Australian
Competition &
Consumer
Commission

Final Determination – Model Non-price Terms and Conditions

November 2008

Glossary

ACMA	Australian Communications and Media Authority
ACDC	Australian Commercial Disputes Centre
ACIF	Australian Communications and Information Forum (now known as Communications Alliance)
CAN	Customer access network
CSG	Customer Service Guarantee
DCP	Design and Construction Proposal
DSLAM	Digital Subscriber Line Access Multiplexer
ISS	Information Security Strategy (under the Telstra Operational Separation Plan)
iVULL	Intact Vacant Unconditioned Local Loop
LCS	Local Carriage Service
LSS	Line Sharing Service
LTIE	Long-Term Interest of End-users
MDF	Main Distribution Frame
MDU	Multi-Dwelling Unit
MNM	Managed Network Migration
OPM	Ordering and Provisioning Manual
OSP	Operational Separation Plan
PSR	Preliminary Study Request
PSTN	Public Switched Telephone Network
TCAM	Telstra Customer Access Module
TEBA	Telstra Exchange Building Access
TPA	Trade Practices Act
ULLS	Unconditioned Local Loop Service
VULL	Vacant Unconditioned Local Loop
WLR	Wholesale Line Rental

Contents

Introduction

Executive Summary

By way of this determination the ACCC is making model non-price terms and conditions of access to core services under section 152AQB of the *Trade Practices Act* 1974 (the TPA) to will replace the model non-price terms and conditions which expire on 31 October 208.

The model terms and conditions of access are a means by which the ACCC can provide guidance on what it considers fair and reasonable terms and conditions of access. Model terms and conditions are 'non binding' and so parties remain able to agree on other terms and conditions of access.

Consistent with the government's intention when providing for model terms and conditions, the ACCC has addressed those terms and conditions of access where providing guidance is likely to materially assist parties in negotiating access.

The ACCC must have regard to the model terms and conditions in arbitrating access disputes concerning the core services, and may also have regard to them in other access disputes or in considering access undertakings.

The model terms are expressed to remain in force for five years unless earlier revoked. The ACCC can vary the model terms where it considers it appropriate to do so.

Part 1: Background and general approach

1.1 Overview of legislative requirements

The Telecommunications Competition Act 2002 introduced a new regulatory requirement to establish model terms and conditions relating to access to core telecommunications services. Section 152AQB of the TPA requires the ACCC to make a written determination setting out model terms and conditions of access for each of the core services.[1]

The core services are:

- Domestic Public Switched Telephone Network (PSTN) Originating Access Service;
- Domestic PSTN Terminating Access Service;
- Local Carriage Service (LCS); and
- Unconditioned Local Loop Service (ULLS).

No other declared services have been specified as core services.

The ACCC must publish a determination made under section 152AQB of the TPA in such a manner as it considers appropriate, including in electronic form.[2] A determination will remain in force for a period of 5 years in relation to the particular core service, unless sooner revoked.[3] The ACCC must have regard to a determination made under section 152AQB if it is required to arbitrate an access dispute in relation to a core service covered by a determination.[4]

Before making a determination, the ACCC must publish a draft of the determination and invite people to make submissions on the draft determination.[5] The ACCC published a draft of the determination on 18 September 2008 and received submissions on behalf of Telstra, Optus and a number of other service providers.

The ACCC has also consulted with the Australian Communications and Media Authority (ACMA) in making this determination.[6]

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[1] ss152AQB(2)
[2] ss152AQB(7)
[3] ss152AQB(8)
[4] ss152AQB(9)
[5] ss152AQB(5)
[6] ss152AQB(6)

1.2 Objectives of model terms and conditions of access

The requirement for the ACCC to make and publish model terms and conditions of access was part of a regulatory package intended to provide greater certainty to industry and encourage industry to resolve access issues more quickly, as well as reducing the potential for regulatory gaming.[7] The aims of these measures were to assist parties to reach commercial agreement on terms and conditions of access, or to submit access undertakings, thus providing more timely access for access seekers to "core" fixed line network services.[8]

