FINAL ACCESS DETERMINATION: NON-PRICE TERMS AND CONDITIONS

Response to the
Australian Competition and
Consumer Commission's Discussion Paper

Public version

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Contents

1. Executive summary

Vodafone Hutchison Australia Pty Limited (**VHA**) welcomes the opportunity to participate in the ACCC's consultation on its final access determination (**FAD**) discussion paper for non-price terms and conditions (**Discussion Paper**) for the Domestic Transmission Capacity Service (**DTCS**); the Mobile Terminating Access Service (**MTAS**); and fixed line services.

VHA also welcomes the ACCC's decision to consider supplementary pricing alongside primary pricing in the FAD inquiries. That approach will allow for proper consideration of supplementary price issues in the context of primary prices and for the cost of access to the declared service to be considered as a whole. It will also better reflect commercial practice of access seekers considering the overall bargain, rather than isolated elements, when determining whether or not to acquire declared services.

FAD non-price terms and conditions (**NPTCs**) are a vital factors in access seekers' decisions to acquire declared services. NPTCs, along with the price of the service, ultimately affect the basis upon which access seekers are able to offer services to end users. It is therefore in the long-term interest of end-users (**LTIE**) that NPTCs are fair and balanced.

The current NPTCs fail to act as a viable alternative to a negotiated access agreement where an access provider and access seeker cannot agree on an aspect of supply. Currently, access seekers must reach agreement with access providers on the majority of terms of supply of a declared service, leaving negotiations open to the influence of access providers' superior bargaining power. Over time, access providers have exploited their bargaining position to insist on unbalanced terms, so that access seekers have come to accept terms of supply less favourable than those typically found in agreements negotiated in competitive markets.

Targeted NPTCs or guiding principles will not effectively address this normalisation of unfair terms, and the inequalities in bargaining power between access providers and access seekers. To ensure a level playing field between access providers and access seekers, the ACCC must ensure the NPTCs comprehensively address the wide range of issues that may arise between access provider and access seeker in relation the supply of declared services.

2. Importance of NPTCs

VHA welcomes the ACCC's acknowledgement that non-price aspects of supply are a critical factor in access seekers' decisions to acquire declared services. NPTCs must be in place to act as an effective fall-back should access provider and access seeker be unable to agree on aspects of supply of a declared service.

It is in the LTIE for access seekers to acquire declared service, not just on reasonable prices, but also on fair contract terms. The combination of the non-price and price aspects of supply of a declared service to access seekers are passed on to end users in the form of price, service quality commitments and other terms of supply. To promote the LTIE, the NPTCs, in conjunction with the regulated price for a declared service, must reflect a reasonable deal to access seekers.

VHA agrees with other access seekers that providing an effective fall-back is particularly important due to the imbalance in negotiating power between access seekers and access providers. This natural inequality has been perpetuated by the failure of the current regulation, including the current NPTCs, to curb Telstra's market dominance and deliver a level competitive playing field for telecommunications in Australia.

3. The current nature of negotiations of NPTCs

3.1 Use of existing NPTCs

The existing set of NPTCs have provided certainty to access seekers and access providers on the fair and appropriate treatment of matters addressed in the NPTCs. However, VHA has found the issues addressed by the existing FAD terms are generally not contentious in the negotiation of access agreements for declared services. VHA has had little need to reference those terms in the past, and has found that it is the other terms of its supply by access providers that are more problematic.

3.2 The normalisation of unfair terms

The lack of comprehensive NPTCs to date, has meant that for several years access seekers have not had an effective fall-back option to reaching agreement with an access provider. Although the existing FAD terms cover some of the matters typically in contention between access providers and access seekers, currently, if an access seeker wishes to acquire a declared service, it has no choice but to reach agreement with the access provider on the majority of the terms of supply. Given the imbalance of bargaining power between the parties to the negotiation, access providers have offered terms which are skewed in their interest, and have had little or no incentive to reach compromise positions with access seekers on commercially reasonable terms. Access seekers' awareness of their inferior bargaining power, and their past experience of access provider behaviour, has led to access seekers adopting a very different approach to negotiations with access providers than with other suppliers to their businesses.

