

23 November 2007

Operational Separation Submission  
ICT Regulatory Team  
Ministry of Economic Development  
PO Box 1473  
Wellington

## TELECOM'S DRAFT SEPARATION PLAN

Submission from the Telecommunications Users Association of New Zealand Inc (TUANZ)

### Introduction

TUANZ appreciates the opportunity to comment on Telecom's draft separation undertakings.

We recognise that Telecom has attempted to reconcile fiduciary obligations to its shareholders with the requirements foreshadowed in the Minister's draft *Telecommunications (Operational Separation) Determination* pursuant to section 69F of the Telecommunications Act 2001, in the context of Telecom's other legislated obligations. The Government's requirements have no other purpose than to improve the ability of various service providers to compete with Telecom in provision of services to end users, and must therefore be at variance with Telecom's commercial objectives.

In our view, the structure and practice outlined in Telecom's Draft Undertakings fall far short of the "robust operational separation" that would be required to meet the objectives of the Telecommunications Act and the Minister's proposed determination. Any undertakings that are accepted pursuant to the Telecommunications Act must further the purposes of that Act, including the section 18 purpose furthering the long-term interests of the end user by means of competition. We understand that the Minister could not accept any undertaking that falls short of those objectives and purposes.

### Comment

The contribution of Telecom's undertakings to development of services in New Zealand should be considered from three aspects:

1. The effectiveness of Telecom's structural arrangements in delivering unconflicted provision of access services to competitive wholesale and retail service providers;
2. The effect of Telecom's proposed implementation schedules on the investment scenarios for competing service providers; and
3. The effect of Telecom's undertakings with regard to Telecom's own investment in services available to New Zealand end users.

1. On the first aspect, in the Attachment we offer specific comment on many of the provisions of Telecom's draft proposals as drafted. These mostly relate to the 108 paragraphs of the undertakings themselves, rather than the implementation schedules. In general, our comments identify what we see as weaknesses in the effective separation of interests between the various parts of Telecom Group. Cumulatively, we consider that Telecom Board, executive and employees working within the proposed regime would have difficulty practising an unconflicted operational separation.

We are concerned that the corporate commercial objectives of Telecom Group can far too easily impinge on the supposedly separate Access Network Services unit and the Wholesale Unit with regard to their dealings with Access Seekers. Telecom Group CEO and Board have undertaken no

limitations on the directions that they may give to ANS. There is insufficient restriction on the flow of commercially-valuable information between ANS and other units of Telecom Group, via the executive, contractors, or advisors. Perhaps most critically, we find that there is still a high probability that the personal incentive arrangements for employees of ANS and of the Wholesale Unit can give such employees and managers a higher personal stake in the commercial success of Telecom Group than in ANS or Wholesale.

Additionally, ANS is set up so that, under Telecom Group direction, it could develop its portfolio of services in a way that marginalises the set of services to which the access obligations and undertakings apply, and steadily replaces them with services not subject to these undertakings. The proposed balance of services between ANS and Wholesale seems designed to push as many customers as possible away from ANS infrastructure access products toward Wholesale bitstream and related products, which would provide Telecom Group not only with higher profit margins, but also greater vertical control of the market and the customers.

Finally, the rules concerning the compliance obligations of Telecom's Board, CEO, staff and even contractors seem insufficiently binding on any party to ensure the compliance of any other party. To be valid, the undertakings must bind the Board and CEO to ensure the compliance of anyone paid by Telecom to perform any relevant task. As drafted, anyone who considers that their interest is not served by following the undertakings is likely to find a loophole in these undertakings.

2. On the second aspect, we consider that current and potential Access Seekers or service providers are better placed than TUANZ to evaluate the detailed and cumulative effect of the lengthy implementation schedules that are proposed, and whether the technical reasons given for these lengthy timetables are valid. However, viewing the proposed implementation schedules from our experience as end users who negotiate service delivery with Telecom and with its competitors, we are concerned that Telecom, under these proposed undertakings, may retain a significant bottleneck power over many current and evolving infrastructure services and the access seekers who depend upon them. Potential investors in competitive services would thus be discouraged from entering the market.

It would appear that in general Telecom proposes to allow itself the maximum possible time to meet EOI or other migration standards. Some of the more extended deadlines may well be longer than the life-cycle of the relevant technologies. For example, the timetables for full implementation of EOI for ANS's core product of UCLL seem likely to restrict the takeup of UCLL and thereby push Access Seekers toward Telecom Wholesale's higher-margin bitstream services. TUANZ understands that, far from all copper trunks being "obsolete" technology, DSL transmission technologies continue to develop rapidly, so that the increased bandwidth that will become available over existing copper lines in the next few years is quite likely to reduce the business case for replacement of much of the access network with optical fibre, while increasing the value of UCLL as a platform for competitive service delivery. Telecom's proposed migration would instead capture the access seekers into bitstream products that Telecom could then migrate to optical fibre, truncating the opportunity for competitive UCLL.

4. Public discussion of the operational separation issue has to some extent been coloured by statements from Telecom about its intention to make significant investments in upgraded networks. TUANZ is disappointed that no investment or technology undertakings have been made in this draft. Telecom has restricted its undertakings to the bare minimum scope required under the existing law. This somewhat diminishes any special consideration that might be given in assessing Telecom's proposal for a less than rigorous operational separation.

Ernie Newman  
Chief Executive

**ATTACHMENT:**

**TUANZ comments on specific text in  
Telecom's Draft Separation Undertakings draft dated  
25 October 2007**

In this attachment:

Text quoted from Telecom's draft undertakings document *is in Italic script.*

Key phrases in the quotes **are highlighted.**

TUANZ comments **are in boxes.**

Absence of a quote or comment on parts of the Draft Undertakings indicates only that TUANZ does not offer a comment on that text, not that TUANZ supports the text.

## **PART 1: DEFINITIONS AND INTERPRETATION**

### *1 Definitions*

#### **1.1**

*In these Undertakings, unless the context requires otherwise:*

*Crisis Management Team means a team within Telecom (including Employees, contractors and agents of that team) formed from time-to-time to manage and facilitate Telecom's response to a crisis;*

Clarity is needed as to whether an employee of ANS or Wholesale Unit who is a member of a Crisis Team remains bound to act primarily in the interest of their separate unit.

*Customer Confidential Information:*

*(a) means any information that:*

*(i) an Access Seeker provides to Telecom in relation to the provision of a Relevant Service;*

Does "Telecom" here include ANS or not? Information provided to ANS should not generally be considered as provided to Telecom.

