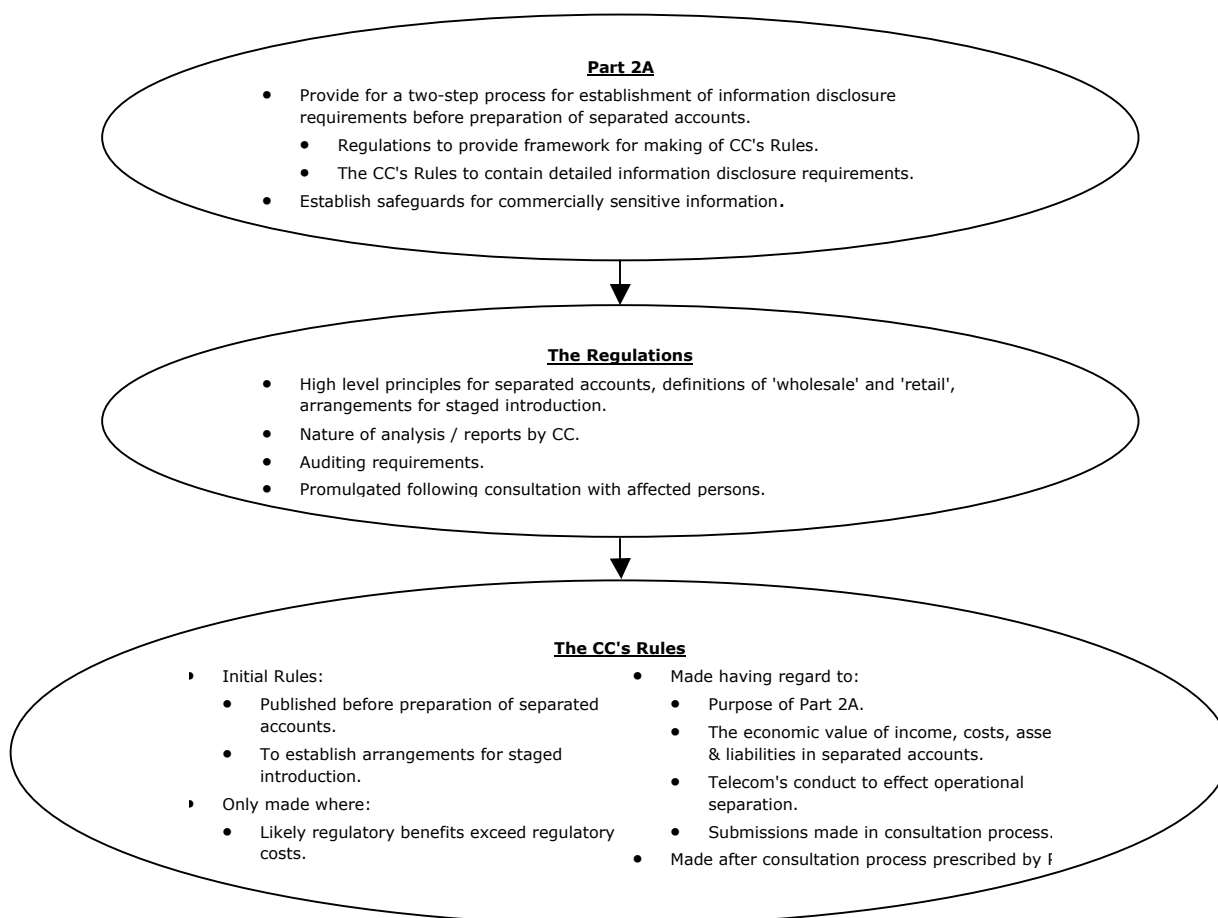

Appendix C: Telecom's Proposals for Part 2A of the Bill - The Accounting Separation Regime

