



Australian
Competition &
Consumer
Commission

Telecommunications
Final Access Determination
Inquiries
Non-price terms and conditions and
connection charges for fixed line
services

Draft Decision

March 2015



Australian Competition and Consumer Commission

© Commonwealth of Australia 2015

This work is copyright. In addition to any use permitted under the Copyright Act 1968, all material contained within this work is provided under a Creative Commons Attribution 3.0 Australia license, with the exception of the Commonwealth Coat of Arms and the ACCC logos.

The details of the relevant license conditions are available on the Creative Commons website, as is the full legal code for the CC BY 3.0 AU license.

Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, ACCC, GPO Box 3131, Canberra ACT 2601, or publishing.unit@acc.gov.au.

Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

Parties who wish to re-publish or otherwise use the information in this publication must check this information for currency and accuracy with the ACCC prior to publication. This should be done prior to each publication edition, as ACCC guidance and relevant transitional legislation frequently change. Such queries should be addressed to the Director Publishing, ACCC, GPO Box 3131, Canberra ACT 2601, or publishing.unit@acc.gov.au.

www.accc.gov.au

Contents

List of abbreviations and acronyms	i
Glossary.....	ii
Executive Summary.....	v
1 Introduction	ix
1.1 Public inquiry process to date	ix
1.2 Consultation process	x
1.3 Structure of the report.....	xi
2 Legislative framework and relevant considerations	1
2.1 Submissions.....	1
2.2 ACCC approach.....	2
2.3 Variation inquiry and binding rules of conduct.....	3
Part A: Non-price terms and conditions for fixed line services, DTCS and MTAS	4
3 Regulatory approach to NPTCs.....	5
3.1 Overview	5
3.2 Submissions.....	5
3.3 ACCC draft decision	6
4 Application of NPTCs to relevant declared services.....	10
4.1 Overview	10
4.2 Issues raised in submissions	10
4.3 ACCC draft decision	11
5 Common terms.....	14
5.1 Billing and notification	14
5.2 Creditworthiness and security.....	17
5.3 General dispute resolution	20
5.4 Confidentiality.....	23
5.5 Communication with end users.....	25
5.6 Suspension and termination	27
5.7 Changes to operating manuals.....	30
5.8 Liability (risk allocation) and indemnity	32
5.9 Network modernisation and upgrade notice periods	34
5.10 Other matters	36
6 Service-specific terms.....	43

6.1	Wholesale ADSL: Resale provisions	43
6.2	ULLS and LSS: Ordering and provisioning processes (Managed Network Migrations and LSS to ULLS transfer)	44
6.3	ULLS: Intact Vacant ULLS processes	45
6.4	Other service-specific matters	47
7	Consideration of NPTCs against the legislative matters	48
8	Commencement, expiry and review	52
8.1	ACCC draft decision	52
8.2	Issues raised in submissions	52
8.3	Reasons for ACCC draft decision	52
9	Part B: Connection charges for fixed line services	54
9.1	Non-price and supplementary prices position paper	55
9.2	Submissions	55
9.3	Telstra data on third party rates	57
9.4	The previous ULLS and LSS connection model	58
9.5	UXC Consulting initial report on connection charges for the ULLS, LSS and wholesale ADSL service	59
9.6	ACCC draft decision	61
	Appendix A: Legislative framework for final access determinations	68
	Content of a FAD	68
	Fixed principles provisions	68
	Varying a FAD	68
	Commencement and expiry provisions	68
	Criteria to consider when making a FAD	68
	Appendix B: Draft FAD instrument for fixed line services	75

List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	Asymmetric Digital Subscriber line
CCA	Competition and Consumer Act 2010
c-i-c	commercial in confidence
CSP	carriage service provider
DAC	Data Activation Centre
DTCS	domestic transmission capacity service
FAD	final access determination
FOAS	fixed originating access service
FTAS	fixed terminating access service
LCS	local carriage service
LSS	line sharing service
LTIE	Long term interests of end-users
MNM	Managed network migration
MNO	mobile network operator
MTAS	Mobile Terminating Access Service
NBN	National Broadband Network
NPTCs	Non-price terms and conditions
PSTN OA	public switched telephone network originating access service
PSTN TA	public switched telephone network terminating access service
RSPs	retail service providers
SSU	Structural Separation Undertaking
TEM	Telstra Economic Model
ULLS	unconditioned local loop service
VULL	Vacant ULLS connection process
WLR	wholesale line rental

Glossary

Access agreement	A commercial contract between an access provider and an access seeker which sets out negotiated terms and conditions of supply for a declared service.
Access determination	Written determinations made by the ACCC relating to access to a declared service after conducting a public inquiry, which may specify any or all of the terms and conditions for compliance with any or all of the standard access obligations.
access seeker	Telecommunications companies that seek access to the declared service (that is, the right to use the declared service).
access provider	Telecommunications companies that provide access to a declared service.
ADSL	Asymmetric Digital Subscriber Line. A technology for transmitting digital information at high data rates on existing copper phone lines. It is called asymmetric because the download and upload speeds are not symmetrical (that is, download is faster than upload).
DAC	Data Activation Centre is part of Telstra back of house activities used in providing connections services.
declaration inquiry	The process by which the ACCC holds a public inquiry to determine whether a service should be declared.
declared service	A service that the ACCC has declared under Part XIC of the CCA. Once declared, a service provider must supply the service to other parties upon request in accordance with the standard access obligations and as otherwise required under the Pt XIC of the CCA
DSLAM	Digital Subscriber Line Access Multiplexer. A device which makes use of the copper access lines to provide high data rate services, enabling broadband services to be provided over copper lines. It is located in a telephone exchange that links many customer DSL connections (copper wires) to a core IP network via a backhaul system.
DTCS	Domestic Transmission Capacity Service. The regulated transmission service.
end-user	Retail consumers of telecommunication services.
e-VULL	Enhanced vacant ULLS connection process consists of provisioning a ULLS using a vacant and intact metallic path.
FAD	Final Access Determination which means Access Determination.
FLSM	The fixed line services model is a model developed by the ACCC to set the monthly access and usage prices for the regulated fixed line services
FOAS	Fixed Originating Access Service. The new name of the previously declared PSTN OA service.
FTAS	Fixed Terminating Access Service. The new name for the previously

	declared PSTN TA service.
fixed line services	Telecommunications services provided over fixed networks, such as Telstra's copper network and HFC networks. The 'declared fixed line services' are the six fixed line services declared in 2014 – the ULLS, LSS, WLR, LCS, FOAS and FTAS. The ACCC also declared the wholesale ADSL service in February 2012.
LCS	The declared Local Carriage Service. Enables access seekers to resell local calls to end-users without having to invest in their own network and switching equipment. The LCS is purchased in conjunction with the WLR service.
LSS	The declared Line Sharing Service. Enables access seekers to share the use of the copper line connecting consumers to the telephone exchange, allowing them to provide fixed internet services using their own equipment.
MNM	Managed network migration refers to the process of connecting multiple services.
MTAS	The declared Mobile Terminating Access Service. A wholesale service provided by a mobile network operator (MNO) to fixed line operators and other MNOs to connect – or 'terminate' – a call or SMS on its mobile network. It enables calls to be made to consumers on mobile phone networks.
PSTN	Public Switched Telephone Network. The telephone network that allows the public to make and receive telephone calls via switching and transmission facilities and utilising analogue and digital technologies.
PSTN OA	The declared PSTN Originating Access service. Enables a telephone call to be connected from the caller to a point of interconnection with another network.
PSTN TA	The declared PSTN terminating access service. Enables a telephone call to be carried from the point of interconnection to the party being called on another network.
retail service provider	Companies that offer telecommunications services to end-users.
Telstra wholesale agreement	Introduced by Telstra on 31 March 2014 and is designed to replace the existing Customer Relationship Agreement on which most access agreements between Telstra and its wholesale customers are based.
TEM	The TEM is Telstra's internal financial reporting management system used in its day to day business, and relies on the same financial accounts that Telstra uses for its public reporting. Telstra as part of its Structural Separation Undertaking is required to periodically publish reports based on the TEM to make the revenue and cost information available to the ACCC to improve transparent.
transmission	The carriage of voice, data or other communications.
ULLS	The declared Unconditioned Local Loop Service. Allows access seekers to use the copper line connecting end-users to the local telephone exchange, allowing them provide both fixed internet (broadband) and voice services

	using their own DSLAMs and other exchange equipment.
wholesale ADSL	The declared wholesale ADSL service. Allows access seekers to purchase a wholesale ADSL product from Telstra and resell internet services to end-users.
VULL	Vacant ULLS connection process consists of provisioning a ULLS using a vacant metallic path.
WLR	The declared Wholesale Line Rental service. For a monthly 'per-user' charge, it allows access seekers to purchase a line rental service from Telstra, which includes access to the copper line and associated services (including a dial tone and telephone number) supplied using Telstra's equipment.

Executive Summary

The Australian Competition and Consumer Commission (ACCC) has reached its draft decision on non-price terms and conditions (NPTCs) to be included in the final access determinations (FADs) for the seven declared fixed line services (including wholesale Asymmetric Digital Subscriber Line (wholesale ADSL)) supplied by Telstra on its copper and DSL networks, the Mobile Terminating Access Service (MTAS) and the Domestic Transmission Capacity Service (DTCS) (together, the relevant declared services).

The ACCC has also made a draft decision on the connection charges for fixed line services.

Non-price terms and conditions (Part A)

The ACCC's draft decision is to make a targeted set of NPTCs which focus only on those aspects of access where commercial agreement is less likely to result and where specific competition concerns are likely to arise (Targeted Final Access Determination (Targeted FAD)). The ACCC has formed the overall view that a Targeted FAD will promote the long term interests of end-users (LTIE) by ensuring, on an as needs basis, that there is a regulatory fall back for specific matters that have typically raised competition concerns or have been the subject of dispute between the parties.

The ACCC has approached its consideration of NPTCs with a view to ensuring there will be a suitable set of fall back terms and conditions of access for parties if they are unable to negotiate terms of access acceptable to both the access seeker and access provider. This reflects the practical effect of both the ACCC's power to set up-front terms and conditions of access to declared services in access determinations and the access hierarchy provided for in Part XIC of the *Competition and Consumer Act 2010 (CCA)*.¹

In this regard, the ACCC considered the extent to which access seekers are able to negotiate reasonable commercial terms where there is no complete set of regulated, fall back terms and conditions of access, and the ability of monopoly service providers to include unreasonable terms and conditions of access in access agreements in that context.

The evidence provided by industry to date has varied and does not at this point suggest a widespread problem of sufficient magnitude to warrant a more interventionist regulatory response (such as a FAD which sets out a comprehensive set of all terms and conditions of access), which would represent a significant regulatory burden on both industry and the ACCC in developing, consulting on and ensuring compliance with such a FAD.

However, the ACCC is aware from its review of the access agreements lodged with it under s152BEA (now amended)², that access agreements may include clauses that could have the effect of entirely excluding the application of current and future regulated terms during the life of the agreement. Whilst acknowledging that these access agreements and terms are commercially negotiated between the parties, the ACCC is nonetheless concerned that such clauses have the potential to prevent regulated terms applying to 'fill the gaps' in commercial agreements during the life of the agreements and are at odds with the underlying premise

¹ The hierarchy provides that a carrier or carriage service provider must comply with the standard access obligations on terms and conditions specified in: 1. An access agreement, 2. A special access undertaking given by the access provider and accepted by the ACCC, 3. Binding rules of conduct, 4. Access determinations. Instruments higher in the access hierarchy take precedence to the extent of any inconsistency with instruments that are lower in the hierarchy.

² The previous section 152BEA required the carrier or carriage service provider (who supplied or proposed to supply declared services) to provide the ACCC with a copy of any access agreement within 28 days of it being entered into. The current section 152BEA requires that within 30 days after the end of each quarter, the carrier or carriage service provider who supplies or proposes to supply a declared service must give the ACCC a statement setting out the details of any access agreement in force during the quarter.

behind the Part XIC telecommunications access regime. That is, that there is a need to provide for recourse to regulatory terms to promote competitive outcomes and the long term interests of end-users.

In this circumstance, access determinations would not in practice represent the regulatory fall-back envisaged by Part XIC of the CCA and would instead act as guidance to inform commercial negotiations and facilitate parties reaching terms of access by way of commercial agreement.

This current FAD inquiry process has not brought forth evidence that leads the ACCC to believe there is a persistent or broad 'take it or leave it' approach taken by access providers in negotiating terms of access for the relevant declared services. Nonetheless, the ACCC considers that access seekers should be fully aware when negotiating their agreements of the potential effect of such clauses in entirely excluding the application of current and future regulated terms during the life of the agreement. The ACCC considers that access agreements should provide the opportunity for access seekers to have recourse to new or varied regulatory terms on a timely basis so as to promote competitive outcomes and the long term interests of end-users.

The ACCC is working constructively with an access provider to provide for terms that will give an opportunity to access seekers to seek regulated terms either at the end of a 2 year contract period or with 6 months' notice, along with specific contractual commitments to negotiate in good faith in relation to these regulated terms. The ACCC considers this is a matter of some relevance and will continue to monitor industry practices in relation to commercially negotiated access agreements.

Overall, having had regard to submissions, the LTIE and other matters under section 152BCA of the CCA, the ACCC has decided to make Targeted FAD terms which address the following matters, and which will commonly apply for all the relevant declared services:

- billing and notification
- creditworthiness and security
- general dispute resolution
- confidentiality (including disclosure of confidential information to regulatory bodies)
- communication with end users
- suspension and termination
- changes to operating manuals
- liability (risk allocation) and indemnity
- network modernisation and upgrade notice periods

In addition, the ACCC has considered submissions raising concerns about a lack of recourse to regulated terms during the access agreement term. The ACCC considers that if parties cannot obtain access to regulated terms, their terms of access in the access agreement are likely to be less reasonable on the whole. Accordingly, the ACCC's draft decision is to make FAD terms (which will apply to all the relevant declared services) which preserve such recourse to regulated terms.

The ACCC has also made terms which only apply to certain declared services because they are only relevant to those services:

- Resale services (for wholesale ADSL only)

- Ordering and provisioning processes (managed network migrations and Unconditioned Local Loop Service (ULLS) to Line Sharing Service (LSS) transfer) (for ULLS and LSS only).

The ACCC has decided that all the above terms will commence and expire in line with the terms on primary prices for the relevant declared service.

The ACCC notes that it will consider other supplementary service-specific matters for Domestic Transmission Capacity Service (DTCS) relating to connection charges and special linkage charges, in its draft decision on the primary prices for the DTCS FAD expected to be released in the second quarter of 2015. At this stage, the ACCC does not consider it will make any service-specific non-price terms for MTAS.

Connection charges for fixed line services (Part B)

The ACCC's draft decision is to continue to set a range of price terms for connection charges for the ULLS, LSS and wholesale ADSL services in the FADs.

The ACCC considers connection charges are an unavoidable cost in providing voice or broadband services to customers using the declared services. In the absence of regulated connection charges, Telstra would have the ability and incentive to set connection charges above costs which would create a cost barrier for access seekers to supply end-users with broadband and/or voice services. This in turn may reduce competition in the retail market. Furthermore, Telstra has not provided any evidence to suggest the connection charges for these services should not be regulated and the ACCC's draft decision is that setting price terms for a selection of fixed line connection charges will promote the LTIE.

As part of the ACCC's consideration of connection charges, the ACCC has engaged a technical consultant to provide advice on the costs Telstra incurs in providing connections for the ULLS, LSS and wholesale ADSL services. As part of this advice, the ACCC's consultant has updated the existing ULLS and LSS connection model and extended it to estimate the costs involved in providing wholesale ADSL connections.

In updating and extending the model the ACCC's consultant has had regard to Telstra's new contractual arrangements, which have been implemented to improve the flexibility, productivity and efficiency of their third party contractors which perform the physical jumpering work in Telstra exchanges.

The ACCC has had regard to the information provided by Telstra, UXC's initial report and the outputs of its updated connection model in setting the draft regulated connection charges for the ULLS, LSS and wholesale ADSL services. These new regulated price terms are set out in table 9.1 in chapter 9 of part B of this draft decision.

The majority of the draft regulated price terms for the connection charges for the ULLS, LSS and wholesale ADSL services have been reduced. For example, single LSS and ULLS connections in band 1 have reduced by 8.9 per cent and 13.8 per cent respectively. In regards to wholesale ADSL connections these have reduced by 45.8 per cent for a Type B connection occurring in band 1 and Type A connection charges have reduced by 8.2 per cent. There are only a couple of connection charges that have not been reduced and these relate mainly to the fixed component of the managed network migration charge for the LSS and ULLS.

In regards to the reduction in connection charges for the ULLS and LSS these have mainly been driven by a drop in the third party contractor rates Telstra pays, which appears to reflect Telstra's new approach to managing its external contractors. The reduction in charges for the wholesale ADSL connections have been driven by a change in the approach to estimating these charges which better reflects the costs Telstra incurs in providing these services.

The ACCC has also considered the need to set a separate price term for a single LSS disconnection charge and an early termination charge for the wholesale ADSL service. The

ACCC's draft decision is not to allow Telstra to impose these charges. The ACCC's draft decision is not to extend the scope of its regulation of connection charges.

1 Introduction

The ACCC is responsible for the economic regulation of the telecommunications sector. Part XIX of the CCA sets out an access regime for the telecommunications sector. A number of telecommunications services are declared. The ACCC recently extended and varied the declarations for the following services (together, the relevant declared services):

- the DTCS in March 2014 until 31 March 2019³
- the MTAS in June 2014 until 30 June 2019⁴
- the six fixed line services (not including wholesale ADSL) in April 2014 until 31 July 2019.⁵

The ACCC also declared the wholesale ADSL service in February 2012 until 13 February 2017.⁶ Once a service is declared, the ACCC can make a final access determination (FAD) relating to access to the declared service. Such an access determination may specify how an access provider is to comply with the standard access obligations applicable to the provider, and any other terms and conditions of access to the declared service.⁷

The relevant declared services are currently regulated through FADs. The ACCC has extended the existing FADs for the declared services, and each will now expire on the day before the new FADs come into force. The current FADs for the declared services specify price and NPTCs that apply where commercial negotiations do not result in agreement between the access provider and access seeker.

In this draft decision, the ACCC has made draft NPTCs which it intends to include in the new FADs which will replace the existing FADs. The ACCC's draft NPTCs contain terms on the same matters covered by the existing NPTCs in the current FADs and additional terms relating to new matters. This draft decision also includes price terms for connection charges for some of the declared fixed line services.

1.1 Public inquiry process to date

On 11 July 2013 the ACCC commenced a public inquiry into making new FADs for the six fixed line services and the wholesale ADSL service. On 22 May 2014, the ACCC commenced inquiries into making new FADs for the DTCS and the MTAS.

In May 2014, the ACCC decided to consult separately on the primary prices for all the declared services and on NPTCs and supplementary prices. The ACCC considered there is benefit in combining its consultation for NPTCs across all the relevant declared services given that a

³ The regulated DTCS is a subset of all transmission services and refers to high capacity data links that are used by carriers and carriage service providers to carry large volumes of voice, data, video or other communications over long distances.

⁴ The MTAS is a wholesale service provided by a mobile network operator to fixed line operators and other MNOs to receive and then terminate voice call and SMS on its mobile network. The MTAS is essential for calls to be made between subscribers connected to different mobile networks, and for calls to be made from fixed networks to mobile networks.

⁵ The fixed line services are made up of the unconditioned local loop service (ULLS), line sharing service (LSS), local carriage service (LCS), wholesale line rental (WLR) service, the Fixed Originating Access Service (FOAS) and the Fixed Terminating Access Service (FTAS).

⁶ ADSL (asymmetric) services are the dominant fixed-line broadband technology in Australia, accounting for around 83 per cent of fixed-line broadband services in operation as at June 2011. It is supplied over Telstra's near-ubiquitous customer access network (CAN) which runs from the exchange building to premises. As the operator of the CAN, Telstra is the dominant access provider of ADSL services at the wholesale level.

⁷ Section 152BC(3) of the CCA.

number of these terms are currently similar (or the same) and may benefit from consistency. The ACCC also considered there was benefit in consulting separately on certain supplementary charges, given the number and complexity of the issues for the ACCC's inquiries into setting primary prices for the relevant declared services.

The ACCC has released a number of papers on the NPTCs aspect of the FAD inquiries:

- In May 2014, the ACCC released a position paper, seeking submissions on the NPTCs and supplementary prices (ACCC Position Paper), to which it received 10 submissions and a further submission from Telstra.
- In October 2014, the ACCC released a discussion paper seeking further industry views regarding the regulatory option the ACCC should adopt when making NPTCs in FADs (ACCC Discussion Paper). The ACCC received 7 submissions to the discussion paper.
- In December 2014, the ACCC sent a request to stakeholders asking for comments on the drafting of certain NPTCs (ACCC's Request for comments on draft NPTCs). The ACCC received 8 responses to its request.

Part A of this paper takes into account submissions to all of the above papers.

Part B of this paper takes into account submissions on connection charges received in response to the ACCC position paper, which covered both NPTCs and supplementary prices. Part B sets out the ACCC's draft views on connection charges for the fixed line services. The other supplementary prices considered in the Position Paper will be set out in either the DTCS or fixed line services draft decision.

1.2 Consultation process

The ACCC encourages industry participants, other stakeholders, and the public more generally, to consider and make submissions on the various aspects of the ACCC's draft decision outlined throughout this paper, including both its overall approach to make a Targeted FAD (Chapter 3), and specific draft terms that together form the draft Targeted FAD (discussed in Chapters 4 to 6).

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC expects that claims for commercial-in-confidence status of information by parties will be limited in nature in order to allow the widest possible participation in the public inquiry.

The ACCC has published a Confidentiality Guideline which sets out the process parties should follow when submitting confidential information to communications inquiries commenced by the ACCC. The Guideline describes the ACCC's legal obligations with respect to confidential information, the process for submitting confidential information and how the ACCC will treat confidential information provided in submissions. A copy of the Guideline can be downloaded from the ACCC's website.

The ACCC-AER information policy: *the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator on the collection, use and disclosure of information. A copy of the policy document can also be downloaded from the ACCC's website.

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format which enables the submission text to be searched.

Please contact Nicole Ross regarding any questions you have concerning this consultation on (03) 9290 1957.

Submissions in response to this discussion paper are due by 17 April 2015.

Following this draft decision paper and consultation on it, the ACCC intends to publish a final decision finalising NPTCs for the FADs in June 2015.

Please email submissions to:

fixedservices@acc.gov.au

Cc: Nicole.Ross@acc.gov.au

Cc: Robert.Wright@acc.gov.au

1.3 Structure of the report

This report is set out as follows:

- Chapter 2 sets out the relevant legislative framework for making FADs. This is relevant to the NPTCs and price aspects (connection charges) in Parts A and B of this paper, respectively.
- Part A regarding non-price terms consists of:
 - Chapter 3 which sets out the ACCC's regulatory approach to NPTCs.
 - Chapter 4 which sets out how the specific NPTCs will apply to the declared services (i.e. whether they apply commonly or are service-specific).
 - Chapters 5 and 6 set out the ACCC's detailed assessment of the common NPTCs and service-specific NPTCs, respectively.
 - Chapter 7 sets out a general assessment of the NPTCs against the legislative matters.
 - Chapter 8 sets out the commencement and expiry of the NPTCs.
- Part B regarding connection charges for fixed line services consists of Chapter 9.
- Appendix A sets out the ACCC's approach to applying the legislative framework for making FADs.
- Appendix B contains the Draft NTPCs (the draft FAD instrument for fixed line services including price terms and NPTCs).

2 Legislative framework and relevant considerations

The ACCC must have regard to the matters specified in subsection 152BCA(1) of the CCA when making a FAD. These matters are:

- whether the determination will promote the long term interests of end-users (LTIE) of carriage services or services supplied by means of carriage services
- the legitimate business interests of a carrier or carriage service provider (CSP) who supplies, or is capable of supplying, the declared service, and the carrier's or CSP's investment in facilities used to supply the declared service
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

Subsection 152BCA(3) of the CCA sets out other matters that the ACCC may take into account including any other matters that it thinks are relevant when making a FAD. The ACCC's approach to these matters and other relevant matters is described in Appendix A to this paper.⁸

The ACCC considers that it is sufficient to broadly identify the scope of the relevant markets likely to be affected by the ACCC's regulatory decisions. The ACCC considers that the FADs will most likely affect retail markets (that is, end-users of the products) and wholesale markets (suppliers of the products) for the supply of fixed line services, transmission services and mobile services.

2.1 Submissions

The ACCC invited submissions on the section 152BCA matters. The following submissions relate to the ACCC's assessment of NPTCs.

Telstra submitted that in assessing the LTIE criteria, the ACCC must consider whether it would be in the LTIE to include a particular NPTC and then, how the drafting of the term would meet the LTIE.⁹ Telstra also submitted that the ACCC should ensure that it assesses each non-price term by referring to the direct impact on the end-user.¹⁰

iiNet submitted that terms that reasonably balance access provider and access seeker interests will be most likely to promote the LTIE.¹¹ iiNet also made specific submissions on the meanings

⁸ Available at: <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/discussion-paper>

⁹ Telstra, Submission to the ACCC Discussion Paper (Public version), 16 December 2014, p. 9.

¹⁰ Telstra, Submission to the ACCC Discussion Paper (Public version), 16 December 2014, Appendix 1, p. 1.

