IT'S HOW WE CONNECT

TELSTRA CORPORATION LIMITED

Response to the Commission's draft final access determination for the Domestic Mobile Terminating Access Service (MTAS)

21 October 2011

CONTENTS

01 EXECUTIVE SUMMARY

1. Telstra welcomes the opportunity to comment upon the Australian Competition and Consumer Commission's (**Commission**) draft Final Access Determination (**FAD**) for the Domestic Mobile Terminating Access Service (**MTAS**).

1.1. Pricing issues

2. Telstra agrees that decreasing MTAS rates would be consistent with the long term interests of end users (**LTIE**) and believes that a rate of 6cpm is appropriate. However, Telstra does not agree with the Commission that the MTAS rates for 2013 and 2014 outlined in the draft FAD represent conservative estimates of the TSLRIC+ rates. Rather, Telstra submits that the Commission has not adequately take into account certain key factors when having regard to:

   - the 2007 WIK model;
   - international estimates and benchmarks; and
   - the MTAS on a LTE network.

3. Telstra considers that the Commission's analysis of the 2007 WIK model exaggerates the impact of recent operational efficiencies on the results implied by that model. Whilst Telstra acknowledges that technological developments in the mobile industry have resulted in the realisation of operational efficiencies, Telstra notes that as recently as 2009 the Commission stated that the WIK model provides an estimate of the TSLRIC+ of supplying the MTAS that is lower than that achievable in reality. Further, the Commission's analysis of the WIK model ignores the offsetting factors that increase the cost of supplying voice services.

4. Telstra submits that the estimates derived by the Commission by reference to the New Zealand Commerce Commission's (**NZCC**) international benchmarking, represent lower bound TSLRIC+ estimates for MTAS, and that a more thorough analysis of the NZCC benchmarking clearly indicates that a more conservative approach is required.

5. Telstra believes that it is still too early to assume that the efficient TSLRIC+ estimate of supplying MTAS on a LTE network will be close to 0cpm. This is primarily because LTE should at present be regarded as a *best available* technology, rather than a best in use technology. The mobile network operators in Australia have a strong track record of investing in and deploying new technologies. However, imposing a new technology standard before it has been established and used on a widespread basis risks second-guessing future market developments and failing to reward those who adopt new technologies early, thereby adversely impacting on efficient investment and innovation.

6. Telstra agrees that if the Commission is looking to decrease the MTAS price to an end point lower than 6cpm, then it is appropriate to do so with a three year glide path, as this will promote regulatory certainty and allow the industry to adjust over time to the new regulated rates.

7. However, for the reasons specified above, Telstra believes that the end price of the Commission's draft price trajectory is too low.

1.2. Regulatory treatment of FTM and MTM

8. Telstra welcomes the Commission's decision not to differentiate between fixed to mobile (**FTM**) and mobile to mobile (**MTM**) termination, given the arbitrage issues and inefficiencies that would result from such an approach. This is consistent with the Commission's previous approach to determining the appropriate price of the service, and its approach in determining the regulated price of the terminating access service on the fixed network, where the relevant question to be

determined is what is the efficient cost of the terminating access service being provided, irrespective of the nature of the network from which the calls are being made.

1.3. FTM pass through

9. Telstra remains of the view that mandating pass through is inappropriate and unnecessary and would be contrary to the LTIE. Telstra therefore considers the Commission's preliminary decision not to include a pass through safeguard in the MTAS FAD is appropriate.

1.4. Non-price terms and conditions

10. In commenting on the non-price terms and conditions contained in the draft FAD, Telstra has proposed a number of amendments which, among other things, clarify the parties' rights. Such amendments are necessary:

- in light of the severe consequences for both Access Providers and Access Seekers if they breach the FAD, being a breach of an Access Provider's carrier licence conditions and a breach of the Access Seeker's service provider rules. There are potentially significant pecuniary penalties associated with doing so; and
- in order to avoid unnecessary disputes regarding the interpretation of the FAD, which is in the interests of both Access Providers and Access Seekers.

11. The FAD should be balanced in its application to both Access Providers and Access Seekers. The FAD does not sufficiently protect Access Providers' interests in respect of the principal obligation owed by Access Seekers to Access Providers, being the obligation to pay (in a timely manner) for supply of the MTAS under the FAD. Accordingly, Telstra has proposed amendments in order to adequately protect Access Providers' financial exposure and risk.

12. In addition, the FAD should be consistent with commercial practice. This is because those practices reflect an efficient outcome resulting from balanced negotiations between the parties. Efficient outcomes should not be overturned by the Commission without a good reason for doing so.

13. Telstra is concerned that some of the terms of the draft FAD (for example, clauses 3.1 and 3.5) would effectively require Access Providers to provide access to Access Seekers where there are reasonable grounds to believe that the Access Seeker would fail to comply with the relevant terms and conditions.

14. Moreover, Telstra is concerned that the draft FAD does not provide Access Providers with the right to immediately suspend the supply of the Service in circumstances where it is legitimate and necessary to do. Accordingly, Telstra has proposed certain immediate rights of suspension which address core safety and protection issues. Whilst such rights would rarely be implemented, they are both fundamentally important and entirely consistent with commercial practice.

15. Finally, the FAD should not apply more broadly than its intended scope. That is, the FAD should apply to MTAS, and only to the charges for that service which are set out in the FAD.

02 DRAFT DECISION ON PRICE

16. Telstra considers that MTAS rates have been kept high for too long and that decreasing the regulated price for the service would be consistent with the LTIE.

17. In its Response to the Commission's Discussion Paper on Domestic Mobile Terminating Access Service (MTAS), dated July 2011 (**Telstra July Submission**), Telstra argued that it is in the LTIE for the MTAS rate to be based on a TSLRIC+ estimate and that – taking into account the 2007 WIK model results, international benchmarking estimates and Australia's unique cost characteristics – 6cpm represents a reasonable TSLRIC+ based MTAS rate. In the Draft Access Determination Explanatory Statement, dated 23 September 2011 (**Explanatory Statement**), the Commission acknowledges that TSLRIC+ remains the most appropriate approach for regulating the price of the MTAS and proposes the following rates:[1]

Time Period	cpm
1 January 2012 – 31 December 2012	6
1 January 2013 – 31 December 2013	4.8
1 January 2014 – 30 June 2014	3.6

18. The Commission's proposed MTAS rates are based upon the following factors:

- a TSLRIC+ upper bound based on the 2007 WIK Model, but noting the significant industry changes since that time;
- international efficient cost estimates of providing the MTAS; and
- a lower bound approaching zero for the efficient cost of providing voice termination on a LTE network, but taking into account that Australia may not have reached this position prior to 30 June 2014.