*or*

*(ii) that Telecom otherwise holds or obtains in relation to the provision of a Relevant Service to an Access Seeker; and that is confidential to and specifically and identifiably about that Access Seeker or a person that is, or intends to become, an end-user of that Access Seeker; but*

*(b) does not include:*

*(i) information that was publicly available or known to Telecom at the time of receipt, or that becomes publicly available other than as a result of a breach of confidentiality;*

*(ii) information that was obtained by Telecom directly from the end-user or from sources that are independent of the Access Seeker;*

Information provided by an Access Seeker to ANS must not be excluded from the confidentiality requirements. Nor should commercial information obtained from any "independent" source be excluded if it concerns commercial relations between an Access Seeker and an end user, and the parties to that commercial relation have reason to consider the information is confidential.

*Employee means a Telecom employee other than the CEO and, in respect of a Telecom Business Unit, includes the manager of that unit and any other **Employee working for that unit;***

A “snapshot” definition is not sufficient to account for people who may be rotating between employment in ANS and employment in another Telecom business unit. Such rotation will be fairly common, and employees will need enduring non-disclosure obligations.

*Mobile Services mean services delivered predominantly by means of Cellular Mobile Systems, and which enable calls or communication sessions to be maintained including when an end-user moves location, including moving between areas served by different wireless transmitters. **For the avoidance of doubt, Mobile Services includes services provided by one Telecom Business Unit to another Telecom Business Unit or Access Seeker for the purpose of enabling a Mobile Service such as site co-location, roaming, cell-site linking and backhaul;***

This definition should be amended to require “exclusively for the purpose”, because some infrastructure and backhaul services may be shared with “non-mobile” services such as data backhaul or UCLL backhaul

*Resale Equivalence means that, where Telecom provides a particular Resale Service that is a Relevant Wholesale Service to an Access Seeker that, (to the extent **such matters are within the control of Telecom**):*

*(a) **the service characteristics and functionality of the Resale Service must be the same as the service characteristics and functionality of the corresponding retail service except for:***

***(i) trivial differences;***

This should apply to all matters that are “within the reasonable control of Telecom”, to limit excuses. It should not be for Telecom to decide case by case what is a “trivial” difference and what is not. In this and all other such definitions, “Trivial” should be replaced with “Differences that do not materially affect the interests of any Access Seeker”.

## **Example**

*The Resale Equivalence standard:*

*(a) requires that, if the new connection lead time for provision of a voice access service is, on average, 10 hours for Telecom’s end-users, then the new connection lead time for the equivalent Resale Service will be, **on average, 10 hours;***

“Average” standards are not an appropriate measure for equivalence, because Telecom’s historic customer base includes all the most remote and difficult sites. Benchmarks should be calibrated to the circumstances in which access seekers are operating, not to Telecom’s total customer base

*(b) does not require Telecom to provide certain functionality that Access Seekers provide themselves. For example, when Telecom provides a Resale Service to an Access Seeker, that service must be capable of allowing the Access Seeker to deliver the same end-user service delivery experience if the Access Seeker provides the same **level of call centre functionality that Telecom provides its end-users;***

The Access Seeker should be provided with exactly the same level of real-time network information as would be available to a Telecom call-centre. An Access Seeker’s call centre can not operate blind-fold, or be forced to refer issues to Telecom, unless the terms are fully specified in the Access Seeker’s SLA with Telecom

*(c) does not prevent Telecom from offering a service that is different by virtue of the wholesale relationship. For example, **Telecom can provide an unbranded or “white label” Resale Service***

This suggests that Telecom might itself flood the market with white label discount services under different brands. As this raises serious possibilities of predatory market behaviour by Telecom when any Access Seeker is entering a particular market segment, we suggest clarification of the intention.

## Undertakings Implementation

1.2 *In these Undertakings, unless the context requires otherwise:*

(a) *Equivalence of Inputs or EOI means that, if Telecom is required to provide Access Seekers with a Relevant Service:*

(i) *Telecom must provide itself and the Access Seekers with the same service;*

(b) *in subclause (a), the same means exactly the same, subject to:*

*(i) trivial differences;*

Consistency is required regarding what is considered trivial. We suggest that a standard for “trivial”, meaning “having no material effect on the ability of an Access Seeker to provide its service” should be added to the Interpretation section (part 2)

*(ii) differences relating to:*

*(A) credit requirements and vetting procedures;*

*(B) payment procedures;*

*(C) matters of national and crime-related security, physical security, security required to protect the operational integrity of the network, or any other security requirements agreed by Telecom and the Commission;*

*(D) provisions relating to the termination of supply;*

*(E) provisions relating to dispute resolution (to the extent necessary because Telecom is one company);*

We consider that this exclusion could be used by Telecom to provide an inferior dispute-resolution outcome to Access Seekers, compared to Telecom business unit.

*(F) requirements for a safe working environment; and*

*(iii) differences that are agreed by Telecom and the Commission in writing;*

Agreement between Telecom and the Commission should not be secret. We propose adding to (iii) “...in writing, following public consultation”.

*(iv) differences that are requested by an Access Seeker and agreed to by Telecom;*

*(v) differences that are specified elsewhere in these Undertakings; and*

*(vi) differences relating to terms required by a residual terms determination under subpart 2A of Part 2 of the Act; and*

This may be too vague – replace “relating to terms” with “reflecting terms” so as to tighten the connection with any determination.

## 2 Interpretation

2.1 *References in these Undertakings to Telecom’s Access Network, Local Access Network, or Regional Backhaul Network:*

*(a) include a reference to those networks as they may be modified or upgraded, or replaced in part, from time to time; but*

*(b) do not include a reference to a network of an entirely different type that is installed in substitution for any of those networks and that is not of a type that is referred to in the Access Network definition.*

Users are concerned with the function of the network, not its technology. This exclusion looks like an invitation for Telecom to direct its capital expenditure to restructure its network so as to reduce opportunities for competitive access.

#### **4 Application of Undertakings limited to Relevant Services**

*Where these Undertakings refer to Telecom or a part of Telecom, the Undertakings only apply to Telecom or the part of Telecom (and to the extent applicable, the Employees, agents and contractors of Telecom or the part of Telecom) to the extent to which Telecom or the part of Telecom provides, purchases, or is otherwise involved with Relevant Services.*

While this is legally consistent with the Minister's Draft Determination, it appears to be a backdown from the position suggested by Telecom while negotiating the scope of the Determination. Telecom offers no undertaking regarding significant network development.

#### **6 Requirement to provide services to Access Seekers limited**

*6.1 Nothing in these Undertakings requires Telecom to provide Access Seekers with a Relevant Service (even if a Telecom Business Unit provides that service to another Telecom Business Unit) unless Telecom is required to provide the Relevant Service to an Access Seeker under a determination made under Part 2 of the Act, a Telecom undertaking registered under clause 6 of Schedule 3A of the Act, or any other law.*

Since Telecom has not offered any undertakings concerning services other than those already scheduled under Part 2 of the Act, this paragraph substantially limits the scope of the undertakings.