1 Executive summary

- 1.1 The introduction of Part 2A to the *Telecommunications Act 2001* (**Telecommunications Act**) is consistent with Telecom's own moves to separate Telecom's retail and wholesale operations. An accounting separation regime established under Part 2A would provide Telecom with an opportunity to demonstrate that it does not discriminate between its wholesale customers and its own retail operation, in price or non-price terms, in the provision of those services.
- 1.2 As outlined in other parts of this Submission, Telecom is committed to voluntary separation of its wholesale and retail operations, which involves:
- 1.2.1 Separation of retail and wholesale;
 - 1.2.2 Public and binding undertakings on delivery of services and non-discrimination commitments; and
 - 1.2.3 Independent monitoring and reporting of performance against the undertakings by an Independent Oversight Group.
- 1.3 The experience internationally is that accounting separation regimes are expensive, implementation is protracted and the outcomes may be of limited practical benefit for the industry. In addition, the telecommunications industry is inherently dynamic, raising the possibility that industry change may render the introduction of an accounting separation regime superfluous. For this reason, Telecom submits that Part 2A of the Telecommunications Act should confer a discretionary power, rather than impose a mandatory obligation, to introduce accounting separation.
- 1.4 Telecom's moves to establish operational separation will necessitate a reconsideration of the introduction, and form, of any accounting separation regime because:
- 1.4.1 Operational separation is a more interventionist means of achieving substantively similar objectives to accounting separation; and
 - 1.4.2 Accounting separation and operational separation are necessarily inter-related, and any accounting separation regime should support, and work in parallel with, the operational separation undertakings.
- 1.5 For this reason, as well as that discussed in paragraph 1.3 above, Part 2A of the Telecommunications Act should confer a discretionary power to introduce accounting separation. In addition, for the same reason, Telecom submits that:
- 1.5.1 Part 2A should require that any accounting separation regime that is introduced should be consistent with any operational separation undertakings agreed by Telecom and the Crown; and
 - 1.5.2 The scope of any accounting separation regime should mirror the scope of the operational separation undertakings - that is, any accounting separation should be confined to targeted access services'.

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- 1.6 In addition, Telecom's view is that Part 2A of the Telecommunications Act should be designed to achieve the following outcomes:
- 1.6.1 Establish an appropriate and well-drawn purpose provision.
 - 1.6.2 Provide regulatory certainty for access providers and access seekers.
 - 1.6.3 Ensure accounting separation is implemented in a reasonably practicable timeframe.
 - 1.6.4 Strike an appropriate balance between transparency and commercial sensitivity.
 - 1.6.5 Avoid imposing an undue regulatory burden and strike an appropriate balance between regulatory benefits and regulatory costs.
 - 1.6.6 Provide for an enforcement mechanism in which penalties are proportional to the history of compliance with the relevant obligations, and the penalties for breach of a competition rule.
- 1.7 If the legislative framework is to achieve these outcomes, Telecom submits it should:
- 1.7.1 Align the purpose provision more closely with the objective of introducing accounting separation. Once again, this would be achieved by confining the information disclosure requirements by reference to targeted access services.
 - 1.7.2 Confer a discretionary power on the Commerce Commission (**CC**) to establish and maintain an accounting separation regime for Telecom, rather than a mandatory duty to do so.
 - 1.7.3 Include statutory criteria and principles to guide the CC in the exercise of its discretion to determine the detailed rules and methodologies for accounting separation.
 - 1.7.4 Require Regulations to provide more detailed and technical guidance for the exercise of the CC's discretion.
 - 1.7.5 Require the CC to publish Rules prescribing its requirements, before Telecom and other access providers are to produce separated accounts, following a consultation process established by the Act.
 - 1.7.6 Establish procedural safeguards for disclosure of commercially sensitive information and safeguards for a reasonably practicable implementation timetable.
 - 1.7.7 Reduce the proposed penalty from \$1 million to \$250,000.

Telecom's Proposed Legislative Model



1.8 Telecom encourages the Select Committee to give due consideration and weight to ensuring Part 2A of the Telecommunications Act will deliver the outcomes set out in paragraph 1.6 above, rather than simply adopting the legislative framework for information disclosure by electricity lines businesses established by subpart 3 of Part 4A of the *Commerce Act 1986* (**Commerce Act**). The information disclosure regime for electricity lines businesses is inappropriate for the telecommunications industry because it:

1.8.1 Relates to a different industry, with a different market structure.

1.8.2 Has a different purpose.

2 Design principles for legislative framework for accounting separation

2.1 In addition to achieving the objectives of introducing the accounting separation regime, a legislative framework for accounting separation should be designed to achieve:

2.1.1 Regulatory certainty for access providers and access seekers.

2.1.2 An appropriate balance between regulatory benefits and regulatory burdens / costs.

2.1.3 An appropriate balance between transparency and the protection of commercially sensitive information - that is, information that would

confer on competitors to the provider a competitive advantage that is inconsistent with competitive market outcomes.