19. Having regard to these factors, the Commission considers that its draft FAD prices represent a conservative assessment of the current and future efficient costs of providing the MTAS over the period 1 January 2012 to 30 June 2014.

20. Telstra does not agree that the MTAS rates proposed by the Commission represent conservative estimates of the TSLRIC+ rates. In particular, Telstra believes that the 3.6cpm MTAS rate proposed from 1 January 2014 to 30 June 2014 represents a lower bound estimate of the TSLRIC+ of supplying the MTAS. Telstra has reviewed the three factors that the Commission has had regard to when reaching the proposed price points in the draft FAD and considers that:

- **The 2007 WIK model:** In assessing the 2007 WIK Model, the Commission does not appear to have adequately accounted for industry developments that are likely to have increased the cost of supplying the MTAS since 2007;

- **International estimates and benchmarks:** A thorough assessment of the international benchmarking undertaken by the NZCC suggests that 6cpm represents a conservative TSLRIC+ estimate of the MTAS, whilst 3.6cpm is a lower bound estimate; and

[1] Explanatory Statement, p 6.

- **MTAS on a LTE network:** It is still too early to presume that the efficient TSLRIC+ estimate of supplying MTAS services on a LTE network will be 0cpm because, while MTAS costs are likely to decrease with an all IP network, IP interconnection on any meaningful scale is still five to ten years away.

21. Each of these considerations is discussed in more detail below.

2.1. 2007 WIK model

22. In the Telstra July Submission, Telstra set out its view that the WIK Model results could be used in conjunction with other information to provide a reference point for the Commission to derive a TSLRIC+ price for the MTAS.

23. In the draft FAD, the Commission argues that due to significant industry development there are a number of operational efficiencies that have substantially reduced the actual costs of providing the MTAS below the outputs of the WIK model. This includes the migration of voice traffic from 2G to more cost efficient 3G networks, the continued growth of minutes over time and the decreasing costs of network equipment.

24. Telstra acknowledges that operational efficiencies have been realised with the development in technology in the mobile industry. However, the Commission ignores that, as recently as 2009, the Commission itself claimed that the WIK model provides an estimate of the TSLRIC+ of supplying the MTAS that was somewhat lower than that achievable in reality.[2] Further, it ignores the offsetting factors highlighted in the Telstra July Submission that will, all other things being equal, increase the cost of supplying voice services,[3] that is:

- increased investment costs in base stations to meet additional coverage requirements;
- increased investment in capacity to meet the increased levels of voice traffic compared to 2007; and
- a higher proportion of voice traffic being in the busy hour.

25. Telstra believes that each of these factors suggest that the WIK model outputs may be lower than a TSLRIC+ estimate of the MTAS.

2.2. International estimates and benchmarks

2.2.1. The New Zealand Commerce Commission benchmarking

26. In the Telstra July Submission, Telstra argued that international benchmarking could be used to inform the Commission about the TSLRIC+ of the MTAS in Australia. Telstra cited the range of TSLRIC+ estimates from the NZCC's benchmarking study of NZ2.77cpm to NZ10.89cpm and noted that, consistent with previous assessments by the Commission of international benchmarks, it would be appropriate to take a point higher in that data range. Further, based on work by WIK Consult,[4] Telstra noted that Australia is a large sparsely populated country and therefore, would have relatively higher MTAS costs. On this basis, a MTAS price of 6cpm appears reasonable.

27. In the draft FAD, the Commission suggests that current best practice international benchmarks can assist in identifying the efficient costs of providing the MTAS. However, it maintains that it is

[2] ACCC, *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, July 2009, p. 18.
[3] Telstra, *Response to the Commission Discussion Paper on Domestic Mobile Terminating Access Service (MTAS)*, July 2011, para 142, p. 35 and Appendix F.
[4] WIK Consult (W. Neu), *Cost Sensitivity Analyses with Mobile Cost Models – A study for the Commerce Commission of New Zealand*, 22 December 2008.

difficult to adjust such benchmarks based upon relevant factors relating to the Australian jurisdiction. The Commission cites the NZCC international benchmarking study, and states that:

> "*The New Zealand Commerce Commission identified numerous issues relating to international benchmarking and settled on a large data set including some historical data for a TSLRIC price approach to mobile termination. This resulted in the regulatory body adopting a price path starting from NZ4.28cpm in 2011 to NZ3.56cpm in 2014, approximately 3.42cpm to 2.84cpm in Australian currency. However, the ACCC notes that the 3G penetration is much higher in Australia than in New Zealand.*"[5]

28. Telstra believes that there are a number of important aspects of the NZCC's access determination that need be taken into consideration when making such a comparison, in particular:

a. *The NZCC chose a price point based on the 25th percentile of the range of TSLRIC+ estimates*

The NZCC's benchmarking study was based on cost modelled TSLRIC+ rates from 12 countries and yielded a large sample range for the MTAS cost between NZ2.77cpm to NZ10.89cpm. Australia was included in this sample and the TSLRIC+ estimate from the 2007 WIK model of 5.8cpm was used, rather than the actual 9cpm rate. The NZCC ultimately chose a price point taking the 25th percentile of the range, which yielded an estimated TSLRIC+ of NZ4.28cpm.

This choice of a lower price point on the range was primarily driven by a particular concern that the NZCC had about competitive characteristics of the New Zealand mobile market, which up until 2009 had only two mobile network operators. That concern centred on the prevalence of large retail on-net pricing discounts for voice services and the 80% of voice traffic being carried on-net in New Zealand. The NZCC believed that this could create a barrier to entry for the new mobile entrant, 2degrees, to efficiently expand its network if MTAS rates were set at too high a point on the range.[6] (This particular feature of the NZCC decision was also noted in the submission made by Macquarie Telecom in response to the Commission's June discussion paper.[7]) In contrast, in Australia, the mobile market has consolidated from four to three mobile network operators and the potential to create a barrier to efficient expansion of a new operator has not been an issue.