¹¹ iiNet, Submission to the ACCC Discussion Paper (Public version), 12 December 2014, section 10.

of other subsection 152BCA(1) criteria and that certain criteria are not relevant to non-price terms.¹²

Optus submitted that the principles that the ACCC applied in developing model non-price terms and conditions should continue to apply to making NPTCs. For example, that the terms should be fair and reflect current market conditions.¹³

Macquarie Telecom submitted that of the three matters that are considered when assessing the LTIE, promotion of competition is particularly relevant.¹⁴ Nextgen agreed with the ACCC's approach in applying the legislative framework discussed in Appendix A to the Discussion Paper, and noted that certain criteria are more relevant.¹⁵ Macquarie Telecom¹⁶, Nextgen¹⁷ and Optus¹⁸ emphasised that it is important that regulated terms should evenly balance the interests of access seekers and access providers.

2.2 ACCC approach

Appendix A to the ACCC's Discussion Paper¹⁹ which is reproduced at Appendix A to this paper, sets out the way the ACCC will approach making an FAD under Part XIC, and in particular, how it will take into account the section 152BCA matters, for both the price and non-price matters discussed in this paper.

In relation to NPTCs specifically, the ACCC made its draft decision by assessing:

- The ACCC's regulatory approach to make a Targeted FAD (as opposed to a Comprehensive FAD or no FAD at all). Its assessment is set out in Chapter 3 of this paper.
- The application of and the substance of each particular clause in the NPTC schedules of the draft FAD, and changes to those clauses (as proposed by submitters), against the section 152BCA matters in Chapters 4 to 6.
- The draft NPTC schedules generally against the section 152BCA matters in Chapter 7.

The ACCC notes, in view of industry submissions the following about its assessment:

- Some 152BCA matters are not relevant to its assessment of certain NPTCs.
- Reasonable NPTCs are important to the promotion of competition and the LTIE in the relevant markets.
- The section 152BCA matters of legitimate business interests of an access provider, and interests of persons who have rights to use the service (such as access seekers), are also particularly relevant to its assessment of NPTCs.

In relation to connection charges for the ULLS, LSS and wholesale ADSL services, the ACCC has considered the following in its considerations:

- The ACCC has considered the promotion of competition in making its draft decision to continue to set price terms for these services. The ACCC has concluded that in the absence of regulated connection charges, Telstra would have the ability and incentive

¹² iiNet, Submission to the ACCC Discussion Paper (Public version), 12 December 2014, section 10

¹³ Optus, Submission to the ACCC Position Paper (Public version), 18 July 2014, p 9

¹⁴ Macquarie Telecom, Submission to the ACCC Position Paper, 23 July 2014, p. 12.

¹⁵ Nextgen, Submission to the ACCC Discussion Paper, 12 December 2014, p. 2

¹⁶ Macquarie Telecom, Submission to the ACCC Position Paper, 23 July 2014, p. 2

¹⁷ Nextgen, Submission to the ACCC Discussion Paper, 12 December 2014, p. 4.

¹⁸ Optus, Submission to the ACCC's request for comments on draft NPTCs (Public version), 16 January 2015, p. 3.

¹⁹ Available at: <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/discussion-paper>

to set connection charges above costs which would create a cost barrier for access seekers to supply end-users with broadband and/or voice services. This in turn may reduce competition in the retail market.

- The ACCC has also considered Telstra's direct costs in providing these services by seeking updated information from Telstra on its direct and indirect costs. The ACCC has considered Telstra's legitimate business interests and the efficient use of infrastructure for all parties in setting the draft connection charges.

2.3 Variation inquiry and binding rules of conduct

If a FAD results in unintended consequences or if circumstances change, the ACCC may consider initiating an inquiry into varying the FAD²⁰ or issuing binding rules of conduct (BROC).²¹

The ACCC may make a BROC for NPTCs for the relevant declared services if it considers that there is an urgent need to specify terms and conditions for a carrier or carriage service provider to comply with the SAOs or to require compliance with the SAOs as specified in the BROC. The BROC would prevail over any provision of the FAD to the extent of any inconsistency.

The duration of a BROC is limited to a maximum of 12 months. If the ACCC makes a BROC in relation to NPTCs for any of the relevant declared services, it must also commence a public inquiry to vary the existing FAD or make a new FAD to address the issues raised in the BROC on a more permanent basis.

²⁰ Section 152BCN of the CCA

²¹ Section 152BD of the CCA

Part A: Non-price terms and conditions for fixed line services, DTCS and MTAS

3 Regulatory approach to NPTCs

3.1 Overview

The ACCC's draft decision is to make a targeted set of NPTCs which focusses only on those aspects of access where commercial agreement is less likely to result and where specific competition concerns are likely to arise. The ACCC's assessment of each specific non-price term which together form the Targeted FAD, is outlined in chapters 4 to 6.

In its Discussion Paper, the ACCC discussed options for providing effective regulatory fall back. One option was to develop comprehensive NPTCs for all aspects of access required to provide certainty in the absence of any access agreement (Comprehensive FAD). The other option was a Targeted FAD.

In its Position and Discussion Papers, the ACCC discussed the implications of making a Comprehensive FAD. The ACCC considered that it might be necessary to make a Comprehensive FAD in order to provide effective regulatory fall back. However adopting a Comprehensive FAD would reflect a significant departure from the approach the ACCC has adopted in the current FADs. The ACCC considered that while a more comprehensive approach may provide greater certainty, it may be less flexible and less able to deal with a changing commercial environment. The ACCC also noted that this approach could potentially require lengthier discussion of the issues as well as significant resources by both the ACCC and industry. Accordingly, the ACCC was reluctant to make a Comprehensive FAD, unless it determined that it was necessary to do so.

3.2 Submissions

3.2.1 Submissions to the Position Paper

Most submitters to the Position Paper agreed that NPTCs should be made in order to provide an effective regulatory fall back. However, Telstra submitted that no NPTCs should be made. Telstra considered that including NPTCs in the FADs is unnecessary, given that the current contractual NPTCs are well understood and accepted by industry, and there have been no formal disputes notified in respect of any NPTCs since 2009. Telstra stated that a reference offer (Comprehensive FAD) would introduce unnecessary regulatory and compliance burden which would not be in the LTIE.²²

Other stakeholders were divided on the question of whether the ACCC should adopt a Targeted or a Comprehensive FAD. Most stakeholders (NBN Co²³, Optus, Macquarie Telecom²⁴, Nextgen²⁵, Basslink²⁶, and TPG²⁷) preferred that the ACCC adopt a Targeted FAD. They submitted that a FAD should address issues on which commercial agreement is less likely, or commercial terms which are likely to harm the LTIE. Basslink submitted that commercial agreements are readily reached, relatively expeditious and 'commercially acceptable' for all parties.²⁸

There was limited support for a Comprehensive FAD. VHA and iiNet were the only stakeholders advocating for a Comprehensive FAD. VHA submitted that to address Telstra's

²² Telstra, Submission to the ACCC Position Paper (Public version), 15 July 2014, p. 5.

²³ NBN Co, Submission to the ACCC Position Paper (Public version), 15 July 2014, p. 2.

²⁴ Macquarie Telecom, Submission to the ACCC Position Paper, 23 July 2014, p. 2.

²⁵ Nextgen, Submission to the ACCC Position Paper, 15 July 2014, p. 4.

²⁶ Basslink, Submission to the ACCC Position Paper, 15 July 2014, p. 2.

²⁷ TPG, Submission to the ACCC Position Paper, 17 July 2014, p. 3.

²⁸ Basslink, Submission to the ACCC Position Paper, 15 July 2014, p. 2.

monopoly, the FAD must contain a comprehensive, fair and commercially implementable set of NPTCs.²⁹ iiNet proposed the ACCC make a complete set of default terms.³⁰

3.2.2 Submissions to the Discussion Paper

In response to the Discussion Paper, Telstra maintained that including NPTCs was not necessary for the FADs. Its further reasons were that unlike price terms, NPTCs are not mandated by the CCA, and nearly 90 per cent of services offered to access seekers are not declared and therefore Telstra must and does offer NPTCs in a competitive environment. In the alternative, Telstra stated that if the ACCC were to include NPTCs in its FADs, it would prefer a Targeted FAD approach.³¹

NBN Co and Optus preferred a Targeted FAD. NBN Co submitted that focussing NPTCs on matters less likely to be agreed upon would provide for the primacy of negotiated outcomes while recognising the role of regulated terms.³² NBN Co noted that there is no evidence that such an approach is failing to promote the LTIE.³³ Similarly, Optus stated 'it is not aware of any take-it-or-leave-it style of negotiations outside of NBN Co'³⁴ and that making NPTCs on all terms of access would be impractical.³⁵

Four stakeholders (Nextgen, Macquarie Telecom, VHA and iiNet) supported a Comprehensive FAD. Nextgen submitted that although it has been 'reasonably happy' with the targeted NPTCs to date, a comprehensive FAD would potentially provide more effective regulatory fall back.³⁶ Macquarie Telecom also submitted its support for a Comprehensive FAD.³⁷ Nextgen's and Macquarie Telecom's views have changed from their submissions to the ACCC's Position Paper.

VHA and iiNet maintained support for a Comprehensive FAD.³⁸ VHA submitted that the current Targeted FADs have meant that the bargaining power in negotiations is skewed in favour of access providers³⁹, and a Comprehensive FAD would provide certainty to access seekers who do not have an access agreement and seek to rely on regulated terms alone.⁴⁰ iiNet cited concerns about an imbalance in bargaining power [C-i-C starts [REDACTED] [REDACTED] C-i-C ends], and listed examples of what it considered were unreasonable terms.

The ACCC notes that the Discussion Paper sought views on the ways the ACCC could make a Comprehensive FAD e.g. by incorporating terms from another contractual document. As the ACCC's draft view is to not make a Comprehensive FAD, the ACCC has not outlined its consideration of these submissions on how to implement a Comprehensive FAD in this paper and it is not discussed further.

3.3 ACCC draft decision

The ACCC's draft decision is to make NPTCs on certain matters. In its Discussion Paper, the ACCC noted that a Comprehensive FAD would provide effective regulatory fall back because it would represent a commercially viable alternative to supply under an access agreement. That is, if there was a material imbalance in bargaining power, then making a Comprehensive FAD

²⁹ VHA, Submission to the ACCC Discussion Paper (Public version), 12 December 2014, p. 4.

³⁰ This alternative option would effectively form a comprehensive FAD.

³¹ Telstra, Submission to the ACCC Discussion Paper (Public version), 16 December 2014, p. 2.

³² NBN Co, Submission to the ACCC Discussion Paper, 12 December 2014, p. 2.

³³ NBN Co, Submission to the ACCC Discussion Paper, 12 December 2014, p. 3.

³⁴ Optus, Submission to the ACCC Discussion Paper, 12 December 2014, p. 2.

³⁵ Optus, Submission to the ACCC Discussion Paper, 12 December 2014, p. 1.

³⁶ Nextgen, Submission to the ACCC Discussion Paper, 12 December 2014 p. 2.

³⁷ Macquarie Telecom, Submission to the ACCC Discussion Paper, 19 December 2014, p. 1.

³⁸ iiNet, Submission to the ACCC Discussion Paper, 12 December 2014, p. 4.

³⁹ VHA, Submission to the ACCC Discussion Paper, 12 December 2014, p. 4.

⁴⁰ VHA, Submission to the ACCC Discussion Paper, 12 December 2014, p. 7.

would likely address this by providing a regulatory alternative. This would in turn promote competition by improving the reasonableness of terms of access.

However, the ACCC considers that overall, there is insufficient evidence to support a view that there is a significant imbalance in bargaining power which has adversely impacted the competitive process.

Specifically, the evidence to date has been varied and does not suggest a widespread problem of such magnitude to warrant an industry wide response and significant increase in regulation (as would be provided by a Comprehensive FAD). Only two submitters (VHA and iiNet) (out of the four that supported a Comprehensive FAD) provided some anecdotal evidence about terms in their access agreements which they submitted were different from those that would be negotiated in a competitive market. **[c-i-c starts**

c-i-c ends]

In contrast, other access seekers such as Optus submitted that there is no imbalance in bargaining power in the context of non-NBN services. Further, submitters supporting a Targeted FAD only cited concerns about terms of supply offered by Telstra. Submitters did not cite concerns about other access providers.

On balance, the ACCC considers that access to the relevant declared services is occurring, and there is a lack of evidence to suggest that the terms of access are so unreasonable as to materially impede that access, and/or adversely affect competition in the relevant retail markets on a widespread scale.

The ACCC also notes that making a Comprehensive FAD would necessarily cover all non-price aspects of access including terms about non-contentious matters that do not raise a competition concern. This approach would also increase the costs of compliance for Telstra and other access providers, and regulator costs in terms of enforcement and compliance monitoring. Further, making a Comprehensive FAD would require significant resources to draft commercial terms on all aspects of access, and significant levels of consultation, input and review by industry in order to ensure their appropriateness. Given these considerations and the lack of evidence of widespread access and/or competition problems, the ACCC considers that making a Comprehensive FAD is not warranted at this time.

Instead, the ACCC considers that making a Targeted FAD (compared to not making a FAD of any kind) will allow the ACCC to set appropriate terms of access for matters where agreement is less likely to result or where specific competition concerns arise (contentious matters). Telstra considered that the ACCC should not make any NPTCs. However, the ACCC has formed the overall view that a Targeted FAD will promote the LTIE by ensuring, on an as needs basis, that there is a regulatory fall back for specific matters that have typically raised competition concerns.

The draft NPTC schedules cover key commercial terms of access which facilitate the commercial supply of the service (for example, terms that address how bills are issued, how risk and liability is allocated and some operational processes). These key terms will set an ACCC regulatory benchmark about the matters they address while allowing parties the freedom to negotiate different terms on these matters. This will encourage access seekers to efficiently use and invest in infrastructure. The ACCC also considers that this targeted approach to regulation is in the legitimate business interests of an access provider – by limiting unnecessary regulation and not unduly increasing the costs of supply.

However, the ACCC is aware from its review of the access agreements lodged with it under s152BEA (now amended)⁴¹, that access agreements may include clauses that could have the

⁴¹ The previous section 152BEA required the carrier or carriage service provider (who supplied or proposed to supply declared services) to provide the ACCC with a copy of any access agreement within 28 days of it being entered into. The current section 152BEA requires that within 30 days after the end of each quarter,

effect of entirely excluding the application of current and future regulated terms during the life of the agreement. Whilst acknowledging that these access agreements are commercially negotiated between the parties, the ACCC is nonetheless concerned that such clauses have the potential to prevent regulated terms applying to 'fill the gaps' in commercial agreements during the life of the agreements and are at odds with the underlying premise behind the Part XIC telecommunications access regime. That is, that there is a need to provide for recourse to regulatory terms to promote competitive outcomes and the long term interests of end-users.

In this circumstance, access determinations would not in practice represent the regulatory fall-back envisaged by Part XIC of the CCA and would instead act as guidance to inform commercial negotiations and facilitate parties reaching terms of access by way of commercial agreement.

The issue of the effectiveness of commercial negotiation in achieving competitive market outcomes and settling issues in dispute has also been considered in the NBN context by the committee undertaking an independent cost benefit analysis of broadband and review of regulation (the Vertigan Committee). The Vertigan Committee has noted that:

...[it] is concerned that NBN Co will increasingly be in a position to exercise monopoly power with respect to the negotiation of access agreements based on its SFAA.⁴²

And while noting that access agreements take precedence in the access hierarchy, once settled, the Vertigan Committee concluded:

'NBN Co, which will be the sole infrastructure provider in many areas of Australia, will increasingly, be in a position to exercise monopoly power with respect to the negotiation of access agreements, based on its standard form access agreement.

*Therefore, access seekers should be afforded an opportunity to approach the ACCC to make decisions on aspects of an access agreement before it is considered finally settled and beyond the reach of further ACCC intervention.'*⁴³

The Vertigan Committee recommended that Part XIC should be amended to achieve the above, unless NBN Co can achieve it through its Standard Form Access Agreement or Special Access Undertaking. It stated in Recommendation 11:

*'Arrangements should be put in place to enable carriers and service providers to have effective recourse to the ACCC for a specified period on the terms and conditions of an access agreement they are entering into with NBN Co and which they consider are unreasonable.'*⁴⁴

The ACCC considers that this issue applies equally in respect to parties negotiating access to legacy services under the regulatory hierarchy set out in Part XIC. This current FAD inquiry process has not brought forth evidence that leads the ACCC to believe there is a persistent or broad 'take it or leave it' approach taken by access providers in negotiating terms of access for declared services. Nonetheless, the ACCC considers that access seekers should be fully

the carrier or carriage service provider who supplies or proposes to supply a declared service must give the ACCC a statement setting out the details of any access agreement in force during the quarter.

⁴² Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM, *Statutory review under section 152EOA of the Competition and Consumer Act*, June 2014, http://www.communications.gov.au/_data/assets/pdf_file/0008/240767/3_Section_152EOA_Report.pdf, p. 35.

⁴³ Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM, *Statutory review under section 152EOA of the Competition and Consumer Act*, June 2014, http://www.communications.gov.au/_data/assets/pdf_file/0008/240767/3_Section_152EOA_Report.pdf, p. 35.

⁴⁴ Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM, *Statutory review under section 152EOA of the Competition and Consumer Act*, June 2014, http://www.communications.gov.au/_data/assets/pdf_file/0008/240767/3_Section_152EOA_Report.pdf, p. 37.

aware when negotiating their agreements of the potential effect of such clauses in entirely excluding the application of current and future regulated terms during the life of the agreement.

The ACCC is working constructively with an access provider to provide for terms that will give an opportunity to access seekers to seek regulated terms either at the end of a 2 year contract period or with 6 months' notice, along with specific contractual commitments to negotiate in good faith in relation to these regulated terms.

In this context, the ACCC emphasises that while it is making a Targeted FAD, the ACCC will continue to monitor any competition concerns arising from contentious matters (as they arise in commercial negotiations), and:

- where it considers it appropriate to do so (subject to the relevant provisions of the CCA) it will consider making a BROC to urgently address matters as they arise.
- it will also examine any unreasonable NPTCs or conduct around those NPTCs in an enforcement context under Part XIB or other sections of the CCA.

The schedules forming the ACCC's Targeted FAD are assessed in chapters 5 and 6, and how these NPTCs apply to the relevant declared services is discussed in chapter 4. The ACCC has also generally assessed the schedules against the section 152BCA matters in Chapter 7.

4 Application of NPTCs to relevant declared services

4.1 Overview

The ACCC's draft decision is that terms and conditions on eight matters will be included in the FADs for all of the relevant declared services, and that terms on two matters will apply to only some of the relevant declared services (these matters are listed in section 4.3 below). The ACCC's reasons for determining that some terms will apply to all of the relevant services and other terms will apply only to some are set out below, and the substantive assessment of each of the draft NPTC schedules is set out in chapters 5, 6 and 7.

4.2 Issues raised in submissions

Telstra submitted that if any NPTCs should be common across all of the relevant declared services, they should be limited to those that currently are common and should not be extended to include further common NPTCs.⁴⁵ Telstra specifically submitted that the following terms should not apply to all the services:

- If the ACCC were to include terms on liability and indemnity in the FADs, they should be limited to the FADs to which they currently apply (DTCS and wholesale ADSL).⁴⁶
- If the ACCC retains provisions regarding changes to operating manuals, their application should be limited to ULLS and WDSL.⁴⁷
- The schedule relating to communications to end users should only apply to the fixed services (including wholesale ADSL).⁴⁸ For MTAS, communications with end users are rare, and are not relevant to DTCS.⁴⁹
- Network modernisation and upgrade provisions are not relevant to MTAS or DTCS.⁵⁰ These provisions were aimed at ensuring that changes in the network would not result in access seeker's equipment no longer being supported.⁵¹ They are only relevant where a service is no longer supplied or its quality is adversely affected⁵² and as such these are not relevant to MTAS or DTCS because a wholesale customer buys an end-to-end service regardless of the infrastructure used to deliver it.⁵³
- Ordering and provisioning terms should be limited to ULLS and LSS.⁵⁴
- If the ACCC were to make a term regarding resale of services, it should only apply to wholesale ADSL.

Nextgen submitted that it does not have a strong view on which terms and conditions should be common beyond supporting this objective to the extent it is practicable⁵⁵ as it will allow the ACCC to make them faster.⁵⁶

⁴⁵ Telstra, Submission to the ACCC Discussion Paper, 12 December 2014, p. 13.

⁴⁶ Telstra, Submission to the ACCC Discussion Paper, 12 December 2014, p. 11.

⁴⁷ Telstra, Submission to the ACCC Discussion Paper, 12 December 2014, p. 11.

⁴⁸ Telstra, Submission to the ACCC Discussion Paper, 12 December 2014, p. 9.

⁴⁹ Telstra, Submission to the ACCC Discussion Paper, 12 December 2014, p. 9.

⁵⁰ Telstra, Submission to the ACCC Discussion Paper, 12 December 2014, p. 9.

⁵¹ Telstra, Submission to the ACCC Discussion Paper, 12 December 2014, p. 9.

⁵² Telstra, Submission to the ACCC Discussion Paper, 12 December 2014, p. 10.

⁵³ Telstra, Submission to the ACCC Discussion Paper, 12 December 2014, p. 10.

⁵⁴ Telstra, Submission to the ACCC Discussion Paper, 12 December 2014, p. 10.

VHA submitted that the majority of matters addressed by NPTCs should apply commonly to all the relevant declared services.⁵⁷ VHA submitted that service-specific terms should include technical matters including service descriptions and service levels.⁵⁸

iiNet submitted that the common terms listed at 7.3.1 of the ACCC's discussion paper should apply to all the relevant declared services.⁵⁹ iiNet also submitted that ordering and provisioning terms that relate to ULLS and LSS should be included as service-specific terms in the new FADs for ULLS and LSS only.⁶⁰

Macquarie and TPG submitted that NPTCs that are appropriate across all of the declared services include: billing and notification, creditworthiness and security, general dispute resolution, confidentiality, communication with end-users, suspension and termination, and changes to operating manuals.⁶¹ TPG added that network modernisation and upgrade, and liability and indemnity NPTCs, should also apply commonly.⁶²

NBN Co agreed within the ACCC's views that there could be benefits in maintaining consistency across common terms, but cautioned that some common terms may need to differ between the relevant declared services (for example, terms about liability and indemnity).⁶³

Optus submitted that the NPTCs in the current FADs should be retained and that there may be scope for the ACCC to align the terms across the various FADs so that they are consistent.⁶⁴ Optus submitted that the NPTCs that currently apply to all the FADs should be the starting point for determining which terms are common.⁶⁵ Optus submitted that resale provisions should apply to all services, including wholesale ADSL, provided by an access provider.⁶⁶

Optus also submitted that should the ACCC make a set of non-price terms, it should ensure that the non-price terms (both common and service-specific terms) only apply to access providers that have significant market power.⁶⁷

4.3 ACCC draft decision

4.3.1 Common and service-specific application of the NPTCs

The ACCC's draft decision is that the following terms will apply commonly to all the relevant declared services:

- billing and notification

⁵⁵ Nextgen, Submission to the ACCC Position Paper, 15 July 2014, p. 6.

⁵⁶ Nextgen, Submission to the ACCC Position Paper, 15 July 2014, p. 6.

⁵⁷ VHA, Submission to the ACCC Position Paper, 15 July 2014, page 13.

⁵⁸ VHA, Submission to the ACCC Discussion Paper, 15 July 2014, page 13.

⁵⁹ iiNet, Submission to the ACCC Discussion Paper, 12 December 2014, paragraph 9, 9.1 and paragraph 16.

⁶⁰ iiNet, Submission to the ACCC Discussion Paper, 12 December 2014, paragraph 10.

⁶¹ Macquarie Telecom, Submission to the ACCC Position Paper, 23 July 2014, p. 4; TPG, Submission to the ACCC Position Paper, 17 July 2014, p. 4.

⁶² TPG, Submission to the ACCC Position Paper, 17 July 2014, p. 4.

⁶³ NBN Co, Submission to the ACCC's request for comments on draft NPTCs, 4 February 2015, p 2

⁶⁴ Optus, Submission to ACCC position paper, 18 July 2014, p. 9.

⁶⁵ Optus, Submission to ACCC position paper, 18 July 2014, p. 9. These include billing and notification, creditworthiness and security, general dispute resolution procedures, confidentiality provisions, communications with end users, network modernisation and upgrade provisions and suspension and termination

⁶⁶ Optus, Submission to the ACCC's request for comments on draft NPTCs, 16 January 2015, p. 7.

⁶⁷ Optus, Submission to the ACCC Discussion Paper, 12 December 2014, paragraph 2.7.

- creditworthiness and security
- general dispute resolution
- confidentiality (including disclosure of confidential information to regulatory bodies)
- suspension and termination
- communication with end users
- network modernisation and upgrade notice periods
- changes to operating manuals.

The ACCC has decided that the following provisions should apply to only certain declared services:

- Resale services (Wholesale ADSL only)
- Ordering and provisioning relating to managed network migrations (ULLS and LSS only)
- ULLS ordering and provisioning processes for ULLS to LSS transfer (ULLS and LSS only)

Consistent with its position paper, the ACCC has developed a common set of NPTCs to apply across the relevant declared services, except where there are service-specific reasons for why a different approach is appropriate. For instance, some aspects of access might not arise in respect of all the declared services, or a different in-principle position might be appropriate for some aspects of access that are common across the services.

The ACCC considers that the common terms identified above are relevant terms of access to all the relevant declared services. It notes Telstra's submissions that terms regarding liability and indemnity, communications with end-users, network modernisation and upgrade notice periods, and changes to operating manuals should only apply to some services. In response, the ACCC considers that these terms are relevant to access to all the services. For instance, liability and indemnity is a key commercial matter for all the relevant declared services and has a direct bearing on the risk allocation between the parties (and therefore the direct costs of providing the service and its efficient use by access seekers). The ACCC therefore considers that the terms should apply to all services to reasonably allocate risk in the supply of those services. Similarly, regarding Telstra's views on the application of network modernisation and upgrade NPTCs, the ACCC disagrees and notes that even for end-to-end services like MTAS and DTCS, it is still in the interests of access seekers to be aware of outages which affect their service (whether or not this involves their equipment being supported).