Access seekers have learned that it is largely ineffective to delay and waste resources seeking to negotiate commercially reasonable positions with some access providers. As a result, access seekers who need to acquire declared services have come to accept that they must do so on terms less reasonable than the terms on which they make for other purchases where there are competing suppliers. For example, [redacted]

This normalisation of unfair practices has meant that access seekers currently accept access agreement terms which favour access providers more so that they would accept terms favouring the supplier in other contracts. When dealing with access providers, access seekers are more likely to recognise their lack of bargaining power and access provider intransigence on points, which leads them to more quickly accede to less reasonable terms. This effect is compounded when the access seeker is under pressure to acquire

the service quickly for its own business reasons. As a result, there are few instances where negotiations reach a stalemate, and it is difficult to provide examples of access providers engaging in 'take it or leave it behaviour'.

3.3 Examples

[redacted]

[redacted]

4. Approach to developing NPTCs

VHA supports the ACCC's view that comprehensive NPTCs are to be preferred over guiding principles or NPTCs that target select issues only. Comprehensive NPTCs are the only way to ensure all gaps are filled in an access agreement where the parties cannot agree on some aspects of supply. Comprehensive NPTCs also provide certainty to access seekers who do not have an access agreement in place as to the complete terms and conditions applicable to their acquisition of declared services. The importance of having comprehensive NPTCs has been recognised in other jurisdictions, such as Singapore and New Zealand.

If NPTCs are not comprehensive, opportunities exist for access providers to exploit their superior bargaining power to supplement the NPTCs with terms more restrictive than those generally available under standard commercial contracts. For this reason, a comprehensive set of NPTCs is to be preferred over NPTCs that target only a selection of issues. Even if selective NPTCs were developed to address those issues typically in dispute between access seekers and access providers, by leaving gaps in the issues addressed, the approach would leave room for access providers to exploit their superior bargaining power to the detriment of access seekers and, ultimately, end users.

VHA also agrees with the ACCC's assessment that a principle-based approach is unlikely to be suitable. That approach will not provide certainty required to act as an effective alternative to a negotiated access agreement.

Developing comprehensive NPTCs will require significant effort on the part of the ACCC. However, such effort is appropriate given the importance of non-price aspects of supply in the context of declared services. A number of approaches can be taken by the ACCC to efficiently develop comprehensive NPTCs. These include leveraging, where appropriate:

- the New Zealand Commerce Commission Standard Terms Determination;
- the SingTel Reference Interconnection Offer;
- the terms of the NBN Co Wholesale Broadband Agreement; and
- the terms of the proposed Telstra Wholesale Agreement.

VHA's comments on the New Zealand Commerce Commission Standard Terms Determination are set out in Appendix A. VHA will provide comments on the draft NPTCs circulated by the ACCC on 8 December 2014 and

would be happy to provide comments on the other approaches being considered by the ACCC (although VHA has yet to see a copy of the proposed Telstra Wholesale Agreement).

Regardless of the resources leveraged by the ACCC to prepare comprehensive NPTCs, the ACCC should continue to circulate drafts of the NPTCs to the industry for comment and discussion.

5. Key clauses to be included in NPTCs

To act as an effective fall-back to a negotiated access agreement, and to avoid access providers being able to exploit their market power in gaps in NPTCs, comprehensive NPTCs must cover a wide range of issues. For a complete list of key clauses which should be included in the NPTCs, VHA refers the ACCC to Appendix 1 of VHA's response to the ACCC's Position Paper on non-price terms and conditions and supplementary prices (**Position Paper**).

Regardless of whether the ACCC decides to implement comprehensive or targeted NPTCs, it is critical that the NPTCs address the following issues in particular.

5.1 The ACCC's role in disputes

The NPTCs should recognise the key role to be played by the ACCC in resolving disputes arising from their use. As the creator of the FAD and NPTCs, the ACCC is best placed to understand the intended application of the terms, and therefore to resolve issues that cannot be resolved between access seekers and access providers themselves.