Furthermore, when the Commission has previously assessed international benchmarks involving such a large range of MTAS prices, it has opted for a more conservative approach. For example, in 2004, the Commission examined a range of TSLRIC+ estimates of 5cpm to 12cpm and settled on the upper bound of the range at 12cpm.[8] Telstra does not support taking an upper bound estimate in relation to the benchmarking at this time, but notes that if such an approach were adopted, it would result in a MTAS price of NZ10.89cpm, yielding a MTAS estimate for 2011 of A8.69cpm.[9]

If instead the median, average or 75th percentile was taken from the international benchmarking done by the NZCC[10] then the TSLRIC+ estimate would be:

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[5] ACCC, *Inquiry to make a Final Access Determination for the Domestic Mobile Terminating Access Service (MTAS) – Draft Access Determination Explanatory Statement*, September 2011.
[6] Commerce Commission, *Standard Terms Determination for designated services of the mobile termination access services (MTAS) fixed-to-mobile voice (FTM), mobile-to-mobile voice (MTM) and short messaging services (SMS),* Decision 724, 5 May 2011.
[7] Macquarie Telecom, *Macquarie Telecom's Submission In Relation To The ACCC's Review Of Domestic Mobile Termination Access Service (MTAS) – June 2011 – Discussion Paper*, July 2011, Appendix A.3, p. 24.
[8] ACCC, *Mobile Services Review Mobile Terminating Access Service, Final Decision*, June 2004, p. xix.
[9] Estimate based upon the Commission's NZ-AUD exchange rate of 0.79826.
[10] Commerce Commission, *Standard Terms Determination for designated services of the mobile termination access services (MTAS) fixed-to-mobile voice (FTM), mobile-to-mobile voice (MTM) and short messaging services (SMS),* Decision 724, 5 May 2011, Table 17, p. 71.

TSLRIC+ estimate from NZ benchmarking & ACCC Currency Conversion Rate		
Median	**Average**	**75th Percentile**
NZ5.15cpm	NZ5.87cpm	NZ6.59cpm
A4.11cpm	A4.69cpm	A5.26cpm

Telstra considers that the choice of a TSLRIC+ estimate based on a 75th percentile of international benchmarks is more likely to provide a conservative estimate of the MTAS cost. In this regard, Telstra notes that when it was considering the issue of the MTAS in 2006, the NZCC outlined that it had made a number of "conservative assumptions", which included selecting a starting cost-based mobile termination rate that was above the 75th percentile.[11] In choosing the 75th percentile as a reference point, the NZCC acknowledged that:

> *"In a number of determinations relating to designated access services under the Act, the Commission has established access prices that are based on benchmarking against prices in comparable countries that have been determined using forward-looking cost based pricing. In recognition of the asymmetric risk of fixing prices that do not reasonably compensate the access provider, the Commission has generally selected a rate at the 75th percentile. By doing so, the risk of setting an access price that is 'too low' is hedged…"*[12]

b. *The Australian currency estimate of the MTAS cost path from NZ is sensitive to the NZ-AUD conversion rate chosen by the Commission*

To derive the approximate MTAS cost path figures in Australian currency of 3.42cpm for 2011 and 2.84cpm for 2014 the Commission used the one month average NZ-AUD exchange rate from August 2011.[13] This approach is inconsistent with the Commission's previous practice and also the practice employed by the NZCC. Both of these alternative approaches – which Telstra considers would be more robust than a one month average – result in *higher* MTAS rates than those derived by the Commission.

Telstra submits that a more robust approach, which incorporates a longer-term fluctuation of currencies, is justified for two reasons. First, the one month average exchange rate employed by the Commission has been taken at a time when the Australian dollar has been performing well against other currencies, such that it is unreliable as a proxy for longer term outcomes. Second, basing a three-year price determination on a one month average exchange rate is inappropriate, because it is not representative of what would likely be experienced over the duration of the three-year price term.

In 2004, when converting the MTAS figures from the UK into AUD, the Commission applied a 10 year exchange rate.[14] If such a currency conversion were employed by the Commission (using data from 12 October 2001 – 12 October 2011)[15] for 2011 and 2014 would yield higher MTAS rates of 3.65cpm to 3.03cpm in Australian currency.

Alternatively, if the Commission were to adopt the NZCC's approach to currency conversion when undertaking international benchmarking – which involves using a blended Purchasing

[11] Commerce Commission, *Schedule 3 Investigation into Regulation of Mobile Termination, Reconsideration Final Report*, 21 April 2006, p. 59.
[12] Ibid, p. 67.
[13] ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS): Draft Access Determination Explanatory Statement,* September 2011, p8.
[14] See ACCC, *Mobile Services Review Mobile Terminating Access Service*, *Final Decision*, June 2004, p. 231.
[15] Data sourced from http://www.oanda.com/currency/historical-rates/, using the daily rates based on midpoint price estimates from 12 October 2001 – 12 October 2011. The resulting average NZ-AUD exchange rate would be 0.85172.

Power Parity and 10-year exchange rate estimate[16] – then the resulting NZ-AUD conversion rate would be 0.91052.[17] This would yield Australian figures for the cost estimates used by the NZCC of 3.89cpm for 2011 and 3.24cpm for 2014 (compared to the 3.42cpm and 2.84cpm figures obtained by the Commission).

As already stated, Telstra believes that using the 75th percentile of the NZCC's sample would be a more conservative approach. Applying the NZCC's currency conversion approach to the 75th percentile results in a TSLRIC+ estimate for the MTAS in 2011 of 6cpm, which is consistent with the rate proposed by the Commission. If the equivalent percentage reduction in the MTAS cost path derived by the NZCC was applied to the 6cpm rate, then in 2014 the MTAS price would be approximately 5cpm, which is considerably above the proposed 3.6cpm figure.

c. *The NZCC rate takes into account higher rates of 3G penetration and should not be considered conservative*

The relevance of higher 3G penetration in Australia versus New Zealand is not apparent in the Commission's analysis, given that the New Zealand rate is based on international benchmarking analysis that already includes a number of countries with high 3G penetration. Telstra agrees that provided there is scale on a 3G network, there will be cost efficiencies in the supply of the voice termination service, which all other things being equal, will result in a lower TSLRIC+ estimate for the MTAS. If the NZCC had used a cost model approach then a downward adjustment may be warranted due to the higher level of data service and 3G services used in Australia. However, the international benchmarks are based on cost model estimates from a number of countries, some of which have extensive 3G network build, take up and usage, e.g. Sweden and the UK.[18] In other words, the benchmarking already takes into account higher rates of 3G penetration; hence the benchmarking estimates should not be seen as being conservative.

d. *NZCC applied a glide path and did not set a price of 4.28cpm*

The TSLRIC+ cost estimate of NZ4.28cpm in 2011 was not the MTAS price set by the NZCC for 2011. The Commission has suggested that the NZCC established a price path starting from 4.28cpm in 2011 and going down to 3.56cpm in 2014. Whilst the NZCC estimated a TSLRIC+ figure of 4.28cpm in 2011 (based on the 25th percentile of the range), the NZCC opted to use a glide path in the initial stages, and did not set a price of 4.28cpm as part of the access determination. The prices it set were as follows:[19]

Effective From	6 May 2011	1 October 2011	1 April 2012	1 April 2013	1 April 2014
MTR for voice MTAS services (NZ cpm)	7.48 {4.28}	5.88 {4.28}	3.97	3.72	3.56

Where { } denotes the MTR that would have applied had the Commission not applied a glide path.