6.2 For the avoidance of doubt, prior to receiving a Relevant Service, an Access Seeker will have to:

- (a) be a party to a binding commercial service provision agreement with Telecom for the provision of that service;
- (b) have requested access to the service in accordance with a standard terms determination issued under Part 2 of the Act; or
- (c) have requested access to the service in accordance with a registered undertaking, where that registered undertaking provides complete terms and conditions.

This provision would discriminate in favour of Telecom units as against Access Seekers, because these undertakings do not provide complete terms and conditions for any such services. Any new service introduced to a market ought to be available to Access Seekers at the same time, and on equivalent terms and conditions, as it is available to a Telecom unit.

#### **7 Role of Board and CEO**

*7.1 Nothing in these Undertakings limits, and these Undertakings do not apply to:*

- (a) *the duty or role of the Board, any TCNZ director or the CEO, when exercising powers or performing duties as the Board, a TCNZ director or the CEO, to act in a manner that they, he or she believes is in the best interests of Telecom (or any decision, act or omission done in performing such duty or role); or*
- (b) *any decision, act or omission of Telecom or any part of Telecom (including any Employee, agent or contractor of Telecom or any part of Telecom) where that decision, act or omission is done*

*to act in accordance with the directions of the Board or CEO, whether or not doing so would otherwise be contrary to these Undertakings.*

*7.3 For the avoidance of doubt, the CEO and, where relevant, the Board may approve, amend or otherwise deal with the annual and long-term corporate plans and technology plans (or equivalent documents) of any Telecom Business Unit as they see fit.*

Paragraphs 7.1 and 7.3 appears to invalidate the entire set of undertakings, by providing a universal excuse for non-compliance. The undertakings can only be considered meaningful if the Telecom Board undertakes strict obligation NOT to order, instruct or permit any employee to act in a way contrary to these undertakings.

*7.4 If the Board or the CEO participates in a significant decision of the ANS Unit in respect of a Relevant Network Access Service, or of the Wholesale Unit in respect of a Relevant Wholesale Service:*

*(a) Telecom will provide the IOG with copies of any documentation provided to the Board or CEO that contains the formal recommendation and any documentation that records the different formal decision, if the decision relates to:*

*(i) an investment matter involving capital expenditure in excess of 10% of the annual capital budget of the relevant unit; or*

*(ii) any matter that materially impacts on the operation of these Undertakings; or*

The limitation in (i) should be deleted, because many significant changes affecting the availability of the narrow set of access services covered in these undertakings, could be implemented below this capex threshold. In (ii), the criterion should be “that materially affects the market for Relevant Access Services”, because relevant decisions may be a) about services that are not specified under these current undertakings, but b) have the effect, and perhaps the purpose, of reducing the market for regulated access services.

*(b) in any other case, Telecom will provide the IOG with copies of any documentation provided to the Board or CEO that contains the formal recommendation and any documentation that records the different formal decision, if the IOG reasonably requests them; and*

This criterion for disclosure is too loose. Any case where Telecom Group overrides a recommendation of ANS or the Wholesale Unit ought to be provided to the IOG as a matter of course.

*(c) Telecom will notify the Commission in writing as soon as practicable when documentation is provided to the IOG under clause 7.4(a).*

*7.5 For the avoidance of doubt:*

*(a) approving a recommendation made by the ANS Unit or the Wholesale Unit in respect of a Relevant Service is not participation in a decision for the purpose of clause 7.4;*

We find it odd that 7.4 suggests that if the Board or CEO modifies or rejects a recommendation made by these supposedly separated units is certainly “participation in a decision”, whereas 7.5 specifies that accepting a recommendation is not.

Given the many channels of communication and influence that remain in place between Board, CEO and unit managers (see 7.5 (b) and (c) below), we foresee that “recommendations” will usually be put to the CEO or Board only in a form that will be substantially approved, and thus avoid IOG scrutiny.

*(b) clause 7.4 is not intended to apply to any participation by the CEO in the course of the CEO's day-to-day management of the members of the Executive; and*

*(c) clause 7.4(a) does not apply to any participation of the Board or the CEO in relation to the annual and long-term corporate plans and technology plans (or equivalent documents) of the ANS Unit or the Wholesale Unit.*

Taken together, 7.5 (a), (b), and (c) give Telecom CEO and Board almost unfettered ability to direct ANS and Wholesale. There is little evidence of "arms length" operational separation.

## **8 Inconsistency**

*If a provision in this Part 2 and a provision in another Part of these Undertakings are inconsistent, the provision in Part 2 prevails.*

This simply confirms that all the specific undertakings regarding separation are qualified to the point of being almost meaningless.

## **PART 3: IMPLEMENTATION**

### **13 Scope of business of the ANS Unit**

*13.1 At the Separation Day, the scope of business of the ANS Unit is to provide fixed line local access services (and associated services), and the functions and responsibilities applicable to those services, to other Telecom Business Units and Access Seekers.*

*13.2 The Board or the CEO may amend the ANS Unit's scope of business from time to time provided that:*

- (a) the scope of business is not materially reduced from that provided in clause 13.1;*
- (b) the Board or the CEO gives written notice of any material change to the IOG and the Commission; and*
- (c) the change is consistent with the robust operational separation of Telecom.*

Any change in scope of ANS should require the prior approval of IOG and ratification by the Commission, not just self-attestation, because it may be fundamental to the market effect of the undertakings and amount to a modification of Telecom's legal obligations under the Telecommunications Act.

### **14 The ANS Unit will control the Access Network**

*14.1 The ANS Unit will control the Access Network and the operation of that network.*

*14.2 Unless the context requires otherwise:*

*Access Network means Telecom's Local Access Network and Telecom's Regional Backhaul Network;*

*Local Access Network:*

- (a) means all lines between the network demarcation point at an end-user's premises (or, where relevant, the building distribution frames) and the local telephone exchange distribution frame or optical fibre distribution frame or equivalent facility; and*
- (b) includes:*
  - (i) all cables and lines, including aerial and buried customer lead-ins from the network demarcation point at the end-user's premises, sub-loop, loop and feeder copper, and optical fibre cables;*
  - (ii) the following infrastructure and buildings:*
    - (A) poles, ducts, and manholes;*
    - (B) towers, distribution cabinets, and buildings that are predominantly used to house equipment that forms part of the access network;*

(C) power and building services equipment in the distribution cabinets and buildings referred to in subparagraph (B); and

References in (B) and (C) above to “buildings” should be to “premises”, because there may well be distinct parts of buildings that are “predominantly” or exclusively used for ANS business, while the building as a whole may be “predominantly” used for other services

(iii) all multi-access radio systems, and microwave systems that are used for backhaul between the points referred to in paragraph (a);

(iv) all copper-pair gain and loop conditioning systems, but not including the terminal multiplex equipment;

TUANZ is not satisfied that all multiplexers should be excluded. There may be situations where a terminal multiplexer may provide the only technically feasible access to a subscriber line.