While the model terms and conditions are non-binding, they are intended to provide clear guidance on the ACCC's views as to what would constitute fair terms and conditions of access[9]. Further, should an access dispute be notified to the ACCC concerning a core service, regard would be had to the model terms and conditions in making a determination in the arbitration of that dispute, and hence there is a likelihood that such a determination would generally reflect the position that had been adopted in the model terms and conditions.[10] The ACCC notes that any arbitral determination will depend upon the particular circumstances of the dispute. As such, an arbitral determination may depart from the model terms and conditions. The ACCC could also have regard to the model terms and conditions in assessing access undertakings or in arbitrating other access disputes.

Consequently, the model terms and conditions provide industry with an up-front view of the likely approach that the ACCC would take to a particular issue in arbitration, thereby assisting the parties to reach commercial agreement on access or to submit access undertakings.[11]

1.3 Scope of terms and conditions

The aim of the draft determination and accompanying report was to field industry participants' views on the appropriateness of the proposed non-price model terms and conditions of access, in terms of:

- Scope, i.e. whether additional terms and conditions of access should be addressed in the model terms and conditions, or whether any identified terms and conditions of access should not be addressed
- Appropriateness of the in-principle position proposed for each term and condition of access
- Suitability of proposed drafting, i.e., whether the suggested model terms and conditions properly implement the in-principle position.

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[7] Department of Communications, Information Technology and the Arts (DCITA), Media release, 24 April 2002, "Telecommunications regime to be made more competitive", 97/02.
[8] Explanatory Memorandum, *Telecommunications Competition Bill 2002*, p. 39
[9] ibid
[10] The statutory obligation on the Commission under ss152AQB(9) is for the Commission to have regard to the model terms and conditions.
[11] Explanatory Memorandum, *Telecommunications Competition Bill 2002*, pp 2 and 39

Telstra submitted that, in its view, there is little need for model terms to be issued, or alternatively that any model terms should be of limited scope as:

- the failure of access seekers to raise access disputes in respect of many aspects of its commercial offer indicated that its commercial offer is appropriate; and/or,
- where access seekers have raised complaints, these have already been addressed in commercial offers or may otherwise be of a transitory nature.

Balancing this view, Optus and other access seekers consider that the model terms should be of greater scope.

In reaching a final view upon the terms and conditions that should be addressed, the ACCC noted that the model terms and conditions need not address all possible terms and conditions of access. The Explanatory Memorandum to the Telecommunications Competition Act 2002 states that the government's intention when introducing section 152AQB of the TPA was that:

> *. . . the model terms and conditions will not need to be comprehensive; the ACCC will be able to publish any or all of the model terms and conditions relating to a core service.*[12]

Having regard to the stated policy objectives, and in particular the intention that the ACCC should provide guidance on terms and conditions of access for the purpose of facilitating commercial negotiation, the ACCC considers it should here address those terms and conditions of access that are currently problematic, and/or on which service providers sought ACCC guidance when the initial (2003) model terms were developed.

Further, the ACCC considers that it should focus on those terms and conditions of access that could be expected to have a material bearing on a service provider's business and hence the range, quality and price of services offered to end-users. The ACCC considers that this approach will best meet the overall objective of Part XIC of the TPA; promoting the Long Term Interests of End-users (LTIE).

In preparing the proposed model non-price terms and conditions, the ACCC selected particular terms and conditions of access for inclusion by reviewing the terms and conditions of access which:

- an access provider has addressed in access undertakings proposed for a core service;
- have been notified under section 152CM of the TPA as in dispute; and/or,
- industry has identified as important, either when previously consulted on the initial (2003) model non-price terms and conditions and/or when consulted on the replacement model non-price terms and conditions.