Under the 'negotiate-arbitrate' model, the ACCC's role in resolving issues between access providers and access seekers was clear and there was no need to build a contractual right into the NPTCs for parties to refer disputes to the ACCC. Since the departure from that model, however, the existing NPTCs have not adequately addressed the ACCC's role in disputes between parties to an access agreement.

Given the importance of the ACCC's role in regulating the supply of declared services, it is essential that the NPTCs create a contractual right for either party to refer disputes to the ACCC for arbitration. This right should be triggered once the parties have exhausted their ability to resolve a dispute between themselves through escalation to senior representatives. For the ACCC to have an effective role in resolving disputes, its involvement should not be dependent on completion of other lengthy dispute resolution processes, such as mediation. Including a clear role for the ACCC in disputes under the NPTCs will provide visibility to the ACCC of issues arising between access seekers and access providers and ensure the ACCC continues to play an effective role in the relationships between those parties.

5.2 Regulatory review

The need for the NPTCs to respond to critical regulatory events should be addressed in the NPTCs themselves. It is important that a clause dealing with regulatory events is included because those events may significantly affect the rights and obligations of an access provider or an access seeker.

To this end, the NPTCs should include a regulatory review clause of the type described in item 45 of Appendix 1 of VHA's response to the Position Paper. The clause should provide that, in the event of a defined regulatory event occurring, either party may initiate discussions to determine the consequential effect on the parties' rights and obligations. Where an access agreement exists between the relevant access provider and access seeker, a regulatory review clause should oblige the parties to negotiate in good faith any consequential changes to its terms. Any dispute as to how the terms should be changed to reflect the regulatory event should be managed in accordance with the dispute resolution process, including referral to the ACCC for arbitration if required by either party.

5.3 Billing accuracy

Access providers must be required to promptly apply billing changes in their systems. This will ensure bills are up-to-date and allow access seekers to efficiently manage their finances. While this is a simple requirement, its absence from the current NPTCs is creating a real and unnecessary administrative burden for VHA.

5.4 Remedies for non-performance

While contractual remedies for non-performance are naturally a focus of NPTCs, where there is no alternative provider in the market they become especially important. Where there is no other viable source of supply of a declared service, there is no natural market discipline for access providers to perform. Contractual remedies become an access seeker's key tool to manage access providers' performance, and assume greater importance than they would in a market environment. Contractual remedies need to be considered, targeted and binding on access providers. They must also be tied to objective tests and standards, rather than to an access provider's assessment of its own performance. The range of contractual remedies appropriate to the NPTCs is included in Appendix 1 of VHA's response to the Position Paper.

6. Conclusion

In setting NPTCs the ACCC has the opportunity to rectify the current terms' inability to curb access providers' exercise of their market power in negotiations with access seekers. The ACCC should make the most of this opportunity by ensuring the NPTCs are comprehensive and balance of the interests of access providers and access seekers. Fair and balanced terms will ensure declared services are provided to access seekers in a manner which more closely reflects the supply of services in competitive markets. The benefits of this will ultimately be passed to end-users of the declared services. VHA looks forward to working with the ACCC to further develop comprehensive NPTCs.

Appendix A - Comments on New Zealand Commerce Commission Standard Terms Determinations

This appendix sets out VHA's comments on the New Zealand Commerce Commission's Standard Terms Determination for Mobile Termination Access Services (the **Mobile Termination Access Terms**). The Mobile Termination Access Terms consist of:

- Mobile Termination Access General Terms, which set out the general rights and obligations of access providers and access seekers for MTAS (**MTAS General Terms**);
- detailed schedules containing service descriptions, pricing, service-specific terms and an operations manual; and
- a detailed implementation plan for MTAS.

The structural split of the Mobile Termination Access Terms into general access terms and more detailed service-specific terms may be a useful model for the ACCC to consider applying to NPTCs in Australia. However, as discussed in VHA's previous submission, this structure can be applied to declared services generally, so that common access terms are consistent across fixed services, MTAS and DTCS. Adopting consistent general terms for declared services would lead to efficiencies in both for the ACCC in developing the terms and for access providers and access seekers in applying them.

