstra submits that in light of the concentration in the Optus Further Submission on the effect on Optus' investments, a lack of recognition by Optus of the legitimate rights of Telstra to perform upgrades to its network and the technological limitations of the legacy copper network (including the advantages to end-users from bringing the customer access module closer to supply broadband), the Commission should not have regard to the Optus Further Submission.

B. Essential elements to be included in a potentially acceptable network modernisation clause

18 In Section 2 of the Optus Further Submission, Optus sets out what it considers to be the essential elements to be included in a potentially acceptable network modernisation clause. Telstra responds to each of the elements in the paragraphs below:

- (a) In relation to the first proposed requirement that no network modernisation displacing ULLS should be authorised until all the terms of supply of a replacement FTTN access product have been finalised, Telstra repeats its submission in paragraphs 305 to 308 of the Telstra Submission. Telstra agrees with the Commission that alternative access products are beyond the scope of the scope of the assessment of the reasonableness of the Undertakings. Telstra rejects that this is an essential element of an acceptable or reasonable (under the criteria of section 152AH of the TPA) network modernisation clause and believes consideration of an FTTN network rollout is irrelevant for the purposes of assessing the reasonableness of the Undertakings for the reasons set out in paragraphs 252 to 259 of the Telstra Submission.
- (b) In relation to the proposed requirement that decisions on network upgrades be no more than what is “reasonably required” to promote Telstra legitimate business interests, Telstra repeats its submission in paragraphs 275, 279 to 288, and 294 of the Telstra Submission. Telstra submits that it has a legitimate business interest, recognised by the Commission in its draft decision, to have the ability to alter the underlying structure of its network and not be unduly restricted to legacy network arrangements. Telstra also submits that its decision making will always be subject to Part IV and Part XIB of the TPA so network upgrades will not have an anti-competitive purpose or effect. Telstra submits that the requirements propounded by Optus are inconsistent with the criteria in Part XIC of the TPA.
- (c) In relation to the proposed requirement for a longer period of minimum notice, Telstra repeats its submission in paragraphs 268 to 278 and 295 to 300 of the Telstra Submission. Telstra submits that a notice period of not less than 15 weeks is reasonable in light of the criteria of section 152AH of the TPA and that any longer period would have an unreasonable impact on Telstra’s legitimate business interests. Telstra submits that any notification would

under the terms of the Undertakings give access seekers details of the ULLSs affected, timing and nature of the network upgrade, and any required remedial action. However, given that the necessary information requirements are likely to change over time (including format and particular information provided), Telstra does not consider that it is appropriate to provide further detail of the notice requirements in the Undertakings.

- (d) In relation to the proposed requirement that Telstra's internal retail units not be given any greater opportunity than third party access seekers, Telstra repeats its submission in paragraphs 271 and 318 of the Telstra Submission and refers to paragraphs 16 and 17 of the statement of [c-i-c] dated 28 July 2006 ("**[c-i-c] Statement**"). Telstra submits that in light of its existing equivalence obligations that this is not an essential element of a reasonable (under the criteria of section 152AH of the TPA) network modernisation clause.
- (e) In relation to the proposed requirement for good faith negotiations and for Telstra to observe the legitimate business interests of access seekers, Telstra repeats its submissions in paragraph 279 to 287 of the Telstra Submission. Telstra rejects that this is an essential element of a reasonable (under the criteria of section 152AH of the TPA) network modernisation clause.
- (f) In relation to the proposed requirement that Telstra bear the costs of access seekers that are necessary to reconfigure their networks or appropriately compensate access seekers if ULLS is no longer commercially viable, Telstra repeats its submissions in paragraph 262 to 267 of the Telstra Submission. Telstra submits that access seekers have been well aware of the risks of investing in infrastructure using the legacy copper network and have or should have factored these risks into any investment decisions. Telstra repeats its submissions at paragraphs 314 to 316 and 325 to 328 of the Telstra Submission regarding the effect on the LTIE. Telstra considers that such an obligation would effectively require Telstra to underwrite all future copper-based access seeker investment foreclosing any improvement to the legacy copper network. Further, Telstra submits that any obligation to compensate access seekers would allow access seekers to make inefficient investment decisions which did not have regard for changes in end-user demand.