2.1.4 Implementation over a reasonably practicable timeframe.

2.2 The objectives for introducing accounting separation, and the outcomes discussed in paragraph 2.1 above, predicate the following design principles for Part 2A of the Telecommunications Act.

2.2.1 There should be guidance in the legislation, or in delegated legislation, on the making of the detailed rules for information disclosure under the accounting separation regime, e.g. statutory criteria and relevant considerations.

2.2.2 The body responsible for prescribing the detailed rules for information disclosure under the accounting separation regime should be required to publish the rules prior to, and in sufficient time to enable, the access provider to prepare accounts complying with the requirements of the rules. The arrangements for the staged or phased introduction of those requirements should be set out in the rules.

2.2.3 The rule-making body should be required to follow a prescribed procedure for consultation with stakeholders prior to making, and to have regard to the submissions received in making, the rules.

2.2.4 The requirements in the rules should not be revisited in an unreasonably short period.

2.2.5 Adequate safeguards should be established for:

- Access providers' commercially sensitive information.
- A reasonably practicable implementation timetable.
- The imposition of information disclosure requirements only where the regulatory benefits of those requirements exceed their regulatory costs.
- Preventing undue regulatory burden.

2.2.6 The penalties included in the enforcement regime should be proportionate to:

- The lack of any history of compliance with the accounting separation regime.
- The relative seriousness of a breach of that regime when compared to the greater seriousness of, and the quantum of the penalties for, a breach of the competition rules.

2.3 Precedent from other jurisdictions for each of the above design principles for Part 2A of the Telecommunications Act is set out in Annexure 1 to this Submission.

2.4 The process for issuing information disclosure requirements for electricity lines businesses established by subpart 3 of Part 4A of the Commerce Act is not appropriate for establishing the requirements of the accounting separation regime applicable to access providers in the telecommunications industry because:

- 2.4.1 Subpart 3 of Part 4A of the Commerce Act does not establish an accounting separation regime. Accordingly, the complex issues that arise in respect of establishing an accounting separation regime, necessitating extensive consultation and regulatory certainty to minimise regulatory costs, do not arise under the Commerce Act.
- 2.4.2 Unlike access providers in the telecommunications industry, electricity lines businesses are not vertically integrated into upstream or downstream contestable activities. Accordingly, the issues that arise in relation to disclosure of telecommunications access providers' commercially sensitive information to their competitors in upstream or downstream contestable activities do not arise under subpart 3 of Part 4A of the Commerce Act.
- 2.4.3 There is greater complexity associated with establishing information disclosure requirements for the telecommunications industry than there is in establishing requirements for the electricity industry, necessitating more extensive consultation and regulatory certainty. This greater complexity results from:
- The multi-product nature of a telecommunications access provider's business as compared to the single-product nature of an electricity lines business.
 - The more dynamic nature of the telecommunications industry.
- 2.5 It is no answer to the concerns raised by Telecom regarding the proposed Part 2A that it is based on a legislative model that is effective for requiring information disclosure by electricity lines businesses.

3 Part 2A of Telecommunications Act in current Bill

Wide purpose

- 3.1 Telecom agrees with the alignment of the opening words of the s69A purpose provision with the purpose of Part 2 (set out in s18 of the Telecommunications Act). However, the paragraphs of s69A are too widely drawn and, accordingly, will provide limited guidance to the CC in the exercise of its discretion under Part 2A, with associated regulatory uncertainty.
- 3.2 The objective of accounting separation is to facilitate:
- 3.2.1 The identification of potential vertical leveraging behaviour by Telecom in the provision of access services, including but not limited to predatory behaviour that may contravene s36 of the Commerce Act (e.g. a price squeeze).
- 3.2.2 The negotiation of supply agreements for regulated access services.
- 3.2.3 The administration by the CC of the provisions of the Telecommunications Act that regulate access services, in the provision of which the access provider may engage in vertical leveraging behaviour.ⁱ
- 3.3 However, the objective of Part 2A is not to investigate specific infringements of the Commerce Act or to facilitate the identification of infringements of that Act by

telecommunications providers more generally. Information of this kind should be sought through the CC's investigative powers under the Commerce Act.