[16] Commerce Commission, *Standard Terms Determination for designated services of the mobile termination access services (MTAS) fixed-to-mobile voice (FTM), mobile-to-mobile voice (MTM) and short messaging services (SMS),* Decision 724, 5 May 2011, p. 67, para 290.
[17] Commerce Commission, *Standard Terms Determination for designated services of the mobile termination access services (MTAS) fixed-to-mobile voice (FTM), mobile-to-mobile voice (MTM) and short messaging services (SMS),* Decision 724, 5 May 2011, Table 17, p. 71. This figure is derived by dividing the Australian WIK cost model AUD TSLRIC+ estimate of the MTAS of 5.8cpm by the converted NZD figure of 6.37cpm.
[18] Ibid.
[19] Ibid, p. iii, para ix.

Using the Commission's NZ-AUD exchange rates, the equivalent Australian MTAS rate would be 5.97cpm and 4.69cpm for 2011, while using the NZCC's conversion factor discussed previously would yield an equivalent Australian MTAS rate of 6.81cpm and 5.35cpm for 2011.

29. Based on the factors outlined above, Telstra believes that the estimates derived by the Commission of 3.42cpm in 2011 and 2.84cpm in 2014 by reference to the NZCC's internationally benchmarked cost estimates represent *lower bound* TSLRIC estimates of the MTAS. Similarly, the 3.6cpm rate proposed in the draft FAD for 2014 does not represent a conservative estimate of the MTAS price. Conservative estimates of MTAS are more likely to be based on a 75th percentile estimate of a benchmarked sample, whereas the 3.6cpm figure appears much closer to a 25th percentile estimate.

30. As outlined above, a more thorough analysis of both the WIK model and the international benchmarking suggests that the rates outlined in the draft FAD for 2013 and 2014 are not conservative estimates of the TSLRIC+ rates. In addition to the matters raised above, Telstra believes that other factors support a higher 2013 and 2014 MTAS price being adopted than that proposed by the Commission in its draft FAD.

2.2.2. Pure LRIC

31. Although Telstra believes that the 3.6cpm MTAS rate proposed by the Commission for 1 January 2014 to 30 June 2014 is not a conservative TSLRIC+ estimate, it could be argued that this rate is a conservative pure LRIC estimate. However, the Commission has – in Telstra's view, rightly – rejected a pure LRIC approach.

32. In response to the Commission's June discussion paper, a number of respondents argued for much lower MTAS rates than the 6cpm considered by Telstra to be appropriate. Some of the suggested rates also appear to be below the TSLRIC+ based MTAS rates proposed by the Commission in the draft FAD. At least some of these proposed rates are based upon pure LRIC estimates of the MTAS. Telstra agrees that pure LRIC is inappropriate. In the Telstra July Submission, Telstra highlighted that such an approach fails to provide for efficient cost recovery of shared or common network costs and does not align to sound economic principles or principles of appropriate cost recovery for an efficient mobile network operator.[20] This point was also highlighted by WIK Consult when assessing the pure LRIC approach in work commissioned for the NZCC.[21]

33. Despite rejecting a pure LRIC approach, the Commission suggests that, in the long run, the differences between pure LRIC and TSLRIC+ will diminish. The timeframe over which the Commission expects this to occur is not clear from the draft FAD. However, based upon cost modelling by Ofcom in the UK, TSLRIC+ estimates were still approximately two-and-a-half times higher than the pure LRIC estimates up until (at least) 2014.[22] For this reason, Telstra suggests that the Commission risks understating the difference between LRIC and TSLRIC+ pricing outcomes, and should therefore adopt a more conservative pricing outcome in its final determination.

2.3. MTAS on a LTE network

34. In deriving the MTAS price estimates, the Commission states that it has used forward-looking LTE efficient cost estimates approaching zero as a lower bound. To support its use of such cost estimates, the Commission notes that it considers the deployment of LTE technology and all IP networks represents best in use technology for mobile networks and mobile termination and that over time, the deployment of all IP networks, such as LTE, will mean that the cost of providing

[20] Telstra, *Response to the Commission Discussion Paper on Domestic Mobile Terminating Access Service (MTAS)*, July 2011, Section 3.4, pp. 27-30.
[21] WIK, *Commentary on issues raised in submissions regarding the Commerce Commission's MTAS investigation and during the conference on 2 and 3 September 2009*, February 2010.
[22] See Ofcom, *Wholesale Mobile Voice Call Termination Statement*, 15 March 2011, Section 7.

the MTAS will tend towards 0cpm. The Commission acknowledges that Australia may not reach that position prior to the expiration of the FAD, but considers that as a LTE network would be deployed by a hypothetical efficient new operator in the market today, it provides a lower bound estimate of the efficient cost of providing the MTAS.

35. As set out in its July submission, Telstra agrees that investments in all IP networks along with increased data usage would lower the efficient costs of supplying the MTAS over time, but for current pricing purposes, IP interconnection is not a relevant issue.[23] Access Providers do not currently operate in an IP world, it is not yet clear how an IP world would develop and service standards for IP interconnect are yet to be defined properly by international bodies. MTAS voice services are still typically supplied using a circuit-switched voice service, which imposes non-trivial and positive costs on suppliers. IP interconnection on any meaningful scale is still five to ten years away.

36. In addition, while zero prices are often referred to in an IP interconnection context, this has primarily arisen due to the zero pricing peering arrangements that are in place for IP interconnection of internet traffic. It is important to note that those interconnection arrangements have evolved commercially in an unregulated environment and reflect outcomes that are aligned with the commercial interests of parties. They do not reflect the notion that there is a TSLRIC+ of zero associated with supplying the services. Instead, they reflect the fact that the transaction costs associated with reaching agreement on a non-zero price are high, relative to the costs of interconnection in that environment. At this stage, it would be speculative to suggest that the current regulated interconnection environment in telephony would evolve to generate similar outcomes. It would also ignore the fact that peering arrangements are often subject to very stringent conditions and strict rules; in particular, if traffic comes out of balance by a certain amount, or where the infrastructure of one party greatly exceeds the infrastructure of another so that one party bears an inordinate portion of the costs, a non-zero "transit" payment fee would apply.

37. Further, in assessing what constitutes "best-in-use" technology in relation to mobile networks, Telstra does not agree with the Commission's assessment that LTE represents an example of a best-in-use technology. Telstra is the first Australian mobile network operator to rollout a LTE network and is currently in the initial stages of its nationwide deployment. In this context, best practice is likely to be a hybrid of 3G and LTE, because LTE does not replace HSPA/3G. Furthermore, it is likely that 2G GSM networks will also continue in use for some time (particularly for roaming purposes). Any mobile operator will need to provide access to 4G, 3G and 2G infrastructure for the foreseeable future in order to support roaming. On this basis, Telstra considers that at the present time LTE should be considered by the Commission as an example of a *best available* technology, rather than a best-in-use technology.