In relation to applying the same common term to all the relevant declared services, the ACCC notes that this consistency would potentially lower the costs of compliance for access providers supplying more than one relevant declared service as they would only have to comply with one set of terms. It would also present potentially lower costs in contract management for access seekers. The ACCC has therefore decided that the terms should be the same across all the relevant declared services.

Regarding resale services, and managed network migrations and LSS to ULLS transfer, the ACCC recognises that these terms are only relevant to certain services and they only apply accordingly (as set out above). At this stage, the ACCC does not have information before it to suggest that the resale obligation should apply to services other than wholesale ADSL. For example, information about the extent to which other services are resold to resellers.

4.3.2 Application of NPTCs to carriers

The ACCC notes Optus' submission that the ACCC should ensure that NPTCs only apply to access providers that have significant power. The ACCC also notes that the existing wholesale ADSL FAD includes a term that only Telstra is required to comply with the SAOs in respect of the wholesale ADSL service. That is, all other carriers and carriage service providers are exempt from the application of the SAOs in respect of wholesale ADSL.

The ACCC's draft decision is to include a carrier-specific exemption in the wholesale ADSL FAD. The ACCC has included a term in the draft FAD instrument in respect of wholesale ADSL exempting all non-Telstra access providers from the category A SAOs in relation to the supply of wholesale ADSL. This applies to both FAD price and non-price terms. The ACCC has made this draft decision for the same reasons as set out in the ACCC's draft decision on primary prices.⁶⁸

As the ACCC has not received any specific information which indicates that including carrier specific exemptions in the remaining fixed-line services, MTAS or DTCS FADs, would align with the matters set out set out in subsection 152BCA(1) of the CCA. In this regard, the ACCC notes that these remaining services have been declared and subject to the relevant SAOs and have been covered by access determinations for many years. Accordingly, the ACCC's draft decision is to not include such terms in the remaining fixed-line services, MTAS and DTCS FADs.

⁶⁸ ACCC, *Public inquiry into FADs for fixed line services – primary price terms, Draft Decision*, March 2015. See Chapter 16.

5 Common terms

The ACCC's detailed assessment of the following common terms is set out in this section. The common terms will apply to the fixed line services (including wholesale ADSL), the MTAS and the DTCS. The common terms cover the following contentious matters:

- billing and notification
- creditworthiness and security
- general dispute resolution
- confidentiality (including disclosure of confidential information to regulatory bodies)
- communication with end users
- suspension and termination
- changes to operating manuals
- liability (risk allocation) and indemnity
- network modernisation and upgrade notice periods

Submissions on the above terms and the ACCC's assessment of the terms are set out in the rest of this section.

5.1 Billing and notification

5.1.1 ACCC draft decision

The ACCC's draft decision is to include billing and notification terms and conditions (set out in Schedule 3 of the NPTC) which set out the access provider's responsibilities to provide accurate bills within particular timeframes and how the access provider will be paid for services it supplies. The terms outline procedures for resolving billing disputes including an escalation process involving possible mediation. The ACCC considers that these terms are key commercial terms of access.

5.1.2 Issues raised in submissions and other issues

VHA made a number of submissions, including:

- that access providers should be required to quickly apply billing changes in their systems as this will ensure bills are current and allow access seekers to manage their finances efficiently.⁶⁹
- clause 3.9 be amended to prescribe more detail, including detail that specifies that the invoice is itemised, in an agreed format, outlines which service each charge relates to and the manner the charge has been calculated.⁷⁰
- clause 3.6(a) be amended to give access seekers 60 days, rather than 30 to pay their invoice once received.⁷¹

⁶⁹ VHA, Submission to the ACCC Discussion Paper, 12 December 2014, p. 16.

⁷⁰ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p. 4.

⁷¹ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p. 3.

- clause 3.6(c) which states the interest to be applied to owing and unpaid amounts by an access seeker, be amended to include some safeguards for access seekers.⁷² These included that a 10 day time limit be included before the interest can be applied.⁷³ Further, the access provider should be required to re-send the invoice with a statement that it is overdue and the date the invoice will start to accrue interest.⁷⁴
- parties should be able to set-off between them for services in the same service category.⁷⁵ (The draft terms do not currently allow for set-off unless a party goes into liquidation or unless agreed).
- clause 3.6(b) be amended to allow access seekers the right of set off, with written notice, where they are owed monies by the access provider which are overdue.⁷⁶
- clause 3.8 should be amended so that set off is not restricted to a liquidation event.⁷⁷ These rights should mirror the termination rights on insolvency.⁷⁸
- clause 3.3 be amended to include the words 'at regular intervals' so that the monthly invoices are issued at regular intervals.⁷⁹
- clause 3.3 be amended to ensure that invoices include credits payable and not charges only.⁸⁰
- clause 3.26(a) (resolving a billing dispute via mediation) be amended to allow the ACCC to have such disputes referred to it.⁸¹
- that where disputes cannot be resolved through the billing and payment dispute process, the dispute should be referred to the general dispute resolution process (Schedule 5 of the draft FADs) before legal proceedings can be commenced.⁸²
- an amendment be made to an incorrect cross reference at clause 3.31.⁸³

Telstra made a number of submissions, including:

- clause 3.7 should be amended so that an access provider does not have to wait 20 Business Days before taking action to recover an unpaid amount as a debt (where a dispute has not been notified).⁸⁴
- clause 3.19 be amended so that the timeframe within which the access seeker may decide whether or not it agrees with the access provider's decision to reject a billing dispute notice should be reduced from 15 Business Days to 5 Business Days.⁸⁵
- the ACCC should change clause 3.31. This clause provides that when a billing dispute procedure or 'other dispute resolution procedure' determines a number of incorrect and consecutive invoices then a penalty interest rate applies. This should be limited to

⁷² VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p 3.

⁷³ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p 3.

⁷⁴ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p 3.

⁷⁵ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p 3.

⁷⁶ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p 3.

⁷⁷ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p 4.

⁷⁸ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p 4.

⁷⁹ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p 2.

⁸⁰ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p 3.

⁸¹ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p 4.

⁸² VHA, Submission to the ACCC's Request for comments on draft NPTCs, Appendix 1, 20 January 2015, p. 17.

⁸³ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p. 5. The reference to clause 2.7 should be amended to clause 2.6'

⁸⁴ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 5.

⁸⁵ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p 24.

Billing Dispute Procedures (and not cover 'other dispute resolution procedures' unless it relates to the same matter).⁸⁶

- clause 3.31 should be further changed as penalty interest should only be triggered if the access provider is aware of the error, otherwise access seekers will not notify the access provider in order to take advantage of the interest rate payable under the clause.⁸⁷ This effect could also be addressed by subjecting access seekers to the same penalty interest under clause 3.31 where charges are resolved against them.⁸⁸

Nextgen proposed to delete clause 3.21 which states that interest is payable where access providers refund a disputed Charge.⁸⁹

Optus submitted a new clause so that access providers provide transactional data that is required to enable billing by access seekers.⁹⁰

5.1.3 Reasons for ACCC draft decision

The ACCC considers that access seekers could be adversely affected by materially inaccurate bills or delayed bills, or if billing disputes are not resolved quickly. The terms promote competition (and therefore the LTIE) by encouraging accurate and timely billing and by preventing disruptions to business activities resulting from errors or ongoing disputes. The ACCC also considers that this is in the interests of access seekers.

The terms also reflect the legitimate business interests of access providers. These terms reduce the risks for access providers by ensuring that access providers earn a normal commercial return on their investment by minimising the risk of not being paid amounts owing. For instance, the terms allow for back-billing (within six months since the date the relevant amount was incurred) for services rendered. Further, the terms are also in the access provider's legitimate business interest because they provide it certainty that charges will be recovered in a timely manner.

The specific proposals made by stakeholders summarised above are considered in turn below.

Regarding VHA's submission on clause 3.9, the ACCC has decided to adopt one of VHA's proposals to make clear in invoices which service each charge relates to. This will allow an access seeker to appropriately and efficiently recover its costs from end users which also thereby promotes the efficient use of and investment in infrastructure used to supply listed services. This would also be in the interests of access seekers using the declared service.

The ACCC has not adopted VHA's other amendments:

- It does not consider it appropriate to amend (as proposed by VHA) clause 3.6 to increase the due date for payment of an invoice from 30 Calendar Days to 60 Calendar Days. Extending the timeframe would likely result in unreasonable delays to access providers recovering monies owed.
- VHA's proposed amendments to clause 3.6(c) to require a 10 day time limit and other notice before access seekers are required to pay interest on unpaid amounts is not reasonable. The current drafting is important to access providers' legitimate business interests as they incentivise timely payment by access seekers. In relation to VHA's submissions regarding set-off rights in subclause 3.6(b) and clause 3.8, the ACCC does not consider it reasonable that set off rights (or the lack thereof) should be

⁸⁶ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 6.

⁸⁷ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 6.

⁸⁸ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 6.

⁸⁹ Nextgen, Submission to the ACCC's Request for comments on draft NPTCs, 23 January 2015, p. 3.

⁹⁰ Optus, Submission to the ACCC's Request for comments on draft NPTCs, 16 January 2015, p. 4.

expanded. Parties can already seek further set off rights (for insolvency or otherwise) by agreement under Clause 3.6(b).

- The ACCC considers that VHA's proposal to change the wording of 3.3 to provide invoices 'at regular intervals' is not necessary. The current drafting of 3.3 already requires that invoices be provided each month or unless the parties agree otherwise.
- The ACCC does not consider reasonable VHA's submission that unresolved billing disputes should be referred to the general dispute resolution process (Schedule 5) before legal proceedings can be commenced. Schedule 3 provides for various escalation steps that are appropriate and adequate before parties can pursue legal proceedings. The current processes promote timeliness which is in the interests of both parties.

The ACCC considers that VHA's proposed change to 3.26(a) so that the ACCC has a role in mediating billing disputes is not necessary. The ACCC considers that the Schedule gives parties adequate recourse to independent mediation and court. (The ACCC has also considered whether the ACCC should have a role in regards to the general dispute resolution process under Schedule 5 in section 5.3). In relation to Telstra's submission to change clause 3.7, the ACCC considers that removing the grace period of 20 days available to access seekers before an access provider can recover debt is not appropriate. The current 20 days is a reasonable length of time for an access seeker to identify and rectify non-payment, while still allowing an access provider to take debt recovery action reasonably quickly. Also, the ACCC considers that Telstra's proposal to reduce the timeframe within which an access seeker may notify a Billing Dispute should not be implemented. The current timeframe appropriately balances the interests of all parties.

The ACCC notes Telstra's concern that access seekers may try to take advantage of the interest payable under clause 3.31 by not promptly notifying a dispute about an invoice error. The ACCC has not adopted Telstra's proposed solution to make clause 3.31 reciprocal as this will not effectively deal with the issue. Rather, it has decided to amend clause 3.14 which currently provides that a Billing Dispute Notice must be given to the access provider within six months of the invoice. The ACCC will amend this clause to also specify that the access seeker must, as early as practicable, notify the access provider of an error identified by the access seeker in an invoice. The ACCC considers that this change will address any incentive of access seekers to take advantage of the penalty rate in clause 3.31 and is therefore in the legitimate business interests of the access provider and is not an onerous obligation on access seekers.

The ACCC has considered Telstra's other proposed amendments to clause 3.31 and has not adopted them because they are unnecessary or not appropriate.

The ACCC considers that Nextgen's proposal to delete clause 3.21 so that an access provider does not pay interest on charges it refunds to access seekers, would favour access providers' financial interest at the expense of the interests of access seekers. The ACCC has retained the previous drafting which reflects common industry practice.

5.2 Creditworthiness and security

5.2.1 ACCC draft decision

The ACCC has decided to make terms on creditworthiness and security. These terms protect the access provider's interests and minimise its risk by enabling it to make appropriate enquiries regarding the creditworthiness of an access seeker and to seek security where it is necessary to protect its legitimate business interests. These terms also reduce the likelihood of an access seeker defaulting on a payment.

5.2.2 Issues raised in submissions

VHA submitted that the ACCC should amend clause 4.3 to make it clear that when assessing the access seeker's ability to pay for services (inability to pay is a trigger for requesting security), the access provider must take into account the access seeker's credit rating.⁹¹

Telstra made a number of submissions, including that:

- security should be a precondition to the supply of a service and that the access provider should decide the amount and form of security.⁹² Telstra submitted that if 'upfront' security is not required, then an access provider should be able to immediately suspend supply where security is never supplied.⁹³
- clause 4.3 be amended to make clear who, out of the access provider and access seeker, can determine the amount and form of security.⁹⁴
- clause 4.5, which allows security to be altered as a result of ongoing creditworthiness information (OCI), be amended in a number of ways. Firstly, to shorten the period in which the access seeker must provide altered security from 20 Business Days to 10 Business Days.⁹⁵ Telstra also proposed amendments to clause 4.5 to add more triggers (other than receipt of OCI) that allow Telstra to request altered security.⁹⁶ E.g. where an access seeker significantly increases services ordered.⁹⁷
- the meaning of 'ongoing creditworthiness information' should be broadened to include further types of information including any other information reasonably required to assess the access seeker's creditworthiness.⁹⁸
- clause 4.10, which provides that certain failures such as failure to provide warranties that the OCI is true and correct, will amount to a trigger for altering security, or a breach of a material term of the FAD, be amended. The amendment would allow the access provider to choose both outcomes rather than choosing between the two outcomes.⁹⁹

Optus made a number of submissions including:

- clauses 4.2(b) be clarified as it is not clear what 'the amount paid or satisfied' refers to.¹⁰⁰
- clause 4.4 be amended to remove the last two paragraphs relating to when an existing Bank Guarantee lodged as security expires, as the access seeker already has an obligation to maintain the relevant security (which may be a bank guarantee) under 4.2(a).¹⁰¹ (Telstra objected to these suggested changes to clause 4.4¹⁰²).

⁹¹ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p. 6.

⁹² Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 7.

⁹³ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 7.

⁹⁴ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 8.

⁹⁵ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 8.

⁹⁶ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 8.

⁹⁷ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 8.

⁹⁸ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 9.

⁹⁹ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 10.

¹⁰⁰ Optus, Submission to the ACCC's Request for comments on draft NPTCs, 16 January 2015, p. 4.

¹⁰¹ Optus, Submission to the ACCC's Request for comments on draft NPTCs, 16 January 2015, p. 5.

¹⁰² Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 10.

5.2.3 Reasons for ACCC draft decision

The ACCC considers that excessive creditworthiness information or security requirements may delay an access seeker's ability to acquire services. This may also create a barrier to their ability to compete in the downstream market. However, the ACCC also recognises the importance of reducing the financial risk for the access provider in supplying wholesale customers who are not creditworthy. Reducing this risk promotes economically efficient investment in infrastructure, as access providers will have confidence that they can recover their costs of investment. The ACCC considers the current terms in Schedule 4 balance these competing considerations and promote the LTIE.

Each of the proposals is considered in turn below.

The ACCC's draft decision is that it is not necessary or appropriate to require that security is a precondition to supply, or require that additional triggers are included for requesting an altered security. These amendments would extend the rights of the access provider beyond those necessary for the protection of its legitimate business interests, and may raise barriers for access seekers to acquire services and compete in downstream markets.

The ACCC considers that Telstra's proposal that clause 4.3 be amended to make clear that it is the access provider (and not the access seeker) who may determine the amount and form of security is reasonable and will provide more certainty about the term in the interests of both parties. This amendment is also in the legitimate interests of the access provider as it ensures the recovery of direct costs of providing access to the declared service (where an access seeker fails to pay). Also, the amendment promotes the LTIE, by ensuring that an appropriate amount of security is determined and ultimately obtained from the access seeker which encourages the efficient use of infrastructure used to supply listed services. The ACCC considers VHA's proposal to amend clause 4.3 so that the access provider must consider an access seeker's credit rating when deciding its ability to pay, is not necessary. The ACCC notes the access provider must have 'reasonable grounds' to doubt the ability of an access seeker to pay, and the ACCC considers that this would require the access provider to have reasonable evidence, including a consideration of the access seeker's credit rating.

The ACCC considers that 20 Business Days is a reasonable length of time for access seekers to provide altered security under clause 4.5. Shortening the timeframe, as proposed by Telstra, might be commercially unreasonable particularly for significant increases in security and would not be in the interests of the access seeker.

The ACCC considers that Telstra's proposal to extend the meaning of 'ongoing creditworthiness information' is reasonable and appropriately balances the section 152BCA matters. The ACCC considers that broadening it to include 'any other information reasonably required... to assess the access seeker's creditworthiness' is reasonable but should be limited to 'as agreed between the parties'. The ACCC considers that it is in both the access provider's and access seeker's interests to have flexibility to agree to further and alternative creditworthiness information, particularly where the documents listed in clause 4.8 are not available. This new subclause has been included as subclause 4.8(e) of the draft NPTCs in the draft FAD.

The ACCC has not adopted Telstra's proposed change to subclauses 4.10 (a) and (b) as it would not reflect a reasonable balance of access provider and access seeker interests.

The ACCC has not adopted Optus' proposal regarding clause 4.2(b) as it does not consider it to be appropriate. The ACCC has also not adopted Optus' proposal regarding clause 4.4 as the ACCC does not consider that subject matter (dealing with when a bank guarantee expires) is adequately dealt with by clause 4.2 (as suggested by Optus).

5.3 General dispute resolution

5.3.1 Overview

Schedule 5 of the Draft FAD instrument regarding general dispute resolution procedures establish how disputes should be managed. These procedures provide for escalation within and between the parties to either an Expert Committee or to mediation before legal proceedings. The ACCC proposes to include these NPTCs as they promote the interest of both the access provider and the access seekers by allowing for faster and more cost effective resolution of disputes before legal proceedings.

5.3.2 Issues raised in submissions and other issues

VHA made a number of submissions, including:

- the ACCC should be involved in hearing disputes under clause 5.2 about whether a dispute is a billing or non-billing dispute and parties should be able to choose the ACCC as a possible independent third party as an alternative to existing Australian Commercial Dispute Centre (ACDC) members.¹⁰³
- clause 5.4(b) should also include a referral to the ACCC to resolve a non-billing dispute (this clause currently allows parties to refer the dispute to an Expert Committee).¹⁰⁴ VHA alternatively proposes a new clause 5.9A be included to outline the procedures when a non-billing dispute is referred to the ACCC.¹⁰⁵
- clause 5.11(d) which specifies that the ACDC appoint an independent chairperson to the Expert Committee should be changed to an appointment by the ACCC.¹⁰⁶
- clause 5.8 be amended to clarify that the communications between parties during the course of a Non-Billing Dispute are without prejudice and confidential where the communications are 'in connection with that Non-Billing Dispute'.¹⁰⁷

Optus submitted that clause 5.2 (independent third party determining whether a dispute is a billing dispute or a non-billing dispute) specify certain qualifications or expertise that this third party must hold.¹⁰⁸ Alternatively, Optus submitted that the third party could be an arbiter from the ACDC (who fulfils the requirements in clause 5.10(d)).¹⁰⁹ Optus also identified a drafting error at clause 5.5.¹¹⁰

Nextgen proposed a minor drafting amendment to clause 5.11 (i) (Expert Committee) so that such a Committee may conduct 'reasonable inquiries' rather than 'any inquiry as it thinks fit'.¹¹¹

5.3.2.1 ACCC as arbitrator

A number of stakeholders made submissions regarding the role of the ACCC to arbitrate disputes. Telstra submitted:

¹⁰³ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p. 6.

¹⁰⁴ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p. 6.

¹⁰⁵ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p. 7.

¹⁰⁶ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p. 7.

¹⁰⁷ VHA, Submission to the ACCC's Request for comments on draft NPTCs, 20 January 2015, p. 7.

¹⁰⁸ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 5.

¹⁰⁹ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 5.

¹¹⁰ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 5.

¹¹¹ Nextgen, Submission to the ACCC's Request for comments on draft NPTCs, 23 January 2015, p. 3.

- where a dispute relates to terms and conditions in a FAD, the ACCC should not have a dispute resolution role as the existing schedule on dispute resolution already provides for adequate processes for resolving disputes regarding FAD terms.¹¹² Telstra also submitted that the 'negotiate-arbitrate' model was intentionally removed from the CCA as it was not producing effective outcomes for industry or consumers.¹¹³
- where a dispute relates to terms and conditions in an access agreement, a dispute resolution role by the ACCC would not work as clauses in access agreements do not generally distinguish between how they apply to declared versus non-declared services.¹¹⁴ Hence, practical issues would arise where disputes relate to declared and non-declared services as the ACCC does not have power to set terms and conditions for non-declared services.¹¹⁵

iiNet submitted that there is a distinction between a dispute about a breach of terms and conditions of access and a dispute about what the terms and conditions of access should be.¹¹⁶ iiNet submitted that a dispute relating to whether or not a variation to existing terms is reasonable is similar to a dispute about what the terms of access should be. Given the ACCC's ability to make default terms of access in FADs and BROCs, the ACCC should arbitrate those disputes (about variations to terms of access).¹¹⁷

Similarly, Vocus submitted concerns around the ACCC not having a role in hearing disputes about variations to the terms for access.¹¹⁸ Vocus considered that a dispute about the variation of these contractual terms of access is different to a dispute about a breach of existing access terms.¹¹⁹ Vocus considered that the former should be dealt with by the ACCC when parties are unable to resolve the dispute themselves.¹²⁰

VHA submitted that the clauses should include an option for arbitration of the dispute by the ACCC, given the role the ACCC has in setting the NPTCs and regulating declared services.¹²¹ This right should be activated after the parties have exhausted attempts to resolve the dispute between themselves via escalation to senior representatives.¹²²

5.3.3 Reasons for ACCC draft decision

The ACCC considers that defined and balanced dispute resolution procedures reduce the time and expense for resolving disputes for all parties. The ACCC considers that the terms in Schedule 5 of the draft FAD achieve a balance between the interests of both the access seeker and the access provider. For example, they provide an assurance to parties that disputes can be resolved without litigation and through an escalation process, but then also allow for litigation when these procedures have been exhausted and the dispute is sufficiently serious.

¹¹² Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 8.

¹¹³ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 8.

¹¹⁴ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 8.

¹¹⁵ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 8.

¹¹⁶ iiNet, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 7.

¹¹⁷ iiNet, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 7.

¹¹⁸ Vocus, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 4.

¹¹⁹ Vocus, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 4.

¹²⁰ Vocus, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 4.

¹²¹ Vocus, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 4.

¹²² VHA, Submission to the ACCC Discussion Paper, 12 December 2014, p. 8.

The ACCC has considered submissions below.

The ACCC considers that VHA's submitted amendment to clause 5.8 so that it is clear that the communications must be 'in connection with that Non-Billing Dispute' is reasonable and provides clarity to both parties regarding when the communications are without prejudice and confidential. The ACCC has considered VHA's other proposals and has decided to not adopt them because it does not consider them to be necessary.

The ACCC considers that clause 5.2 which concerns appointing the person who hears whether a dispute is a non-billing or billing dispute, should be amended to specify that they hold certain qualifications (as proposed by Optus). The ACCC considers that the qualifications listed in clause 5.10(d)(i)-(iii) are appropriate and these have been applied to clause 5.2 in a new subclause 5.2(a). The ACCC considers that it is in the interests of both access seekers and access providers that the person making the determination does not have a conflict of interest and understands the relevant aspects of the telecommunications industry and the competition law implications of a decision.

The ACCC has not adopted Nextgen's submission to amend clause 5.11(i) so that the Expert Committee may conduct 'reasonable inquiries' rather than 'conduct the type of inquiry as it thinks fit'. The ACCC considers that the current drafting of this clause is more likely to result in efficient and timely resolutions for both parties.

5.3.3.1 ACCC as arbitrator

The ACCC notes iiNet, Vocus and VHA's submissions supporting an ACCC dispute resolution role over variations to terms of access in an access agreement, and a role under Schedule 5 (general dispute resolution under the FAD). The ACCC also notes Telstra's views opposing a role for the ACCC in resolving any of these disputes.

The ACCC has not amended Schedule 5 to specify that the ACCC has a role as arbitrator for any disputes about access agreement terms (or variations to them), nor has it made a role for the ACCC to arbitrate disputes under the FAD.

Regarding disputes about access agreement terms, the ACCC notes Part XIC of the CCA was amended in 2010 because the Government found that the previous negotiate-arbitrate model in which the ACCC had an arbitration role, did not produce effective outcomes for industry or consumers.¹²³ Previously, Part XIC of the CCA provided that if parties could not agree on the terms of access to a declared service, then either party could notify an access dispute to the ACCC.¹²⁴

The ACCC also notes its current extensive powers under section 152BD of the CCA to issue a binding rule of conduct to set the various terms and conditions of access on which a carrier or carriage service provider is to comply with.¹²⁵ These powers allow the ACCC to respond swiftly if the Commission considers that there is an urgent need to do so.¹²⁶ If parties had concerns about terms of access in their access agreement when negotiating them or after entering into their access agreement, the ACCC could effectively hear those concerns and (subject to the relevant CCA matters) make a BROCC on them.¹²⁷ In view of this BROCC power, the ACCC does not consider it necessary to specify that it has a role in resolving disputes about access agreement terms.

¹²³ Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, Explanatory Memorandum, page 4.

¹²⁴ Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, Explanatory Memorandum, page 4.

¹²⁵ Competition and Consumer Act 2010, sub-section 152BD (1).