- 3.4 A common element of the objectives of accounting separation is that they relate to 'access services' regulated under Part 2 of the Telecommunications Act, as it is in the provision of these services that the Government has determined the 'bottleneck facilities' problem may arise. Yet, the proposed purpose provision contemplates disclosure of information of a kind that bears no relationship to 'access services'. Section 69A contemplates that Telecom disclose information that informs the public 'about the operation and behaviour of Telecom's wholesale and retail business activities and services', where no guidance is provided on the meaning of 'wholesale' and 'retail'ⁱⁱⁱ.
- 3.5 In addition, if the accounting separation regime is to support, and work in parallel with, the operational separation undertakings, the purpose provision for, and resultant scope of, accounting separation should be confined by reference to 'targeted access services'.
- 3.6 The purpose of the information disclosure regime set out in proposed s69A(b) is also too widely drawn, resulting in regulatory uncertainty. It contemplates that access providers, including Telecom, disclose information that informs the public 'about the operation and behaviour of prescribed businesses that provide prescribed services, in order to monitor and facilitate compliance with prescribed applicable access principles', where prescribed businesses and prescribed services are to be determined by the CC in its discretionⁱⁱⁱ. Telecom submits that the purpose of information disclosure should be confined by reference to services regulated under Part 2 of the Telecommunications Act - that is, 'designated services' and 'specified services'.
- 3.7 Telecom urges the Select Committee to revisit the objective of requiring information disclosure and re-consider the purpose set out in s69A.

Duty rather than discretion

- 3.8 Telecom submits that imposing a duty on the CC to establish and maintain accounting separation for Telecom, as currently proposed in s69C, is inconsistent with the design principles set out in section 2 above.
- 3.9 The experience internationally is that accounting separation regimes are expensive, implementation is protracted and the outcomes may be of limited practical benefit for the industry. Further, while the Select Committee may be satisfied that, at this point in time, the regulatory benefits of introducing accounting separation exceed the costs, a change in market conduct or conditions may reverse the balance of regulatory benefits and costs. If the CC has a duty to establish and maintain accounting separation, rather than a discretion, the CC would be compelled to establish and maintain separation even where the regulatory costs of doing so exceeded the benefits.
- 3.10 In particular, Telecom's commitment to voluntary operational separation will necessitate a reconsideration of the case for introducing accounting separation. Where Telecom provides a binding undertaking to effect operational separation, this may change the balance of regulatory benefits and costs resulting from accounting separation. It is appropriate that the CC have a discretion to determine whether to introduce accounting separation, having regard to the regulatory benefits and costs of doing so in light of any commitment by Telecom to disclose information as part of its implementation of operational separation.

Broad discretion

- 3.11 In contrast to the design principles in section 2 above, the CC has a broad discretion to make information disclosure requirements. The CC's discretion is:
- 3.11.1 Not subject to any express statutory criteria or a requirement to have regard to express relevant considerations (and the purpose provision provides inadequate guidance for the reasons discussed above).
 - 3.11.2 Expressly stated to be exercisable from time to time, including the express example of more than once a year (see proposed s69E(1)(j)).
 - 3.11.3 Not subject to any procedural requirements except a requirement, expressed in the alternative, to 'hold conferences *or* consult' (emphasis added) (see proposed s69C(5)).
- 3.12 Likewise, there are few limits on the CC's discretion to perform, and publish, 'analysis' under proposed s69H.
- 3.13 Telecom submits that the breadth of the CC's power to make requirements and perform 'analysis' under proposed ss69C and 69H will have unintended, adverse consequences because:
- 3.13.1 In the absence of statutory criteria conditioning the exercise of the CC's discretion, and express prescription of the considerations relevant to the exercise of that discretion, there will be no regulatory certainty. Without regulatory certainty:
 - The implementation of the regime is unlikely to promote competition in downstream contestable activities.
 - The regulatory costs imposed on access providers are likely to be unduly and unnecessarily high, as they seek to repeatedly align their internal organisation to changed reporting and disclosure requirements.
 - Any enforcement regime will be undermined because of the difficulty of enforcing uncertain obligations.
 - 3.13.2 It is inconsistent with the objective of the Bill's amendments to Part 2 of the Telecommunications Act, which is to remedy the lack of Parliamentary guidance for the Telecommunications Commissioner in administering Part 2.^{iv}
 - 3.13.3 The discretion to issue requirements from time to time, including more than once a year, will result in undue regulatory costs for access providers and increase the difficulty of compliance.
 - 3.13.4 The complexity of the issues involved in determining detailed requirements (e.g. choices of methodology) necessitates a rigorous consultation process, if the resultant regime is to be effective.