38. The mobile network operators in Australia have a strong track record of investing in and deploying new technologies into each of their networks. As noted by the Commission in the draft FAD, Australia has one of the higher 3G penetration rates in the world.

39. The bigger risk in the mobile telecommunications space is that the Commission may impose and base prices on a best available technology prior to its widespread adoption and deployment by industry. Imposing a new technology standard before it has been established, deployed and used on a widespread basis, risks second-guessing future market developments and failing to appropriately reward any supplier who is a successful early adopter of that new technology. This is a key tenet of incentive regulation and is entirely consistent with outcomes in an effectively competitive market. Firms competing in such markets do experience some form of transitory reward to the extent that they are able to successfully innovate and adopt a new technology or technique in supplying services prior to their competitors. This promotes the

[23] Telstra, *Response to the Commission Discussion Paper on Domestic Mobile Terminating Access Service (MTAS)*, July 2011, Section 3.3.4, pp. 25-26.

appropriate incentives for a firm to innovate in a competitive market environment and is consistent with dynamically efficient market outcomes.

03 OTHER MATTERS

3.1. Differential regulatory treatment of FTM and MTM

40. Telstra welcomes the Commission's decision not to differentiate between FTM and MTM termination. As set out in its July submission and its September supplementary submission, Telstra strongly believes that differential treatment of FTM and MTM termination – in particular, imposing a Bill and Keep (**BAK**) regime for MTM traffic while maintaining a positive price for FTM traffic – would be neither efficient nor in the LTIE.

41. Telstra – and other respondents to the Commission's discussion paper – believes that differential treatment of FTM and MTM termination would lead to significant problems with arbitrage.[24] Telstra further highlighted the higher administrative costs that would result from policing such arbitrage; costs that Telstra believes would negate (and likely outweigh) the cost savings envisaged by the Commission in its June discussion paper.[25]

42. Furthermore, Telstra continues to believe that the asymmetric pricing that would result from differential pricing of FTM and MTM calls would lead to inefficient overuse of the mobile network and inefficient fixed to mobile substitution. Inefficient FTM substitution would decrease allocative efficiency in the overall fixed voice and mobile market and is not in the LTIE.[26]

43. Telstra also notes that maintaining a consistent price for FTM and MTM termination is consistent with the Commission's approach to determining the regulated price of other services, such as the terminating access service, and with the adoption of TSLRIC+ pricing more generally, where the nature of the originating network is irrelevant, as the key issue is what is the efficient cost of providing the regulated service in question. For MTAS, whether the service provided is FTM or MTM, the same service is provided, and the same level of efficient costs are incurred by the service provider. This provides further support for the Commission maintaining a constant price across both FTM and MTM terminating access.

3.2. Fixed to mobile pass through

44. Telstra continues to believe that mandating pass through of MTAS price reductions to FTM retail prices is unnecessary and contrary to the LTIE. As such, Telstra believes that the Commission's preliminary decision not to include a FTM pass through safeguard in the MTAS FAD is appropriate. However, Telstra notes that the Commission refers to the forthcoming retail price control review and its observation that price control sub caps for residential and business FTM services may be appropriate to address perceived high FTM retail prices.[27] Telstra will, of course, provide input to the retail price control review as appropriate, but in the meantime, it is worth noting the following points:

- FTM services are not sold in isolation; rather, they form part of a bundle of fixed voice services that also includes access, local, STD and international calls, as well as some value added services. In the Telstra July Submission, Telstra demonstrated that from 2004-2010, the average revenue per user of the bundle of fixed voice services has fallen by more than the

[24] Ibid, Section 3.3,2, pp. 23-24.
[25] Ibid, Section 3.3,3, pp. 24-25 and Section 4.6.2.1, p. 37.
[26] Ibid, Section 3.3.5, pp. 25-26.
[27] ACCC, *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, March 2009.

reduction in the unit cost of supplying the bundle (including the cost of terminating FTM calls);[28] and

- Furthermore, even if FTM is assessed on a standalone basis (which Telstra believes is incorrect), since 2004, [c-i-c commences] [c-i-c].[29] [c-i-c ends] In other words, Telstra has passed through almost 100% of its cost savings to FTM calls.[30]

45. As set out in its September supplementary submission, Telstra is concerned that mandating a pass through of MTAS reductions to FTM calls would likely hinder innovation in pricing plans. Fixed line operators should have the commercial flexibility to develop competitive solutions to meet customer preferences.[31] Accordingly, Telstra reiterates its view that mandating FTM pass through would be contrary to the LTIE because it is both unnecessary and has the potential to inhibit the efficient operations of service providers.

04 CONCLUSION: PRICE

46. Telstra disagrees with the Commission that the rates outlined for 2013 and 2014 are conservative estimates of the TSLRIC+ rates. Rather, a detailed analysis of the 2007 WIK model and the international benchmarking, together with a more realistic analysis of MTAS on a LTE network, suggests that a more conservative approach is required.

47. Telstra welcomes the Commission's decision not to differentiate between FTM and MTM termination. Such an approach would give rise to arbitrage issues and inefficiencies. Further, maintaining a uniform approach to pricing is consistent with the Commission's approach in relation to other declared services.

48. Finally, Telstra agrees with the Commission's preliminary decision not to include a FTM pass through mechanism in the FAD. This is because such a mechanism is unnecessary and would be contrary to the LTIE.

[28] Telstra, *Response to the Commission Discussion Paper on Domestic Mobile Terminating Access Service (MTAS)*, July 2011, Section 5.2.
[29] [c-i-c commences] [c-i-c] [c-i-c ends]
[30] See Telstra, *Response to the Commission Discussion Paper on Domestic Mobile Terminating Access Service (MTAS) (Confidential Version)*, July 2011, Section 5.2 and Telstra, *Supplementary Submission in Response to the Commission Discussion Paper on Domestic Mobile Terminating Access Services (MTAS) (Confidential Version)*, 19 September 2011, Section 2.2.
[31] Telstra, *Supplementary Submission in Response to the Commission Discussion Paper on Domestic Mobile Terminating Access Services (MTAS)*, 19 September 2011, Section 2.1.
[31] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, p 39-40 per Mason J.
[31] *CCA,* subs 152BCA(3).

05 NON-PRICE TERMS AND CONDITIONS

5.1. Introduction and General Approach

49. In this section Telstra sets out its comments on the non-price terms and conditions contained in the draft FAD.

50. Telstra maintains its view that it is not necessary to include any non-price terms and conditions in the MTAS FAD. This is because, historically, these terms have not been the subject of disputes between parties, who have consistently been able to reach commercial agreement on those terms. Therefore, the inclusion of these matters in the MTAS FAD may create unnecessary regulatory and compliance burdens with no additional benefits.[32] Nonetheless, should the Commission proceed with its proposal to include certain core non-price terms and conditions in the MTAS FAD, Telstra has provided the comments below to ensure that any such terms are balanced, reasonable and within the scope of the Commission's powers under the *Competition and Consumer Act 2010* (**CCA**).