VHA's comments in this appendix are focused on the suitability of using the MTAS General Terms as a starting point for developing common NPTCs for declared services in the Australian market. However, the MTAS-specific components of the Mobile Termination Access Terms may also be useful for developing NPTCs for that particular service.

Part A – Interpretation

The NPTCs should include interpretation principles similar to those included in the MTAS General Terms (but updated to reflect the Australian jurisdiction). This includes clear definitions of terms and general principles of construction.

Part B – Scope

1. The role of the terms

Clauses 2.1 to 2.11 of the MTAS General Terms provide an explanation of the circumstances in which the terms apply, and the role of the terms in the relationship between access provider and access seeker. A similar clause would be useful in NPTCs for the Australian market.

2. No restrictions on resale or use

Clause 2.18 of the MTAS General Terms includes an express acknowledgement that the terms do not restrict the use or resale of services for either the access provider or the access seeker. This is a fair and reasonable way to ensure access is not provided on conditions which limit either party's ability to use the services to more effectively compete in the market. A similar clause should be included in the NPTCs for the Australian market.

3. Key commitments

Clauses 2.19 and 2.20 contain the key commitments from the access provider to provide the service to the access seeker. These clauses fall short of the terms that would be expected in a commercial agreement for the service. Unbalanced protection is offered to the access provider, who is required to provide the service only 'to the extent reasonably practicable' and to not guarantee the service will be continuous or fault-free. A more balanced approach would be to require the access provider to commit to providing the service in accordance with set service levels which set the minimum standard of performance for the service. That approach would give access seekers and access providers certainty as to the standard expected and ensure an incentive exists for access providers to perform.

4. Security

The security provisions of the MTAS General Terms strike a fair balance between allowing access providers to protect their interests by requiring security from access seekers, and ensuring such security is only provided where appropriate, given the individual access seeker's financial standing. The Australian NPTCs should use clear objective tests to determine whether security requirements are triggered, consistent with the approach in the MTAS General Terms.

5. Other provisions

Clause 2.21 clearly sets out each party's responsibility for its own network. This is a clear and balanced approach, and would be useful to include in NPTCs for the Australian market.

Other parts of clause 2 of the MTAS General Terms deal with service-specific terms, such the limits of the service. VHA suggests that these matters be dealt with in service-specific parts of the NPTCs for MTAS, DTCS and fixed services in Australian market, rather than in the access terms common to all declared services.

The MTAS General Terms do not address service levels and associated credits for service level failures. While the particular service levels and service credit calculations will be service-specific, the NPTCs common to declared services should include general framework provisions requiring the access provider to provide the service in accordance with service levels, and for the payment of service credits for service level failures.

Part C – Dispute resolution

The dispute resolution process in clause 3 of the MTAS General Terms reflects the terms that would typically apply to a negotiated commercial agreement between the parties for the supply of services. The fact that the parties have 20 working days to resolve the dispute between them before proceeding to more formal dispute resolution practices reflects commercial practice of escalation of issues between parties to a contract. The incorporation of alternative dispute resolution methods, such as mediation and arbitration, is also sensible, since it represents a faster and more cost-effective way to resolve a dispute than formal legal proceedings.

The dispute resolution provisions of the NPTCs for the Australian market should adopt a similar structure to that adopted in the MTAS General Terms. However, the NPTCs should also include critical provisions requiring the parties to continue to perform their obligations which are unaffected by general disputes, similar to the provisions regarding billing disputes in clause 18.8 of the MTAS General Terms.

Rather than include provision for arbitration of a dispute by an agreed arbitrator or an arbitrator appointed by a law society, the NPTCs for the Australian market should include an option for the dispute to be referred to the ACCC for arbitration. For the reasons set out in the body of our submission, this is an important requirement given the critical role the ACCC plays in determining the NPTCs and regulating declared services generally.

Part D – Suspension, force majeure, termination and liability

1. Suspension

Under the MTAS General Terms, the access provider is entitled to suspend services where it is entitled to terminate the service or in the instances set out in the service-specific terms. Those limited rights to suspend the service are generally appropriate. However, the service-specific instances that justify suspension would need to be carefully considered to ensure they are defined with reference to objective criteria and balance the interests of the access provider, access seeker and end-users. It would be appropriate for the service-specific occurrences justifying suspension to be limited to emergencies.