Safeguards for commercially sensitive information

- 3.14 There is no express protection conferred on, nor any requirement on the CC to have regard to, the commercial sensitivity of information in determining what information to publish.

- 3.15 One of the objectives of accounting separation (and other measures in the Bill to address discrimination in wholesale supply) is to prevent the undue use of information by access providers.^v The Bill should ensure that measures, such as accounting separation, do not substitute undue use of information by access seekers for undue use of information by access providers.

Safeguards for reasonably practicable implementation timetable

- 3.16 There is a power conferred on the CC to provide for transitional provisions (see proposed s69C(1)(i)) but it is discretionary, rather than mandatory, and there is no guidance on the matters to be taken into account in establishing any transitional provisions.
- 3.17 There is also no requirement in Part 2A for the CC to ensure that, in imposing a requirement, it has regard to the reasonably achievable timetable for implementation.

Penalties

- 3.18 A maximum pecuniary penalty of \$1,000,000 (see proposed s165K(3)) is out of proportion with other penalties given:
- 3.18.1 The accounting separation regime will be newly implemented, giving rise to a significant risk of an unintentional technical or procedural breach both by Telecom and access providers.
 - 3.18.2 A breach does not necessarily involve a contravention of any substantive prohibition, e.g. of a competition rule by a price squeeze.
 - 3.18.3 It far exceeds the maximum penalty in other jurisdictions, e.g. in Australia of AUD\$250,000.
 - 3.18.4 It is not proportional to the maximum penalty in New Zealand for breach of the restrictive trade practices provisions of the Commerce Act (being up to the greater of \$10 million, or either three times the value of the resultant commercial gain or, where the commercial gain is not readily quantifiable, 10% of group turnover), having regard to the far greater seriousness of a Commerce Act breach. Compare Australia, where the relationship is AUD\$250,000 for an accounting separation breach and AUD\$31 million for a breach of the competition rules.^{vi}

4 Overview of Telecom's proposals for Part 2A

- 4.1 To address the shortcomings identified in the preceding section, Telecom submits that Part 2A should be amended as outlined below. The drafting changes proposed by Telecom are set out in **Appendix D** to Telecom's submission.

Purpose

- 4.2 Telecom submits that s69A should be amended to clarify that:
- 4.2.1 The purpose of accounting separation is to require the provision by Telecom of information about the operation and behaviour of Telecom's wholesale and retail business units in the provision of 'targeted access services' and services in the relevant upstream and downstream markets; and

- 4.2.2 The purpose of information disclosure is to require access providers, including Telecom, to provide information about the operation and behaviour of those providers in supplying 'designated services' or 'specified services'.
- 4.3 The concept of 'prescribed' businesses and services should be removed from Part 2A (in particular, in ss69C(2)(b) & 69C(4)(a) as currently drafted) because it:
- 4.3.1 Is unnecessary where the purpose of accounting separation is properly defined;
- 4.3.2 Results in regulatory uncertainty; and
- 4.3.3 Would result in a lack of alignment between accounting separation and Telecom's operational separation undertakings.