- (g) In relation to the proposed requirement that Telstra not be permitted to make any necessary network upgrade until all disputes have been resolved, Telstra repeats its submissions in paragraphs 285 to 287 of the Telstra Submission in terms of the effect that such delay would have on the LTIE. Telstra notes that such a requirement was never required by the Commission by its model terms and conditions for ULLS where the Commission made it clear in its final report that “[t]he provisions do not give the access seeker a right of veto, and notwithstanding any negotiations between the parties, a relocation will nevertheless proceed at the time specified by the access provider”³. Telstra rejects that this is an essential element of a reasonable (under the criteria of section 152AH of the TPA) network modernisation clause.
- (h) Finally, in relation to the proposed requirement that the Commission should retain the right to intervene and prevent a network upgrade where it is concerned that the upgrade may disrupt the availability of competitive customer access networks or contravene the competition rule in Part XIB of the TPA, Telstra is surprised at Optus’ misconstrued inference that were the Commission to accept the Undertaking it would somehow be giving up its rights under Part XIB. Telstra submits that this may explain some of the other allegations made by Optus in the Optus Further Submission. Telstra refers to the Commission’s powers to seek an injunction under section 80 (in respect of Part IV) and section 151CA (in respect of Part XIB) of the TPA. Telstra rejects that this is an essential element of a reasonable (under the criteria of section 152AH of the TPA) network modernisation clause.

C. The unacceptable elements of the Telstra Network Modernisation Clause

- 19 In Section 3 of the Optus Further Submission, Optus set out what it considers to be the “material adverse elements” of Network Modernisation Clause. In particular, Optus:
- (a) refers to clauses 6.1(c) and 6.2(a) to (c) of the Undertakings and concludes that an access seeker “therefore has no ongoing guarantee of supply or quality of service”. Telstra acknowledges that this is the case and repeats its submissions

³ Australian Competition & Consumer Commission *Final Determination - Model Non-price Terms and Conditions*, October 2003, at page 36.

at paragraphs 263 to 266, 307 and 308 of the Telstra Submission in this regard;⁴

- (b) claims that no consideration is given to the need to take into account the interests of access seekers or to engage with access seekers in an effort to maintain the continuity of supply. Telstra rejects the submission that no consideration was given to the interest of access seekers by the Network Modernisation Clause and repeats paragraphs 262 to 293, 298, 307 and 308 of the Telstra Submission. For all the reasons above and in the paragraphs referenced, there is no unlimited right to a declared service. Further, Telstra has taken into account the interest of access seekers in submitting the Undertakings and, in particular, in setting the minimum notice period at 15 weeks and not something shorter;
- (c) claims that the only protection given is the 15 week notice period and that it is entirely unclear what information is supplied in such a notice. Further Optus claims that it would be concerned that Telstra may argue that particular FTTN deployments improve network security or integrity and would therefore not be subject to the minimum 15 week notice period. Telstra refers to paragraph 18(c) above and also repeats its submissions in paragraphs 289 to 293 and 295 to 304 of the Telstra Submission; and
- (d) identifies that the Undertakings permit Telstra to terminate the supply of the ULLS in certain circumstances and refers to a comment by the Commission in the Draft Decision that it is in Telstra's interests to recover end-user customers from its competitors. Telstra refers to paragraphs 273 and 274 of the Telstra Submission and emphasises that without the right to terminate the ULLS in these limited circumstances, access seekers would be able to indefinitely delay network modernisation, which is inconsistent with previous conclusions of the Commission that Telstra be entitled to modernise its network and that access seekers not have a right to veto network upgrades.