¹²⁶ Competition and Consumer Act 2010, subsection 152BD(6).

¹²⁷ Subsection 152CI(8) of the CCA - if the ACCC makes a BROCC to a declared service and no access determination is in force, then within 30 days after making the BROCC, the Commission must commence to hold a public inquiry about a proposal to make an access determination relating to access to the declared service.

For the same reasons identified above, the ACCC does not consider that a dispute regarding a variation to any access agreement terms should be dealt with by the ACCC.

In relation to disputes about FAD terms, the ACCC considers that the current general dispute resolution clauses already provide timely and efficient measures to resolve such disputes and recourse to an independent forum – an Expert Committee, mediator, or court. This safeguards both access seeker and the access provider interests.

5.4 Confidentiality

5.4.1 ACCC draft decision

The ACCC's draft decision is to include a schedule of NPTCs (Schedule 6) on confidentiality obligations which apply to both parties. Confidentiality clauses seek to ensure that confidential information used or obtained in the course of providing access is not misused to the access seeker's detriment.

5.4.2 Issues raised in submissions and other issues

Telstra made a number of submissions, including:

- clause 6.2 be amended to further clarify that the information must be about the service for it to be confidential information (currently, the clause defines the information by reference to how it is generated).¹²⁸
- a new clause regarding disclosure of confidential information to regulatory bodies which would allow an access provider to disclose an access seeker's confidential information to meet a reporting obligation or request by a regulator or a government body under Telstra's Structural Separation Undertaking (**SSU**), or in connection with interception capability relating to a Service provided by the Access Provider to the Access Seeker.¹²⁹ Telstra submitted that these amendments promote certainty and the efficient use of information as it will not have to obtain consent each time disclosure is required.¹³⁰
- that the permitted disclosure of confidential information to directors, employees etc set out in clause 6.5(a) should not be, as it currently is, confined to disclosure for the purposes of the FAD.¹³¹ This does not reflect that the access provider may be supplying other wholesale services other than the service supplied under this FAD.¹³²

iiNet submitted that it has no objections to the FAD terms permitting disclosure to the ACCC so long as Telstra notifies the access seeker that its confidential information has been disclosed to the ACCC.¹³³ iiNet submitted that any rights of disclosure to regulatory bodies should apply to both parties.¹³⁴ Vocus made similar proposals to those made by iiNet and added that if a regulatory authority publishes information, consent should be sought for that publication.¹³⁵

VHA made a number of submissions, including:

¹²⁸ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 10.

¹²⁹ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 5 February 2015, p. 6.

¹³⁰ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 10.

¹³¹ Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 10.

¹³² Telstra, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, p. 10.

¹³³ iiNet, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 5.

¹³⁴ iiNet, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 5.

¹³⁵ Vocus, Submission to the ACCC's Request for comments on draft NPTCs, 14 January 2015, paragraph 3.

- a new clause 6.5(j) be made that allows for disclosure in order to obtain funding and in connection with a prospective sale of the business or assets.¹³⁶ Similarly, VHA submitted a new clause 6.5(k) to allow disclosure within the corporate group.¹³⁷
- clause 6.5(i) (which specifies that information can be disclosed as required by the listing of any stock exchange where the parties' securities are listed) be amended so that the confidential information can be disclosed to include 'or the securities of a related body corporate'.¹³⁸

Optus made a number of submissions, including:

- that Optus does not support the inclusion of a clause relating to disclosure of information to the ACCC or other government bodies.¹³⁹ Optus submitted there is no need for such a clause because under Part XIC, access providers must submit to the ACCC a copy of its access agreements.¹⁴⁰
- changes to clarify clause 6.10.¹⁴¹
- before an access provider discloses any confidential information of an access seeker to a credit reporting agency under clause 6.10, the access provider should be obliged to notify the credit reporting agency that the information is confidential.¹⁴² The credit reporting agency should also be required to agree to certain confidentiality clauses no less onerous than those set out in clauses 6.1, 6.5, 6.6 and 6.7.¹⁴³

5.4.3 Reasons for ACCC draft decision

The ACCC considers that the terms in Schedule 6 provide assurance that commercially sensitive information and confidential information cannot be used to gain a competitive advantage to the detriment of the other party. They do this by specifying how Telstra can use that information for the purposes of the FAD. The provisions also protect disclosure of confidential information to other parties which are not parties to the contract. These protections are likely to result in efficient investment in and use of infrastructure used to supply the relevant services, because access seekers will know that confidential information is protected and competition will occur on its merits and that access providers cannot exploit an unfair advantage. This would be in their interest. The provisions also allow for use of confidential information for the purposes of supplying services which allows for the efficient operation of the carriage service by access providers.

Each of industry proposals are considered in turn below.

The ACCC has decided to include Telstra's submitted new subclause regarding disclosure of confidential information pursuant to its SSU or in connection with Telstra's interception

¹³⁶ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 8.

¹³⁷ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 9.

¹³⁸ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 8.

¹³⁹ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 3.

¹⁴⁰ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 3.

¹⁴¹ Optus sought to clarify whether an 'or' should be inserted next to sub-paragraph (a)(i) and to clarify whether it is correct that an 'or' is placed following sub-paragraph (b), Ibid, p. 5.

¹⁴² Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 5.

¹⁴³ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 5.

capability obligations (the new subclauses are subclauses 6.5(j) and (k)). However, the ACCC considers such a clause should also require Telstra to notify the relevant regulator of the confidential nature of the information disclosed. This will apply reciprocally so that access seekers can also disclose the same information without consent.

The ACCC considers this new clause would lead to efficiency as less time would be used in negotiating the non-contentious release of such confidential information. This reflects the legitimate business interests of the access provider, while also ensuring that the interests of access seekers are maintained by making clear to the disclosee that the information is confidential.

Regarding clause 6.5(a), Telstra submitted that limiting disclosure of confidential information within Telstra to the 'purposes of the FAD' fails to recognise that an access provider may be supplying multiple services to a wholesale customer and that disclosure of the confidential information may be required in the supply of those services.¹⁴⁴ The ACCC recognises Telstra's concern and has made an amendment to allow disclosure of Confidential Information in connection with the supply of the service to which the FAD relates. This is broader than the terms of the current FADs. This amendment will allow Telstra to disclose Confidential Information for purposes other than those of the FAD, for instance, to allow Telstra to supply other services not covered by the FAD but the supply of which is required to supply the relevant service under the FAD. The ACCC considers that this amendment will promote the efficient operation of a carriage service by allowing the use of information within Telstra to provide the relevant declared services and services related to it. The ACCC also considers that access seeker interests will continue to be safeguarded as the disclosure must be as 'reasonably required' for the purposes of the FAD or other supply agreements, and protections around wholesale customer information such as the information security provisions in Telstra's SSU will continue to apply.

The ACCC considers that VHA's submitted amendments to subclauses 6.5(j) and (i), and proposed new subclause 6.5(k), are not appropriate as it would expand parties' rights to disclose confidential information without consent to potentially a very great and unknown extent.

The ACCC has not implemented Telstra's other proposed amendments because it does not consider that they are necessary.

The ACCC has amended clause 6.10 to clarify it as requested by Optus, however it has not adopted Optus' proposal requiring an access provider to notify the credit reporting agency that its information is confidential because it considers this proposal to be inappropriate.

5.5 Communication with end users

5.5.1 ACCC draft decision

The ACCC has decided to make Schedule 9 of the draft terms which contain clauses on when and how a service provider can communicate with an end-user of the other party. The ACCC considers that these are important terms of access in assuring access seekers that access providers cannot misuse their position as wholesale provider to market goods and/or services to end users.

¹⁴⁴ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 10.

5.5.2 Issues raised in submissions and other issues

Optus is concerned that clauses 9.3(b) and 9.3(c) situate the access provider in a position where its staff may install and maintain service on behalf of access seekers.¹⁴⁵ It states they should be amended to ensure that an access provider may not engage in marketing activity on behalf of its retail divisions.¹⁴⁶

VHA made a number of submissions, including:

- clause 9.2 (a)-(c) (which set out circumstances in which an access provider may communicate with the access seeker's end-users, e.g. as the general public) should be deleted, as those circumstances do not relate to the agreement.¹⁴⁷
- clause 9.2 (e) be amended to reflect that the only circumstances an access provider may contact an access seeker's customers is where an emergency situation has occurred and where it cannot practicably provide notice to an access seeker so it can make contact.¹⁴⁸
- clause 9.6 (a) be amended to further specify that a party cannot use the other party's name, trademarks etc., unless consent has been given.¹⁴⁹
- clause 9.7 (which specifies that parties may not attribute fault or outcomes to the other Party when communicating with end-users) be amended, so that it is allowed when the matter has been investigated, and the cause has been agreed between the parties.¹⁵⁰

5.5.3 Reasons for ACCC draft decision

The clauses about communication with end users restrict access providers from inappropriately using marketing strategies when dealing with the access seeker's customers. For instance, when an end-user contacts an access provider about a fault. The clauses are important as they assure access seekers that an access provider is unable to use its control over the network to try to attract the access seeker's end-user customers to switch retail providers. By requiring that communication and marketing with access seeker end-users may only be undertaken appropriately, competition between access providers and access seekers will occur on the relative merits of service providers. Parties are also more likely to increase competition by undertaking efficient investment in infrastructure in an attempt to provide additional services, and goods and services of a higher quality.

The clauses are also in the legitimate interests of access providers as they help to protect their reputation of access providers by specifying that parties cannot blame the other party for a fault or suspension of the service. Therefore, as a whole, Schedule 9 enables both access providers and access seekers to compete equally to win and retain customers. The ACCC therefore considers that the schedule will promote the LTIE.

Stakeholder proposals are considered below.

¹⁴⁵ Optus Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 6.

¹⁴⁶ Ibid.

¹⁴⁷ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 11.

¹⁴⁸ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 11.

¹⁴⁹ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 12.

¹⁵⁰ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 12.

In response to Optus' submission, the ACCC does not consider that clause 9.3(c) should be amended to remove an access provider's ability to market or discuss its own goods and/or services which it supplies to an end-user. The ACCC considers that the current drafting of clause 9.3(c) strikes a balance between protecting both the legitimate business interests of the access provider and access seeker. The ACCC has not adopted Optus' proposal regarding sub-clauses 9.3(b) and (c). They are reasonable as they only allow an access provider to market services for the services it already supplies the end-user.

The ACCC considers that VHA's proposal to amend clause 9.6(a) is appropriate. The ACCC considers that the submitted amendments promote the legitimate business interests of the access provider as they prevent access seekers from using the access provider's name and trademarks (without consent) to gain a competitive advantage. The ACCC also notes that this position is consistent with intellectual property laws.

In response to VHA's submission, the ACCC does not consider that sub-clauses 9.2(a) – (c) should be deleted so (d) and (e) are the only circumstances in which an access provider may contact an access seeker's customers. The ACCC considers these clauses provide certainty to the parties so that they know an access provider can communicate to end-users in those specified circumstances. E.g. an access provider can communicate to access seeker customers when those customers are part of the general public. The ACCC has decided to not adopt VHA's other amendments to clause 9.7.

5.6 Suspension and termination

5.6.1 ACCC draft decision

The ACCC's draft decision is to make NPTCs that relate to how the relevant declared services can be suspended and terminated. These terms are set out in Schedule 7 of the draft NPTC schedules. The ACCC considers that these NPTCs are fundamental commercial terms of access and provide certainty to access seekers about when their services can be disrupted.

5.6.2 Issues raised in submissions and other issues

Telstra made various submissions on the schedule regarding suspension and termination:

- clause 7.1 (which allows an access provider to immediately suspend the supply of a Service) should be extended so that an access provider can also suspend services where the access seeker breaches 'key' security or creditworthiness obligation (see section 5.2), or the resale obligation (discussed in section 6.1).¹⁵¹
- clause 7.5 (which enables Telstra to cease supply with notice) should be amended in a number of ways that would allow it to cease supply faster or expand its right to cease supply, including:
 - ceasing supply where an access seeker ceases to carry on business for 10 consecutive days (subclause 7.5(b)) should be amended so that it is not subject to the 10 day timeframe.¹⁵²
 - an access seeker should have completed remedial action (rather than only have commenced it) under the Remedy Period. i.e. an access seeker would have to do more to avoid its services being terminated.¹⁵³

¹⁵¹ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, p. 10.

¹⁵² Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, p. 11.

¹⁵³ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015 p. 11.

- the FAD include a new subclause under clause 7.5 which would allow the access provider to immediately cease supply where an access seeker commits a material breach that is incapable of being remedied.¹⁵⁴

VHA made a number of relevant submissions, the key of which are:

- The access provider should have a limited right to suspend services, with notice, for emergencies only (current terms allow for immediate suspension in other circumstances).¹⁵⁵
- A new termination clause should be introduced (clause 7.5A) which would allow a reciprocal right for an access seeker to terminate the agreement with notice for material breach.¹⁵⁶ Optus made a similar submission.¹⁵⁷
- Clause 7.10 which specifies an access provider must refund sums paid for a service which has been terminated, should be extended to also require an access provider to refund monies for periods of suspended service.¹⁵⁸

Optus submitted:

- Subclause 7.2(d) which specifies that an access provider can give a Suspension Notice 'as soon as reasonably practicable after becoming aware of the Suspension Event', should be amended to specify a period of 20 days for notice.¹⁵⁹
- Subclause 7.2 which provides a 10 day period for an access seeker to institute remedial action after receiving a Suspension Notice (and thereby avoid a refusal to supply or suspended service), should be extended to 20 business days.¹⁶⁰ (Telstra strongly disagreed with this given the seriousness of the events giving rise to Telstra's ability to suspend under this subclause.)¹⁶¹

Nextgen made submissions on Schedule 7, including that clause 7.6 should be amended to specify that the access seeker must pay all charges, regardless of termination, to the end of the contracted period where the access seeker has defaulted or terminated without cause.

5.6.3 Reasons for ACCC draft decision

The ACCC considers that suspension and termination NPTCs, which set out when an access provider may suspend or terminate services, the required process for notice and actions that access seekers can take to avoid suspension or termination, promote the LTIE. These provisions will assure access seekers that their services will not be indiscriminately or inappropriately suspended or terminated, and thereby provide certainty to them which will encourage the efficient use of infrastructure used to supply the relevant declared services. Also, by protecting against inappropriate suspension and termination, this will promote competition on its merits in the relevant retail markets.

¹⁵⁴ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, p. 11.

¹⁵⁵ VHA, Submission to the ACCC Position Paper, 16 July 2014, Appendix 1, p. 9.

¹⁵⁶ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 9.

¹⁵⁷ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, January 2015, p. 5.

¹⁵⁸ VHA, Submission to the ACCC Request for comments on draft NPTCs submission, 20 January 2015, p. 10.

¹⁵⁹ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 5.

¹⁶⁰ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 5.

¹⁶¹ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 10.

The ACCC considers that the particular terms strike a balance between access providers' legitimate interests in protecting against the risks of supplying risky access seekers or in risky circumstances, and also the access seekers' right to use the service without undue disruption. They balance the seriousness of the event triggering the suspension/termination, with whether notice is required and an access seeker's ability to take remedial action.

The ACCC considers submissions on various amendments to Schedule 7 below.

5.6.3.1 Immediate suspension under clause 7.1

Telstra sought amendments to expand the right to immediately suspend services for two new events. The ACCC considers that these events do not warrant immediate suspension of services and would not be in the interests of access seekers. Conversely, VHA submitted that an access provider's ability to suspend services should be restricted to emergencies only. The ACCC considers that this would not be consistent with an access provider's legitimate business interest to immediately suspend supply to protect against other significant non-emergency risks.

5.6.3.2 Suspension with Suspension Notice

Optus sought amendments to the clause 7.2 process for providing a Suspension Notice (the process that applies before an access provider is allowed to suspend a service). The ACCC has not adopted these amendments because it considers the process in clause 7.2 to appropriately balance access provider and access seeker interests. For instance, regarding Optus' proposal to extend the period in which an access seeker must institute remedial action, the ACCC considers that a period of 10 days is proportionate to the seriousness of the Suspension Events (in subclauses 7.2(a) to (c)).

5.6.3.3 Termination under clause 7.5

VHA and Optus submitted that the FAD should specify that access seekers have rights to terminate a service. The ACCC has considered whether part (b) of clause 7.5 should also reciprocally apply to access seekers so that they can terminate supply (as was the case under the 2008 Model terms). That is, allow an access seeker to terminate services where an access provider ceases to carry on business for more than 10 business days. The ACCC notes that some FADs (for fixed line services and MTAS) provide for this reciprocal right and others do not (DTCS and wholesale ADSL FADs).

The ACCC notes that not changing the term would mean that the FADs would only deal with how an access provider can terminate services and this might be appropriate where the FAD focusses only on protecting against an access provider's inappropriate termination of services. However, the ACCC considers that making subclause 7.5 (b) reciprocal would be appropriate and in the access seeker interest as it provides more certainty about when they can terminate services, particularly where it is clear that the access provider cannot supply them. The ACCC has decided to include a new subclause 7.5A which provides a reciprocal right to access seekers to terminate acquisition of services where an access provider has ceased to carry on business. The ACCC has decided that it is not appropriate to make other subclauses in 7.5 reciprocal.

The ACCC has not adopted Telstra's proposed amendments to clause 7.5 which expand Telstra's ability to terminate services as the current drafting provides a reasonable balance of interests. For instance, Telstra's proposed new subclause which would eliminate the breach notice process (and the ability of access seekers to avoid termination) for breaches that are incapable of being remedied is not appropriate. The ACCC considers that access seekers should be able to prove that the breach is remediable before termination under clause 7.5.

5.6.3.4 Refund of monies under clause 7.10

The ACCC has not adopted Nextgen's proposed changes to clause 7.10 which would require access seekers to pay to the end of the contract period where they have defaulted or terminated without cause. This would result in inefficient over-recovery of costs by the access provider for services not supplied and is therefore not in the interests of access seekers.

The ACCC has adopted VHA's proposal requiring an access provider to refund sums paid for services which have been suspended but has subjected this to a time period of suspension for 10 or more business days. This provides for the efficient use of a telecommunications network because access seekers will not be paying (and an access provider will not be over-recovering) for suspended services. The ACCC considers that the related compliance costs for access providers is balanced by only requiring refunds where suspension has continued for a material period of 10 days or more.

5.7 Changes to operating manuals

5.7.1 ACCC draft decision

The ACCC's draft decision is to include NPTCs relating to changes to operating manuals in Schedule 11 of the draft NPTC schedules. These terms specify how an access provider can unilaterally change, with notice and consultation, its operating manuals to vary standard processes. They also provide for referral of disputes on changes to manuals to the general dispute resolution process under the FAD.

5.7.2 Issues raised in submissions and other issues

Telstra submitted that:

- there is no need to make any non-price terms relating to changes to operating manuals for any of the declared services.¹⁶²
- 'operational documents concerning the service' in clause 11.1 (which defines the scope of the obligations) is a broad term and it should be restricted to documents that are provided to the access seeker.¹⁶³
- only changes to manuals that have a material adverse impact on the access seeker should be subject to notice and consultation under clause 11.1.¹⁶⁴
- subclause 11.1(b) – which provides that parties can agree on changes to operating manuals - should be deleted.¹⁶⁵

iiNet also submitted that the NPTCs on changes to operating manuals should be amended to include recourse to the ACCC in the dispute resolution process, as the ACCC is best placed to deal with disputes about varied terms (the current FAD terms refer disputes to the general dispute resolution process which does not include recourse to the ACCC).¹⁶⁶

Optus submitted that changes to operating manuals should be amended, including as follows:

¹⁶² Telstra, Submission to the ACCC Discussion Paper, (Public version) 16 December 2014, p. 11.

¹⁶³ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, p. 11.

¹⁶⁴ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, p. 11.

¹⁶⁵ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, p. 57.

¹⁶⁶ iiNet, Submission to the ACCC Discussion Paper, Public version) 12 December 2014, paragraph 9.1.

- Changes to standard processes which have a significant impact on access seekers should be subject to a 60 day notification (current terms provide for 20 days). Telstra disagrees with this as being far too long to delay operational changes of any nature.¹⁶⁷
- Material changes to certain core service level agreements should be subject to agreement between the parties.¹⁶⁸ Telstra disagreed stating changes to these matters need to be made across the customer base and should not be delayed because one wholesale customer disagrees with it.¹⁶⁹
- Material changes to technical specifications that effectively downgrade the service should be subject to agreement.¹⁷⁰ Telstra argued against this, stating that it already must comply with the declaration and the equivalence obligations in the SAOs and SSU¹⁷¹).

VHA submitted that the terms on changes to operating manuals should be varied as follows:

- Under subclause 11.1(a)(ii), the obligation on access providers to 'consider' any comments when consulting on changes to manuals, should be raised to 'implement' any reasonable amendments.¹⁷²
- Under subclause 11.3(b), the term that provides for general dispute resolution where a change to manuals 'deprives the access seeker of a fundamental part of the bargain' should be broader and cover changes including those that result in less favourable terms of supply.¹⁷³

5.7.3 Reasons for ACCC draft decision

The ACCC's draft decision is to make terms on changes to operating manuals because they promote efficient investment in infrastructure by allowing an access provider to change operational manuals unilaterally subject to a specified and short process of notice and consultation. This allows an access provider to implement changes to operating manuals without unreasonable disputation by access seekers and lengthy processes, and is therefore in the access provider's legitimate business interest. However, the terms also reflect access seeker interest by allowing them to dispute changes to operational manuals where they are adversely affected. In this way, the terms strike a reasonable balance of access provider and access seeker interests.

The ACCC has considered submissions below.

The ACCC has decided to implement one of Telstra's amendments to subclause 11.1 (a) limiting the notice and consultation obligations to operational manuals that 'have been provided' to access seekers. Clarifying that Schedule 11 does not apply to all of Telstra's operational documents regardless of whether they are relevant to the access seeker provides more certainty. The ACCC has also included some examples of operational documents in a new subclause 11.1(c) to provide more clarity as the term is not defined.

¹⁶⁷ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 January 2015, p. 11.

¹⁶⁸ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 6.

¹⁶⁹ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 January 2015, p. 11.

¹⁷⁰ Optus Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 6.

¹⁷¹ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 January 2015, p. 11.

¹⁷² VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 14.

¹⁷³ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 15.

The ACCC has considered VHA's submission to amend subclause 11.1(a)(ii) which would require access providers to 'reasonably implement' (rather than give reasonable consideration to) access seeker comments on changes to operating manuals. The ACCC considers that this would be in the interests of access seekers and provides better certainty around Telstra's obligation. Further, this amendment is appropriate overall, given that clause 11.1 allows Telstra to unilaterally change its operating manuals (subject to notice and consultation). The ACCC also notes that the obligation is not absolute – access providers only have to 'reasonably' implement the amendments.

The ACCC has not adopted VHA's proposed amendments to subclause 11.3(b) which would lower the threshold for recourse to dispute resolution. The ACCC considers that this would be inappropriate and that serious concerns about unfavourable terms are already captured by subclause 11.3(a) which captures amendments that are 'unreasonable'.

The ACCC has considered iiNet's submission proposing that the ACCC hear disputes on changes to operating manuals and variation of all other terms and conditions. The ACCC considers that current referral of disputes to the general dispute resolution process is appropriate and a separate process is not warranted. The ACCC has considered whether access seekers should have recourse to the ACCC for general disputes under the FAD terms in section 5.3 (General Dispute resolution).

The ACCC has considered Optus' proposals regarding Schedule 11. These proposals would compromise the ability of Telstra to quickly make unilateral changes (with consultation with access seekers) for significant changes to operating manuals, and remove this ability for changes to core service levels or technical specifications. The ACCC does not have sufficient information about the effect of these amendments, and in particular notes that these changes could have a significant impact on an access provider's operational efficiency. The ACCC has therefore decided to not adopt Optus' proposals in Schedule 11.

5.8 Liability (risk allocation) and indemnity

5.8.1 ACCC draft decision

The ACCC's draft decision is to include clauses in the FAD about liability and indemnity. The liability and indemnity clauses reflect who should be responsible for damage to property or personal injury, i.e. to compensate parties that have suffered loss. These clauses also set liability caps and require parties to limit their losses to the extent they can. In this way, the clauses ensure that parties are not exposed to excessive commercial risk, and incentivise parties to act in a safe and reliable manner to avoid causing losses or injuries.

5.8.2 Issues raised in submissions and other issues

Telstra submitted that liability and indemnity has never been the subject of a formal dispute between parties and so regulation is unnecessary.¹⁷⁴ However, should the ACCC include these terms across all declared services then the terms should be drafted consistently.¹⁷⁵

VHA made a number of submissions regarding the liability and indemnity schedule, including:

- an amendment to clause 8.1(a) so that the Access Seeker does not face a liability cap that is too low in the early days of using the service. VHA submitted the amended term to read:

'the 12 month period commencing on the date of the first supply of the service under this FAD is limited to the aggregate amount paid *or reasonably forecast*

¹⁷⁴ Telstra, Submission to the ACCC Position Paper, (Public version), 15 July 2014, p. 10.

¹⁷⁵ Telstra, Submission to the ACCC Discussion Paper, (Public version), 12 December 2014, p. 13.

to be payable by the Access Seeker to the Access Provider for the service provided by the Access Provider in the initial 12 month period.’