Commerce Commission discretion & reasonably practicable implementation timetable

- 4.4 Telecom proposes that Part 2A should provide for a two-step process for establishment of the information disclosure requirements:
- 4.4.1 The Minister to be conferred with a discretion to promulgate Regulations to:
- Require the CC to make rules for either accounting separation by Telecom or information disclosure by access providers, or both; and
 - Establish a framework for, and guidance with respect to, the exercise of the CC's discretion to determine rules.
- 4.4.2 The CC to have an obligation, where required by the Regulations, to publish Rules containing its detailed accounting separation and / or information disclosure requirements.
- 4.5 Part 2A should provide that Regulations may be promulgated, following consultation with affected persons^{vii}, requiring either accounting separation by Telecom or information disclosure by access providers, or both. Any such Regulations must prescribe:
- 4.5.1 For accounting separation, high level principles for:
- The separated accounts, e.g. common cost allocation, imputation analysis, service reporting against non-price KPIs etc.
 - The definitions of 'wholesale' and 'retail'.
 - The arrangements for staged or phased introduction of the regime in a reasonably practicable timetable.
- 4.5.2 The nature of any analysis and report to be published by the CC under proposed s69H.
- 4.5.3 The auditing requirements, i.e. the criteria for the auditor and the nature of the audit engagement.

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- 4.5.4 Any required review of the Regulations, e.g. at the end of a prescribed period; and
- 4.5.5 Any other matter.
- 4.6 Part 2A should provide that the CC:
- 4.6.1 Must publish Rules setting out its information disclosure requirements or 'rules', where required by the Regulations. Any initial Rules for accounting separation must:
- Be published before Telecom has to prepare separated accounts; and
 - Establish arrangements for the staged or phased introduction of the Rules in respect of the following dimensions of accounting separation:
 - The granularity of separations.
 - The valuation methodology.
 - The publication requirements; and
 - The audit requirements.
- 4.6.2 May only make a rule where it is reasonably satisfied that:
- The rule is not likely to impose undue regulatory burden and the likely regulatory benefits of the rule exceed its likely costs; and
 - The rule provides for implementation in a reasonably practicable timetable, having regard to the nature of the rule and the amount of work by the access provider required to implement that rule (including, without limitation, the execution of process and system changes).
- 4.6.3 Must have regard to the following matters in making a rule:
- The purpose set out in s69A (this would be analogous to s19 in Part 2 of the Telecommunications Act, just as proposed s69A is analogous to s18 in Part 2).
 - For accounting separation, the principle that the financial information in the separated accounts in relation to income, costs, assets and liabilities should reflect their economic value - that is, the current value to the access provider of being deprived of that income, cost, asset or liability, where the provider earns a normal economic return.
 - Any submissions made by affected persons on the draft rule in the procedure outlined below.
- 4.6.4 Must follow the following procedure in making any rule:
- Publish the draft rule.

- Invite affected persons to make written submissions on the draft rule within a reasonable period specified by the CC.
- If requested to do so by any one or more of the affected persons, hold a public conference on the draft rule; and
- Publish the final rule, together with written reasons for its decision to make the rule.

4.7 Any Regulations requiring accounting separation must be consistent with any operational separation of Telecom's wholesale and retail business activities agreed between Telecom and the Government. This will, in turn, ensure that any rules made by the CC for accounting separation will also be consistent with any agreed operational separation undertakings.

Safeguards for commercially sensitive information

4.8 Additional provisions should be included in Part 2A which govern the public disclosure of information by the CC. These provisions should provide that the CC must:

- 4.8.1 In making any rules requiring public disclosure of an access provider's information, weigh the benefits of information disclosure and transparency against the costs if a competitor's access to commercially sensitive information confers an advantage inconsistent with competitive market outcomes; and
- 4.8.2 Give the access provider written notice of the CC's intention to publicly disclose information provided by the access provider and consult with the provider within a reasonable period specified by the CC in the written notice.

Penalties

4.9 Proposed s165K(3)(a) should be amended to prescribe a maximum penalty of \$250,000.

ⁱ MED, *Regulatory Measures to Address Wholesale Supply Discrimination Issues and Information Needs*, 28 April 2006 (**MED Wholesale Supply Discrimination Paper**).

ⁱⁱ The Bill does not propose that the terms 'wholesale' and 'retail' be defined, and proposed s69C(b) expressly provides that the CC allocate Telecom's activities to 'wholesale' and 'retail' 'without regard to ... the usual meanings of the words wholesale and retail'.

ⁱⁱⁱ See proposed s69B definition of 'prescribed'.

^{iv} MED, *Functions of the Telecommunications Commissioner*, 20 April 2006.