20 For all the reasons identified above and set out in the Telstra Submission, Telstra rejects the inference that Telstra can act completely unrestrained (and, in particular, without due regard to the impact on access seekers) in undertaking network upgrades. Telstra disagrees that the Network Modernisation Clause is designed to

⁴ See also Telstra's submission in response to the Optus Submission.

authorise changes to competitor networks. It is designed to authorise change to Telstra's network, a right that has been recognised by the Commission previously. For the same reasons set out in paragraphs 252 to 259 of the Telstra Submission, Telstra believes that detailed consideration of the impacts of a FTTN network rollout is irrelevant to the consideration of the reasonableness of the Undertakings.

- 21 In relation to Optus' claims that the rights afforded to Telstra under the Network Modernisation Clause could be used by Telstra to provide 15 weeks notice that it was replacing part or all of the copper at major exchanges served by Optus thereby undermining the Optus ULLS based broadband network, Telstra:
- (a) repeats its submissions in paragraphs 268 to 271 and 318 of the Telstra Submissions in relation to the minimum notice period and obligations of equivalence;
 - (b) refers to paragraphs 16 and 17 of the [c-i-c] Statement;
 - (c) repeats that access seekers do not have an absolute right to continual access to ULLS. In this respect, Telstra repeats paragraph 18(f) above and paragraphs 254 and 262 to 267 of the Telstra Submission;
 - (d) submits that Telstra is not responsible for any inefficient or inappropriate investment decisions made by access seekers in the knowledge that ULLS is dependent on access to copper loops and in the knowledge that Telstra has (and the Commission acknowledges that Telstra has) the right to modernise its network; and
 - (e) again notes that Telstra's conduct in undertaking such network modernisation would be constrained by the conduct provisions of Parts IV and XIB of the TPA.
- 22 In relation to Optus' claim that the Network Modernisation Clause does not observe the principles set down by the Commission in its ULLS model terms and conditions, Telstra refers again to all the relevant paragraphs of the Telstra Submission as to why these requirements are not necessary for the Undertaking to be considered as reasonable in light of the criteria under Part XIC of the TPA.

D. The ACCC cannot be satisfied the Undertakings are reasonable

- 23 Telstra agrees that the Commission must be satisfied that the terms and conditions are “reasonable”, as determined under section 152AH of the TPA. Telstra submits that the Commission can be satisfied that the Undertakings (including the Network Modernisation Clause) are reasonable and refers to its submissions in the Telstra Submission. Telstra refers to its submissions in Appendix F to the Telstra Submissions in this regard.
- 24 Telstra refers to paragraph 8 above regarding the irrelevance of FTTN to the assessment of the reasonableness of the Network Modernisation Clause. In particular, Telstra repeats its submission that the Allen Consulting Report is therefore irrelevant for the present assessment and should not be considered by the Commission.
- 25 Telstra submits that there is sufficient evidence to support the reasonableness of the Network Modernisation Clause. In this regard Telstra makes specific reference to part E of the statement of [c-i-c] dated 4 August 2006 (“[c-i-c] Statement”) and the [c-i-c] Statement. Telstra also refers to paragraphs 248 to 261 of the Telstra Submission and submits that the Commission has been aware of issues related to network modernisation since before the declaration of ULLS. Telstra submits that the Commission is well placed to properly assess the reasonableness (as it is required by Part XIC of the TPA to do) of any network modernisation clause including the Network Modernisation Clause in the Undertakings.
- 26 Telstra notes Optus’ claim that the alternative access services that may be offered to access seekers are not fully understood or confirmed by contract or the regulatory environment and agrees with the Commission’s conclusion at page 135 of the Draft Decision that the consideration of alternative access services is beyond the scope of its assessment. Telstra further submits that the issue of alternative access services to ULLS are an irrelevant consideration in the assessment of the reasonableness of the Undertakings.
- 27 Telstra submits that it is an irrelevant consideration that the Commission will no longer be able to arbitrate access disputes if the Commission otherwise finds the Undertakings to be reasonable. Telstra notes the obvious benefits to access seekers, the Commission, Telstra, and end-users of bringing certainty and finality to this issue

by accepting the Undertakings if it considers the Undertakings to be reasonable. Telstra rejects (and is surprised by) Optus' claim that by accepting the Undertakings, the Commission would consider itself restrained in enforcing Part VI and Part XIB of the TPA.