The MTAS General Terms effectively balance the interests of access seekers and access providers by requiring that the suspension is to the minimum extent practicable to limit disruption to the access seeker or end users and is lifted as soon as reasonably practicable. This would be strengthened if the terms also required advance notice of a suspension to be given, where possible, to allow an access seeker an opportunity to plan around the suspension and to take steps such as notifying affected end-users.

A pro-rata reduction in fees should be applied during any period during which the services are suspended or otherwise unavailable. A provision to this effect is not included in the MTAS General Terms, but should form part

of the NPTCs for the Australian market because it is unreasonable to except an access seeker to pay for a service which is not being supplied.

2. Force majeure

The force majeure provisions of the MTAS General Terms generally reflect force majeure provisions that would be seen in commercially negotiated contracts for services in Australia, and therefore are a useful starting point for Australian NPTCs. However, an artificially broad definition of 'force majeure' is used. Pursuant to clause 5.2.13 of the MTAS General Terms, force majeure includes failures of a third party to provide goods or services that are beyond the reasonable control of the party relying on the force majeure clause to excuse its non-performance. This aspect of the definition takes force majeure beyond the limits of the concept as typically applied to commercial agreements in Australia. Each party should be responsible for the actions of its suppliers, and should seek to contract with those suppliers in a way that includes appropriate remedies for their failure to supply. The NPTCs for the Australian market should adopt a more standard definition of force majeure which does not extend to events such as third party supplier failures.

3. Termination

No minimum term is specified in the MTAS General Terms, and both parties have the right to terminate for convenience on two months prior notice to the other party, without the payment of early termination fees. These rights are appropriate rights for access seekers. However, to avoid access providers being permitted to refuse to supply a declared service to an access seeker, the NPTCs in the Australian market should provide for this termination right to be exercisable by the access seeker only.

The MTAS General Terms take the approach of giving access seekers and access providers reciprocal rights to terminate for breach and insolvency. The terms could be improved to remove operational uncertainty for the parties as to whether a particular breach is sufficiently 'material' to justify termination. To this end, the NPTCs for the Australian market should explicitly set out the types of breaches that give rise to termination rights. These would include a failure by the access provider to meet the same service level in three consecutive months or a failure by the access seeker to pay undisputed amounts when due (after appropriate grace period and reminder requirements have been met).

4. Liability

Both parties' have little liability to each other under the MTAS General Terms. This is inconsistent with the approach generally taken in commercially negotiated agreements in competitive markets and represents an unfair distribution of risk. This is because the potential for an access provider's non-performance to cause loss or damage to the access seeker's business is much higher than the potential for the access seeker's non-performance (which would chiefly be a failure to pay) to impact the access provider's business. The NPTCs for the Australian market would better reflect a balancing of the interests of the access provider and access seeker, and ensure each party is compelled to perform its obligations, if each party remained generally liable for its acts and

omissions. For further details of VHA's suggested liability regime, please refer to Appendix 1 of VHA's submission in response to the Position Paper.

The elements of the MTAS General Terms liability regime which do broadly reflect a fair allocation of risk and the typical terms of commercially-negotiated agreement are:

- the mutual exclusion of consequential and indirect losses; and
- a liability cap structure based on the greater of a fixed minimum cap amount and a multiple of the fees paid in a 12 month period.

The NPTCs for the Australian market should include provisions dealing with the same subject matter.

5. Indemnity

The inclusion of an indemnity for infringement of a third party's intellectual property rights is appropriate in NPTCs. However, the indemnity in the MTAS General Terms is significantly watered-down by the ability of the indemnifying party to unilaterally notify terms that effectively qualify the scope of the indemnity (see clauses 7.12 and 7.14). This creates uncertainty as to the rights the indemnified party has to use the intellectual property rights provided by the other party and should be avoided in NPTCs for the Australian market.