(v) all passive and active optical fibre equipment between the network demarcation point at an end-user’s premises (or, where relevant, the building distribution frames) and the distribution frame or equivalent facility, including the distribution frame or equivalent facility, but not including the optical termination equipment, optical line terminals, PSTN switch, ethernet aggregation switch, or edge router equipment if that equipment is not connected through a distribution frame;

In large commercial premises such as office buildings, some of these items of terminal equipment may define points of access to line ports. TUANZ sees this as analogous to sub-loop unbundling, and believes they should not be excluded from the ANS, so that Access Seekers can compete fairly with Telecom Wholesale in provision of wholesale services.

(vi) all copper and optical distribution frames (including main distribution frames, building distribution frames, cabinet-based frames, and intermediate distribution frames) that are predominantly used for the access network; and

(vii) those information technology support systems that are necessary to ensure the efficient operation, maintenance, and provisioning of the access network and the current and future services that are provided by the ANS Unit, except to the extent that they are provided by Shared Services; but

(c) does not include:

(i) service nodes, including DSLAMs, multi-service nodes, PSTN switches, or other similar devices that are used to deliver value-added services to end-users and that are not required for the normal operation of the access network;

These are all access devices that may, in some situations, be essential to access seekers and not technically or economically feasible to duplicate. To allow for this, the provision should be reworded to specify exclusion ONLY when these devices “are not reasonably required for the normal operation of the access network”. Furthermore, the list of inclusions in (b),(i)-(vii) should not be exhaustive. A final item (viii) could be added: “any other facility essential to the delivery of a local access service by an Access Seeker”.

## **17 Responsibilities of the ANS Unit in relation to the Access Network**

17.1 The ANS Unit will, without limitation, be responsible for:

(a) building, maintaining, operating, and repairing Telecom’s Access Network;

There should be an undertaking to maintain the capability of the Access Network to deliver services at levels at least equivalent to current service standards, so as to give Access Seekers some security in planning and investment for market entry.

(b) making investment decisions relating to Telecom’s Access Network;

(c) determining which services Telecom’s Access Network will be capable of supporting;

(d) determining what enhancements to the functionality of Telecom's Access Network are appropriate; and for the avoidance of doubt, in each case, **in accordance with any applicable plan approved by the Board or the CEO** and the ANS Unit's scope of business.

The scope of the Board and CEO ability to determine ANS planning and investment remains a serious concern. The undertaking should provide criteria against which the Board or CEO could withhold such approval, obliging them to act solely in the commercial interest of the ANS Unit.

## **18 The ANS Unit will provide Relevant Services**

18.1 The ANS Unit will provide Relevant Network Access Services.

18.2 In these Undertakings, unless the context requires otherwise, Relevant Network Access Services:

(c) does not include:

(iv) to avoid doubt, any **Mobile Services**.

The current definition of Mobile Services can be interpreted as including backhaul services that are used in connection with a mobile access service. The definition of Mobile Services needs to be clarified.

### **Example**

The ANS Unit will provide local loop unbundling co-location, and local loop unbundling backhaul (including both distribution cabinet to telephone exchange and telephone exchange to interconnect point). The ANS Unit is not required to supply HSNS **because**, while this service is delivered using assets that form part of Telecom's Access Network, **material service layer assets are also used** in the delivery of HSNS.

The use of material service layer assets should not be the base of an exclusion in any case where the HSNS provides the only access path to an access service that would have been available under legacy transmission technology.

## **20 Fibre to the Premises Access Service**

The ANS Unit will manage any FTTP Access Network Architecture assets that form part of Telecom's Local Access Network in a way that:

(a) is consistent with its obligations under these Undertakings; and

(b) **enables the Wholesale Unit to deliver an FTTP Access Service in accordance with its obligations in clause 65.**

The FTTP Access Service should not be available exclusively to Telecom Wholesale, because it will be a direct substitute for the standard Access Service. When ANS makes FTTP service available to Wholesale Unit, it should also be obliged to make the same service available to Access Seekers on the same terms.

## **23 The ANS Unit will build services ready for Equivalence of Inputs standard**

23.1 When the ANS Unit builds a Relevant Network Access Service after the Approval Date, then the ANS Unit will build that service in a way that will allow the service to be provided on an EOI basis (or, if applicable, the relevant standard of equivalence required by clause 22) as soon as reasonably practicable in the event that Telecom becomes required to provide Access Seekers with the service. **For the avoidance of doubt, it will not be reasonably practicable for the ANS Unit to provide any Relevant Network Access Service on an EOI basis before 31 December 2011.**

This deadline seems excessively lax. “Avoidance of doubt” can not be used to cloak an unwarranted intention to delay competitive access to new services. Any service that is introduced incrementally should be made available to Access Seekers in the same increments. What is “reasonably practicable” should be a judgment made by IOG and confirmed by the Commission, not by the access provider unit.

23.2 Clause 23.1 is subject to any minor **exceptions agreed by the Commission** for a particular Relevant Network Access Service.

**Example**

**Telecom may propose that the ANS Unit build a new service in a manner that is not consistent with achieving the EOI standard as soon as reasonably practicable where:**

- (a) the service is expected to only be supplied to another part of Telecom; or**
- (b) the service is expected to only be supplied to a particular Access Seeker.**

We are not at all comfortable with this suggestion of an undefined range of exceptions, which could significantly change the market for Access Services. If exceptions are to be “agreed by the Commission”, then this should be by a process that is public and allows the Commission to seek the views of Access Seekers. Development of services by ANS uniquely for particular customers, as in examples (a) and (b), could distort the availability of services sought by other Access Seekers.

## **24 The ANS Unit will act on a stand-alone basis and at arm’s-length**

24.2 The ANS Unit will:

(a) have relationships, dealings, and transactions with other Telecom Business Units in respect of Relevant Services that do not include elements that parties in their respective positions would usually omit, and that do not omit elements that parties in their respective positions would usually include, if:

- (i) the parties were acting independently;
- (ii) one party (the ANS Unit) were acting on a stand-alone basis;
- (iii) the parties were acting at arm’s-length; and (b) in respect of Relevant Services, comply with the other Arm’s-Length Rules that apply to the ANS Unit.