- 28 Telstra submits that Optus' real concern is that if the Commission finds that this or any other Network Modernisation Clause is reasonable and therefore again recognises Telstra's right to upgrade its network, Optus will be limited in its ability to make generalised allegations (as occurs throughout the Optus Further Submission) that network upgrades are necessarily anti-competitive because of the effect on the availability of ULLS.

Long term interests of end users

- 29 Telstra rejects Optus' submission that the inclusion of "any network modernisation clause" and the Network Modernisation Clause in particular will not promote the LTIE. Telstra repeats its submissions at paragraphs 314 to 330 of the Telstra Submission.
- 30 Telstra rejects Optus' submission that "*the purpose and effect of the Network Modernisation Clause is to stifle competition, increase investment uncertainty for access seekers, and potentially, to enable Telstra to roll out FTTN in a manner that regards (or is intentionally designed to damage) the interests of Access Seekers*". Telstra considers that Optus' allegations regarding its purpose for inserting the Network Modernisation Clause in the Undertakings are contrary to the evidence. Telstra refers to paragraphs 64 to 70 of the [c-i-c] Statement and paragraphs 7 to 15 of the [c-i-c] Statement in this regard.
- 31 Telstra submits that Optus has failed to fully consider the effect on the LTIE such as the improvements to services and overall network efficiency resulting from network upgrades. Telstra submits that network upgrades are not contrary to the LTIE simply because some access seekers will suffer detriment. Given Optus' attitude towards "any network modernisation clause", Telstra considers that Optus is submitting that the LTIE will be served by maintaining 2006 levels of broadband speeds and penetration for the foreseeable future, which clearly cannot be the case.
- 32 Optus submits that Telstra would deliberately design network upgrades so that any use of a "truncated ULLS configuration" is unviable. Telstra submits that this is contrary to evidence and refers to paragraphs 64 to 70 of the [c-i-c] Statement in this

regard. Telstra rejects the suggestion that there is economic incentive for Telstra to design its network in a way that was uneconomic and inefficient to target access seekers even though as the supplier (either at a retail, wholesale, or access level) of telecommunications services in Australia it would be making its own investment unviable. Telstra also rejects the suggestion by Optus that the LTIE would be better served by maintaining the present network configuration and not shortening the local loop where required to provide better quality of services because it will make use of the ULLS unviable by access seekers.

The legitimate business interests of the carrier

- 33 Telstra rejects Optus' submission that the Network Modernisation Clause gives Telstra contractual rights and protection from regulatory intervention that go well beyond Telstra's legitimate business interests. Telstra repeats its submissions at 294 to 313 of the Telstra Submission. Telstra rejects Optus' submission that the acceptance of the Undertakings will prevent regulatory intervention and submits that it will be subject to significant regulatory intervention. The Commission will still be entitled to take action under Part IV and Part XIB of the TPA as well as for any breach of the Undertakings. Further, the Commission will retain full power to declare other services under section 152AL of the TPA.
- 34 Optus has submitted that the Network Modernisation Clause does not include appropriate checks and balances to ensure that:
- (a) decisions to engage in upgrade activities are not made solely to promote Telstra's legitimate business interests;
 - (b) the interests of access seekers are taken into account and all reasonable efforts are made by Telstra to ensure that ULLS can continue to be provided with minimum disruption to access seekers and their customers; and
 - (c) there is a process in place to resolve any disputes fairly.
- 35 In regards to paragraph 34(a) above, Telstra repeats its submissions at paragraphs 281 and 282 of the Telstra Submission regarding the sufficiency of the constraints on Telstra's behaviour from Part IV and Part XIB of the TPA. Telstra submits that any additional "checks or balances" in this regard would have an unreasonable (in light of

all the section 152AH criteria) detrimental impact on its legitimate business interests and repeats its submissions at paragraphs 303 to 310 of the Telstra Submission.