The procedure for managing indemnified claims included in the MTAS General Terms broadly reflects the procedures that would be included in commercially negotiated service contracts. However, the procedure should also:

- include requirements that no claim be settled by the indemnifying party without the indemnified party's consent. This is important to ensure the settlement does not cause further harm to the indemnified party;
- not include any restriction on the ability of the indemnified party to recover its own reasonable legal fees where the indemnifying party conducts defence of the claim. Even where it is not conducting the defence, the indemnified party will still require legal advice in relation to its rights and potential settlements, which should also be covered by the indemnity; and
- include an obligation for the indemnifying party to procure a right for the other party to continue using the relevant intellectual property rights to ensure that there is no adverse effect on the performance of the relevant service. It is reasonable for the party providing the licence rights to bear responsibility for addressing any deficiencies in them. This also reflects typical provisions included in commercially negotiated service agreements.

Part E – Relationship and network management

1. General

The relationship and network management provisions of the MTAS General Term are, for the most part, specific to the MTAS. Under VHA's suggested structure for the NPTCs, those terms would form part of the service-specific terms rather than the terms common to all declared services.

Provisions of the MTAS General Terms which would be useful to include in NPTCs common to all declared services include:

- provisions similar to clause 8 dealing with the establishment and operations of a governance body to deal with day-to-day operational issues between the parties. Clause 8 of the MTAS General Terms strikes a good balance between prescribing key aspects of the committee's operations, while allowing flexibility to reflect the resourcing levels and organisational structures of the particular access provider and access seeker involved ;

- procedures for dealing with changes to operational procedures, manuals and technical specifications generally (including a role for referral of issues to the regulatory body); and

- clauses requiring the parties to avoid damage to or interference with each other's networks, sabotage and fraudulent use.

2. Standards and quality

Clause 13.9 of the MTAS General Terms requires the access provider to provide a service which is of a quality comparable to that provided to the access provider's end-users and group. This is consistent with contracts negotiated in a competitive market, and goes some way to contractually addressing the issues raised by vertical integration of access providers. In the NPTCs for the Australian market this should be supplemented with commitments that services will also be provided to a firm standard of care that is not relative to a standard effectively set by the access provider. This would be by way of, for example, contractual obligation to supply the services in an efficient, professional manner, using all due care and skill and to a standard generally employed or expected in the industry of a competent person providing similar services.

3. Outage pre-planning

The MTAS General Terms include very high level requirements for the parties to meet to discuss issues surrounding outage planning. The NPTCs for the Australian market should set out more detailed procedures for the parties to follow – discussion is often not sufficient to resolve these issues. VHA's suggested processes for managing planned outages, and for monitoring, reporting and managing faults, are set out in Appendix 1 to VHA's submission in response to the Position Paper.

Part F – Charging and payments

1. GST

Tax provisions for Australian NPTCs would need to reflect Australian taxation law. For this reason, the GST provisions in clause 17.3 and 17.4 of the MTAS General Terms are may not be a useful starting point for the Australian terms.

The MTAS General Terms do not address how changes to taxes would impact the fees payable by the access seeker. The NPTCs for the Australian market should provide that access providers must absorb changes in taxes, unless the change is directly applicable only to the supply of services specifically to the access seeker. Any risk in the costs of delivering a service is most appropriately borne by a service provider as part of doing business.

2. Billing and payment

The billing and payment provisions in clause 18 of the MTAS General Terms address some key billing and payment issues likely to arise between the parties, such as the requirements for invoices to be issued monthly and for them to include information sufficient for the access seeker to verify the accuracy of the amount charged. The Australian NPTCs should also specify that invoices be itemised, in Australian dollars, sent to the access seeker's designated address and in an agreed format.

3. Due Date

The MTAS General Terms provide for payment to be made within 20 working days of the date of an invoice. This is a shorter period than that typically included in contracts negotiated in a competitive market. In VHA's experience, payment terms of 60 calendar days are common practice to allow customers sufficient time to validate invoices and process payments.