- Alternatively, that there could be a liability cap structure not only based on the previous 12 months, but also on a fixed minimum amount (where the higher of the two would apply).¹⁷⁶
- clause 8.6 be amended to ensure that a Party is liable for any loss of profits or data (currently parties are not).¹⁷⁷ VHA considered that such losses can be reasonably foreseen as a result of a breach of the FAD or negligence.¹⁷⁸

Optus submitted an amendment to clause 8.3 to extend the obligation to indemnify the other party against loss arising from death or personal injury of ‘a third party’ in addition to a representative of the other Party.¹⁷⁹ Similarly, Optus also submitted that clause 8.4 (obligation to indemnify relating to loss or damage to property) be extended to include damage to third party property in addition to that of the other property.¹⁸⁰

Nextgen made a number of submissions regarding the liability and indemnity schedule, including:

- clauses 8.3 to 8.5 (circumstances a Party is liable to indemnify another Party) be amended to clarify that such clauses are subject to clauses 8.8 and 8.11 (which specify when an indemnity is reduced because of certain actions of an innocent party e.g. breach of the FAD).¹⁸¹
- clause 8.4 be amended to clarify that the property referred to is ‘tangible’ property.¹⁸²
- clause 8.8 which specifies circumstances the Indemnifying Party is not obliged to indemnify the Innocent Party where the claim is the ‘direct result of’ certain actions of the Innocent Party, be amended. That is, so that the indemnity is reduced where it was ‘caused or contributed’ to by certain actions of the Innocent Party.
- And, that 8.8(b) (limiting liability where an act intended to cause death, personal injury, or loss or damage to property) is amended so that the scope includes where an act ‘causes’ one of the events listed in 8.8(b), rather than only ‘intended to cause’ those events listed.¹⁸³

5.8.3 Reasons for ACCC draft decision

The ACCC considers that the liability and indemnity clauses promote the economically efficient use of and investment in infrastructure by managing the allocation of risk between the parties.

¹⁷⁶ VHA, Submission to the ACCC’s Request for comments on draft NPTCs submission, 20 January 2015, p. 10; VHA, Submission to the ACCC Position Paper (Public version), 16 July 2014, Appendix, p. 20.

¹⁷⁷ VHA, Submission to the ACCC’s Request for comments on draft NPTCs submission, 20 January 2015, p. 11.

¹⁷⁸ VHA, Submission to the ACCC’s Request for comments on draft NPTCs submission, 20 January 2015, p. 11.

¹⁷⁹ Optus, Submission to the ACCC’s Request for comments on draft NPTCs submission, (Public version), 16 January 2015, p. 6.

¹⁸⁰ Optus, Submission to the ACCC’s Request for comments on draft NPTCs submission, (Public version), 16 January 2015, p. 6.

¹⁸¹ Nextgen, Submission to the ACCC’s Request for comments on draft NPTCs submission, 23 January 2015, page 4.

¹⁸² Nextgen, Submission to the ACCC’s Request for comments on draft NPTCs submission, 23 January 2015, page 4.

¹⁸³ Nextgen, Submission to the ACCC’s Request for comments on draft NPTCs submission, 23 January 2015, page 4.

The ACCC considers that the inclusion of liability and indemnity clauses will help the parties to enter into commercial negotiations on how to manage liability and losses which will reduce barriers to entry and promote competition. In the absence of these terms, parties could be made to carry risk of loss that is outside their control which could result in inefficient outcomes, or risk of unlimited loss which could deter entry.

Submissions are considered in turn below.

The ACCC does not consider that VHA's submitted amendment to clause 8.1(a) to amend the liability cap is necessary or appropriate. The ACCC notes that the liability cap adjusts annually to equal the amount paid or payable in the preceding year. VHA's concern is that this liability cap might be too low where the number of services an access seeker acquires is growing in early years. However, the ACCC notes that conversely, the liability cap might be too high in subsequent years when services decrease. The current drafting appropriately balances these two considerations. The ACCC has also decided to not introduce a fixed amount for the minimum liability cap (as proposed by VHA). The ACCC considers that in the transition to the NBN it is unlikely that there will be a significant number of new access seekers seeking to acquire the legacy services (in particular fixed line services). Accordingly, the issue of a low liability cap resulting from low amounts paid in the initial year is not likely to be a significant concern.

The ACCC considers that VHA's submitted amendment to clause 8.6 so that parties are liable for loss of profits or data is not reasonable as it may expose parties to excessive commercial risks thereby deterring entry. The ACCC further notes that it is not common industry practice. The ACCC has decided to not adopt VHA's other proposed amendments.

The ACCC considers that it would be inappropriate to extend the indemnity in clause 8.3 and 8.4 from that owed to the other party to 'a third party' as well (as requested by Optus). The ACCC considers that this would inappropriately, and possibly to a large extent, expand the scope of the indemnity obligation for the indemnifying party (both access providers and access seekers).

In response to Nextgen's submissions:

- the ACCC considers that it is not necessary to amend clauses 8.3 to 8.5 to clarify that they are subject to clauses 8.8 to 8.11, as this intention is already clear from the current drafting of these clauses.
- The ACCC considers that Nextgen's proposed amendment to clause 8.4 to clarify that the indemnity applies for loss of or damage to 'tangible' property is unnecessary as it is clear from the drafting of the term that it concerns physical property.
- The ACCC considers that Nextgen's first proposed amendment to clause 8.8 is reasonable and clarifies the objective in limiting the indemnity where the other party has caused or contributed to (rather than directly resulting in) the liability which is the subject of the indemnity claim. The ACCC considers that the changes reflect common commercial practice.

5.9 Network modernisation and upgrade notice periods

5.9.1 ACCC draft decision

The ACCC's draft decision is to make terms relating to Network Modernisation and Upgrade. Broadly, these terms specify that an access provider must notify, consult and negotiate with access seekers before commencing a major network modernisation and upgrade¹⁸⁴ or before it

¹⁸⁴ Briefly, Major Network Modernisation and Upgrade is defined as an modernisation or upgrade that (a) involves the installation of the Access Provider's customer access modules closer to end-users than an

implements a coordinated capital works program (which affect access seeker services).¹⁸⁵ Schedule 10 also specifies that an access provider must provide a three year forecast of coordinated capital works describing its investment plans.¹⁸⁶ The terms specify the timing and contents of the notices.

5.9.2 Issues raised in submissions and other issues

Regarding clause 10.1, Nextgen submitted that it is not feasible for a carrier to reach agreement with all access seekers and therefore the prerequisite to undertake a major network modernisation and upgrade to 'negotiate in good faith any reasonable concerns' should be removed.¹⁸⁷ Nextgen also submitted that clauses regarding the Coordinated Capital Works should be deleted as they are too onerous on access providers.¹⁸⁸

VHA made a number of submissions on the network modernisation and upgrade schedule, including:

- Subclause 10.6(b) should be extended so that Telstra's obligation to provide an individual notification for a Major Network Modernisation and Upgrade should also apply where the supply of the service is likely to be or is interrupted (current terms state it only applies where the service is no longer supplied).¹⁸⁹
- Subclause 10.7(b), which requires Telstra to provide weekly reports about the anticipated cutover dates for the access seeker's affected services, should be amended to also require Telstra to specify the duration of the outage and a description of the outage.¹⁹⁰
- The ACCC add a new clause requiring that major network upgrades and coordinated capital works must be undertaken between 11pm and 6am (outside peak hours), unless otherwise agreed in writing.¹⁹¹

5.9.3 Reasons for ACCC draft decision

The ACCC's draft view is that the network modernisation and upgrade terms will promote competition and ensure ongoing any-to-any connectivity, by assisting in managing and planning for service disruptions and any resulting impacts on the availability of, or quality of services, to access seeker end users. This will improve access seekers' ability to compete and thereby promote competition in the relevant downstream markets. Further, the information provided under the notice requirements will assist access seekers to make investment and planning decisions, and therefore promote the economically efficient operation of the services.

Exchange; (b) requires the removal/relocation of the Service provided from Exchanges and the establishment of a new POI (or relocation of an existing POI) for the Service; or (c) results in a Service no longer being supplied or adversely affects the quality of that Service, but does not mean an Emergency Network Modernisation Upgrade or an NBN related upgrade.

¹⁸⁵ See subclause 9.19 and subclause 9.20 of the draft NPTCs, respectively. Coordinated capital works means a planned Major Network Modernisation and Upgrade with respect to the Service that extends across more than one ESA but does not include an Emergency Network Modernisation and Upgrade.

¹⁸⁶ See subclauses 9.10 of the draft NPTCs.

¹⁸⁷ Nextgen, Submission to the ACCC's Request for comments on draft NPTCs submission, 23 January 2015, pp. 4-5.

¹⁸⁸ Nextgen, Submission to the ACCC's Request for comments on draft NPTCs submission, 23 January 2015, p. 5.

¹⁸⁹ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 13.

¹⁹⁰ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 13.

¹⁹¹ VHA, Submission to the ACCC Position Paper (Confidential version), 16 July 2014, Annexure 1, p. 7; VHA Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, pp. 13-14.

The ACCC recognises that it is a legitimate business interest of the access provider to modify or upgrade networks that are necessary to supply new or additional services or to improve existing services, and to do this when required and in a timely manner. However, the provisions also recognise the interests of access seekers in receiving information about impacts to their service and being consulted on these impacts. Schedule 10 appropriately balances these two sets of interests.

Submitter views are considered below.

The ACCC has decided to not adopt either of Nextgen's proposed amendments. Regarding its proposed amendment to clause 10.1, the ACCC considers that retaining a requirement for access providers to negotiate in good faith Major Network upgrades is important to access seeker interests and their ability to ensure that upgrades minimise any unnecessary disruption to their services. This obligation is not absolute – only reasonable concerns have to be negotiated¹⁹² - which appropriately excludes any frivolous or vexatious concerns.

The ACCC has also not adopted Nextgen's proposal to remove obligations around Coordinated Capital Works because it considers that these provisions are essential to access seeker's longer term planning about the availability of their services. The ACCC does not consider that the provisions are disproportionately burdensome on access providers. It notes that Telstra has complied with a corresponding requirement in the SSU for wholesale ADSL.¹⁹³

Regarding VHA's submissions, the ACCC's draft decision is to:

- adopt VHA's amendment to extend subclause 10.6(b) to specify that individual notification must be provided where the upgrade will result in the service being suspended (but to specify a period of suspension of 4 weeks or more). The ACCC considers that this will not materially raise compliance costs, and that it will provide valuable information to access seekers where their services are suspended (and not only where they are no longer supplied).
- Adopt VHA's amendment to require an access provider to provide information about the anticipated length of the outage, but to adopt this in clause 10.5 (which specifies what must be included in an individual notification) by including a new subclause 10.5(b), rather than include it in subclause 10.7(b).
- Adopt one minor drafting change to subclause 10.1(b).¹⁹⁴

The ACCC does not intend to include VHA's other proposed changes. For example, expressly requiring that modernisation and upgrades be undertaken outside of peak hours would likely significantly increase the direct costs to the access provider in providing the service.

5.10 Other matters

5.10.1 ACCC draft decision

The ACCC has considered whether it should make common terms on a number of other matters which submitters have raised.

The ACCC has considered issues around terms in access agreements which exclude the application of regulated terms after an access agreement has been entered into (regulatory recourse). The ACCC has decided to make terms, to facilitate parties' access to new or varied regulated terms (in FADs or Binding Rules of Conduct) after they have entered into access agreements.

¹⁹² See subclause 9.1(b) and 9.19(b) of the draft NPTCs.

¹⁹³ Subparagraph 11.1 of Schedule 4 of the SSU.

¹⁹⁴ A minor amendment to subclause 9.1(b) to clarify that Telstra's consultation and negotiation around Major Network Modernisation and upgrades are 'to address' any reasonable concerns.

The ACCC has decided to not make NPTCs which ensure equivalent supply of the relevant declared services nor to include draft NPTCs on change management without further information from industry.

5.10.2 Issues raised in submissions

5.10.2.1 Regulatory recourse

VHA considered that having recourse to regulated terms is an issue because 'regulatory events' such as changes to regulated terms may significantly affect the rights and obligations of either party.¹⁹⁵ VHA proposed a NPTC that specifies that where a regulatory event occurs, either party may initiate discussions to determine the consequential effect on the parties' rights and obligations.¹⁹⁶ Where an access agreement exists, the regulatory review clause should oblige the parties to negotiate in good faith any consequential changes to its terms.¹⁹⁷ If disputes occur over how the terms should be changed, this should be resolved via the dispute resolution process, including referral to the ACCC for arbitration.¹⁹⁸ The ACCC has discussed whether the dispute resolution process should include referral to it in section 5.3 above.

iiNet submitted that currently, there are no practical commercial opportunities which would alleviate the need for a FAD to provide regulatory recourse.¹⁹⁹ iiNet submitted that in a Targeted FAD, future regulated terms should automatically flow through and it would be up to the parties to exclude or limit the application of the regulated terms.²⁰⁰ iiNet provided a draft clause that could be included in the NPTCs FAD.²⁰¹

Vocus also submitted that the FAD terms should provide for recourse to regulated terms and that access seekers are currently placed in a position of having to take the offer that Telstra places on the table.²⁰²

Optus does not support a regulatory recourse clause as Optus supports the current practice where parties may agree to forgo regulatory recourse.²⁰³ Optus did, however submit that problems would arise in circumstances where the access provider unilaterally decides to exclude the right to terms of a FAD in an access agreement.²⁰⁴ Optus submitted that should the ACCC include a term on this issue, such a term should reflect current commercial practice; it should be a term that requires access agreements to allow for variations to the regulated terms, unless otherwise agreed by the parties.²⁰⁵

Telstra opposed NPTCs which provide for recourse to regulated terms (including a 'review' clause that would allow for variation or termination, or automatic pull through of regulated terms

¹⁹⁵ Regulatory events which would include but is not limited to, defined events such as ACCC declarations, determinations, undertakings, or amendments to any code or standard by the ACCC. See VHA, Submission to the ACCC Discussion Paper (Confidential version), 12 December 2014, p. 8- 9.

¹⁹⁶ VHA, Submission to the ACCC Discussion Paper (Confidential version), 12 December 2014, p. 8- 9.

¹⁹⁷ VHA, Submission to the ACCC Discussion Paper (Confidential version), 12 December 2014, p. 8- 9.

¹⁹⁸ VHA, Submission to the ACCC Discussion Paper (Confidential version), 12 December 2014, p. 8- 9.

¹⁹⁹ iiNet, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 4.

²⁰⁰ iiNet, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 4.

²⁰¹ iiNet, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 4.

²⁰² Vocus, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 2.

²⁰³ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 8.

²⁰⁴ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 8.

²⁰⁵ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 8.

into access agreements).²⁰⁶ Regarding a pull through term, Telstra submitted that such a term would be inconsistent with the statutory hierarchy and the legislative intent of Part XIC of the CCA which provides for the primacy of commercially negotiated agreements.²⁰⁷ Telstra also submitted that there are already trigger points by which Telstra's wholesale customers currently have the opportunity to negotiate terms during or on termination of the contract.²⁰⁸ Therefore an explicit term recognising that a contract can be reviewed (renegotiated or terminated) when a regulated term is made or varied, is not required.

NBN Co submitted that the ACCC should defer any consideration of 'recourse to regulated terms' until the government has finalised its views on the issue in the NBN context.²⁰⁹

5.10.2.2 Change management

This section sets out submissions regarding how Telstra can change terms in access agreements more generally (and not specific to changes to operating manuals which is discussed in section 5.7).

VHA submitted that changes to terms of access should be processed through 'change control' as it is unreasonable to allow unilateral changes unless they are minor and have no adverse impact on the access seeker and its end users. The change control process could be to notify the access seeker, consult on the proposed change, and prepare any documentation.²¹⁰ VHA submitted that no changes should take effect unless agreed.²¹¹

iiNet submitted that where an access provider is permitted to unilaterally vary terms and conditions in an access agreement, an access seeker should have recourse to dispute resolution including recourse to the ACCC as the arbitrator.²¹² The issue of whether the ACCC should have a dispute resolution role under the FAD terms is discussed in section 5.3 (general dispute resolution).

5.10.2.3 Equivalence

Some submitters supported a new FAD term which would impose on access providers an obligation to provide services to access seekers that are equivalent to services supplied to itself.

Telstra submitted that it is already required to provide equivalence under the standard access obligations under Part XIC of the CCA and under its SSU and that duplicating regulation is not in the LTIE and would be inefficient and lead to uncertainty.²¹³ Further, including an overarching equivalence obligation in the FADs would likely be inconsistent with the SSU.²¹⁴

iiNet supported an equivalence obligation in the FADs. Requiring Telstra to provide equivalence (except for price equivalence) would provide a means for access seekers to directly enforce Telstra's commitments in its SSU. Given the complexities of the equivalence commitment under the SSU, iiNet proposed a modified and narrower equivalence

²⁰⁶ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 4.

²⁰⁷ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 4.

²⁰⁸ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 2.

²⁰⁹ NBN Co, Submission to the ACCC's Request for comments on draft NPTCs submission, 28 January 2015, p. 2.

²¹⁰ VHA, Submission to the ACCC Position Paper (Public version), 16 July 2014, Annexure 1, pp. 8-9.

²¹¹ VHA, Submission to the ACCC Position Paper (Public version), 16 July 2014, Annexure 1, pp. 8-9.

²¹² iiNet, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, paragraph 7.

²¹³ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission, 5 February 2015, p. 3.

²¹⁴ Telstra, Submission to the ACCC Position Paper (Confidential version), 15 July 2015, p. 12.

commitment.²¹⁵ Optus is concerned that the metrics in the SSU and obligations based around these metrics do not reflect equivalence.²¹⁶ Optus submitted that equivalence should be the basis for developing all price and non-price terms and supported clarifying equivalence obligations and metrics in the FADs.²¹⁷

5.10.2.4 Other matters

VHA submitted that the FADs lack key NPTCs and as a result, access seekers cannot execute the terms as a standalone agreement. VHA submitted that the ACCC should make a number of terms about service descriptions referring to objective technical standards²¹⁸, a commitment that the service will be provided to a standard of care²¹⁹, service levels and rebates where the service levels are not met²²⁰, proactive fault monitoring and reporting by the access provider²²¹, and legal boilerplate terms.²²²

In its submission to the Position Paper, TPG noted that the supply of service from Telstra requires various features including terms about IT system interfaces and operations that are not covered by the FADs. Accordingly, relying on regulated terms alone is a risk for access seekers.²²³ TPG submitted that this could be addressed by including an obligation on an access provider to provide all systems and operational aspects covered by an access agreement if an access seeker chooses to rely on regulated terms alone.²²⁴

The ACCC considers that covering these matters would be tantamount to making a Comprehensive FAD. The ACCC's draft decision is to not make a Comprehensive FAD at this time. Its reasons are set out in section 3.3.

5.10.3 Reasons for ACCC draft decision

5.10.3.1 Regulatory recourse

The ACCC notes that there are mixed views amongst industry about whether recourse to regulated terms is an issue, and the ways in which the ACCC could address it. For the reasons set out below, the ACCC considers that the NPTCs FAD should provide a schedule of clauses addressing regulatory recourse during the term of their access agreement. The ACCC has decided to make schedule 14 containing 'review' clauses as follows:

²¹⁵ iiNet, Submission to the ACCC's Request for comments on draft NPTCs submission, 14 January 2015, section 6

²¹⁶ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 9.

²¹⁷ Optus, Submission to the ACCC's Request for comments on draft NPTCs submission, 16 January 2015, p. 9.

²¹⁸ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 16.

²¹⁹ VHA, Submission to the ACCC Discussion Paper, (Confidential version), 12 December 2014, p. 15; VHA, Submission to the ACCC Position Paper (Confidential version), 16 July 2014, p. 8.

²²⁰ VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p. 16.

²²¹ Ibid, p. 17.

²²² VHA, Submission to the ACCC Position Paper, 16 July 2014, Annexure 1, pp. 30-31, VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, pp 19-20. VHA also submitted that terms be made covering an obligation for access providers and access seekers to comply with applicable laws (VHA, Submission to the ACCC Position Paper, 16 July 2014, Annexure 1, p. 23); terms restricting use of the other party's name, logo and trademarks (VHA, Submission to the ACCC Position Paper, 16 July 2014, Annexure 1, pp. 26, 28), and terms requiring that the access provider retain records for potential auditing (VHA, Submission to the ACCC Position Paper, 16 July 2014, Annexure 1, p. 28), terms regarding warranties, intellectual property, insurance, network use, governance, and how terms are interpreted (VHA, Submission to the ACCC's Request for comments on draft NPTCs submission, 20 January 2015, p 18-21).

²²³ TPG, Submission to the ACCC Position Paper, 17 July 2014, p. 2.

²²⁴ TPG, Submission to the ACCC Position Paper, 17 July 2014, pp. 2, 3.

- A clause obliging parties to negotiate in good faith, where the ACCC varies or makes a regulated term and one party proposes to the other party to vary the access agreement to reflect that new or varied regulatory term. This clause sets out that good faith requires: if requested, that parties meet to discuss the proposal and, that if the second party refuses the variation it must give reasons.
- A clause allowing either party to terminate an access agreement with 8 weeks' notice where the ACCC makes or varies a regulated term in relation to the service, and the new regulatory determination deals with a matter other than price.

From submissions, the ACCC considers that there is an issue whereby parties find it difficult during the term of their access agreements, to incorporate new or varied regulated terms. Further as noted above in Chapter 3, the ACCC is aware from its review of the access agreements lodged with it under s152BEA (now amended)²²⁵, that access agreements may include clauses that could have the effect of entirely excluding the application of current and future regulated terms during the life of the agreement. [c-i-c starts

[REDACTED]

[REDACTED]

[REDACTED] c-i-c ends]

The ACCC considers that the regulatory recourse issue is a contentious matter, particularly in view of those clauses. The ACCC is of the view that:

- Those clauses should not oust the role of the regulator in specifying terms of access as contemplated by the Part XIC hierarchy.
- The effect of those clauses is not clear.
- If parties cannot get access to regulated terms, their terms of access in the access agreement are likely to be less reasonable on the whole.

[c-i-c starts [REDACTED]

[REDACTED] c-i-c ends] The ACCC therefore considers that, in some circumstances, parties do not have effective recourse to regulated terms.

The ACCC has considered possible options to provide recourse to regulated terms. The ACCC does not consider that a 'pull through' clause that automatically applies regulated terms is appropriate as this approach does not recognise that parties may want to negotiate different terms.

Rather, the ACCC considers that the Schedule 14 clauses recognise that parties should be able to seek access to declared services on regulated terms, while also recognising that parties may be able to negotiate a commercial agreement that overall they consider more advantageous than those set out in regulated terms. The ACCC has therefore decided to make the review clauses. The ACCC considers, in view of the s 152BCA matters, that:

²²⁵ The previous section 152BEA required the carrier or carriage service provider (who supplied or proposed to supply declared services) to provide the ACCC with a copy of any access agreement within 28 days of it being entered into. The current section 152BEA requires that within 30 days after the end of each quarter, the carrier or carriage service provider who supplies or proposes to supply a declared service must give the ACCC a statement setting out the details of any access agreement in force during the quarter.

- The review clause could result in more reasonable terms of access where parties are able to negotiate their inclusion. This, in turn, supports access seeker ability to compete on their merits in downstream markets. This promotes competition in the relevant retail markets and is consequently in the LTIE.
- The draft clauses are in the interests of both the access seeker and access provider as they ensure that access agreements with no set termination date do not become outdated and are able to be renegotiated to incorporate regulatory developments as they occur.

The ACCC seeks industry views regarding the attached draft Schedule 14.

The ACCC notes that if it becomes clear that Schedule 14 has not been effective in practice in ensuring that access seekers can negotiate to include regulated terms (due to unequal bargaining power between the parties and the operation of the Part XIC hierarchy) and significant detrimental harm is occurring in relevant markets as a result, then the ACCC will consider the need for further regulatory action. This could include making a binding rule of conduct or varying the FAD so that access seekers can terminate their access agreement, rely on regulated terms alone as a standalone basis for supply, and thereby gain access to regulated terms.

5.10.3.2 Change management

The ACCC notes VHA's views that for changes other than minor changes there should be a change control process which requires agreement from parties in writing. The ACCC notes that where adopted this proposed term would apply broadly to all variations to executed access agreement terms. However, the ACCC's draft decision is to not adopt such a broad requirement in the absence of more information from industry indicating that there is a significant competition concern arising from this issue. The ACCC has adopted certain change management provisions specifically relating to changes to operating manuals (see section 5.7).

5.10.3.3 Equivalence

The ACCC's draft decision is to not make FAD terms which either impose an overarching equivalence commitment, or which would establish service levels that reflect equivalent levels of service. The ACCC notes that similar issues were considered in its last wholesale ADSL FAD inquiry in 2013. The ACCC notes that Telstra's SSU contains a number of provisions which relate to achieving non-price equivalence:

- An overarching equivalence commitment which requires Telstra to ensure equivalence in relation to the supply of Regulated Services to Telstra's wholesale customers and its retail business units.²²⁶ This commitment is only enforceable by the ACCC through specific enforcement mechanisms set out in Schedule 11 of the SSU.
- Regarding operational quality (the time taken to activate or provision a service, or rectify a fault):
 - System and process commitments that generally require Telstra to manage orders and tickets of work for service provisioning or faults in an equivalent matter²²⁷
 - Equivalence and transparency metrics which establish service levels against which Telstra's performance is to be measured²²⁸ and provide a basis for rectification by Telstra, and the payment of service level rebates.²²⁹

²²⁶ As provided under clause 71 of Schedule 1 to the *Telecommunications Act 1997*, a regulated service in this context means a declared service under Part XIC of the CCA unless the Minister declares otherwise.

²²⁷ SSU, Clauses 11 and 13.

²²⁸ SSU, Schedule 3 and clause 16.

²²⁹ SSU, clause 16.1(b).