**24.3 For the avoidance of doubt, clause 24.2 does not apply in respect of any arrangements put in place for the purpose of complying with clause 93.**

Together with clause 93, this permits Telecom Group to cripple the independence of ANS by limiting its freedom and directing service business to Telecom Wholesale instead.

## **26 Employees working for the ANS Unit will not work for any other Telecom Business Unit**

26.1 No Employee working for the ANS Unit may work for any other part of Telecom.

26.2 For the avoidance of doubt, nothing in clause 26.1 prevents an Employee working for the ANS Unit from **doing work for another part of Telecom** where the ANS Unit and that part have entered into a written agreement on an arm’s length basis for the ANS Unit to do that work on commercial terms. Telecom will supply copies of any such written agreements to the IOG if requested.

“Doing work” ought to be replaced by “providing ANS services” to another part of Telecom. Otherwise, 26.2 opens the door to ad hoc “secondments” that will compromise the independent motivation of ANS employees. In any case, relevant documents should be provided to IOG immediately and as a matter of course, not only as a result of a request from IOG.

## **27. Setting the ANS Unit annual and long-term corporate plans and technology plans**

27.1 The ANS Unit will *develop and submit for approval to the CEO and, where relevant, the Board annual and long-term corporate plans and technology plans (or equivalent documents) of the ANS Unit. Such plans may comprise those parts of Telecom plans that relate to the ANS Unit.*

Because of the special regulatory status of ANS, these plans must, at a minimum, be provided to the IOG for comment before approval by the Telecom Board. Preferably, the IOG should be obliged to inform the Commission of any issues related to competitive access to ANS services, or investment plans that could materially affect Access Seekers as customers of ANS. Any plans not consistent with the registered undertaking would constitute a breach of the undertaking.

## **28 Implementation of plans and day-to-day management**

28.1 The ANS Unit will be solely responsible for:

(a) the implementation of the ANS Unit's annual and long-term corporate plans and technology plans *approved by the CEO or the Board*; and

These parties need limited criteria against which they can reject an annual plan made by ANS, and those criteria should specify that rejection or amendment can only be on grounds of the commercial interests of the ANS unit. Otherwise, the operational separation suggested in para. 30 is a fiction.

## **30 The ANS Unit will act in its own best interests**

All ANS Unit Employees, agents and contractors will act in good faith *and in what they believe to be in the best commercial interests of the ANS Unit within the ANS Unit's scope of business* when making decisions on behalf of the ANS Unit in respect of Relevant Network Access Services.

This is compromised by the conflict of interest in the Board and CEO of telecom toward ANS and Wholesale Unit. ANS Unit's scope of business is determined by Board and CEO.

In any case, employees actions should be in the best commercial interest of the ANS Unit, not qualified by "what they believe", because such belief might include, for example, the honest belief that the long-term interests of ANS and of Telecom Group were inseparable.

## **34 The ANS Unit's Commercial Information**

34.1 The ANS Unit (including its Employees, agents and contractors) will not *disclose ANS Unit Commercial Information in respect of a Relevant Network Access Service to any other part of Telecom* unless that information is also available on an equal basis to any Access Seekers who are being provided with that Relevant Network Access Service.

The information described is available to the CEO and the Board of Telecom, who in turn can direct ANS commercial strategy, while also being responsible for Telecom Wholesale, and not being required to be arms' length in any binding degree.

## **35 The ANS Unit's incentive arrangements**

35.5 For the avoidance of doubt, nothing in this clause limits:

(a) an Employee working for the ANS Unit who has previously worked for another Telecom Business Unit from retaining any incentive remuneration or entitlement received as a result of his or her work for the other Telecom Business Unit; or

(b) an Employee working for the ANS Unit from participating in *Telecom's group-wide Employee benefit arrangements*.

It must be explicit that this exception applies only to employee benefits that are not related to performance incentives – eg not connected in any way to Telecom shares or options.

### **38 Employees working solely for the ANS Unit**

38.2 For the avoidance of doubt, nothing in clause 38.1 prevents an Employee working for the ANS Unit from doing work for another Telecom Business Unit where the ANS Unit and that Telecom Business Unit have entered into a written agreement on an arm's length basis for the ANS Unit to do that work on commercial terms. Telecom will supply copies of any such written agreements to the IOG if requested.

Since this raises immediate issues of conflict of interest, submission of any tasking agreement to the IOG should be automatic and prior, not optional and retrospective, to ensure transparency.

## **PART 5: WHOLESALE BUSINESS UNIT**

### **43 Establishment of the Wholesale Unit**

43.1 Telecom will establish the Wholesale Unit.

43.2 For the avoidance of doubt, if Telecom chooses to include the Wholesale Unit as part of a Telecom Business Unit, then the obligations in these Undertakings that apply to the Wholesale Unit only apply to that part.

TUANZ considers that the Wholesale Unit should have a clear and isolated business function, without any possible conflict of interest due to be part of a unit that might be in competition with Wholesale's external customers. Telecom will have the opportunity to use transfer pricing so as to maximise wholesale prices to its competitors, while taking lower margins and pricing competitively in the retail sector. The proposed level of operational separation for Wholesale Unit does nothing to limit this commercial practice, which is standard practice in vertically integrated service providers.

### **53 Separate management and reporting lines for the Wholesale Unit**

53.3 The Manager of the Wholesale Unit will:

(a) not have any responsibility for the ANS Unit or any of the Retail Units (but may also have responsibility for any other Telecom Business Unit);

Any additional business responsibilities for a wholesale manager should be subject to scrutiny by IOG to avoid conflict of interest – eg if the manager were to be in charge of a facilities unit that has access to confidential information of access seekers

### **55 Wholesale Unit will formulate own Commercial Policies**

The Wholesale Unit will formulate its own Commercial Policies in respect of Relevant Wholesale Services. In formulating any Commercial Policy for a Resale Service, the Wholesale Unit may take into account the fact that the Resale Service is based on a corresponding retail service, and any consequences this may have for the Resale Service.

This appears to say that Wholesale has no obligation to offer any resale service if Telecom retail units object. This would make a farce of any non-discrimination provisions.

### **59 Wholesale Unit's Commercial Information**

59.1 The Wholesale Unit (including its Employees, agents and contractors) will not disclose Wholesale Unit Commercial Information in respect of a Relevant Wholesale Service to any other part of Telecom unless that information is also available on an equal basis to all Access Seekers who are provided with that Relevant Wholesale Services.