51. As Telstra is both an Access Provider and an Access Seeker in the context of MTAS, Telstra has considered the non-price terms and conditions of the draft FAD from the perspective of both parties and has provided submissions which Telstra believes strike an appropriate balance between the interests of both Access Seekers and Access Providers.

52. In making the FAD, the Commission must take into account:

- the mandatory considerations set out in subs 152BCA(1) of the CCA; and
- any other relevant considerations that are mandatory by implication from the subject matter, scope and purpose of Part XIC.[33]

53. The Commission may also take into account any other matters that it thinks are relevant.[34]

54. In relation to these matters, Telstra refers to the material outlined in Appendix A of the Telstra July Submission.

5.1.1. Structure of Telstra's Submissions

55. Telstra's non-price terms and conditions submissions are structured as follows.

56. In section 5.2, Telstra sets out its concerns in relation to particular non-price terms of the draft FAD. In addition to the submissions in this section, Telstra has also provided, as Annexure A**,** a copy of the draft FAD with the following:

- proposed amendments reflecting the concerns set out in the second section of this submission; and
- proposed additional amendments reflecting the correction of drafting errors and other amendments which, in Telstra's view, do not require substantial explanation.

57. Each of the amendments in Annexure A is explained either by reference to the submission or in Annexure A.

58. Section 5.3 deals with the commencement and expiration date.

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[32] See: Telstra July Submission, Section 6.1, p 46.

[33] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, p 39-40 per Mason J.

[34] *CCA,* subs 152BCA(3).

59. In addition to the submissions below regarding the non-price terms and conditions of the draft FAD, Telstra refers to and relies upon its submissions on non-price terms and conditions in section 6 of the Telstra July Submission.

60. Where these submissions do not respond to a specific part of the draft FAD or the Explanatory Statement, this should not be taken as indicating that Telstra agrees with the Commission's approach.

61. Telstra also wishes to note that, by these submissions, it is responding to the non-price terms and conditions of the draft FAD in the context of the MTAS alone. There may be issues associated with FAD non-price terms and conditions in the context of other declared services which are not relevant to MTAS, and are therefore not raised in these submissions. The fact that a matter has not been raised in these submissions indicates only that it is not relevant to MTAS, and nothing more.

5.2. Proposed approach to particular terms of access

5.2.1. Access Providers' financial exposure under the FAD

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

63. 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 an increase in financial exposure and risk in respect of the supply of MTAS under the FAD.

64. 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 FAD.

65. Under Telstra's commercial contracts (and under clauses 2.3 and 2.6 of the FAD), invoices are issued monthly and are payable within approximately 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. 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 the service to the Access Seeker.

66. This exposure has been changed by the draft FAD.

67. Clause 2.7 provides that, whilst preserving any other rights that the Access Provider may have at law or under the draft FAD, 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 FAD, the Access Provider's financial exposure and risk is, at least, three months revenue, which unnecessarily increases the level of risk incurred by the Access Provider in supplying the regulated service to customers. There is simply no justification for this increase in exposure, which may amount to millions of dollars.

68. 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 FAD are compounded by clause 3.1, 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). Given the suspension provisions in clause 6.1 and the necessity to provide notice and wait 10 Business Days before suspending, that financial exposure could be substantial.

69. 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 10 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 close to 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.

70. Accordingly, Telstra considers that the draft FAD should be amended as set out below in Annexure A, which also sets out an explanation for each amendment.

5.2.2. Billing and Notifications

Key points:

- The terms of the FAD should only apply to the charges set out in the FAD.
- Billing Disputes should be clearly and narrowly defined, given that the Commission proposes 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 they are intended to discourage.

5.2.2.1 Definition of "Charge"

71. In order to ensure that the FAD covers the charges intended to be covered, the definition of "Charge" should be more narrowly defined. "Charge" should be confined to a charge set out in the FAD. That is because charges not the subject of the FAD (for example, network conditioning charges) will be covered by commercial agreements between the parties.

72. The remainder of the submission assumes that the above amendments to the definition of "Charge" will be made.

5.2.2.2 Definition of "Billing Dispute"

73. 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 4. For the reasons indicated in 5.2.2.1 above, it is also important that this only relates to a Charge as limited in those paragraphs.

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

75. First, the words "or an invoice" could be interpreted as covering charges which are not the subject of the FAD (for example, the network conditioning charge, which is not a charge which is covered by the FAD but which is a charge incurred 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 FAD. 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.

76. 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 4, not the Billing Dispute Procedures. Given that an Access Seeker is entitled to

withhold payment if it initiates a Billing Dispute (under clause 2.12), the circumstances in which it is entitled to do so should be limited to those set out above.

77. 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.

5.2.2.3 Taking action for unpaid amounts

78. As set out in section 5.2.1 above, clause 2.7 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 FAD is inconsistent with the Commission's concern to ensure that Schedule 2 *"facilitates recovery of payment for services provided in a timely manner"*.[35]

79. 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.

5.2.2.4 Time period for escalating Billing Disputes

80. Telstra agrees that an Access Seeker should be entitled to escalate a Billing Dispute. However, clause 2.22 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 2.22 should be amended to provide that the time period for escalating a Billing Dispute is five Business Days with the ability to request an extension of up to five Business Days, which the Access Provider must consider, acting reasonably.

81. The revised time period reflects the fact that the Access Seeker is likely to be withholding potentially large sums of money 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.

82. Telstra considers that five Business Days (with a possible extension) 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. Having the shorter default period together with the ability for a possible extension to be granted, where reasonable, strikes the appropriate balance between ensuring that such matters are resolved as quickly as possible and allowing for the fact that some matters might be more complicated and take longer to resolve than others. It is also consistent with the other clauses which allow that, on occasion, it might be necessary for a longer period to be agreed.

83. Therefore, the proposed amendments strike 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.

[35] Commission, Explanatory Statement, p 19.

84. 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 Access Seekers (whose interests are to know the outcome so they can bill their end users appropriately).

5.2.2.5 Consequences of inaccurate invoicing

85. Telstra considers that clauses 2.30 and 2.31 should be deleted.

86. The Commission's rationale for identical provisions to clauses 2.30 and 2.31 in the Model Terms was to discourage an Access Provider from frequently issuing incorrect invoices.[36]

87. However, other provisions in Schedule 2 already provide sufficient and proportionate discouragement to Access Providers from issuing incorrect invoices. In that regard:

- clause 2.10 provides that an Access Seeker is entitled to invoke the Billing Dispute Procedures;
- clause 2.12 provides that an Access Seeker is entitled to withhold payment of the disputed Charge until the Billing Dispute is resolved; and
- clause 2.20 provides that interest is payable on any amount refunded to the Access Seeker.