4. Errors and invoicing disputes

The manifest error and other invoicing dispute provisions of the MTAS General Terms largely reflect balanced processes for resolving invoicing issues. The 6 month period during which the access seeker can raise a billing dispute is fair, as are the requirements for any overpaid amount to be refunded with interest. Importantly, the ability to raise a billing dispute is not subject to the access seeker following prescriptive processes set by the access provider. Improvements could be made if the terms specified that the access seeker will not be required to pay the disputed portion of an invoice in the case of any bona fide billing dispute, not just cases of 'manifest error'.

5. Charges omitted from invoices

The 6 month period specified in clause 18.16 of the MTAS General Terms represents a reasonable time limit on the access provider's ability to charge amounts omitted from invoices. This is consistent with general commercial practice and with the 6 month period during which an access seeker can raise a billing dispute. A clause similar to

this should be included in the NPTCs for the Australian market. However, the NPTCs should be drafted in such a way that this clause is not used by access providers to delay implementing billing changes in their systems. Access providers should have a clear obligation to implement price changes promptly, to avoid unnecessary administrative burdens for access seekers in reconciling bills against contracted charges.

Clause 18.18 of the MTAS General Terms provides for interest to be payable on late payments. In principle, this reflects the provisions that could be expected in an agreement negotiated in a competitive market. However, there are a number of aspects of the clause which do not reflect commercial practice. These are:

- the interest rate of the 'Bill Rate' plus 5% is significantly higher than the rates included in commercial contracts, and borders on a penalty. While the MTAS General Terms state that the interest rate is a genuine estimate of the loss likely to be suffered by the party expecting payment, it is difficult to see how an access provider's delay in paying could cause damage to an access provider at that rate;

- the five working day period for payment of disputed amounts is impractically short. Many organisations would find it difficult to arrange payment of any significant amount through their payment processing systems within that period of time; and

- the provisions do not include any grace period or requirement for reminder notices to be issued before interest is applied. These are minimal safeguards that would generally be seen in contracts agreed in a competitive market.

6. Set-off

The MTAS General Terms do not address the application of changes to pricing or the parties' rights to set-off. The parties should also have the right to set-off amounts owing between them for services in the same service category (ie within DTCS, MTAS or fixed services).

Part G – Intellectual property rights and confidential information

1. Intellectual Property Rights

The intellectual property rights provisions in clause 19 of the MTAS General Terms are appropriate for a service agreement which does not involve heavy licensing or development of software or other intellectual property rights.

2. Confidential Information and Privacy

The lengthy confidentiality provisions of the MTAS General Terms could be significantly simplified for the purpose of NPTCs for the Australian market. A simplified approach would assist in application of the terms to the day-to-

day information flows between the parties, and would also be more consistent with confidentiality provision of commercially negotiated agreements. VHA's suggested confidentiality regime is set out in Appendix 1 to VHA's submission in response to the Position Paper.

The privacy protections in the MTAS General Terms relate to New Zealand legislation, so are not an appropriate starting point for NPTCs in the Australian market. The Australian NPTCs should require that any collection, processing, use, storage, handling, disclosure or transfer of personal information provided by an access seeker complies with the *Privacy Act 1988* (Cth) and any other applicable law.

Part H – Numbering

The provisions in this part of the MTAS General Terms are specific to MTAS, and should therefore not be included in the common NPTCs applicable across declared services in the Australian market.

Part I – Miscellaneous

The miscellaneous provisions of the MTAS General Terms address most of the legal 'boilerplate'-type issues that would be covered in a commercial agreement negotiated in a competitive market.

Clause 22 of the MTAS General Terms provides that the access seeker may assign or transfer its rights under the terms with the access provider's consent. This is a useful starting point for the NPTCs, but assignment without consent should be required in limited circumstances to not unduly restrain an access seeker in how it structures or operates its business (e.g. to allow for group re-structures). These assignment rights should apply equally to the access seeker and access provider.

Conclusion

The MTAS General Terms represent a sound starting point for developing NPTCs that are common to declared services in the Australian market. However, in using these as a reference, the ACCC needs to ensure they are amended, as identified above, to ensure they reflect a commercial deal that would typically be struck between parties in a competitive environment.