The ACCC is of the view that the following non-price terms and conditions of access should be addressed in the model terms of access:

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[12] ibid, p 41

- Billing and Notifications;
- Creditworthiness and Security;
- Liability (Risk Allocation) provisions;
- General Dispute Resolution procedures;
- Confidentiality provisions
- Communications with End-Users
- Network Modernisation and Upgrade provisions
- Suspension and Termination;
- Amendment of Operational Manuals
- ULLS Ordering and Provisioning processes; and,
- Facilities Access.

Many of these terms of access were addressed in the same or similar fashion in the 2003 model non-price terms and conditions. However, the model terms and conditions for Network Modernisation and Upgrades differ more substantially in some respects to what was specified in the 2003 model non-price terms and conditions; and the proposed terms and conditions relating to Amendment of Operational Manuals, ULLS Ordering and Provisioning processes, and Facilities Access are new developments.

Each of these areas was identified in the draft determination issued in September 2008. In finalising these model terms, the ACCC has revised its approach in certain respects. This includes addressing some additional aspects within, or removing some aspects from, the draft model terms that were made in September 2008.

These model terms and conditions do not address price-related terms. This reflects the view that, since the time that the 2003 model terms and conditions were made, the ACCC has commenced providing guidance on appropriate price terms for the core services in determinations it has made under section 152AQA of the Act. This guidance is currently in the form of pricing principles and, in respect of the ULLS and LCS, a schedule of indicative prices.

Although it would appear possible to again address price-related terms and conditions in the model terms and conditions made under section 152AQB of the TPA, in the current circumstances the ACCC considers there would be little benefit from doing so. Further, should it be considered necessary to revise or augment its already published views regarding price-related terms, the ACCC at this time considers that this should be done under section 152AQA of the TPA.

These model terms and conditions are expressed to remain in force for five years unless sooner revoked. This is consistent with subsection 152AQB(8) of the Act. The ACCC may vary the model terms should it consider appropriate to do so.

1.4 Developing model terms and conditions

In developing model non-price terms and conditions of access, the ACCC considers that, in addition to the requirements and objectives of section 152AQB of the TPA (which are discussed above), it should have regard to:

- the overall objective of Part XIC of the TPA, and
- the 'reasonableness criteria' contained in that Part.

The objective of Part XIC

The requirement to make a determination under section 152AQB arises within Part XIC of the TPA. The object of Part XIC is to promote the LTIE of carriage services or services provided by means of carriage services.[13] This objective will partly be achieved through establishing appropriate arrangements by which third parties gain access to services which are necessary for competitive services to be supplied to end-users, including the non-price terms and conditions on which access is provided. Accordingly, in making a determination that sets out model non-price terms and conditions, the ACCC should seek to promote the LTIE.

Reasonableness criteria

Although there is no express requirement for it to do so, the ACCC considers model terms and conditions should represent what would be "reasonable" terms and conditions of access.[14] This is because model terms and conditions are intended to guide access negotiations by providing an indication of the position the ACCC might adopt in an arbitration, and in arbitrating disputes (as well as when assessing access undertakings) the ACCC is required to have regard to the reasonableness criteria.[15] It is therefore appropriate to have regard to these same criteria in making model terms and conditions.

That said, the ACCC notes that the model terms and conditions are intended as indicative and non-binding, and therefore any arbitral determination will depend upon the particular circumstances of the dispute. As such, there will remain the potential for an arbitral determination to depart from the model terms and conditions.