59.2 Clause 59.1 does not apply to any disclosure that:

(a) relates to a Relevant Wholesale Service that the Wholesale Unit is not required to provide Access Seekers with and that the Wholesale Unit is not providing to an Access Seeker;

(b) is **necessary operationally** to enable the Wholesale Unit to provide a Relevant Service in accordance with these Undertakings;

There is a danger that this loose provision could be used as an excuse for release of competitively sensitive information. At a minimum, the IOG must have responsibility for setting and overseeing standards for “operationally necessary”

## **60 Wholesale Unit’s incentive arrangements**

60.1 All incentive remuneration for Employees working for the Wholesale Unit will reflect solely the objectives and performance of the Wholesale Unit and, if Telecom wishes, any other Telecom Business Unit (other than the ANS Unit) that manages the provision of wholesale services to Access Seekers.

60.5 For the avoidance of doubt, nothing in this clause limits:

(c) **the Manager of the Wholesale Unit from receiving incentive remuneration that reflects the objectives and performance of Telecom as a group, so long as that incentive remuneration is not more than 80% of his or her total incentive remuneration.**

This is totally inappropriate. The Manager, of all people, should have incentive remuneration that is linked exclusively to the performance of the Wholesale Unit. The 80% loading to Group performance constitutes an unacceptable conflict of interest.

## **62 Employees working for the Wholesale Unit**

62.3 For the avoidance of doubt, nothing in clause 62.1 prevents an Employee working for the Wholesale Unit from doing work for the Retail Units where the Wholesale Unit and the relevant Retail Units have entered into a written agreement on an arm’s length basis for the Wholesale Unit to do that work on commercial terms. Telecom will provide copies of any such written agreements to the IOG **if requested.**

As for ANS, provision of these secondment agreements to IOG should be automatic and prior, for transparency.

## **65 FTTP Access Services**

65.1 **The Wholesale Unit will provide a FTTP Access Service to the Retail Units and Access Seekers in areas where Telecom has deployed an FTTP Access Network Architecture.**

We recognise that FTTP is not a declared service and therefore Telecom has no pre-existing obligations on it. However, at least in any case where an optical fibre transmission path has replaced a copper line transmission path, then the UCLL access obligations ought to apply. Otherwise, bitstream and other wholesale products become the only option for an access seeker, and the competitive opportunities are significantly reduced because ANS is not offering a service to Access Seekers.

65.4 For the avoidance of doubt, **nothing in these Undertakings requires the Wholesale Unit to provide a FTTP Access Service to an Access Seeker if the Access Seeker refuses to provide Telecom with a similar service in any part of New Zealand**

While we recognise that reciprocal access may, case by case, be good for competition, it is not appropriate that Telecom be able to demand reciprocal access in all cases.

These undertakings are being provided by Telecom as an alternative to a regulatory determination that the Government may make because of Telecom’s market dominance. Some non-Telecom FTTP access providers might have a very small business that could not survive without the full retail access customer business. Telecom should not be allowed to discriminate against such an

Access Seeker by withholding access rights. The availability of reciprocal FTTP access could reasonably be taken into account in the commercial terms of an access contract.

## **66 IP Interconnection**

66.4 For the avoidance of doubt, nothing in these Undertakings require Telecom to provide IP Interconnection to an Access Seeker if the Access Seeker refuses to provide Telecom with a similar service on commercial terms that are fair and reasonable in the circumstances.

TUANZ is concerned that a demand for reciprocal IP interconnection could be used to discriminate against local competitors to Telecom's ISP services or other IP-based services. The definition of "fair and reasonable" terms must be agreed with the IOG and not a matter of argument.

## **PART 6: RETAIL UNITS**

### **70 Employees working for the Retail Units may not work for certain other units**

70.1 No Employee working for a Retail Unit may work for the ANS Unit, the Wholesale Unit, or any other Telecom Fixed Network Business Unit.

70.2 For the avoidance of doubt, nothing in clause 70.1 prevents an Employee working for a Retail Unit from doing work for a Telecom Fixed Network Business Unit where the Retail Unit and that Telecom Fixed Network Business Unit have entered into a written agreement on an arm's length basis for the Retail Unit to do that work on commercial terms. Telecom will provide copies of any such written agreements to the IOG if requested.

Arrangements for retail employees to work in ANS or wholesale must be notified, in every case, to the IOG, without waiting for IOG to stumble upon such arrangements. This applies to all cross-divisional work arrangements.

## **PART 7: TELECOM FIXED NETWORK BUSINESS UNITS**

### **Information**

74.1 Each Telecom Fixed Network Business Unit (including its Employees, agents and contractors) will not disclose that unit's Customer Confidential Information to the Retail Units unless the Access Seeker to which the information relates consents.

74.2 Clause 74.1 does not apply to any disclosure of that unit's Customer Confidential Information that is necessary operationally to enable the Fixed Network Business Unit to participate in the provision of a Relevant Service in accordance with these Undertakings.

The precise scope of such "necessary" information must be determined in advance by the IOG, to avoid inadvertent or dubious stretching of the definitions by employees with incentives fixed on Telecom overall performance.

## PART 8: ENFORCEMENT AND OVERSIGHT FOR COMPLIANCE WITH SEPARATION PLAN

### 77 Appointment of members of the IOG

77.4 For the purpose of deciding whether a person has a material conflict of interest, the Board will have regard to whether the person is:

(e) **a material shareholder in Telecom or in any other telecommunications provider.**

Due to the complex possibilities of indirect shareholding, the Board should undertake to maintain, and make available to the Commission, a confidential “Conflict of Interest register” that lists any direct or indirect shareholdings (eg family, company or trust shareholdings) that could be construed as presenting a conflict of interest for an IOG member. A declared interest will not necessarily prevent a person from participating in the IOG, but IOG members with a significant declared interest should be expected to recuse themselves from particular decisions affecting Telecom group financial performance.

## PART 9: PARTICIPATION IN POLICY AND DISCLOSURE OF CERTAIN INFORMATION

### 87 General rules applicable to all Employees

87.4 **The Arm’s-Length Rules do not apply to any Employee performing the function of an access planner to the extent necessary to enable that Employee to perform the ordinary function of an access planner for the purposes of the day-to-day management of Telecom’s network.** Telecom will provide a list of Employees performing the role of an access planner to the IOG annually. Telecom will provide information on the function of access planners to the IOG if reasonably requested.

We are not aware of any reason why access planners should be generally exempt from arms length rules. The function of an access planner will be intimately connected to the interests of Access Seekers as well as to Telecom business units. If anything, access planners should be subject to even more stringent arms length rules than other employees, with a code established by the IOG to ensure that they do not transgress any of the arms-length provisions.