The ACCC notes iiNet's support for including a variation of the equivalence commitment in the FADs. However, when making a FAD, the ACCC must have regard to the conduct that Telstra is required to engage in when complying with the SSU.²³⁰ In this regard, Telstra's compliance with its equivalence commitments in the SSU appropriately and effectively addresses the issue of technical and operational equivalence. To replicate these obligations in the FADs would be unnecessary and result in dual regulation. Further, the standard access obligations²³¹, which include an obligation that an access provider must reasonably ensure that the technical and operational quality of the declared service supplied to a service provider is equivalent, form an additional safeguard for access seekers which ensures equivalence.

Also, given the complexity of the overarching equivalence commitment and enforcement mechanism and the comprehensiveness of the metrics, including an equivalence commitment (in a modified form) or different service levels in the FADs, would likely be inconsistent with the SSU. This would have implications for Telstra where it must comply with both the SSU and FAD terms. For these reasons, the ACCC does not consider it appropriate to replicate any commitments relating to non-price equivalence in the FADs.

²³⁰ Section 152ER(2) of the CCA.

²³¹ Sections 152AR(3)(b) and (c) of the CCA.

6 Service-specific terms

The ACCC has made one schedule of NPTCs that apply only to wholesale ADSL (resale provisions), and two schedules of NPTCs that apply only to ULLS and LSS (which relate to Managed Network Migrations (MNM), and LSS to ULLS transfer). These NPTCs are assessed below.

6.1 Wholesale ADSL: Resale provisions

6.1.1 ACCC draft decision

The ACCC's draft decision is to make terms regarding the resale of wholesale ADSL. Schedule 12 of the draft NPTCs provides that an access seeker can acquire a wholesale ADSL service for the purpose of resale without providing notice to the access provider or seeking its consent.²³²

6.1.2 Issues raised in submissions

Telstra submitted that the NPTCs regarding resale services in the wholesale ADSL FAD are unnecessary and should be removed.²³³ Telstra further submitted that the resale services terms should not apply to any of the declared services.²³⁴ However, if the ACCC were to include Schedule 12, Telstra suggested that the ACCC should insert an additional clause that ensures that all resellers comply with all of Telstra's terms and conditions of access and to provide that access seekers are liable for any non-compliance by their resellers.²³⁵ Telstra submitted that this additional clause would ensure that the supply of the wholesale ADSL service is not compromised and is not intended to impede or restrict resale of Telstra's wholesale services.²³⁶

6.1.3 Reasons for ACCC draft decision

The ACCC considers that the terms in Schedule 12 expressly allowing access seekers to supply the service to resellers without notification to or consent from the access provider is consistent with the section 152BCA matters. Allowing resellers to enter into downstream markets without delay or unnecessary requirements lowers barriers to entry to those markets and increases the number of providers (and likely competition) in those markets. The provisions are therefore in the LTIE.

The ACCC has not adopted Telstra's proposed additional clauses. The ACCC notes that Telstra suggested a similar clause in its submissions to the last wholesale ADSL FAD inquiry (finalised in 2013).²³⁷ The ACCC remains of the view that Telstra's proposed additional clause would impose significant risks and costs on access seekers if they choose to supply the wholesale ADSL service to resellers, who also have the rights to use the declared services. The ACCC considers that a likely consequence is that the access seekers will be less willing to supply the service to resellers and this outcome is likely to have the effect of lessening

²³² ACCC, *Public inquiry to make a final access determination for the Wholesale ADSL service, Final Report*, May 2013, p 97.

²³³ Telstra, Submission to the ACCC Position Paper (Public version), 15 July 2014, p. 11.

²³⁴ Telstra, Submission to the ACCC Position Paper (Public version), 15 July 2014, p. 10.

²³⁵ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission (Public version), 13 January 2015, p. 12.

²³⁶ Telstra, Submission to the ACCC's Request for comments on draft NPTCs submission (Public version), 15 July 2014, p. 12.

²³⁷ ACCC, *Public Inquiry to make a Final Access Determination for the Wholesale ADSL service, Final Report*, May 2013, <http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/wholesale-adsl-final-access-determination-fad-2013/final-determination>, p. 97.

competition in the wholesale market for ADSL. The ACCC considers that such an outcome would not be in the LTIE.²³⁸

6.2 ULLS and LSS: Ordering and provisioning processes (Managed Network Migrations and LSS to ULLS transfer)

6.2.1 ACCC draft decision

The ACCC has decided to make NPTCs on certain ULLS and LSS provisioning processes. Schedule 13(a) specifies terms regarding ULLS and LSS ordering and provisioning which involves MNM. The clauses set out when an access seeker can request to connect ULLS or LSS as part of a MNM, how access seekers are to forecast their MNM requirements, and when an access provider can refuse an MNM. They also specify that an access provider must provide information regarding complex services that have caused a service qualification query to fail.

Schedule 13(b) specifies clauses that apply when an access seeker requests from an access provider the transfer of LSS to ULLS. They specify minimum characteristics of the transfer such as that it must be done in four hours and executed by a single provisioning order (and not both disconnection and connection orders).

6.2.2 Issues raised in submissions

Optus submitted that an additional sub-clause should be added to clause 13.17 (which requires Telstra to provide information on complex services where a service qualification query has failed). The proposed clause would state that a complex service on a line should not prevent an access seeker acquiring ULLS.²³⁹ Also, Optus submitted that clause 13.23 should be varied so that a Connect Outstanding Process²⁴⁰ is supported within 3 months of an access seeker request.²⁴¹

VHA submitted that clause 13.6 should be varied. The current terms specify that if the 20 day forecast for MNM varies from the 56 day forecast by 10 per cent or more, and the services cannot be cutover in time then Telstra 'must take all reasonable steps to ensure the cutover occurs as soon as practicable'. VHA proposed to raise Telstra's obligation from 'take all reasonable steps' to 'use its best endeavours'.²⁴² VHA also sought changes to clause 13.10 which allows Telstra to refuse a required MNM cutover where it is inconsistent with a published capacity limitation notice. VHA submitted that this limitation notice should be published on Telstra's website, and a copy of it provided to the ACCC and, on request, to access seekers.

6.2.3 Reasons for ACCC draft decision

The ACCC has decided to make NPTCs on certain provisioning processes for ULLS and LSS relating to managed network migrations, and LSS to ULLS transfer. The ACCC considers that the draft NPTCs promote competition in the relevant retail voice and broadband markets. Specifically, the provisions around MNM ensure that access seekers can use an efficient process by which they can migrate end-users in blocks from Telstra infrastructure to their own

²³⁸ Subsection 152BCA(1) of the CCA.

²³⁹ Optus, Submission to the ACCC's Request for comments on draft NPTCs, 16 January 2015, p. 7. The current FAD terms state that the Connect Outstanding Process must be supported six months of the FAD commencing.

²⁴⁰ This process seeks to manage the timely connection of a New Occupant's basic access Standard Telephone Service when the Previous Occupant has not yet cancelled their Standard Telephone Service.

²⁴¹ Optus, Submission to the ACCC's Request for comments on draft NPTCs (Public version), 16 January 2015, p. 7.

²⁴² VHA, Submission to the ACCC's Request for comments on draft NPTCs, 22 January 2015, p. 15.

infrastructure. Similarly, the transfer process from LSS to ULLS also ensures that access seekers can migrate LSS to ULLS services without the inefficient process of disconnecting LSS before re-connecting the ULLS. These processes remove unnecessary obstacles to end-users gaining access to competitive retail services using LSS and ULLS inputs, which in turn ensures faster connections, lowers costs, and promotes competition in the relevant markets (and thereby promotes the LTIE). These processes and the certainty about these processes will encourage the efficient use of access provider infrastructure used to supply ULLS and LSS. The ACCC therefore considers the clauses are in the LTIE. The ordering and provisioning processes also ensure the efficient operation of an access provider's telecommunications network.

The ACCC has considered submissions on Schedule 13(a) and (b) below.

In response to Optus' submissions, at this stage the ACCC does not have sufficient information from industry to consider amending clause 13.17 to clarify that the presence of a complex service does not prevent the supply of ULLS. The ACCC does not consider it appropriate to adopt Optus' other proposed amendments.

The ACCC has amended clause 13.23. It currently states that an access provider will support a Connect Outstanding process for ULLS 6 months from the FAD commencing. The ACCC has amended this clause to reflect that the current ULLS FAD contains a clause with this drafting and therefore it is likely that access providers have already established a Connect Outstanding process. To reflect this, the amendment will make clear that an access provider is required to maintain Connect Outstanding processes (which will take effect from when the FADs commence).

The ACCC has not adopted VHA's proposals to amend clause 13.6 to provide that Telstra should use its 'best endeavours' (and not only 'take reasonable steps') to cutover where there has been a significant variation in forecasts. The ACCC considers that the current terms 'must take all reasonable steps to ensure that cutover occurs as soon as practicable' establish an appropriate and reasonable threshold, and therefore strike an appropriate balance between access seeker and access provider interests.

However, the ACCC has decided to adopt some of VHA's submissions to vary clause 13.10 to ensure that the limitation notice is available on Telstra's website and provided to access seekers (on request) (although not to the ACCC). The ACCC considers that these obligations will not impose significant costs on Telstra and will ensure that the notice is readily accessible to access seekers which will improve the effectiveness of the clause. This will result in the more transparent and efficient operation of the network as it is used to provide ULLS and LSS.

6.3 ULLS: Intact Vacant ULLS processes

6.3.1 ACCC draft decision

An intact vacant ULLS also known as (iVULL) process is relevant where there is an existing copper path to the customer's premise, but no current service over that path (intact vacant path).²⁴³ An example is where the end-user moves into premises that have previously had a fixed line service and the previous copper path has not been reassigned.²⁴⁴ Historically there were issues because Telstra did not use this intact vacant path to order and provision ULLS, whereas it did when provisioning its own retail public switched telephone network (PSTN) services.

The ACCC does not propose to include an iVULLS process in the ULLS FAD as there is insufficient evidence from stakeholders that there are current competition concerns or that commercial negotiating is failing to establish an appropriate process around ULLS provisioning via an intact vacant path.

²⁴³ ACCC, November 2008 Model Terms, Final Decision, p. 46.

²⁴⁴ ACCC, *Fixed Line Services, Final Access Determination* - Discussion Paper, April 2011, pp. 210-213.

6.3.2 Issues raised in submissions

iiNet submitted that Telstra has employed a commercial eVULLS ordering and provisioning process, called enhanced vacant ULLS (eVULLS).²⁴⁵ However, iiNet submitted that the FADs should include iVULLS price and non-price terms.²⁴⁶ The remaining submissions to both the ACCC Position and Discussion papers did not address iVULLS.

6.3.3 Reasons for ACCC draft decision

The ACCC has considered regulating ULLS provisioning using an intact vacant path a number of times in the past.

In September 2006, the ACCC considered the issue of iVULLS in an Optus/Telstra arbitration dispute. Optus' claimed that the operational quality of ULLS ordering and provisioning was not the same as that provided for PSTN to Telstra retail. Specifically, Optus stated that for its customers supplied by ULLS, Telstra would not use the intact vacant path and instead allocate the service a different copper pair which would involve two truck-rolls and a subsequent 7-10 business day activation. In contrast, for Telstra retail customers of a PSTN connection, Telstra could re-use the intact vacant path to remotely connect the customer within 1-2 business days.²⁴⁷ The ACCC determined that Telstra was under an equivalence obligation, and the final determination specified that ULLS was to be provisioned using the intact vacant path in certain circumstances. In November 2008 the ACCC made model terms regarding a regulated iVULLS process. The ACCC acknowledged its previous arbitration and made model terms specifying that Telstra had to provision ULLS using the intact vacant path in certain circumstances.²⁴⁸

The ACCC sought views on the inclusion of the iVULLS process in the fixed line services FADs in 2011.²⁴⁹ Herbert Geer²⁵⁰ and Macquarie Telecom²⁵¹ supported a regulated iVULLS process whereas Telstra²⁵² and Optus²⁵³ did not. Telstra submitted that it had already implemented a commercial eVULLS process which had been taken up by four access seekers whose customers constituted 87 per cent of all vacant ULLS connections, and that this new process avoided truck rolls to the customer's premises. The ACCC noted this commercial eVULLS process, and accordingly, the ACCC decided not to include a regulated process at that stage.²⁵⁴

The ACCC again sought views in the current non-price inquiry (in its discussion paper) on making regulated terms on iVULLS.²⁵⁵ The ACCC notes limited industry support in this inquiry for such terms and that there is no evidence that Telstra is refusing to connect ULLS via an intact vacant path. Rather, the ACCC is aware that access agreements contain terms on the

²⁴⁵ Telstra calls this process as the e VULLS (enhanced vacant ULLS).

²⁴⁶ iiNet, Submission to the ACCC Position Paper (Public version), 15 July 2014, p. 12.

²⁴⁷ ACCC, *Optus/Telstra ULLS MDU Final Determination – Statement of Reasons* – 30 November 2007, <http://registers.acc.gov.au/content/item.phtml?itemId=806380&nodeId=113bbd47547007b14b98646b6014a8c6&fn=Optus/Telstra%20ULLS%20MDU%20final%20determination%20%E2%80%93%20Statement%20of%20Reasons%20%E2%80%93%2030%20November%202007.pdf>

²⁴⁸ ACCC, *Final Determination - November 2008 Model Terms*, 19 November 2008, p. 48.

²⁴⁹ ACCC, *Inquiry to make final access determinations for the declared fixed line services*, 20 July 2011, p. 156.

²⁵⁰ Herbert Geer, Submission to Fixed Line Services – Final Access Determination - <http://www.accc.gov.au/system/files/Public%20submission%20on%20behalf%20of%20Adam%20Internet%20C%20Aussie%20Broadband%20C%20inet%20and%20Internode.pdf>, 3 June 2011, p. 19.

²⁵¹ Macquarie Telecom, Submission to Fixed Line Services – Final Access Determination - <http://www.accc.gov.au/system/files/Public%20submission%20from%20Macquarie%20Telecom.pdf>, 3 June 2011, p. 4.

²⁵² Telstra, Submission to Fixed Line Services – Part B – Final Access Determination - 3 June 2011, <http://www.accc.gov.au/system/files/Part%20B%20of%20public%20submission%20from%20Telstra.pdf>, p. 36.

²⁵³ Optus, Submission to Fixed Line services, Final Access Determination - 7 June 2011, http://www.accc.gov.au/system/files/Public%20submission%20from%20Optus_0.pdf, p. 68.

²⁵⁴ ACCC, *Inquiry to make final access determinations for the declared fixed line services*, Final Report, 20 July 2011, p. 156.

²⁵⁵ ACCC, Discussion Paper on NPTCs, 30 October 2014, p. 8.

commercial eVULLS process. Accordingly, the ACCC's draft decision is that it is not appropriate to include FAD terms on iVULLS.

6.4 Other service-specific matters

In responses to its Position Paper, the ACCC notes that there were submissions about other service-specific matters which relate to service-specific charges, that is, the special linkage charges for DTCS.²⁵⁶ The ACCC will consider those submissions in the primary price inquiry regarding DTCS. The ACCC's draft decision is to not make service-specific NPTCs for MTAS.

²⁵⁶ VHA, Submission to the ACCC Position Paper, 15 July 2014, p. 17, and Optus, Submission to the ACCC Position Paper, 18 July 2014, p. 18.

7 Consideration of NPTCs against the legislative matters

The ACCC has considered the legislative matters in detail when considering the common and service-specific terms in Chapters 5 and 6 above. In this section, the ACCC generally assesses the NPTCs against the section 152BCA matters. The section 152BCA matters were discussed in Chapter 2 and the ACCC's approach to applying these provisions is set out in detail in Appendix A.

Paragraph 152BCA(1)(a) – whether the determination will promote the long-term interests of end-users

The ACCC considers that the draft NPTCs will promote the LTIE as they promote the ability of access seekers to compete in the provision of carriage services in the relevant retail markets. Specifically, the draft NPTCs:

- Promote access to the relevant declared service by setting regulated terms on commercial requirements which might form an alternative to unreasonable or unduly onerous commercial requirements. Commercial requirements can hinder access and create barriers to entry. For example, a term requiring access seekers to provide an unreasonable amount of security when an access provider doubts its financial capacity to pay could hinder competition.
- Provide for some protections against access providers obtaining an unfair advantage by virtue of any vertical integration (position as wholesale provider and retail provider). For example, the terms about communication to access seeker end-users, prevent an access provider from marketing to an access seeker's customers.²⁵⁷
- Reduce the risk that access providers' actions will unduly and adversely affect the provision of a declared service to an access seeker, and in turn the supply of the carriage service by access seekers to end-users. For instance, they set regulated terms specifying when a service can be suspended or terminated to protect against inappropriate suspension or termination.²⁵⁸ They also provide for notice around network upgrades which would affect supply of the service, and consultation around those upgrades so that access seekers can negotiate to minimise disruption to services.

The draft NPTCs encourage the economically efficient use of, and economically efficient investment in infrastructure by which listed services are supplied as they:

- Appropriately allocate the risks for access providers associated with not recovering on their investments, which in turn promotes the efficient investment in infrastructure. For example, the billing and notification terms promote timely recovery of monies for services supplied to wholesale customers, and the terms on creditworthiness and security reduce the risk of non-payment.
- As discussed above, are likely to lower the risk to access seekers that their services will not be unduly disrupted²⁵⁹ or adversely affected by the access provider's actions, which in turn may encourage the efficient use of infrastructure.
- Provide further certainty around payment for services used by access seekers²⁶⁰ which encourages the efficient use of infrastructure.

²⁵⁷ NPTCs on communication with end-users.

²⁵⁸ NPTCs on suspension and termination.

²⁵⁹ NPTCs on suspension and termination.

²⁶⁰ NPTCs on billing and notification and creditworthiness and security terms.

- Promote the allocation of risks between the access seeker and access provider according to who can best manage that risk, which promotes efficient outcomes in the investment in and use of infrastructure.

The ACCC considers that the objective of achieving any-to-any connectivity is not generally relevant to the ACCC's assessment of the NPTCs.

Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider

The ACCC considers that the draft NPTCs reflect the legitimate business interests of a carrier or carriage service provider by:

- Recognising that in certain circumstances it would be in a carrier's or carriage service provider's legitimate commercial business interests to not supply an access seeker. For instance, its interest in not supplying where there is an emergency or an access seeker has materially breached the FAD in certain circumstances.
- As discussed above regarding the LTIE, appropriately allocating the risk to access providers of non-recovery of monies for services supplied to access seekers to reflect their legitimate business interests.²⁶¹
- Facilitating the access provider's provision of the relevant declared services by promoting a reasonable balance of access seeker protections so that they do not unnecessarily impede the access provider's ability to provide the relevant declared services. For instance, while the provisions in Schedule 9 ensure that an access provider cannot inappropriately market to access seeker customers when access providers are in contact with them, they also set out when an access provider may legitimately communicate to end-users as required to supply declared services.
- Establishing commercial and operational processes which overall promote an access provider's operational efficiency in providing the relevant declared service. This is discussed more below in relation to the economically efficient operation of a carriage service.

Paragraph 152BCA(1)(c) – the interests of all persons who have rights to use the declared service

The ACCC has formed the view that the draft NPTCs reflect the interests of all persons who have rights to use the relevant declared services. Specifically, the NPTCs:

- should facilitate access to the relevant declared service by providing regulated terms that are reasonable and fairly balanced on the particular matter they cover (both commercial and operational matters). As noted above regarding the LTIE, they promote the outcome that access to the relevant declared service is not hindered by unreasonable or unduly onerous commercial requirements (i.e. that they do not form barriers to entry). For instance, the resale terms provide that access seekers can supply other retail service providers without obtaining consent from the access provider (this may reduce barriers to entry for those resellers).
- As noted above, contain several protections (which may address the competition concerns which arise due to an access provider's vertical integration).
- As noted above, regarding legitimate business interests of an access provider, establish regulated and efficient commercial and operational processes which are likely to reduce access seeker costs around obtaining access. For instance, the ULLS to LSS

²⁶¹ Provisions regarding billing and notification.

transfer provisions contribute to streamlining the transfer process so that they are processed via the one order and not a disconnection and connection process. This is likely to present cost savings to access seekers.

Paragraph 152BCA(1)(d) the direct costs of providing access to the declared service

The ACCC considers that some of the draft NPTCs impact on the direct costs of providing access to the declared service. In this regard, the draft NPTCs:

- are likely to reduce the risk to the access provider of not being able to recover its costs of providing access to the declared service (through billing and notification provisions).
- Where the terms allocate costs, they are likely to do so in an efficient manner. For instance, the allocation of costs arising from the allocation of risks via the liability and indemnity provisions, aim to allocate risk to the party who is best placed to manage the risk.
- are likely to reduce the direct costs of providing access to the declared service by establishing efficient processes. For example, by reducing the costs involved in resolving disputes by encouraging dispute resolution without legal proceedings (where possible)²⁶², and by establishing efficient operational processes such as ULLS to LSS transfer.

Paragraph 152BCA(1)(e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

The ACCC does not consider this matter to be relevant to the draft NPTCs.

Paragraph 152BCA(1)(f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or facility

The ACCC considers that certain draft NPTCs promote the safe and reliable operation of a carriage service because they:

- Allow for an access provider to cease supply when supply is unsafe. For instance, where supply of the service threatens the safety of persons, or is a hazard to equipment and the network.²⁶³
- Facilitate planning around certain network outages²⁶⁴ which promotes the provision of reliable carriage services supplied to end-users.

Paragraph 152BCA(1)(g) the economically efficient operation of a carriage service, a telecommunications network or a facility

The ACCC considers that the draft NPTCs promote the economically efficient operation of a carriage service or telecommunications network or facility. As noted above regarding legitimate business interests of an access provider, the terms establish commercial and operational processes which are likely to improve an access provider's operational efficiency in providing the relevant declared service and operating its network.

These regulated commercial and operational processes are streamlined and thereby are likely to promote timely outcomes. These include processes around information exchange for

²⁶² Billing dispute provisions as set out in the billing and notification terms, and general dispute resolution terms.

²⁶³ Provisions regarding suspension and termination.

²⁶⁴ Network modernisation and upgrade terms.

network modernisation and upgrades, dispute resolution, ordering and provisioning processes for ULLS and LSS, and the ability to make certain changes to operating manuals unilaterally (with consultation).

8 Commencement, expiry and review

8.1 ACCC draft decision

Section 152BCF of the CCA sets out provisions about the duration of a FAD, including its commencement and expiry. The ACCC's draft decision is that the NPTCs for the fixed line services (including wholesale ADSL), the MTAS and the DTCS, will commence when the price terms in those FADs commence. The ACCC has also determined that the NPTCs will expire when the price terms for the same relevant declared service expire.

8.2 Issues raised in submissions

In the position paper and discussion paper, the ACCC asked for views on when the NPTCs should commence and expire and how frequently the ACCC should review the NPTCs.²⁶⁵

Optus, TPG and iiNet submitted that non-price terms should be set for the duration of the FAD (i.e. there should not be a special term for NPTCs which differ from that which applies to price terms). Telstra also submitted that the non-price terms should not have a different term or review process which is more frequent, as it would result in uncertainty and complexity.²⁶⁶

Similarly, Nextgen and VHA considered that a full review every five years in line with when FADs are generally reviewed would be appropriate.²⁶⁷ Nextgen submitted that a 'light-handed' review could be undertaken annually if there is a material change to circumstances or new circumstances.²⁶⁸ iiNet also suggested that binding rules of conduct (BROC) could be used for more urgent matters between review processes.²⁶⁹

Regarding DTCS specifically, VHA submitted that the ACCC should make a FAD before the expiry of the current DTCS FAD (then end 2014) because the terms in the current DTCS FAD are ineffective.²⁷⁰

8.3 Reasons for ACCC draft decision

The ACCC's draft decision is that both the price and non-price terms in the FAD for each of the relevant declared services, will come into effect at the same time, and will be in place for the same period. The ACCC's draft decision is that the fixed line services FAD price terms will have a term of four years, commencing on 1 July 2015 and expiring on 30 June 2019. The ACCC will provide the indicative commencement and expiry of price terms (and therefore NPTCs) for the MTAS and DTCS FADs in its upcoming draft decisions.

The ACCC notes that the above approach is consistent with submitters' views which considered that NPTCs should not have a different duration to that of price terms. Further, the ACCC does not consider that it will conduct a more frequent review of the NPTCs during the duration of the FAD. Rather, when the FADs expire, the ACCC will then simultaneously review the price and NPTCs in a new FAD inquiry. The ACCC notes that during the FAD term, the ACCC can make a BROC to cover a non-price matter for any of the relevant declared services (subject to the CCA criteria) in the event that the ACCC considers it necessary to review or change the FAD terms.

²⁶⁵ ACCC, Position Paper on NPTCs, 23 May 2014, p. 12.

²⁶⁶ Telstra, Submission to the ACCC Discussion Paper (Public version), 16 December 2014, p. 14.

²⁶⁷ Nextgen, Submission to the ACCC Position Paper, 15 July 2014, p 6; VHA, Submission to the ACCC Position Paper (Public version), 16 July 2014, p. 15.

²⁶⁸ Nextgen, Submission to the ACCC Position Paper, 15 July 2014, p. 6.

²⁶⁹ iiNet, Submission to the ACCC Position Paper, 15 July 2014, p 19; iiNet, Submission to the ACCC Discussion Paper (Public version), Section 10 (answer to ACCC question 19), 12 December 2014, p. 19;

²⁷⁰ VHA, Submission to the ACCC Position Paper, 16 July 2014, p. 9.

The ACCC notes VHA's concerns in regards to the current DTCS FAD. The NPTCs for the DTCS FADs will likely be finalised before the price terms are (this non-price inquiry will likely be finalised mid-2015, but the DTCS price inquiry will likely be finalised later). However, as the NPTCs and price terms are part of the same FAD, the ACCC considers that it would provide more certainty for industry to commence both of them at the same time.