In determining whether terms and conditions are reasonable, in general, the following criteria must be considered (as per section 152AH(1) of the Act):

- whether the terms and conditions promote the LTIE of carriage services or of services supplied by means of carriage services;
- the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or provider's investment in facilities used to supply the declared service concerned;
- the interests of persons who have rights to use the declared service concerned;

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[13] ss152AB(1)
[14] Section 152AH contains criteria by which to assess the reasonableness of an access undertaking.
[15] ss152BV(2)(d) and s152CR

- the direct cost of providing access to the declared service concerned;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

This does not, by implication, limit the matters to which regard may be had.[16]

The ACCC considers that each of these criteria could potentially be relevant to varying degrees in developing model terms and conditions of access. This is not to say that a model term or condition should be cast in a way that would be consistent with all of these criteria. In particular, for those terms of access that have proven problematic, and hence are addressed in the model terms and conditions, it will often be the case that certain of these criteria would militate for opposing positions to be reached. For instance, having regard only to the legitimate business interests of the access provider or the interests of the access seeker would often lead to quite different positions being reached. Accordingly, in having regard to these criteria, it may be necessary to balance competing considerations.

Discussion of relevant considerations

The criteria by which to determine reasonableness, and a discussion of the relevant considerations, are elaborated on further in this part.

Long-term interests of end-users

In considering whether a term or condition is likely to promote the LTIE, regard is to be had to whether the term or condition will result in:

- the promotion of competition in markets for telecommunications services;
- achieving any-to-any connectivity in relation to carriage services that involve communications between end-users; and
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied, or any other infrastructure by which telecommunications services are or are likely to become capable of being supplied.[17]

The ACCC believes that, as a general proposition, terms and conditions of access will best promote the LTIE where they facilitate access seekers obtaining core services that are equivalent to the services that the access provider supplies to itself, in terms of technical and operational quality of services and the manner and timing of access.

Legitimate business interests of the carrier or carriage service provider concerned

The ACCC considers that the legitimate business interests of the access provider include its right to conduct its business to a normal commercial standard. Accordingly,

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[16] ss152AH(2)
[17] ss152AB(2)

the ACCC considers that this consideration supports the view that model terms and conditions should not unduly constrain an access provider's ability to conduct its overall business operations.

Interests of persons who have rights to use the declared service

In the ACCC's view, persons who have rights to use a core service comprise access seekers, whose interests lie in their ability to compete for the custom of end-users on the basis of their relative merits, including the price, quality and range of their service relative to the downstream services offered by the access provider and other service providers.

The ACCC believes that this consideration supports the view that model terms and conditions should not place unnecessary or excessive obligations on access seekers, as these could exclude them from entering and supplying a market and displacing less efficient service providers.

The direct costs of providing access

This criterion requires consideration of the access provider's costs of providing access to a core service.

The ACCC considers that this criterion to be more directly relevant to setting price-related terms than non-price terms and conditions of access. Where price-related terms expressly provide for prices that are cost-based, it would be unlikely that the model non-price terms and conditions could directly impede an access provider's ability to recover its costs.

That said, the model non-price terms and conditions could influence the level of costs incurred in providing access, e.g. by requiring additional steps within an operational process to be taken. There could potentially be greater assurance that costs can be recovered where the level of costs is kept to a minimum. Accordingly, the ACCC considers that this consideration will support the view that the model non-price terms and conditions should not require steps to be taken unnecessarily.

Operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility

The ACCC considers 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.

The economically efficient operation of a carriage service, a telecommunications network or facility

The ACCC considers that this criterion requires consideration of services, networks and facilities of all service providers that are used to supply core services or downstream services.

The ACCC believes that model terms and conditions best meet this consideration when they strike an appropriate balance between the ability of the access provider and access seekers to operate their respective services, networks and facilities in an economically efficient manner.

Principles applied in development of the model non-price terms and conditions

The ACCC is of the view that having regard to these considerations, and where necessary balancing competing considerations, will generally result in model terms and conditions that have the following characteristics:

- model terms and conditions should be 'fair'
- model terms and conditions should reflect legislative provisions that require consideration of the access provider's or certain other service providers' reasonably anticipated requirements
- model terms and conditions should reflect current market conditions
- model terms and conditions should provide for efficient access
- model terms and conditions should not seek to establish a 'minimum or maximum' standard of access
- model terms and conditions need not be exhaustive
- model terms and conditions should be expressed in a clear and objective manner
- model terms and conditions need not be developed to the level that they could be inserted directly into a service provider's contracts

The ACCC's view and description of these characteristics and principles follow.