- 36 In regards to paragraph 34(b) above, Telstra submits that the interests of access seekers have been taken into account and refers to its submissions at paragraphs 262 to 293 of the Telstra Submission. Telstra submits that the essence of Optus' submission is that it should be entitled to prevent or delay network upgrades on a case by case basis regardless of whether Telstra has legitimate business interest in the upgrade. Telstra refers to paragraph 265 and 266 of the Telstra Submission and pages 135 to 136 of the Draft Decision and submits that Commission has never intended that an access seeker would be able to prevent network upgrades that were in the Telstra's legitimate business interest from going ahead. Telstra submits that any requirement to take into account the interests of access seekers on a case by case basis will either unduly delay or frustrate network upgrades or lead to inefficient network design to the detriment of Telstra's legitimate business interests and LTIE. Telstra repeats its submissions at paragraphs 294 to 313 of the Telstra Submission and refers to paragraph 77 of the [c-i-c] Statement in this regard.
- 37 In regards to paragraph 34(c) above, Telstra submits that a dispute resolution process will only seek to stall or prevent network upgrades occurring. Telstra repeats its submissions at paragraphs 311 to 313 of the Telstra Submission in this regard and submits that this is inconsistent with the Commission's recognition in its model terms and conditions that network upgrades will proceed regardless of the outcome any negotiations.
- 38 Telstra rejects Optus' submission that the Network Modernisation Clause could "sanction" activities designed to damage competition. Telstra submits that an undertaking does not provide Telstra any protection for conduct that would otherwise be illegal. Telstra repeats its submissions at paragraphs 279 to 288 of the Telstra Submission. Telstra also rejects Optus' claim that Telstra could seek to physically displace part or all of the ULLS where access seeker roll-outs have occurred, and considers it to be contrary to evidence (see paragraphs 64 to 70 of the [c-i-c] Statement).
- 39 In relation to Optus' submission that an obligation to provide a notice period as long as Telstra gives itself will not harm Telstra's legitimate business interests, Telstra repeats its submissions at paragraphs 268 to 270 and 295 to 304 of the Telstra

Submissions as to the reasonableness of the not less than 15 weeks notice provided for in the Undertakings. Telstra rejects Optus' submission that an obligation to consult or make upgrades only where reasonably necessary will not harm Telstra's legitimate business interests and repeats its submission at paragraphs 279 to 288 of the Telstra Submission. Telstra rejects Optus' claim that an obligation to observe the legitimate business interests of access seekers will not harm Telstra's legitimate business interests and refers to its submissions above in this regard and to those following paragraph 40.

The interest of persons who have a right to use the declared service

- 40 Telstra agrees that the Commission must consider the interests of persons who have a right to use the declared service as one of the criteria in section 152AH of the TPA. However, Telstra submits that the Commission does not have to be satisfied that the Undertakings are reasonable in light of each criteria, only that the Undertakings are reasonable in light of all the criteria. In this respect, Telstra submits that these criteria are not necessarily consistent and in particular "the legitimate business interests of the carrier .. concerned" will often be in direct conflict with the "interests of persons who have rights to use the declared service".
- 41 Telstra rejects Optus' claim that the Network Modernisation Clause is entirely detrimental to the interests of access seekers. Telstra repeats its submissions at paragraphs 262 to 294 of the Telstra Submission regarding the interests of persons using the declared service.
- 42 Telstra submits that the essence of Optus' submission is that a network upgrade (regardless of the legitimate business interests of Telstra and positive effect on the LTIE) should not proceed if it has a detrimental effect on the deployment of DSLAMs. Telstra submits that this is inconsistent with an access seeker's rights under section 152AR of the TPA to a declared service. For the reasons set out above and in the Telstra submission, section 152AR does not provide access seekers with an unlimited right to access a declared service. Further, it is also inconsistent with the Commission's conclusions on at least three occasions including the Draft Decision.
- 43 Telstra rejects Optus' claim that it would only ever give the minimum notice period and repeats its submissions at paragraphs 269 to 271 of the Telstra Submission. Telstra once again refers to its comments above about the irrelevance of any FTTN network roll-out to the assessment of the Undertakings and repeats its submission at