^v MED Wholesale Supply Discrimination Paper. MED recognises that one form of wholesale supply discrimination is the undue use of information by the access provider, as follows (at p.6):

'Undue use of information - This may arise where an access provider obtains certain information about the customers of its downstream competitors. Based on this information, the access provider can target it [sic] competitors' customers with tailor-made offers and so can restrict its competitors sales and or raise its' [sic] rivals costs'.

^{vi} As a lesser matter, Telecom also contends that intent should be included in the list of sentencing considerations in proposed s156C because of the higher risk of unintentional technical and procedural breaches following the initial introduction of the accounting separation regime.

^{vii} 'Consultation' would be given the common law definition established by the High Court decision in *Air New Zealand Limited and others v The Wellington International Airport Ltd*, CP403/91.

Annexure 1

Precedent from other jurisdictions for design principles

1 There should be guidance in the legislation, or in delegated legislation or another subordinate instrument made under the legislation, on the making of the detailed rules for information disclosure under the accounting separation regime, e.g. statutory criteria and relevant considerations.

1.1 Australia

Rather than prescribe detailed regulatory accounting rules in Part XIB of the *Trade Practices Act 1974* (**Trade Practices Act**), the Act provides for Ministerial directions to the ACCC that prescribe a framework for the exercise of the ACCC's power to make record-keeping rules (**RKRs**). The Minister's *ACCC (Accounting Separation - Telstra Corporation Limited) Direction (No 1) 2003* (**Direction**) establishes a framework which requires the ACCC to ensure that:

- Telstra prepares current (i.e. replacement) cost accounts as well as the existing historic cost accounts.
- Telstra publishes key financial statements for the core interconnect services (i.e. the public switched telephone network (**PSTN**), the unbundled local loop service (**ULLS**) and the local loop service (**LCS**)).
- Telstra provides information to the ACCC which reveals the margins that would be available to it if it were to purchase the core interconnect services at the prices that it charges external access seekers.
- The ACCC publishes the results of the margin analysis referred to above.
- Telstra publishes quarterly information to compare its performance levels in supplying wholesale and retail services in relation to key non-price terms and conditions.

On introducing the direction power into the Trade Practices Act, the relevant Explanatory Memorandum stated:

'[t]he direction power will provide flexibility for the government to introduce accounting separation for Telstra's wholesale and retail operations in a probative and deliberate manner without the complexity of specifying detailed regulatory accounting rules in Part XIB'.

It is left to the ACCC to determine the detailed RKRs.

2 The body responsible for prescribing the detailed rules for information disclosure under the accounting separation regime should be required to publish the rules prior to, and in sufficient time to enable, the access provider to prepare separated

accounts complying with the requirements of the rules. The arrangements for the staged or phased introduction of those requirements should be set out in the rules.

2.1 United Kingdom

In the United Kingdom, the format of the Regulatory Accounts was determined prior to preparation of Regulatory Accounts by BT. In addition, Ofcom and BT undertake a series of bilateral discussions to ensure a common and clear shared understanding of the requirements. BT provides Ofcom with a detailed methodology and procedures document which sets out how it intends to prepare the Regulatory Accounts in advance of their preparation. Telecom understands that Ofcom undertakes to inform BT of any matters in this document, where it requires revision in advance of the preparation of the Regulatory Accounts; in the absence of such notification, the document provides a detailed description of how the Accounts are to be prepared.

2.2 Ireland

Telecom understands that a similar process to that which applies in the United Kingdom applies between ComReg and eircom in Ireland.

2.3 Australia

In Australia, the Direction governs the ACCC's power to make the RKR and the ACCC publishes the RKR, which detail the required accounting rules and methodologies. Both documents are in place prior to, and in sufficient time to enable, Telstra to comply. Both the Direction and the RKR contemplate their application for a number of years. The Direction establishes a framework for, and the RKR prescribe, the staged or phased introduction of the RKR requirements.

- 3 The rule-making body should be required to follow a prescribed procedure for consultation with stakeholders prior to making, and to have regard to the submissions received in making, the rules.

3.1 United Kingdom

In the United Kingdom, the format of the Regulatory Accounts was subject to a transparent consultation process. In addition, Ofcom and BT undertake the series of bilateral discussions to ensure a common and clear shared understanding of the requirements discussed above.