The model terms and conditions should be 'fair'

The Explanatory Memorandum to the *Telecommunications Competition Act 2002* notes that the model terms and conditions are intended to reflect the ACCC's views as to what would represent 'fair' terms and conditions of access.[18]

In the ACCC's view, the concept of 'fair' as used in the context of model terms and conditions means that they be equitable and strike an appropriate balance of the rights and interests of the various parties in obtaining access to and use of telecommunications services.

The ACCC considers that 'fair' model terms and conditions would be consistent with the reasonableness criteria contained in section 152AH of the TPA, and promote the LTIE as that term is used in section 152AB of the TPA.

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[18] Explanatory Memorandum, Telecommunications Competition Bill 2002, p 39

For instance, fairness will generally involve finding an appropriate balance between the rights and interests of the access provider and access seeker. This would in effect mean taking account of the legitimate business interests of the access provider and interests of an access seeker to use the core service as required under the reasonableness criteria. This in turn should translate into an approach that promotes the LTIE by fostering competition and encouraging the economically efficient use of telecommunications services.

The model terms and conditions should reflect legislative provisions that require consideration of the access provider's or certain other service providers' reasonably anticipated requirements

As a general rule, an access provider has standard access obligations, such as under subsection 152AR(3) of the TPA, to all access seekers that request access to a declared service, including the core services. Further, if there are ways in which the demand of all service providers (including the access provider, existing access seekers and new access seekers) can be met, then the standard access obligations would require that each be supplied.

However, under subsection 152AR(4) of the TPA, an access provider's standard access obligation to supply a declared service is not imposed where it would require it to do something that would prevent it, or another access seeker with an existing right to access the declared service, from acquiring a sufficient amount of the service to meet their reasonably anticipated requirements. These requirements are as measured at the time that the request for access is made.

Also, various limitations are placed on a determination that can be made in arbitration by section 152CQ of the TPA. For instance, where it is necessary to expand a facility before access to a declared service or associated interconnection can be given, the determination cannot require that the access seeker become the owner of that facility, or require an unreasonable proportion of costs to be imposed on a party other than an access seeker in extending or enhancing the capability of a facility.[19]

The ACCC considers that model terms and conditions should reflect these provisions, given that the model terms and conditions are intended to guide negotiations regarding access, including guidance on how the standard access obligations are to be satisfied, and to generally inform service providers of the approach that ACCC is likely to take in arbitrating a dispute.

The model terms and conditions should reflect current market conditions

It is also intended that model terms and conditions be based on an assessment of current market conditions. The ACCC considers that this can be achieved through consultation. Also, implicit in this requirement is that if and when a particular model term and condition no longer reflects current market conditions, it will be appropriate for the ACCC to revise its approach.

[19] ss152CQ(1)(e) and (f)

The model terms and conditions should provide for efficient access

As a general principle, the ACCC considers that model terms and conditions should encourage access to be provided efficiently, in terms of the overall cost to all service providers and time involved. The ACCC further considers that, in general terms, this would require that responsibility for tasks be allocated to the service provider who has the stronger incentive to ensure that the task occurs. This could take the form of requiring a service provider to perform a task directly, or providing for transparent processes so that the service provider is in a position to assess whether another party is properly performing that task.

The model terms and conditions should not seek to establish a 'minimum or maximum' standard of access

As the model terms and conditions are meant to assist parties in negotiating bilateral terms of access in relation to core services, or in the formulation of access undertakings, the ACCC considers that they should represent a 'fair' benchmark against which proposed terms and conditions of access can be assessed. The ACCC does not consider that they should be formulated to represent a 'minimum', or 'maximum', standard of access. Rather, model terms and conditions should be set out in a balanced way, such that it is conceivable that the parties could willingly negotiate a higher or lesser standard of access on different terms of access than that nominated in the model terms and conditions.