paragraph 272 of the Telstra Submission. Further, Telstra rejects Optus' submission that it will always need to plan for network upgrades well in excess of 15 weeks and repeats its submission at paragraph 302 of the Telstra Submission and refers to paragraph 71 of the [c-i-c] Statement in support of this.

- 44 Telstra rejects Optus' claim that the inclusion of the Network Modernisation Clause would have any significant or detrimental effect on access seeker's investment decisions. Telstra repeats its submissions in paragraphs 254 to 257 of the Telstra Submissions, particularly in respect of the prior recognition by the Commission of the limitations of the legacy copper network. Telstra submits that the investment decisions that access seekers would have to make if the Undertakings were accepted are no different to the decisions that access seekers would have had to make for the duration of time that ULLS has been a declared service and are similar to what Telstra faces in choosing whether continued investment in the legacy copper network would be viable. Telstra submits that any uncertainty in investment in ULLS-based infrastructure is not due to the content of any network modernisation clause but the changing demands of Australian end-users that would drive any network modernisation.
- 45 Telstra rejects Optus' submission that inclusion of the Network Modernisation Clause would be a powerful tool for Telstra to suppress access seeker investment. Telstra repeats its submission in paragraph 330 of the Telstra Submission that the Network Modernisation Clause will be more likely to encourage investment by access seekers that is future proof and therefore in the LTIE. Telstra rejects Optus' submission that it would use network modernisation to disrupt access seeker investment and force the "hand back" of customers and repeats its submissions at paragraph 273 to 274 and 281 to 282 of the Telstra Submission in this regard.

Economically efficient use and investment

- 46 Telstra rejects Optus' submission that the Network Modernisation Clause does not promote the economically efficient operation of a carriage service, telecommunication network or facility. In this respect, Telstra repeats its submissions in paragraphs 323 to 330 of the Telstra Submission.
- 47 Telstra rejects Optus' claim that the Network Modernisation Clause significantly hampers the ability to make investment decisions in relation to the provision of ULLS and therefore does not promote economic efficiency. Telstra repeats its submissions in

paragraph 15 above (including the submission referenced in that paragraph) in this regard. Further Telstra repeats its submission at paragraph 328 of the Telstra Submission that continued access seeker investment at the exchange may not constitute efficient investment given changes to end-user demand.

- 48 Telstra submits that any mechanism for consultation would not promote efficiency and that any further attempts to minimise impacts on access seekers (other than the reasonable notice period of not less than 15 weeks provided for in the Undertakings) would lead to inefficient network design to the detriment of the LTIE. Telstra refers to paragraph 77 of the [c-i-c] Statement in this regard. Telstra repeats its submissions at paragraph 279 to 288 of the Telstra Submission on the unreasonableness of any additional requirements to consult with access seekers or additional limitations on Telstra's right to modernise its network. Telstra also repeats its submissions at paragraph 314 to 316 of the Telstra Submission.
- 49 Telstra strongly rejects Optus' accusation that Telstra regards the opportunity to disrupt Optus' customer access strategies as being of significant value. Telstra submits that this claim (and the associated paragraph of submission) in addition to being false, defamatory and contrary to the evidence (see paragraphs 64 to 70 of the [c-i-c] Statement) is completely irrelevant for the purposes of the Commission's assessment of the Undertakings. Telstra once again refers to its comments above about the irrelevance of any FTTN network roll-out to the assessment of the Undertakings.