88. In addition, given the potentially severe consequences for an Access Provider arising out of either of the clauses being triggered, clauses 2.30 and 2.31 could, if included in the FAD, 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.

89. If, despite Telstra's submission, clause 2.30 is to be retained, the following amendments should be made.

90. Clause 2.30 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 2.30 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 implement. It is inappropriate to penalise the Access Provider for an error of which it is not aware.

91. 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 2.30 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 2.30.

92. In addition, clause 2.30 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.

93. 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

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

under the current clause 2.30. If clause 2.30 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.

94. In addition to the reasons set out above, clause 2.31 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 license condition is - as the Commission has previously acknowledged - *"substantial pecuniary penalties of up to $10 million"*.[37] However, clauses 2.30 and 2.31 do not distinguish between inadvertent or unintentional errors and intentional ones. Thus, the consequence of clause 2.31 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 2.30 encourages the Access Seeker to only notify a Billing Dispute when Clauses 2.30 and 2.31 have been triggered in order to take advantage of the high interest rate payable by the Access Provider under clause 2.30. If the Commission is minded to retain clause 2.30 and adopt the amendments proposed by Telstra, this will provide more than enough discouragement to an Access Provider from issuing incorrect invoices.

95. If, despite Telstra's submission, clause 2.31 is to be retained, the following amendments should be made.

96. First, the Access Seeker should bear the onus of triggering clause 2.31 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 2.31. Further, imposing a burden on the Access Provider to monitor invoice inaccuracies in respect of each service covered by the FAD in respect of each Access Seeker, will substantially increase the Access Provider's costs.

97. Second, the triggers for clause 2.30 should also apply to clause 2.31. That is, clause 2.31 should be triggered only in the circumstances set out in paragraphs 91 to 92 above. In addition to the reasons for this amendment set out in paragraphs 91 to 92 above, the threshold for triggering the clause should reflect the severity of the consequences of clause 2.31 for the Access Provider.

98. The above amendments are consistent with the statutory criteria because:

- the clauses in the draft FAD do not promote the LTIE. Efficient investment is not encouraged where an Access Provider can be heavily penalised for an inadvertent error;
- 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
- 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 2.12) and their entitlement to interest (clause 2.20).

[37] Commission, Public inquiry to make final access determinations for the declared fixed line services - Discussion paper, April 2011, p 188.

5.2.3. 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 Ongoing Creditworthiness Information in respect of the Access Seeker.
- The Access Provider should be compensated for the Access Seeker's failure to provide Ongoing Creditworthiness Information or an altered Security.

5.2.3.1 Supply not conditional on provision of Security

99. The Commission states in the Explanatory Statement 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"*.[38] 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 3.1 should be amended to provide that, before the supply of the Service under the FAD to an Access Seeker, the Access Seeker must provide Security to the Access Provider.

100. 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 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 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 FAD so as to have that effect.

101. 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 a substantial period before suspending under clause 6.1. This is because the Access Provider would request the Security at the time that supply is commenced under the FAD. The Access Provider would then have to wait for the provision of Security by the Access Seeker, and only after it becomes apparent that

[38] Commission, Explanatory Statement, p 22.

the Access Seeker has failed to provide the Security could the Access Provider issue a Suspension Notice under clause 6.1 and commence the 10 Business Day Remedy Period which may lead to suspension. During all of this time, under the Commission's proposed wording the Access Provider would be obliged to supply the Service to the Access Seeker, which exposes the Access Provider to an unacceptable and significant credit risk.

102. Telstra's suggested amendment is consistent with the statutory criteria as:

- 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;
- the current clause in the draft FAD 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
- 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 3.3, an Access Seeker must provide security if it is reasonable to do so and such a requirement is in line with normal commercial practice.

5.2.3.2 Amount and form of security

103. Clauses 3.1 and 3.3 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.

104. Such an amendment is necessary because clause 3.3 in the draft FAD 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.

105. 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"*.[39]

106. 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.

5.2.3.3 Alteration of security

107. 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 3.5 as

[39] Commission, Explanatory Statement, p 21.

currently drafted is too restrictive in the circumstances in which it entitles the Access Provider to do so. Thus, clause 3.5 is out of step with commercial practice.

108. The draft FAD limits an Access Provider's right to alter the Security of an Access Seeker to the following three circumstances:

- if an Access Seeker provides Ongoing Creditworthiness Information (**OCI**) and, as a result of that OCI, an Access Provider reasonably requires an alteration to the Security;
- if an Access Seeker fails to provide OCI; and
- if an Access Seeker fails to provide altered Security.

109. 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 MTAS supplied to it by the Access Provider under the FAD. 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.

110. 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 3.5 should be amended to reflect the protection that should be afforded to the Access Provider.

111. 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.

5.2.3.4 Meaning of ongoing creditworthiness information

112. Clause 3.8 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.

113. Such an amendment is needed because some smaller Access Seekers may not be able to provide the types of OCI listed in clause 3.8 (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 3.8 should allow the Access Provider to request "any other information reasonably required to assess the Access Seeker's creditworthiness".

114. 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).

115. 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.

5.2.3.5 Confidentiality undertaking for Ongoing Creditworthiness Information

116. Telstra agrees that an Access Seeker's confidential information should be protected. However, clause 3.9 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 5.

117. If, however, clause 3.9 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.

118. In relation to the form of any such confidentiality undertaking, Telstra has proposed amendments to clause 3.9 which ensure that both parties are required to act reasonably in determining an acceptable form of undertaking.

119. These amendments are 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.

5.2.3.6 Failure to provide ongoing creditworthiness information or altered security

120. If the Commission remains minded - despite Telstra's submissions - to retain clause 2.31, Telstra considers that clause 3.10 should be amended to provide similar rights to the Access Provider that are provided to the Access Seeker under clause 2.31. 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.

121. 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.

122. 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.

5.2.4. General dispute resolution procedures

123. Telstra agrees with the majority of the provisions in Schedule 4 of the draft FAD and agrees that the general dispute resolution procedures should be *"well defined and balanced"*.[40]

124. However, Telstra proposes some amendments to Schedule 4 in order to ensure that:

- the application of the general dispute resolution procedures in Schedule 4 is appropriately confined to the terms and conditions of the FAD; and
- the appropriate dispute resolution procedure (ie either the Billing Dispute Procedures in Schedule 2 or the general dispute resolution procedures in Schedule 4) is used to resolve the dispute.