The model terms and conditions need not be exhaustive

In conducting access negotiations, there may be a significant number of discrete topics on which the parties will need to reach agreement. As discussed above, it is not intended that the ACCC will address all these topics in the model terms and conditions.

Within each topic, there may be broad agreement between parties on the general terms that should apply, but service providers may find it more difficult to agree on a point of detail. For instance, parties may agree that a notification process should be in place, but disagree over the period of notice that must be given.

The objective of model terms and conditions is to bring the parties' negotiating positions closer together, thus expediting and simplifying the commercial negotiation process.[20]

Reflecting this, these model terms and conditions focus on those particular aspects on which the ACCC's indicative views will be most beneficial to facilitating the conduct of negotiations. This allows model terms and conditions that will be of most benefit to service providers to be developed in a timely manner. Accordingly, the ACCC does not intend that these model terms of access to establish exhaustive codes that address each and every aspect of the particular topic. This view is in accordance with the intention of Parliament when inserting section 152AQB into the TPA.[21]

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[20] Explanatory Memorandum, *Telecommunications Competition Bill 2002*, p 39
[21] ibid, p 41

The model terms and conditions should be expressed in a clear and objective manner

Given these objectives, the ACCC considers that model terms and conditions should be expressed in a form that provides guidance to service providers in negotiating terms and conditions of access, and could be easily incorporated into an access undertaking.[22] The ACCC considers that this requires that model terms and conditions should be expressed in a clear and objective manner.

The model terms and conditions need not be developed to the level that they could be inserted directly into a service provider's contracts

Telstra disagreed with this proposition as expressed in the report that accompanied the draft determination. However, the ACCC remains of the view that model terms and conditions need not be in a form that can be inserted directly into an access agreement between the parties. Expressing the model terms in this way may not be possible given differences in commercial practices both over time and across service providers, and attempting to do so would delay the finalisation of the model terms and conditions. Further, as model terms are non-binding, it may be the case that parties will negotiate different terms to be included in their commercial agreement.

Consequently, it will remain a matter for service providers to prepare contracts in a way that suits their specific circumstances, and to consider how to reflect the model terms and conditions in the contract, where applicable. Service providers wishing to directly use or rely on the model clauses should obtain their own independent professional advice in this regard. The ACCC disclaims any responsibility in relation to any loss or damage arising as a result of the use of or reliance on the model clauses.

1.5 Relationship with industry codes and standards

A number of industry codes have been developed on matters that could be relevant to model terms and conditions of access to the core services. These have been developed through Communications Alliance Limited, formerly known as the Australian Communications Industry Forum (ACIF). Some of these codes have been registered with the Australian Communications and Media Authority (ACMA) and as a result are enforceable.

The Telecommunications Access Forum (TAF) also developed an industry code, although this is no longer current. The TAF code was developed by industry participants (access providers and access seekers) and approved by the ACCC as an *approved telecommunications access code* in 1998.[23] The code set out, inter alia, model terms and conditions in relation to core telecommunications services.

In addition, other regulation can inform the particular arrangements that service providers should have in place between themselves, such as the Telecommunications Customer Service Guarantee Standard.

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[22] ibid, p 39

[23] The TAF was abolished pursuant to Part 10 of Schedule 2 of the *Telecommunications Competition Act 2002* along with references in the TPA to the TAF code. Division 4 of Part XIC of the TPA now only refers to a telecommunications access code that can be made by the ACCC.

The existence of industry codes can influence the necessity for model terms and conditions, as well as the form that they should take. This is because, where an industry code is developed through consultation and consensus across the industry, the existence of the code could signify that the matters it addresses are unlikely to be generally problematic in access negotiations. Hence, the need for model terms and conditions addressing that matter may be reduced.