E. Comparable jurisdictions

- 50 Telstra notes that Optus has included a summary of what it considers to be comparable provisions and regulatory requirements in other jurisdictions. While Telstra can see what Optus is trying to achieve, Telstra emphasises to the Commission the importance of bearing in mind the fact that the decisions referred to by Optus have been made:
- (a) in jurisdictions that are subject to a different telecommunications regulatory regime than that imposed in Australian on Telstra; and
 - (b) having regard to different regulatory objectives, criteria and tests to those that apply under Part XIC of the TPA.

- 51 In particular, Telstra submits that unless the decisions of the compared jurisdictions have been made in the context of the reasonableness requirements of section 152AH of the TPA (or an equivalent context), it is irrelevant in terms of the requirement on the Commission to consider the Undertakings in terms of the requirements set out in Part XIC of the TPA.
- 52 Therefore, Telstra submits that before relying on any such analysis, the Commission should undertake its own detailed analysis of the relevant jurisdictions and of other jurisdictions not referred to in the Optus Further Submission to ensure that it is a fair representation of what is happening overseas and to satisfy itself that the consideration of those regimes is relevant for the purposes of considering the reasonableness of the Network Modernisation Clause. For example, Telstra would not expect Optus to have included other overseas jurisdictions that are consistent with or support the reasonableness of the Network Modernisation Clause.
- 53 Telstra submits that in assessing the relevance of the requirements of overseas jurisdictions as set out in Section 5 of the Optus Further Submission, the Commission also needs to take into account the impact of other elements of the Australian regulatory regime as they apply to Telstra and consider how much of what has been imposed in those overseas jurisdictions was imposed to address an issue that has been addressed in Australia by some other mechanism. For example, Telstra submits that the Commission needs to consider how much of the overseas requirements (particularly the UK) have been imposed to achieve what in Australia is dealt with under the operational separation regime.
- 54 In addition to the possibility of there being other jurisdictions supporting Telstra's Undertakings that have not been considered (or have been considered and not mentioned) by Optus, Telstra notes that in summarising the three jurisdictions referred to, Optus has (as would be expected):
- (a) mentioned the requirements of those regimes that impose more obligations on the incumbent than the Network Modernisation Clause and, therefore, support the claims made in the Optus Further Submission; but
 - (b) has failed to mention (or to fairly represent) other requirements of those regimes that are consistent with the Network Modernisation Clause or would support the reasonableness of the Network Modernisation Clause.

55 Further, Telstra again refers to:

- (a) paragraphs 252 to 261 of the Telstra Submission as to the relevance of a FTTN network rollout to the consideration of the Undertakings; and
- (b) paragraphs 7 to 15 of the [c-i-c] Statement as to the rationale for the Network Modernisation Clause,

and emphasises again the fact that the Network Modernisation Clause has not been designed or reviewed to address a FTTN network rollout - nor is it limited to where copper is being replaced by fibre. That is just one of the types of network upgrades that may be performed under the Network Modernisation Clause.

56 In this respect, Telstra submits that (while they may not have been developed for a full FTTN network rollout) the regimes described by Optus in the Optus Further Submission *would* apply as equally to a large-scale FTTN rollout as they would to more minor or one-off upgrades that fall within the scope of the regimes - hence the need for these regimes to include the additional protections. As noted in paragraph 258 of the Telstra Submission, should Telstra at some time in the future undertake any large-scale FTTN network rollout, this would require a separate regime to provide access seekers with sufficient notice of the impact of such a rollout and Telstra would expect this would be dealt with, in any special access undertaking for FTTN services. Telstra would not seek to rely solely on the Network Modernisation Clause in the event of a large-scale FTTN network rollout, not least because of the impact of such a rollout on services other than ULLS.