3.2 Ireland

Telecom understands that a similar process to that which applies in the United Kingdom applies between ComReg and eircom in Ireland.

3.3 Australia

In Australia, the Minister's direction power under the Trade Practices Act is subject to an express procedural requirement to first publish a draft of the direction and invite people to make submissions to the Minister on the draft direction (see s151BUAAA(3)). The Minister is also required to consider any submissions to the Minister on the draft direction that are received within the time limit specified by the Minister when the draft direction was published (see s151BUAAA(3)).

4 The requirements in the rules should not be revisited in an unreasonably short period.

4.1 Australia

In Australia, the Direction and the RKR's contemplate the application of the RKR's for a number of years and provide for the staged or phased introduction of the RKR requirements across this period.

5 Adequate safeguards should be established for access providers' commercially sensitive information.

5.1 Australia

In conferring on the ACCC a power to disclose, or require carriers or carriage service providers to disclose, reports prepared in accordance with the RKR's, the Trade Practices Act establishes strong safeguards for the interests of the carrier or provider in commercially sensitive information.

The provisions contain a number of procedural steps to ensure that information is disclosed only where the benefits to the industry outweigh the commercial interests of the relevant carrier or provider, including the requirement that the carrier whose information is to be disclosed is given the opportunity to comment on the proposed disclosure. In addition, decisions by the ACCC on disclosure are subject to review by the Australian Competition Tribunal.

The Explanatory Memorandum to the *Telecommunications Legislation Amendment Bill 1998*, which introduced the relevant provisions, stated:

'The provisions contain a number of checks and balances with the objective of ensuring that reports would only be disclosed where disclosure would contribute to the development of a competitive telecommunications industry but not unduly affect the legitimate commercial interests of carriers or carriage service providers. The first check provides that the ACCC must be satisfied that the disclosure of a report or reports would promote competition or facilitate the operation of the telecommunications-specific anti-competitive conduct and access provisions of the TPA, the international conduct provisions of the *Telecommunications Act 1997* or the Telstra price control provisions of Part 6 of the Telstra Corporation Act...

A second check requires the ACCC, in making a decision whether to disclose or require the disclosure of reports, to have regard to the legitimate commercial interests of the person whose report(s) would be released. *It is expected that the ACCC will not disclose reports where a detrimental impact on the person's legitimate interests would not be justified by the outcomes achieved from the release of that information.*' [Emphasis added] (pp.16-7).

In addition, the protection of commercially sensitive information was a key consideration in designing the Direction governing Telstra's

accounting separation in Australia. While the Direction provides for publication by Telstra of key financial statements for the core interconnect service (i.e. the PSTN, ULLS and LCS), it is not required to publish underlying financial and traffic data that is commercially sensitive (see the Explanatory Memorandum to the Direction at p.4).

- 6 Adequate safeguards should be established for a reasonably practicable implementation timetable.

6.1 Australia

See paragraph 4.1 above.

- 7 Adequate safeguards should be established for the imposition of information disclosure requirements only where the regulatory benefits of those requirements exceed their regulatory costs.

7.1 Australia

The balance between regulatory benefits and regulatory costs was a key consideration of the Minister in designing the Direction, which established the framework for accounting separation for Telstra in its current form. (See Explanatory Statement to the Direction, p.4.)

- 8 Adequate safeguards should be established for preventing undue regulatory burden.

8.1 European Union

Article 5 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) provides that:

'The information requested by the national regulatory authority shall be proportionate to the performance of that task. The national regulatory authority shall give the reasons justifying its request for information.'

Article 8, paragraph 1 provides that:

'Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.'

- 9 The penalties included in the enforcement regime should be proportionate to:

- The lack of any history of compliance with the accounting separation regime.
- The relative seriousness of a breach of that regime when compared to the greater seriousness of, and quantum of the penalties for, a breach of the competition rules (e.g. by price squeezing).

9.1 Australia

The maximum penalty in Australia for a contravention of the RKR in Australia is \$250,000, with no escalation for a continuing breach. A contravention of the competition rules is appropriately considered to be of far greater significance, attracting a maximum penalty of \$31 million for the first 21 days of contravention, and a cumulative increment in the maximum penalty of \$3 million for each day of contravention thereafter.