9 Part B: Connection charges for fixed line services

Key Points

- The ACCC considers connection charges are unavoidable costs in providing voice and broadband services to customers using the declared services.
- The ACCC has engaged a technical consultant to advise the ACCC on the costs Telstra incurs in providing connections for these services. As part of this advice, the ACCC's consultant has updated the existing unconditioned local loop service (ULLS) and line sharing service (LSS) connection model and extended it to estimate the costs involved in providing wholesale asymmetric digital subscriber line (ADSL) connections.
- Most of the draft connection charges for the ULLS, LSS and wholesale ADSL services are significantly lower than the charges set in the 2011 and 2013 Final Access Determinations.
- Telstra has made significant changes to its contractual arrangements, to increase flexibility, productivity and efficiency, since the ACCC considered these charges in detail in 2007 and 2008. These new arrangements are a significant contributor to the fall in the draft connection charges.
- The ACCC's draft decision is not to allow Telstra to impose a LSS disconnection charge or an early termination charge for the wholesale ADSL service.
- The ACCC has also made a draft decision not to extend the scope of its regulation of connection charges.

Fixed line connection charges are one off charges imposed by Telstra for services associated with connecting an end-user to an access seeker's network using either the unconditioned local loop service (ULLS), line sharing service (LSS) and wholesale asymmetric digital subscriber line (ADSL) services.

There are a range of connection charges currently regulated in the final access determinations (FADs) for the ULLS, LSS and wholesale ADSL services. These charges are set outside the fixed line services model (FLSM) which is used to determine the monthly access and usage prices for these services. The 2011 ULLS and LSS FADs²⁷¹ set connection charges having regard to a cost model developed and refined in previous regulatory processes.²⁷² This previous ULLS and LSS connection model was informed by independent technical advice provided to the ACCC in 2006, 2007 and 2008.

The wholesale ADSL connection charges were first set in the 2013 FAD. In contrast to the ULLS and LSS these charges were set without the benefit of independent technical advice and with limited information about the existing charges. The ACCC decided to set wholesale ADSL connection charges at existing levels (i.e. Telstra's commercial charges). The ACCC final report

²⁷¹ ACCC, *Inquiry to make final access determinations for the declared fixed line services*, Final Report, 20 July 2011, chapter 14.

²⁷² The original ULLS and LSS connection and disconnection cost models were developed by Telstra as part of its December 2004 undertakings. The ACCC made a number of modifications to these cost models as part of the undertaking process and subsequent refinements as part of other regulatory processes. These processes include the ULLS and LSS pricing principles and indicative prices decisions and arbitration determinations for disputes for these services.

on the 2013 FAD for the wholesale ADSL service noted that the ACCC would reconsider these charges again as part of the 2014/15 fixed line services FAD inquiry process.²⁷³

The ACCC has considered fixed line connection and disconnection charges in conjunction with the primary prices FAD inquiry for these services. This report sets out the ACCC's draft determination for these charges.

The ACCC has decided not to set a disconnection charge for the LSS or an early termination charge for the wholesale ADSL service or to extend the scope of its regulation of connection charges. The ACCC's reasons for these draft decisions are set out in this chapter.

9.1 Non-price and supplementary prices position paper

In May 2014 the ACCC released a consultation paper on non-price and supplementary prices as part of the FAD inquiries for the Fixed Line Services, Mobile Terminating Access Service and Domestic Transmission Capacity Services.²⁷⁴ The position paper sought comments on a range of matters including the approach to setting connection (and disconnection) charges for the ULLS, LSS and wholesale ADSL services and comments on the scope of the charges to be regulated. The position paper also sought comments on whether the existing connection charge model should be updated and extended to include connection and early termination charges for wholesale ADSL services. As noted in section 1.1 of this draft decision the position paper also sought comments on a range of other supplementary pricing matters which are being considered alongside the primary prices in the respective FAD inquiries.

9.2 Submissions

9.2.1 Connection and disconnection charges for the ULLS and LSS

Telstra, iiNet, TPG, Optus and Macquarie Telecom were generally supportive of using the existing method to set the regulated connection and disconnection charges for the ULLS and LSS services. Submitters agreed with the ACCC that the underlying data and cost estimates used to derive these charges should be updated. A number of access seekers noted that Telstra had introduced new connection processes since a comprehensive analysis of these charges was last undertaken by the ACCC and that these new processes should have significantly reduced Telstra costs in providing connection services.²⁷⁵

Telstra noted that it still tenders out for connection and disconnection work and that this provides a good proxy for the efficient costs incurred in carrying out this work. Telstra agreed with the ACCC that the data used to derive connection and disconnections charges should be updated.²⁷⁶

iiNet agreed that third party contractor rates were a relevant consideration in setting connection charges, however, expressed concerns that the contractor's quote and the rate Telstra actually pays for these services can differ. iiNet suggested that the ACCC consider undertaking a benchmarking analysis of similar charges applied in other jurisdictions and consider using Telstra's actual costs and proposed expenditure in setting the level of these charges. iiNet considered this approach would ensure that these costs are not included in the FLSM.²⁷⁷

²⁷³ ACCC, *Public inquiry to make a final access determination for the Wholesale ADSL service*, Final Report, 29 May 2013, section 4.3.

²⁷⁴ ACCC, Position Paper on NPTCs, 23 May 2014, chapter 4.

²⁷⁵ TPG, Submission to the ACCC Position Paper, 17 July 2014, p. 5.

²⁷⁶ Telstra, Submission to the ACCC Position Paper, 15 July 2014, p. 6

²⁷⁷ iiNet, Submission to the ACCC Position Paper, 15 July 2014, p. 12.

Macquarie Telecom had no objections to the use of third party contractor rates. It suggested that greater scrutiny be applied to Telstra's back of house and indirect costs.²⁷⁸

iiNet and TPG both raised concerns about the imposition of LSS disconnection charges. iiNet noted that this was especially difficult to justify in light of the migration to the NBN.²⁷⁹

Optus and iiNet's submissions suggested that the ACCC should consider widening the scope of its regulation of ULLS connection charges.²⁸⁰ Specifically iiNet suggested that the ACCC should consider setting a price term for an enhanced vacant ULLS connection process as these are cheaper than using a vacant ULLS connection process as they do not require a truck roll.²⁸¹ Optus submitted that Telstra has introduced connection processes for vacant ULLS and enhanced vacant ULL, the charges for which are subject to commercial negotiation. Optus stated that these processes [c-i-c- starts] [redacted] [c-i-c- ends].

9.2.2 Connection and early termination charges for wholesale ADSL services

Telstra suggested that the scope of the ancillary charges covered by the wholesale ADSL service was adequate and saw little benefit in extending the regulation of ancillary services. Further Telstra submitted that the majority of its revenue from wholesale ADSL ancillary services related to connection charges.²⁸²

iiNet agreed that the current connection charges for the wholesale ADSL service should be retained. iiNet suggested that a similar methodology should be adopted in setting the connection charges for the wholesale ADSL service as that used in setting the connection (and disconnection) charges for the ULLS and LSS. In particular, iiNet suggested that the ACCC should undertake an additional benchmarking analysis and use Telstra's actual costs and proposed expenditure in setting the level of these charges.²⁸³

iiNet and TPG both expressed concerns about the imposition of an early termination charge. TPG noted that it was unclear what costs Telstra would be amortising over a six month term which would require recovery.²⁸⁴ More generally Optus and Macquarie Telecom suggested that the ACCC undertake a more comprehensive analysis of costs incurred in providing connection and early termination charges and ensure they are representative of cost base pricing and are set at reasonable levels.

9.2.3 Connection charges for the wholesale line rental service

Macquarie Telecom was the only submitter to raise concerns with Telstra's connection charges for its wholesale line rental (WLR) service. It suggested that these charges should be cost based. Macquarie Telecom noted that Telstra's Economic Model (TEM) Report²⁸⁵ for the second quarter of 2014-13 shows that WLR connection charges for Telstra's retail business units are significantly lower (-200.63 per cent) than for Telstra's wholesale customers. Macquarie Telecom submitted that these results show Telstra's charges are considerably above costs to the detriment of access seekers and end-users.

²⁷⁸ Macquarie Telecom, Submission to the ACCC Position Paper, 23 July 2014, p. 6.

²⁷⁹ iiNet, Submission to the ACCC Position Paper, 15 July 2014, pp. 13-16.

²⁸⁰ Optus, Submission to the ACCC Position Paper, 18 July 2014, p. 12.

²⁸¹ iiNet, Submission to the ACCC Position Paper, 15 July 2014, p. 12.

²⁸² Telstra, Submission to the ACCC Position Paper, 15 July 2014, p. 6.

²⁸³ iiNet, Submission to the ACCC Position Paper, 15 July 2014, p. 12.

²⁸⁴ TPG, Submission to the ACCC Position Paper, 17 July 2014, p. 5.

²⁸⁵ The TEM is Telstra's internal financial reporting management system used in its day to day business, and relies on the same financial accounts that Telstra uses for its public reporting. Telstra as part of its Structural Separation Undertaking is required to periodically publish reports based on the TEM to make the revenue and cost information available to the ACCC to improve transparent.

9.3 Telstra data on third party rates

On 9 January 2015, Telstra responded to the ACCC's request to provide third party contractor rates for connection and disconnection work. Telstra confirmed that while it still contracts out its installation work and its repair and maintenance work, 'these rates reflect a fundamentally different contractor model' and consequently 'it is not possible to directly compare contractor rates to those previously provided'.²⁸⁶

Telstra advised that in 2010 it made 'a significant change to the management of its external contractors in an effort to increase flexibility, productivity and efficiency of these arrangements'.²⁸⁷ Under these new management arrangements Telstra has moved away from engaging a range of contractors to perform its installation and maintenance work to partnering with a single supplier [c-i-c starts] [c-i-c end] in 2010. Telstra submitted that this arrangement saw it 'take on additional risk and fixed costs (related to [c-i-c starts] [c-i-c end]) and realise greater cost effectiveness in the delivery of the specified work tasks'.²⁸⁸

In light of these new arrangements, Telstra provided the ACCC with the following information in relation to its connection rates:

- the schedule of rates for specific work items for connection activities [c-i-c starts] [c-i-c ends] (set out in Table 1 of Telstra letter of 9 January 2015).
- specific additional tasks, which Telstra advised were necessary to complete the specific connection activity (set out in Table 2 of Telstra letter of 9 January 2015).
- a 'fully loaded' schedule of rates which included the activities described above, in addition to [c-i-c starts] [c-i-c ends] (set out in Table 3 of Telstra letter of 9 January 2015).

In addition to these costs Telstra also advised that it bears its own internal costs and overhead costs associated with connections and disconnections.

On 4 February 2015, Telstra provided the ACCC with supplementary information to its response of 9 January 2014. Telstra's response sought to address the ACCC's follow-up information request which, amongst other things, asked Telstra to provide further information on its schedule of rates set out in table 2. Specifically, the ACCC requested that Telstra confirm its [c-i-c starts] [c-i-c ends] rates related to connection activities disaggregated by ULLS band.

In response, Telstra submitted a revised and consolidated schedule of rates. This schedule reflected a combination of specific tasks for connections and additional tasks.²⁸⁹ While Telstra did not provide a breakdown of the additional tasks, it did note that in most case these 'additional tasks comprised of less than [c-i-c starts] [c-i-c ends] of the total rates paid for specific connection activities'.²⁹⁰ Telstra's response of 4 February also provides a 'fully

²⁸⁶ Telstra, Letter to the ACCC regarding connection and disconnection charges as part of the fixed line services FAD inquiry, 9 January 2015.

²⁸⁷ Telstra, Letter to the ACCC regarding connection and disconnection charges as part of the fixed line services FAD inquiry, 9 January 2015.

²⁸⁸ Telstra, Letter to the ACCC regarding connection and disconnection charges as part of the fixed line services FAD inquiry, 9 January 2015.

²⁸⁹ Telstra, Letter to the ACCC regarding connection and disconnection charges as part of the fixed line services FAD inquiry, 4 February 2015.

²⁹⁰ Telstra, Letter to the ACCC regarding connection and disconnection charges as part of the fixed line services FAD inquiry, 4 February 2015.

loaded' schedule of rates, which again include a [c-i-c starts] [c-i-c ends].

9.4 The previous ULLS and LSS connection model

ULLS and LSS single and MNM connections

Telstra incurs two different types of costs in providing connections for the ULLS and LSS. The first type of costs is associated with technicians performing physical jumpering work inside a Telstra exchange. Telstra has traditionally tendered out this jumpering work to third party contractors and the rates Telstra paid to its third party contractors included labour costs, materials, tools, vehicles and travel.

The second type of costs is incurred by Telstra in providing back of house support so that the connections can occur. This relates to system based work such as ticketing the work and other processes performed by Telstra staff and also includes Telstra's third party contractor management costs.

In estimating the costs and setting the regulated connection charges for the ULLS and LSS, the ACCC has previously used a simple bottom-up cost model. This model was originally provided by Telstra as part of its ULLS and LSS undertakings in December 2004 and has been modified and refined by the ACCC between 2004 and 2010 in separate processes under the previous regulatory regime.

The model sought to estimate the jumpering costs and Telstra back of house costs separately. Third party contractor rates resulting from a competitive tending process were provided by Telstra and used to estimate the jumpering and associated costs for connection charges. Telstra back of house costs were estimated using a time and motion study. The original time and motion study was provided by Telstra in support of its December 2004 undertakings; the ACCC has engaged technical experts to provide advice on the reasonableness of this study and made several modifications to the study outcomes. The jumpering estimates, back of house cost estimates, and an estimate of Telstra's indirect costs incurred in managing third party contractors are used to derive the regulated connection charges for the ULLS and LSS, taking into consideration differences in the work required for each of these services.

The approach described above was used to set the single and managed network migration (MNM) connection charges for the ULLS and LSS. MNM refers to the process of connecting multiple services. More detail on how the single and MNM connection charges are set; can be found in a report prepared by UXC Consulting (UXC) for the ACCC, which is discussed in the next section. The 2011 ULLS and LSS FADs also set the regulated charges for ULLS call diversion²⁹¹ and the charges Telstra can impose if an access seeker cancels a ULLS MNM process. These charges were also set using the approach described above.

ULLS call diversion charges

The 2011 regulated charge for ULLS call diversion comprises of two components: an up-front fixed rate and an ongoing monthly rate.²⁹² As with the other connection charges discussed in UXC's initial report, the regulated charge for the up-front component was determined using a time and motion study prepared by a consultant the ACCC engaged as part of a previous regulatory process.²⁹³ The ACCC has previously determined that ULLS call diversion is

²⁹¹ Call diversion is used in the ULLS connection process where an end-user wants to keep their existing phone number after switching providers. If a call diversion is not put in place, when the physical ULLS cutover occurs the phone number is flagged as inactive and cannot be ported. This means that the end-user cannot take their phone number with them when they move carriers.

²⁹² This monthly on going rate is described in the 2011 FAD as a variable amount or pro rata per month charge.

²⁹³ ACCC's *Unconditional Local Loop Service Access Dispute Between Telstra and Chime Statement of Reasons for Final Determination*, March 2008, p. 174.

performed entirely within Telstra's Data Activation Centre (DAC) which is part of Telstra back of house costs.²⁹⁴ The ACCC's consultant previously estimated that it took Telstra staff 8.5 minutes to perform tasks associated with call diversion.²⁹⁵ In regards to the monthly ongoing rate—the ACCC has previously set this at Telstra's list price. This decision was based on submissions to a 2008 ULLS arbitration that suggested that call diversion was typically not in place for a very long period (between 1 to 14 days)²⁹⁶ and as such the costs associated with this charge were not considered material and the more relevant consideration was the rate associated with the initial connection.

ULLS MNM cancellation charges

The ACCC has previously regulated two types of ULLS MNM cancellation charges, which can be applied if an access seeker cancels a ULLS MNM process within 20 business days of the scheduled transfer occurring. A charge applies where the entire MNM process is cancelled and a per service rate applies where an access seeker cancels specific services to be transferred. Previously, the entire MNM cancellation rate was calculated based on the fixed amount for the ULLS MNM charge. The per service charge was based on the rate Telstra was charged by its contractor in 2007²⁹⁷ who performed this pre-jumpering work plus an allowance of 1.2²⁹⁸ minutes for tasks performed at the DAC by Telstra's staff.

Wholesale ADSL service connection and early termination charges

The ACCC did not use the simple cost model described above to set connection charges or early termination charges for wholesale ADSL service in 2013. This is because the ACCC did not have information available at that time to extend the existing model to connection charges or early termination charges for wholesale ADSL service.

9.5 UXC Consulting initial report on connection charges for the ULLS, LSS and wholesale ADSL service

On 2 March 2015, UXC provided the ACCC with its initial report on connection charges for the ULLS, LSS and wholesale ADSL services. A public version of UXC's initial report is available on the ACCC's website. The ACCC engaged UXC to provide technical advice to the ACCC on the costs Telstra incurs in providing connections for these services. The ACCC considered that it was timely to seek expert advice on connection services as it had been some time since the costs and assumptions underpinning the cost model for these services had been re-examined. As noted in section 9.2, the majority of submitters to the position paper supported this approach.

Information considered by UXC in preparing its initial report included:

- the ACCC's existing ULLS and LSS connections costs model
- previous technical advice provided to the ACCC
- information provided by Telstra both informally in meetings and formally via letters to the ACCC on 9 January and 4 February 2015 (discussed in more detail in section 9.3)

²⁹⁴ ACCC's *Unconditional Local Loop Service Access Dispute Between Telstra and Chime Statement of Reasons for Final Determination*, March 2008, p. 322.

²⁹⁵ ACCC's *Unconditional Local Loop Service Access Dispute Between Telstra and Chime Statement of Reasons for Final Determination*, March 2008, p. 322.

²⁹⁶ ACCC's *Unconditional Local Loop Service Access Dispute Between Telstra and Chime Statement of Reasons for Final Determination*, March 2008, p. 322.

²⁹⁷ ACCC *Unconditional Local Loop Service, Pricing Principles and Indicative Prices*, June 2008, p. 39.

²⁹⁸ ACCC *Unconditional Local Loop Service, Pricing Principles and Indicative Prices*, June 2008, p. 39.

- UXC's own experience and knowledge of Telstra customer access network.²⁹⁹

UXC's model excludes certain third party rates which Telstra has advised sometimes occur during a connection but which UXC considers are related to maintenance works.³⁰⁰ UXC has reduced the revised subcontractor rates Telstra provided on 4 February 2014 by [c-i-c starts] [redacted] [c-i-c ends] to remove costs associated with this maintenance work.

In line with the information Telstra has supplied UXC has applied an uplift of [c-i-c starts] [redacted] [c-i-c ends].

UXC has also adjusted the time to perform DAC activities for LSS connections from four to eight minutes, which is consistent with the equivalent activity for ULLS connections.³⁰¹ To estimate labour costs and third party costs in future years, UXC has used an inflation rate of 2.42 per cent. This inflation rate is the same as that used in the fixed line services model and is calculated by taking the 10-year geometric average of:

- the short term forecasts of CPI published in the RBA's Statement on Monetary Policy for the years they are available, and
- the mid-point of the RBA's target inflation range (i.e. 2.5 per cent) for subsequent years.

UXC's model estimates disaggregated charges across the four ULLS bands, except in the case of MNM connections for LSS and ULLS where the cost inputs are identical across the bands. In accordance with the ACCC's guidance, the updated model does not estimate single LSS disconnection charges.

UXC's updated model has been extended to estimate charges for wholesale ADSL connections. As noted above, the ACCC previously set wholesale ADSL connection charges equal to Telstra's then list price, which included a regulated charge for a 'Type A' connection and a separate charge for a 'Type B' or 'All other' connections. UXC considers that wholesale ADSL 'Type A' connections simply involve an administrative procedure confined to Telstra back of house activities. UXC considers 'Type B and 'All other' connections are analogous to an LSS single connection.

The outputs of UXC's updated model show a reduction in all but one type of connection charge.³⁰² The reductions are mainly driven by a drop in the rates Telstra pays to its third party contractors, which appears to reflect Telstra's new approach to managing external contractors. Telstra has moved away from engaging a range of contractors to perform its installation and maintenance work to partnering with a single supplier [c-i-c starts] [redacted] [c-i-c ends]. UXC understands that this change was intended to materially improve the efficiency of direct activities involved in connections.³⁰³

For each of the LSS and ULLS connection charges (whether single or MNM) the updated model has produced consistently lower estimated prices, ranging from approximately 9 per cent (single LLS Band 1) to 26 per cent (LSS MNMs) lower than the current regulated charges.

Including wholesale ADSL services in the cost model has resulted in a 8 per cent reduction in 'Type A' connection charges and reductions of approximately 40 per cent to 46 per cent for 'Type B' and 'All other' connections, depending on the band. The ACCC observes that the

²⁹⁹ More detail on the information considered please refer to section 2 of UXC's initial report on connection charges for the ULLS, LSS and wholesale ADSL services.

³⁰⁰ UXC's initial report on connection charges for the ULLS, LSS and wholesale ADSL services, p. 10.

³⁰¹ UXC's initial report on connection charges for the ULLS, LSS and wholesale ADSL services, section 3.4.

³⁰² As shown in table 9.1 the fixed component of the MNM charge for the LSS and ULLS have increased slightly.

³⁰³ UXC's initial report on connection charges for the ULLS, LSS and wholesale ADSL services, p. 4.

reduction in the estimated charges is likely driven by the change in approach to estimating these charges which better reflects the costs Telstra incurs in providing these services.

UXC's report did not estimate Telstra's costs in providing ULLS call diversion services or its costs if an access seeker cancelled a ULLS MNM.

9.6 ACCC draft decision

In setting the draft regulated connection charges for the ULLS, LSS and wholesale ADSL services the ACCC has had regard to the findings of UXC's initial report. This section is structured as follows:

- section 9.6.1 sets out the ACCC's draft decision on connection charges, with the actual draft charges set out in table 9.1 at the end of this chapter.
- section 9.6.2 and 9.6.3 sets out the ACCC's draft decision in relation to the scope of charges to be regulated and other issues raised by submitters.

9.6.1 Regulated connection charges

This section sets out the ACCC's draft decision on the regulated charges for single and MNM connections for the ULLS and LSS, connection charges for wholesale ADSL services, ULLS call diversion services and cancellation of a ULLS MNM connection.

The ACCC has considered UXC's initial report and industry submissions to its May 2014 position paper in developing its draft decision on connection charges.

Connection charges for the ULLS, LSS (single and MNM) and wholesale ADSL service

The ACCC considers that price terms for connection services for the ULLS, LSS and wholesale ADSL should be included in the FADs for the ULLS, LSS and wholesale ADSL service. The ACCC considers these connection services are unavoidable costs in providing voice or broadband services to end-users using the declared services. As such, the ACCC considers it appropriate that when determining the price for ULLS, LSS or wholesale ADSL services it must also determine the regulated connection charges for these services.

In the absence of regulated connection charges, Telstra would have the ability and incentive to set connection charges above costs which would create a cost barrier for access seekers to supply end-users with broadband and/or voice services. This in turn may reduce competition in the retail market. Furthermore, Telstra has not provided any evidence to suggest the connection charges for these services should not be regulated. The ACCC's draft decision is that setting price terms for a selection of fixed line connection charges will promote the long term interest of end-users (LTIE).

The ACCC considers UXC's initial report and the updated modelling provide the best available information about Telstra's costs for connections work for the ULLS, LSS and wholesale ADSL services. The ACCC considers that UXC's approach to estimating connection charges for the wholesale ADSL service will result in connection charges that reflect the efficient costs of providing these services. The ACCC agrees with UXC's exclusion of [c-i-c starts] [redacted] [c-i-c ends] to remove certain maintenance activities from Telstra revised contractor rates (see section 9.5 of this chapter), as these costs are not directly related to undertaking connection work and are better categorised as general maintenance costs, which are recovered through monthly access charges.

The ACCC has used the outputs from UXC's updated model to inform its draft decision on the regulated connection charges for the ULLS, LSS and wholesale ADSL service. These charges are set out in table 9.1 at the end of this chapter.

As noted in UXC's initial report, Telstra has made significant changes to the management of its external contractors in order to increase the flexibility, productivity and efficiency of these arrangements.³⁰⁴ UXC notes that these new arrangements have translated to lower third party contractor rates paid by Telstra for connections work. The ACCC considers these cost savings should be passed onto access seekers as connection charges will reflect Telstra's direct costs and its legitimate interests, and will promote competition and efficient use of both Telstra's network and access seekers' own exchange equipment, which will in turn promote the LTIE.

As noted in UXC's initial report, Telstra has not advised of any changes to its back of house costs. In the absence of new information, the ACCC accepts UXC's approach of retaining the previous estimates of the time involved in back of house activities.

ULLS call diversion charges

As noted in section 9.4, the ACCC has previously determined that ULLS call diversion is performed entirely within Telstra DAC which is part of Telstra back of house costs. UXC's initial report notes that Telstra has not advised of any changes to its back of house costs. In line with UXC's approach to back of house costs related to other connection charges (noted above), the ACCC has decided to maintain the DAC activity time estimated in the previous time and motion study at 8.5 minutes in the absence of new information. The ACCC's draft decision is to set the regulated charge for call diversion based on:

- for the up-front fixed rate, the appropriate hourly salary for Telstra back of house staff multiplied by the time taken for Telstra staff to perform the call diversion activities. The hourly salary for Telstra's back of house activities is with the same as the rate used in UXC's updated connection model.³⁰⁵
- for the on-going monthly rate, the ACCC has decided to retain, and inflate to current dollars, Telstra's 2008-09 list price.³⁰⁶ The ACCC has no information to suggest that the typical duration of a call diversion would have changed and as such maintains its previous conclusion that these charges are unlikely to be material.