125. Telstra's proposed amendments are set out in Annexure A.

[40] Commission, Explanatory Statement, p 23.

5.2.5. Confidentiality provisions

Key points:

- The definition of Confidential Information should be amended to clarify that only certain types of information are confidential.
- The permitted uses of Confidential Information should be broadened.
- Clause 5.5 should cover use and disclosure.

5.2.5.1 Confidential Information definition

126. The definition of Confidential Information should be clarified so that it expressly excludes information of an Access Seeker that has been aggregated with similar information such that it cannot be attributed to any particular Access Seeker.

127. The Commission accepts, in its drafting of clause 5.2, 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.

128. 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 MTAS services supplied in a particular area, aggregated across some, but not all Access Seekers who acquire MTAS, 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.

129. 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.

5.2.5.2 Permitted use of Confidential Information

130. The words "referred to in clause 5.2" should be deleted from the opening paragraph of clause 5.4 because the limitations on the type of confidential information that can be used by the Access Provider pursuant to clause 5.4 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 5.4(a) 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 restriction, the underlying principle of ensuring that an Access Seeker's confidential information is only used for appropriate purposes is still retained.

131. 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 clause 5.2 and therefore could not be used under clause 5.4 by the Access Provider for this purpose. Use of such information in this way is common practice currently.

132. In addition, the use referred to in clause 5.4(a)(ii) should be for the purposes of supplying services (generally) to the Access Seeker. Restricting the use of Confidential Information in clause 5.4(a)(ii) to the purposes of the FAD fails to recognise that the supply arrangement with respect to the particular service may not be the only supply arrangement in place between the parties.

133. 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 the same reason, the words, "for the purpose of this FAD" in clause 5.1(a) should be replaced with, "as set out in this FAD".

134. 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.

5.2.5.3 Disclosure of Confidential Information

135. Telstra submits that clause 5.5 should not refer solely to disclosure but to both use and disclosure in order to avoid potential uncertainties. For example, clause 5.5(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 5.4? Accordingly, clause 5.5 should expressly incorporate a reference to both use and disclosure, such an amendment more accurately reflecting how Confidential Information is managed on a day to day basis.

136. Second, clause 5.4(b) 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 FAD.

137. Third, the words "for the purposes of this FAD" should be removed from clause 5.5(a) due to the possible limitations that the words impose, as discussed in paragraph 8382 above. Telstra submits that the words "reasonably required" alone are sufficient to govern appropriate disclosure of Confidential Information to the persons listed in clause 5.5(a).

138. 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.

5.2.6. Suspension and termination

Key point:

The Access Provider should have the right under Schedule 6 to immediately suspend the supply of the Service in circumstances where it is legitimate and necessary to do so.

5.2.6.1 Circumstances giving rise to a right to suspend

139. The Commission states that one of the aims of Schedule 6 is to provide Access Seekers' with an *"assurance that their service will not be indiscriminately suspended or terminated for trivial matters"*.[41] Telstra agrees.

140. However, if Schedule 6 is included in the FAD as currently drafted, Access Providers will face a significant risk because, for example, they do not have the right to immediately suspend supply where the Access Seeker's network or equipment adversely affects the Access Provider's network.

141. Accordingly, Telstra considers that the circumstances in which the Access Provider can immediately suspend or terminate supply of the Service to an Access Seeker should be clearly set out. Whilst these rights would rarely be implemented by Access Providers, they address core safety and protection issues in relation to both personnel and the Access Provider's network.

142. Other than in the context of the various insolvency events set out in clause 6.7, Schedule 6 of the draft FAD does not contain any immediate rights of suspension. In line with the approach in the FADs for the declared fixed line services, Telstra submits that Access Providers should have the right to immediately suspend supply of the Service in circumstances where it is legitimate and necessary to do so. Accordingly, Telstra submits that Schedule 6 should be amended to include the following immediate rights of suspension:

- during an emergency (consistent with the FADs for the declared fixed line services);
- where supply or access poses a threat to safety or the Access Provider's network, or is likely to impede persons responding to an emergency (consistent with the FADs for the declared fixed line services);
- where the Access Seeker's network or equipment adversely affects or threatens to affect the normal operation of the Access Provider's network (consistent with the FADs for the declared fixed line services);
- if the Access Seeker breaches a "key" security or creditworthiness obligation in Schedule 3. 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 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 already given a significant period of time to discharge certain of these obligations elsewhere in the draft FAD. 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.

[41] Commission, Explanatory Statement, p 26.

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 3.1 suggests that if the Access Seeker does not provide the altered Security, it is possible to notify a dispute. However, clause 4.7 appears to require the Access Provider to continue to fulfill its obligations under the FAD. Therefore, clause 3.11 should be amended to clarify that the right to notify a dispute is without prejudice to the Access Provider's rights in Schedule 6;

- if an insolvency event of the kind set out in clause 6.7 occurs. In addition to the ability to cease supply under clause 6.7 when such an event occurs, the Access Provider should also have the option of suspending supply. This will cover situations where suspension (rather than cessation) is a more appropriate response because, for example, there is a reasonable prospect that supply will be resumed in respect of the Access Seeker, notwithstanding the occurrence of the clause 6.7 event. Such an option will also serve the interests of the Access Seeker;
- if the Access Seeker's use of its or the Access Provider's facilities, network or the Service is in contravention of any law and this causes the Access Provider to be in contravention of any law or regulatory obligation. The FAD 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.

143. None of the circumstances set out above are trivial. Further, the circumstances set out in paragraph 142 above expose the Access Provider to substantial financial 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 immediately should be available in such circumstances. Telstra notes that, as an Access Seeker, it would ordinarily expect the imposition of these rights by an Access Provider.

144. It is not in the Access Provider's legitimate business interests to be prevented from suspending supply in the above circumstances, as those circumstances either increase the Access Provider's 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 FAD does not promote efficient investment in infrastructure because an Access Provider will not invest in infrastructure if doing so exposes it to risk.

5.3. Commencement and expiry date

145. Telstra agrees with the proposed commencement date of 1 January 2012, so long as the Commission's decision has been made and published well before then because Telstra does not consider it appropriate for the non-price terms and conditions of the FAD to apply retrospectively. This is because, if the non-price terms and conditions of the FAD applied retrospectively, an Access Provider could automatically be in breach of those terms and conditions. Further, an Access Provider cannot "cure" such a breach by way of, for example, back payment.

146. Telstra agrees with the Commission's proposal to align the expiry date of the FAD with the expiry date of the current MTAS declaration.

06 ANNEXURE A

Telstra's proposed amendments to the draft FAD non-price terms.

07 ANNEXURE B

Confidential information redacted from Telstra's submission. The information contained in this Annexure is confidential to Telstra Corporation Limited.