87.5 No Employee, other than an Employee working for the ANS Unit, will, in respect of Relevant Network Access **Services that the ANS Unit is required to provide Access Seekers with:**

This paragraph implies that Telecom employees are under no restriction in their dealings with ANS unless it is in relation to “required” services. It begs the question as to what services other than “required” services ANS will provide, whether these may affect the market for “relevant” services, and the extent to which the commercial strategies of Telecom business units will be aimed at directing the market away from “required” services to unregulated infrastructure services (eg Telecom business units demand accelerated deployment of FTTP, which de facto shortens the life of UCLL competitive access options).

### 88 Rules for Participation in Policy

88.1 **Part A Persons may Participate in Policy made or formulated by the ANS Unit** by:

If “robust separation” is to be more than a hollow concept, then the ability of the Board to direct ANS must be limited to directions that would be made by a fully independent ANS Board – ie on criteria solely related to the financial performance of ANS, not to performance of Telecom Group as a whole.

88.5 For the avoidance of doubt, clause 88 does not limit:

(a) *Part A Persons from participating in the business of the ANS Unit or the Wholesale Unit if that participation is not Participation in Policy; or*

(b) *the duties or roles of the Manager of the ANS Unit in respect of the ANS Unit, the Manager of the Wholesale Unit in respect of the Wholesale Unit, TCNZ's directors, the CEO or the Board in accordance with clause 7.*

This allows far too broad scope for Part A persons committed to Telecom Group performance to influence the behaviour of ANS. Any participation of Part A persons in ANS must be under specific and transparent terms of reference approved by the IOG.

## **89 Rules for Part B Persons in relation to Commercial Information**

*89.1 The ANS Unit or the Wholesale Unit may disclose Commercial Information of that Unit to a Part B Person provided that:*

(a) *the Part B Person has a legitimate need for the information;*

A formal definition is needed for “legitimate need”, because the ordinary meaning would suggest that any person with an interest in Telecom Group performance could consider limiting the effects of competition to be a “legitimate need” with regard to group performance.

*89.3 Any summaries of Commercial Information provided to a member of the Executive under Clause 89.2 will:*

(a) *contain no more information than is reasonably necessary to enable the Executive member to perform their role*

Executive members have duties to advise on the commercial strategies of Telecom Group, which presents a conflict of interest with the operationally separated ANS and Wholesale units. Part B persons should not be permitted to receive any more information than is necessary for them “to ensure the supply of relevant services to an Access Seeker or Access Seekers”.

## **90 Rules for Part C Persons in relation to Customer Confidential Information**

*90.1 The ANS Unit or the Wholesale Unit may disclose Customer Confidential Information of that unit to a Part C Person provided that:*

(a) *the Part C Person has a legitimate need for the information*

In all of this provision, the term “legitimate need” must be qualified to specify that only the need to supply the relevant service to each customer is a “legitimate” need in this context. This can include, for example, aggregated demand forecasting or plans for transition between services.

## **PART 10: MISCELLANEOUS PROVISIONS**

### **93 Consultation with Access Seekers about which unit they prefer to deal with**

This provision appears to set up an opportunity for the Wholesale Unit to acquire exclusive rights to provision of certain ANS services if “a significant number” of existing Access Seekers agree to Telecom’s proposal. It would allow Telecom to make such an offer very tempting to certain large customers, but with the result of removing significant market share from the independent management of ANS.

We consider this provision should be removed altogether from the undertaking, since any customer who wishes to deal through the Wholesale Unit will in any case always have that option available.

There can be no justification for preemptively excluding ANS from negotiation with Access Seekers.

## 94 Force majeure

94.3 Telecom will not be in breach of these Undertakings if it fails to meet an obligation under these Undertakings to the extent that, and for as long as, such **failure is as a result of a force majeure event**.

The validity of a *force majeure* excuse must be attested by the IOG or the Commission, not simply asserted by Telecom. Add to the last sentence of 9.3 “.. that is accepted as such by the IOG and the Commission”

## 95 Telecom will establish arrangements to ensure compliance

95.2 Where Telecom is required to ensure compliance with these Undertakings by its contractors, Telecom’s obligation is to **use its best endeavours** to obtain the agreement of those contractors to the relevant undertaking, but Telecom will not be in breach of these Undertakings if agreement cannot be obtained from a particular contractor or if, despite **Telecom’s best endeavours** to prevent a breach, the contractor breaches the Undertakings.

Given the significant role of contractors in infrastructure deployment, we consider this obligation on Telecom to be inadequate. Telecom should specify that compliance with any relevant aspect of the undertakings is a condition of any new or renewed contract for supply of related services. That then makes the undertakings a part of the “binding commitments” on contractors.

95.3 For the avoidance of doubt, nothing in these Undertakings requires Telecom to obtain the agreement of, or endeavour to procure, any contractor to act other than:

- (a) in accordance with the contractor’s binding contractual commitments; or
- (b) **in that contractor’s own best interests** unless the contractor is acting on behalf of Telecom.

Contractors should not be excused on own interest grounds, any more than Telecom itself. This loop-hole would tempt a Telecom business unit to simply “outsource”, to an immune contractor, any matter on which it might choose to default on the undertakings.

## 96 Undertakings do not limit outsourcing

96.1 Nothing in these Undertakings limits Telecom’s ability to contract with any other person to operate any of Telecom’s assets or to perform any of Telecom’s functions or to carry out any activities in respect of Relevant Services that would otherwise be carried out by Telecom, provided that:

- (a) Telecom will **use its best endeavours to obtain the necessary agreement** of that person to ensure that the terms of the outsourcing subject the other person to the same obligations as would be imposed on an Employee working for the Telecom Business Unit whose business is being outsourced

Telecom controls all outsourcing contracts and has no excuse not to ensure flow-through of Business Unit obligations to relevant contractors. Best endeavours is too weak.

## 99 Advisors

99.1 Telecom will ensure that its selection and appointment of advisors does not circumvent the intent of these Undertakings.

99.2 For the avoidance of doubt, nothing in these Undertakings prevents Telecom from engaging **the same advisors to advise more than one Telecom Business Unit**.

Any advisor who advises more than one Business Unit must be subject to the rules that apply to employees of those units with regard to these undertakings.

### **104 Failure to comply with these Undertakings**

*Telecom will not be in breach of these Undertakings in circumstances where Telecom fails to meet a requirement of these Undertakings and:*

*(a) the failure to comply is trivial or de minimus;*

The criterion for this limitation should be “has not materially affected the interest of any Access Seeker”.