ULLS MNM cancellation charges

In setting the regulated MNM cancellation charge per service, the ACCC has decided to retain the DAC activity time, estimated in the 2008 time and motion study at 1.2 minutes in the absence of any new information. This is consistent with UXC's approach to calculating back of house costs and the ACCC's approach to calculating the costs associated with ULLS call diversion. The ACCC has based this charge on the revised jumpering rates in UXC report plus an allowance of 1.2 minutes for Telstra back of house costs activities multiplied by the updated labour rate as used in UXC's updated connection model. The regulated MNM cancellation charge per service is set out at the end of this chapter in table 9.1.

With respect to the cancellation charge to be applied to an entire MNM cancellation, the ACCC's draft decision is to set this charge at the same rate as the fixed component of a ULLS MNM charge. This approach is consistent with that previously taken by the ACCC and allows Telstra to recover its fixed back of house cost per MNM. UXC's initial report has estimated this charge and is set out in table 9.1 at the end of this chapter.

³⁰⁴ Telstra, Letter to the ACCC regarding connection and disconnection charges as part of the fixed line services FAD inquiry, 9 January 2015.

³⁰⁵ ABS 6345.0 Table 11a; Financial Year Index ; Ordinary time hourly rates of pay excluding bonuses ; Australia ; Communication services ; Private ; All occupations

³⁰⁶ ABS 6401.0 Tables 1 and 2 CPI, Index Number and percentage changes ; Index numbers; All groups CPI; Australia

9.6.2 LSS disconnection and wholesale ADSL early termination charges

In the 2011 and 2013 FADs for the LSS and wholesale ADSL service respectively, the ACCC set regulated charges for LSS disconnections and an early termination charge for the wholesale ADSL. The ACCC has formed the preliminary view that charges for these services are not in the LTIE and accordingly the ACCC's draft decision is not to allow an LSS disconnection charge or a wholesale ADSL early termination charge. The ACCC's reasoning is set out below.

Disconnection charges

In the ACCC's 2011 FAD inquiry, the ACCC did not reconsider the scope or the underlying cost basis for individual connection and disconnection charges in detail. In the absence of updated information, the ACCC indexed the previously determined connection and disconnection charges made in the most recent arbitrations for the ULLS and LSS, using the RBA's Consumer Price Index forecasts.³⁰⁷ Accordingly, the reason for applying a disconnection charge to LSS has not been reconsidered since the ACCC's 2007 Pricing Principles for the LSS.

In 2008, the ACCC decided not to allow a disconnection charge for the ULLS. The reasoning is set out in the ACCC's 2008 Pricing Principles for the ULLS, which state:

The ACCC considers that the current two-step procedure required by Telstra includes inefficient costs because it requires the removal of a jumper as a separate process before the reconnection of a separate jumper and service and this occurs irrespective of the reason for disconnecting the ULLS. The ACCC considers that this introduces costs of a second jumpering activity that could be avoided by the alignment of disconnection and connection processes whenever the churn of an end-user customer to another provider causes the ULLS disconnection.

In relation to disconnections which do not result from churn but simply from the cessation of an end-user customer's service, the ACCC considers that the jumper could be left in place until either the C-pair port or equipment-side port is re-used. The ACCC accordingly does not consider it necessary to implement an approach that charges for disconnections for such a scenario. The ACCC further considers that any inefficiency or confusion in the management of the MDF in exchanges would be minimal, transitory and outweighed by the factors in favour of disallowing disconnection costs.³⁰⁸

The ACCC considers that this reasoning in relation to disconnections for ULLS is equally applicable to the LSS.

The ACCC notes concerns raised by iiNet and TPG about the application of an LSS disconnection charge, particularly in light of the migration to the NBN. The ACCC notes that the migration from the fixed line network to the NBN is expected to take a number of years to complete. The ACCC considers that end-users on the copper may churn to another provider before the copper line is decommissioned and that additional costs of associated disconnections can be avoided by aligning the disconnection with the connection of the new service, which is efficient and allows the costs to be recovered through the connection charge. In relation to disconnections that are not part of a churn, the ACCC considers the jumper could be left in place until the copper network is decommissioned in that area, avoiding the need for a disconnection charge.

For the reasons outlined above, and taking into account the direct costs incurred by Telstra and Telstra's legitimate business interests, the ACCC considers that allowing a separate regulated disconnection charge for the LSS will not promote the LTIE. This brings the ACCC's approach to regulated charges for LSS in line with the approach for the ULLS.

³⁰⁷ ACCC, *Inquiry to make final access determinations for the declared fixed line services* final report, 20 July 2011, chapter 14.

³⁰⁸ ACCC, *Unconditioned Local Loop Service Pricing Principles and Indicative prices*, June 2008 pp. 32-33.

Early termination charges for the Wholesale ADSL service

The ACCC notes the concerns raised by iiNet and TPG over the application of early termination charges for the wholesale ADSL service.

The ACCC has considered what costs Telstra may be incurring that would need to be recovered through an early termination charge for the wholesale ADSL service.

The ACCC considered whether termination charges may be intended to recover the costs of disconnections. The ACCC notes that Telstra does not impose a disconnection charge for the wholesale ADSL service in its commercial pricing. However, the ACCC also notes that the early termination charge only applies where a party disconnects a service within the first six months; therefore, for disconnections after the first six months Telstra does not impose any charges as a result of disconnection of a wholesale ADSL service.

As outlined above in relation to the ULLS and LSS, the ACCC is of the view that costs incurred in disconnecting a service will generally be recovered as part of connection activities when there is a churn, and the benefits of disconnecting unused jumpers does not otherwise justify the costs involved. The ACCC considers that these reasons also apply in relation to the wholesale ADSL service.

The ACCC also considered whether the early termination charge for the wholesale ADSL service was intended to recover up-front costs incurred by Telstra, such as capital expenditure related to supplying wholesale ADSL services. However, the regulated prices for the declared fixed line services provide for Telstra to recover over time its efficient and prudent forecast operating and capital expenditures, taking into account forecast demand for its fixed line services—as explained in the ACCC’s draft report on the declared fixed line services.³⁰⁹ The ACCC considers that allowing Telstra to recover part of these expenditures through early termination charges for wholesale ADSL would allow Telstra to recover these expenditures twice—once through the monthly access price for the wholesale ADSL service and again through the early termination charge. The ACCC considers that allowing double-recovery of costs through charges to access seekers would not be in Telstra’s legitimate business interests, the interests of access seekers or the LTIE.

It is the ACCC’s draft decision that an early termination charge does not appear to be required in order to allow Telstra the opportunity to recover its efficient costs of providing a wholesale ADSL service. The ACCC’s draft decision is not to allow an early termination charges for the wholesale ADSL service.

9.6.3 The scope of regulated charges

Some submitters to the ACCC’s May 2014 position paper (Macquarie Telecom, Optus and iiNet) suggested extending the scope of regulated connection charges to include connection charges for the WLR and additional ULLS connection processes. The ACCC’s preliminary view is that there is insufficient evidence to suggest that the benefits of increasing the scope of regulation to include these services would outweigh the costs and it would not therefore be in the LTIE to do so. However, the ACCC considers that Telstra should provide additional transparency to access seekers about how these charges are calculated.

Wholesale Line Rental

The ACCC notes Macquarie Telecom’s submission on the variance in the TEM report between the rates Telstra charges its own retail arm for a WLR connection compared to the rate Telstra charges its wholesale customers. The ACCC considers there are limitations in drawing definitive conclusions from Telstra’s TEM report. Telstra’s internal costs are calculated using

³⁰⁹ ACCC, *Public Inquiry into final access determinations for fixed line services – primary price terms Draft Decision*, 11 March 2015, chapter 5.

recent historical information about actual costs and allocation rules from Telstra's accounting system, while its commercial wholesale prices reflect negotiated outcomes.

The ACCC notes that only one submitter raised concerns over WLR connection charges. The ACCC has no evidence that WLR connection charges create a significant barrier to entry and cause competition concerns in the supply of the regulated service. Therefore, the ACCC considers that, on the evidence available to it, the benefits of setting a regulated WLR connection charge are not likely to outweigh the regulatory costs.

The ACCC's draft decision is not to set connection charges for the WLR service.

Additional ULLS connection processes

The ACCC understands that Telstra provides five different types of ULLS connection processes:³¹⁰

- **Vacant ULLS connection (VULL):** This consists of provisioning ULLS using a vacant metallic path. Connections made using this process require both exchange and field work.
- **Enhanced vacant ULLS connection (e-VULL):** This consists of provisioning a ULLS using a vacant and intact metallic path. This is a similar process to VULL, but only requires work to be performed at the exchange and no field work.
- **In-use ULLS connection (iULL):** This consists of provisioning a ULLS using an in-use communications wire. Connections made using this process require exchange based work only. The regulated single ULLS connection charge relates to a iULL connection and a TULL connection.
- **Transfer ULLS connection (TULL):** This consists of a transfer (churn) of an in-use ULLS from one access seeker to another. Connections made using this process require exchange based work only. As noted above, the regulated single ULLS connection charge relates to an iULL and a TULL connection.
- **Diversion ULLS connection (DULL):** This consists of the provision of an ULLS using an in-use communications wire together with a request that Telstra provide a call diversion service for a period of up to 30 calendar days. Connections made in accordance with this process only require work to be performed at the exchange.

Optus and iiNet were the only submitters to the ACCC's position paper to raise concerns over Telstra's charges for VULL and e-VULL connections.

The ACCC notes that Telstra's rate card sets e-VULL charges with reference to the regulated charge for a single ULLS connection.³¹¹ The ACCC draft decision is that it is not necessary to set regulated charges for an e-VULL connection process. The ACCC has not been provided with any evidence to suggest that Telstra's pricing for e-VULL connections is creating significant barrier to entry or competition concerns in the supply of the regulated ULLS service.

Similarly the ACCC has not been provided with any evidence to suggest that Telstra's pricing or use of VULL connections are resulting in barriers to entry or competition concerns.

The ACCC notes that VULL connections are the only connection process which requires an element of field work. As such the ACCC expects that connections made using these processes may be more costly than the other connection processes. It is likely that an

³¹⁰ Telstra Wholesale Structural Separation Undertaking website, available at: <http://www.telstrawholesale.com.au/structural-separation-undertaking/index.htm#tab-4>

³¹¹ Telstra Wholesale Rate card version 6.0 19-12-2014, p. 35.

appropriate charge for VULL connections would comprise of the standard ULLS single connection charge plus a 'mark up' to cover the additional costs associated with the field work. The ACCC notes that the costs underlying this 'mark up' are likely to vary depending on the nature of the field work. For example, works may be required at end-user premises and/or along the copper line between the exchange and premises. It is therefore likely to be difficult to set a single VULL connection charge which would be cost-reflective in all circumstances. For all of these reasons, the ACCC's draft decision is not to set a specific connection charge for VULL connections.

However, the ACCC considers that Telstra should provide additional transparency to access seekers about how these charges are calculated.

The ACCC has considered whether to make specific non-price terms and conditions in relation to these connection processes; the ACCC's draft decision on this are discussed in section 6.3.

Table 9.1 Draft FAD connection and disconnection charges for regulatory period

	Current regulated charges ³¹²	July 2015 to June 2016	July 2016 to June 2017	July 2017 to June 2018	July 2018 to June 2019
LSS charges					
LSS single connections					
Band 1	\$47.55	\$43.33	\$44.38	\$45.45	\$46.03
Band 2	\$47.55	\$44.42	\$45.50	\$46.60	\$47.20
Band 3	\$47.55	\$45.51	\$46.62	\$47.74	\$48.38
Band 4		\$48.01	\$49.17	\$50.36	\$51.06
LSS MNM connection charges – where the service is to be connected on a line Telstra is using to supply a wholesale ADSL service					
Fixed amount (per MNM)	\$154.56	\$168.14	\$172.21	\$176.38	\$180.64
Variable amount (per connection)	\$35.52	\$23.52	\$24.09	\$24.67	\$25.27
LSS MNM minimum exchange charge (excluding Band 4)					
Per exchange	\$865.04	\$638.47	\$653.92	\$669.75	\$685.96
ULLS charges					
ULLS single connection charges – in use ULLS, transfer ULLS and enhanced vacant ULLS connections					
Band 1	\$55.60	\$47.90	\$49.06	\$50.25	\$50.94
Band 2	\$58.58	\$48.63	\$49.81	\$51.02	\$51.72
Band 3	\$63.66	\$59.41	\$60.84	\$62.32	\$63.30

³¹² The current regulated charges will be in place until the day before the new FADs come into effect. The ACCC anticipate that new FADs for the fixed line service will be made by the end of June 2015.

	Current regulated charges ³¹²	July 2015 to June 2016	July 2016 to June 2017	July 2017 to June 2018	July 2018 to June 2019
Band 4		\$66.71	\$68.33	\$69.98	\$71.15
Charges for ULLS MNM – involving the transfer of end-user data services from a Telstra wholesale PSTN and/or ADSL service, or from a line that Telstra is using to supply a ULLS to another access seeker					
Fixed amount (per MNM)	\$152.25	\$168.14	\$172.21	\$176.38	\$180.64
Variable amount (per connection)	\$27.58	\$19.88	\$20.36	\$20.85	\$21.36
ULLS MNM minimum exchange charge					
Per exchange	\$703.86	\$565.75	\$579.44	\$593.46	\$607.82
ULLS call diversion charge					
Fixed amount (per ULLS call diversion)	\$10.26	\$11.34	\$11.62	\$11.90	\$12.19
Variable amount (pro rata per month)	\$13.79	\$14.95	\$15.31	\$15.68	\$16.06
ULLS cancellation charges					
Per service where pre-jumping has occurred	\$22.06	\$11.39	\$11.67	\$11.95	\$12.24
Where entire MNM is cancelled	\$152.25	\$168.14	\$172.21	\$176.38	\$180.64
Wholesale ADSL					
Completed Type A connection					
Per connection	\$22.50	\$20.66	\$21.16	\$21.68	\$22.20
Completed Type B and all other wholesale ADSL connections					
Band 1	\$80.00	\$43.33	\$44.38	\$45.45	\$46.03
Band 2	\$80.00	\$44.42	\$45.50	\$46.60	\$47.20
Band 3	\$80.00	\$45.51	\$46.62	\$47.74	\$48.38
Band 4	\$80.00	\$48.01	\$49.17	\$50.36	\$51.06

Note: the ACCC draft decision is not to allow Telstra to impose ULLS or LSS disconnection charges or an early termination charge for the wholesale ADSL service.

Appendix A: Legislative framework for final access determinations

This section sets out the relevant legislative framework in relation to FADs and the approach the ACCC will take in applying the legislative provisions.

Content of a FAD

Section 152BC of the CCA specifies what a FAD may contain. It includes, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the standard access obligations provided for in the CCA and terms and conditions of access to a declared service. A FAD may make different provisions with respect to different access providers or access seekers.³¹³

Fixed principles provisions

A FAD may contain a fixed principles provision, which allows a provision in a FAD to have an expiry date after the expiry date of the FAD.³¹⁴ Such a provision would allow the ACCC to 'lock-in' a term so that it would be consistent across multiple FADs.

Varying a FAD

Section 152BCN allows the ACCC to vary or revoke a FAD, provided that certain procedures are followed.

A fixed principles provision cannot be varied or removed unless the FAD sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.³¹⁵

Commencement and expiry provisions

Section 152BCF of the CCA sets out the commencement and expiry rules for FADs.

A FAD must have an expiry date, which should align with the expiry of the declaration for that service unless there are circumstances that warrant a different expiry date.³¹⁶

A FAD may be 'backdated' such that it comes into force on a date prior to the making of the determination.³¹⁷ There are, however, limitations on the extent of backdating that is permitted.³¹⁸

Criteria to consider when making a FAD

The ACCC must have regard to the matters specified in subsection 152BCA(1) of the CCA when making a FAD. These criteria are:

- a) whether the determination will promote the LTIE of carriage services or services supplied by means of carriage services

³¹³ Section 152BC(5) of the CCA.

³¹⁴ Section 152BCD of the CCA.

³¹⁵ Section 152BCN(4) of the CCA.

³¹⁶ Section 152BCF(6) of the CCA.

³¹⁷ Section 152BCF(2) of the CCA.

³¹⁸ Sections 152BCF(2A), 152BCF(3), 152BCF(3A), 152BCF(4) and 152BCF(4A) of the CCA.

- b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- c) the interests of all persons who have rights to use the declared service
- d) the direct costs of providing access to the declared service
- e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

Subsection 152BCA(1) criteria mirror the repealed subsection 152CR(1) criteria that the ACCC was required to take into account in making a final determination (FD) in an access dispute. The ACCC has interpreted the subsection 152BCA(1) matters in a similar manner to that used in access disputes.

Subsection 152BCA(2) sets out other matters that the ACCC may take into account in making FADs.

Subsection 152BCA(3) allows the ACCC to take into account any other matters that it thinks are relevant.

The ACCC's views on how the section 152BCA matters should be interpreted for the FAD process are set out below.

The long-term interests of end-users (subsection 152BCA(1)(a))

The first criterion for the ACCC to consider when making a FAD is 'whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services'.

The ACCC has published a guideline explaining what it understands by the phrase 'long term interests of end-users' in the context of its declaration responsibilities.³¹⁹ This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for making FADs for the declared fixed line services.

In the ACCC's view, particular terms and conditions promote the interests of end-users if they are likely to contribute towards the provision of:

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.³²⁰

The ACCC also notes that the Australian Competition Tribunal (Tribunal) has offered guidance in its interpretation of the phrase 'long-term interests of end-users' (in the context of access to subscription television services):

Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary to take the following matters into account when applying the touchstone – the long-term interests of end-users:

*End-users: 'end-users' include actual and potential [users of the service]...

³¹⁹ ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act*, July 1999, pp. 31-38.

³²⁰ ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provision of Part XIC of the Trade Practices Act*, July 1999, p. 33.

*Interests: the interests of the end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings... [T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case...

*Long-term: the long-term will be the period over which the full effects of the...decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.³²¹

To consider the likely impact of particular terms and conditions on the LTIE, the CCA requires the ACCC to have regard to whether the terms and conditions are likely to result in:

- promoting competition in markets for carriage services and services supplied by means of carriage services
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in:
 - the infrastructure by which listed carriage services are supplied, and
 - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.³²²

Promoting competition

In assessing whether particular terms and conditions will promote competition, the ACCC will analyse the relevant markets in which the declared services are supplied (retail and wholesale) and consider whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.³²³

Obstacles to accessing these services include the price, quality and availability of the services and the ability of competing providers to provide telephony and broadband services.

The ACCC is not required to precisely define the scope of the relevant markets in which the declared services are supplied. The ACCC considers that it is sufficient to broadly identify the scope of the relevant markets likely to be affected by the ACCC's regulatory decision.

Any-to-any connectivity

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service. This must be the case whether or not the end-users are connected to the same telecommunications network.³²⁴

The ACCC considers that this objective is relevant to ensuring that the terms and conditions contained in FADs do not create obstacles for the achievement of any-to-any connectivity.

Efficient use of and investment in infrastructure

In determining the extent to which terms and conditions are likely to encourage the economically efficient use of and investment in infrastructure, the ACCC must have regard to:

³²¹ Seven Network Limited (No 4) [2004] ACompT 11 at [120].

³²² Section 152AB(2) of the CCA.

³²³ Section 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Tribunal in Telstra Corporations Limited (No 3) [2007] A CompT 3 at [92]; Telstra Corporation Limited [2006] A CompT at [97] & [149].

³²⁴ Section 152AB(8) of the CCA.

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
 - the technology that is in use, available or likely to become available
 - whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and
- the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the NBN) by which services are, or are likely to become, capable of being supplied, and for the purposes of determining the incentives for investment, regard must be had to the risks involved in making the investment.³²⁵

The objective of encouraging the 'economically efficient use of, and economically efficient investment in ... infrastructure' requires an understanding of the concept of economic efficiency. Economic efficiency consists of three components:

- productive efficiency – this is achieved where individual firms produce the goods and services that they offer at least cost
- allocative efficiency – this is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs)
- dynamic efficiency – this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

On the issue of efficient investment, the Tribunal has stated that:

...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.³²⁶

...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.³²⁷

...access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.³²⁸

Legitimate business interests (subsection 152BCA(1)(b))

The ACCC must take into account 'the legitimate business interests' of the carrier or CSP when making a FAD.

In the context of access disputes, the ACCC considered that it was in the access provider's legitimate business interests to earn a normal commercial return on its investment.³²⁹ The ACCC is of the view that the concept of 'legitimate business interests' in relation to FADs

³²⁵ Sections 152AB(6) and (7A) of the CCA.

³²⁶ Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [159].

³²⁷ Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [164].

³²⁸ Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [164].

³²⁹ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

should be interpreted in a similar manner, consistent with the phrase 'legitimate commercial interests' used elsewhere in Part XIC of the CCA.

For completeness, the ACCC notes that it would be in the access provider's legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.³³⁰

The Australian Competition Tribunal has taken a similar view of the expression 'legitimate business interests'.³³¹

Persons who have a right to use (subsection 152BCA(1)(c))

The ACCC must have regard to 'the interests of all persons who have the right to use the service' when making a FAD.

The ACCC considers that this criterion requires it to have regard to the interests of access seekers. The Australian Competition Tribunal has also taken this approach.³³² The access seekers' interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete with the access provider in the provision of retail services.³³³

People who have rights to currently use a declared service will generally use that service as an input to supply carriage services, or a service supplied by means of carriage service, to end-users.

The ACCC considers that this class of persons has an interest in being able to compete for the custom of end-users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.³³⁴

However, the ACCC does not consider that this criterion calls for consideration to be given to the interests of the users of these 'downstream' services. The interests of end-users will already be considered under other criteria.

Direct costs of providing access (subsection 152BCA(1)(d))

The ACCC must have regard to 'the direct costs of providing access to the declared service' when making a FAD.

The ACCC considers that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access, and includes the incremental costs of providing access.

The ACCC interprets this matter, and the use of the term 'direct costs', as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Australian Competition Tribunal's approach.³³⁵ A contribution to indirect costs can also be supported by other criteria.

³³⁰ ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

³³¹ Telstra Corporation Limited [2006] ACompT 4 at [89].

³³² Telstra Corporation Limited [2006] ACompT 4 at [91].

³³³ Telstra Corporation Limited [2006] ACompT 4 at [91].

³³⁴ Telstra Corporation Limited [2006] ACompT 4 at [91].

³³⁵ Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

However, the criterion does not extend to compensation for loss of any 'monopoly profit' that occurs as a result of increased competition.³³⁶

The ACCC also notes that the Australian Competition Tribunal has considered the direct costs criterion 'is concerned with ensuring that the costs of providing the service are recovered.'³³⁷ The Australian Competition Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.³³⁸

Extensions or enhancements of capability (subsection 152BCA(1)(e))

The ACCC must consider 'the value to a party of extensions, or enhancements of capability, whose cost is borne by someone else' when making a FAD.

In the 1997 Access Pricing Principles, the ACCC stated:

This criterion requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.³³⁹

Safe and reliable operation (subsection 152BCA(1)(f))

The ACCC must consider 'the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility' when making a FAD.

The ACCC considers that this matter involves consideration of whether terms of access compromise the safety or reliability of carriage services and associated networks or facilities, and that this has direct relevance when specifying technical requirements or standards to be followed.

The ACCC has previously stated in the context of model non-price terms and conditions, it is of the view that:

...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.³⁴⁰

Economically efficient operation (subsection 152BCA(1)(g))

The ACCC must consider 'the economically efficient operation of a carriage service, a telecommunications network facility or a facility' when making a FAD.

³³⁶ See Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996, p. 44: [T]he 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

³³⁷ Telstra Corporation Limited [2006] ACompT 4 at [92].

³³⁸ Telstra Corporation Limited [2006] ACompT 4 at [139].

³³⁹ 1997 Access Pricing Principles, p. 11.

³⁴⁰ ACCC, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

The ACCC considers that the phrase 'economically efficient operation' embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The ACCC has also noted – in the context of resolving access disputes - that the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.³⁴¹

Consistent with the approach taken by the Australian Competition Tribunal, the ACCC considers that in having regard to this matter, it is relevant to consider the economically efficient operation of:

- retail services provided by access seekers using the access provider's services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.³⁴²

Other eligible services (section 152BCA(2))

Subsection 152BCA(2) provides that, in making an FAD that applies to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,³⁴³ take into account:

- the characteristics of those other eligible services
- the costs associated with those other eligible services
- the revenues associated with those other eligible services, and
- the demand for those other eligible services.

The Explanatory Memorandum to the Bill that introduced this provision states that this provision is intended to ensure that the ACCC, in making an FAD, does not consider the declared service in isolation, but also considers other relevant services.³⁴⁴ As an example, the Explanatory Memorandum states:

...when specifying the access price for a declared service which is supplied by an access provider over a particular network or facility, the ACCC can take into account not only the access provider's costs and revenues associated with the declared service, but also the costs and revenues associated with other services supplied over that network or facility.³⁴⁵

Any other relevant matters (section 152BCA(3))

The ACCC may take into account any other matters that it thinks are relevant when making a FAD.

³⁴¹ Access Dispute Guidelines, p. 57.

³⁴² *Telstra Corporation Limited* [2006] ACompT at [94]-[95].

³⁴³ 'Eligible service' has the same meaning as in section 152AL of the CCA.

³⁴⁴ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

³⁴⁵ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

Appendix B: Draft FAD instrument for fixed line services