### **105 Employees working for Telecom**

*Nothing in these Undertakings prevents an Employee working for one part of Telecom from ceasing work for that part and working for another part of Telecom.*

Such employees should be subject to the kind of non-disclosure obligation that is common in competitive professions, and that would apply to employees of one unit doing work for another unit as set out in earlier provisions. Even with non-disclosure obligations in place, we are aware that many Boards would actually require a period of quarantine between ceasing work in one area and beginning work in an area where a conflict of interest, or improper advantage, might occur.

## **SCHEDULE 1 - TRANSITION TO EQUIVALENCE**

### **1 OVERVIEW**

*9 The Minister’s determination also recognises that in some circumstances it may be preferable for Telecom to focus its resources and attention on accelerating the deployment of next generation infrastructure and services rather than on converting old services and systems which are not part of the long term future of telecommunications markets. If New Zealand can avoid spending time and money on legacy services, the outcome is a better migration plan for the services that will be the focus of market developments and competition in the future, and a better result for all end users.*

We are not convinced that Telecom’s vision of future market developments is necessarily the same as the best competitive environment. A migration that favours wholesale bitstream services while eliminating UCLL services may seriously hamper competition, with immediate effect.

### **Impact of future resale obligations**

*23 The milestones in the migration plans that follow have been developed assuming there is no obligation on Telecom to resell the Telecom Retail services that consume equivalence based input services. A resale obligation would add significant cost and complexity to the task of re-engineering the retail services.*

*For example an obligation to resell Retail Broadband Services would mean that Telecom would not be able to produce a new Retail Broadband Service that consumes BUBA and/or EUBA until about six months after the currently proposed date of 31 December 2009.*

TUANZ is skeptical of the claim that resale services would handicap service development. In some situations a resale model may be more commercially viable than a wholesale model and access seekers should reasonably expect such services to be available.

## 5 UCLL BACKHAUL MIGRATION PLAN

### Explanation

33 UCLL Backhaul is a generic service that provides transport from the Telecom exchange (or equivalent facility) to the nearest available point of interconnection (NAPOI) for the Access Seeker, and **complements the UCLL service.**

We are concerned that these services, in the context of the current proposed undertakings, may be available only where Telecom has not yet implemented its FTTN cabinetization plans. The undertakings would be more meaningful if the service definition ensured that UCLL backhaul would include any transmission technology necessary to the provision of UCLL services anywhere in the network.

### BUBA MIGRATION PLAN

52 From 31 December 2009, the Retail Units will consume Clothed or Naked BUBA in the delivery of Retail Broadband Services provided to new customers (except where extenuating circumstances apply). To do this **the Retail Units need to develop:**

52.1 the network technology associated with a retail ISP (such as authentication and traffic management), with appropriate interfaces to the Wholesale Unit BUBA input product;

52.2 the sales order and service management capabilities to order, provision and pass faults across to the Wholesale Unit via the B2B gateway provided as part of Front End Equivalence; and 52.3 the billing and payment management capability to make payments to the Wholesale Unit for BUBA and EUBA inputs and bill end customers.

We are concerned that basing this migration on the time taken by Telecom's retail units is not a fair response to the readiness of Access Seekers to bring their own Layer 3 services, such as authenticating and packetshaping, to the UBA Layer Two service, which could be made available much more quickly as a wholesale service.

### EUBA MIGRATION PLAN

61 The first key milestone in the EUBA migration plan is the launch of the EUBA service following the finalisation of the Commission's Standard Terms Determination. The Commerce Commission is addressing both BUBA and EUBA in the same Standard Terms Determination. The Standard Terms Determination is expected to provide **for two EUBA variants (40kbps and 90kbps), and for the possibility of additional EUBA variants to be added to the Standard Terms Determination at a later stage. This migration plan sets out milestones that relate only to the 40kbps and 90kbps variants.** If additional EUBA variants are added to the Standard Terms Determination at a later stage, Telecom will need to develop an EOI migration plan for these new variants and get the Commission's approval for this plan in accordance with clause 47 in the main body of these Undertakings.

These proposed service bitrates would seem to be unnecessarily limited, far below current broadband standards, and not adequate for voice telephony.

## RESALE SERVICES

### Unmet broadband demand

91 Unmet broadband demand refers to customers that would purchase broadband services, but are in locations where the network capacity to provide the service does not exist. The **Wholesale Unit is able to capture information on this unmet demand for broadband services by geographical location, so as to better prioritise its roll-out of additional capacity or capability.**

92 *The Wholesale Unit will develop and make available an equivalent process by which service requests relating to broadband in areas where limited broadband capacity or capability is available are captured, and when a decision is made to install broadband the Retail Units and other Access Seekers are treated on a first in first served basis.*

The wholesale unit should not, in these matters, have any privileged access to information beyond what is available to other Access Seekers. Aggregated demand information should be maintained by ANS, who would plan service development without discrimination between demand for services favoured by Telecom Wholesale and demand for services favoured by Access Seekers.

## **ISDN**

### ***Binding undertakings***

128 *The key reason why Telecom is not forcing migration on customers is that many business customers have significant investment in equipment (such as PBXs) that is completely dependent on the current ISDN standard and functionality. While many of the new PBXs launched to the market in the last two or three years can be upgraded to run an IP trunk interface, the majority of PBX users today (Telecom estimates up to 70% of the market) have equipment that cannot be upgraded.*

The migration of PBX off ISDN must be conducted under an industry-wide plan based on consultation with end user owners of PBX systems. Where PBX “upgrade” is not possible, end users and Access Seekers must have the opportunity to employ compatible solutions such as third-party gateways and not be locked into Telecom’s preferred product offerings.

## **SCHEDULE 5 - WHOLESALE UNIT EMPLOYEE EQUITY SCHEME**

*Telecom may choose to offer Telecom equity to an Employee working for the Wholesale Unit as part of the long-term incentive component of the Employee’s remuneration package. If Telecom chooses to offer Telecom equity to an Employee working for the Wholesale Unit, the equity will be offered in accordance with the following requirements:*

- 1 *the total maximum value of the Telecom equity offered in a financial year will be 20% of the Employee’s total remuneration. For the avoidance of doubt, the value of the shares will be determined at the date of the offer using the value Telecom uses to calculate the equity grant; and*
- 2 *the equity will be provided in the form of restricted shares or share options. The date at which the shares become unrestricted, or on which share options can be exercised, will be determined at the time of the offer, but will usually be 3 years after the date of offer. Performance and/or employment criteria must be met in order for the restricted shares or the share options to be exercisable.*

This scheme creates a strong personal incentive for a wholesale unit employee to favour Telecom’s retail units against other wholesale customers. The importance of this effect is greater because the proposed undertakings, as structured, will generally tend to drive potential Access Seekers toward use of wholesale products (such as bitstream and FTTx) rather than ANS products (such as UCLL and backhaul).