Industry codes and standards can also be appropriate points of reference in developing model terms and conditions. Where service providers are required or expected to interact with another, or supply their downstream services in accordance with these standards, then they should be taken into account when developing model terms and conditions. For instance, if the model terms and conditions were to address the issue of provisioning or fault repair timeframes for core services, then standards for connecting or remedying faults on core services and/or downstream services could be expected to provide an appropriate benchmark.

While there can be a general preference for industry to deal with technical matters through self regulatory processes, this is not to say that the model terms and conditions should never depart from these standards, or address technical matters that are not subject to them. Similarly, the ACCC could after hearing from the parties in arbitrating a particular access dispute choose to depart from them where this was appropriate. This could be more likely where, for instance, the industry code or standard was not intended to be exhaustive or override bilateral agreements between the parties, or otherwise does not address all relevant issues, or reflect the entire range of circumstances in which the code could subsequently apply, such as newly emerging issues or circumstances.

Part 2: Approach to particular terms of access

2.1 Billing and Notifications

The provisions concerning Billing and Notifications are set out in Clause A of the determination. These terms concern how an access provider may bill for core services, and the process by which an access seeker can lodge a billing dispute.

These terms are important to the access provider in that they set out its responsibilities to provide accurate bills and ultimately affect its ability to be paid for the core services it supplies. These terms are also important to access seekers, as they require accurate and timely billing data in order to bill end-users. Access seekers may also be adversely affected if bills for core services are materially inaccurate or unduly delayed, or if workable processes do not exist to resolve billing disputes in an appropriate and timely manner.

The ACCC considers that fair and reasonable terms of access would balance these considerations.

Submissions

Telstra and access seekers made opposing suggestions on the proposed terms. Access seekers objected to Telstra being able to bill for services supplied in previous billing periods (backbill), or recommended that the period of backbilling should be limited to three months to align with an industry code dealing with billing retail services. Telstra sought removal of the proposed limits on its ability to backbill.

Telstra objected to additional interest being payable where its invoice amounts repeatedly overstate the access seeker's actual liability (overbill). Optus recommended that provision be made for waiver of interest on underpayments where withholding payment was legitimate.

Telstra recommended that the time period allowed to access seekers to notify or escalate a billing dispute should be reduced, while the time allowed to investigate disputes be increased.

Telstra also recommended that provision be made for billing disputes to be terminated that it considers were not notified in good faith, and that the obligation to disclose relevant materials should be scaled back. Optus suggested a provision that would encourage mediation processes to complete within three months.

Optus also recommended that the model terms nominate the time allowed to pay invoices, and suggests that thirty calendar days would be an appropriate period.

In-principle position

Should there be specific timeframes and rules regarding billing enquiries and billing disputes?

The ACCC remains of the view that the access seeker should be given a maximum timeframe of six months in which to notify a billing dispute. In addition, if a dispute resolution process results in one party paying money or refunding money to another party, then such payment or refund should occur within a definite and reasonable time, such as within one month of the resolution of the dispute.

As per Telstra's submission, the ACCC has increased to thirty calendar days the timeframe within which the access provider is to respond to the access seeker. This is to provide a suitable timeframe within which the billing dispute can be resolved and if necessary a replacement invoice issued. The ACCC has similarly increased the time period allowed to an access seeker to consider Telstra's proposed response. Reflecting the submission made by Optus, the ACCC has nominated three months as a reasonable period within which mediation should generally conclude.

The other suggested revisions to the proposed timeframes were not adopted, as the ACCC remains of the view that the proposed timeframes represent fair terms of access.

The ACCC did not adopt the recommendation to scale back obligations to disclose relevant information, as it considers greater transparency will assist in resolving billing disputes and be likely to prevent similar disputes arising in future. The suggestion that interest should be waived where a disputed amount was reasonably withheld (but subsequently found to be payable) was not adopted. This is to avoid weakening incentives for bills to be paid promptly, subject to legitimate billing disputes, and the potential for protracted settlement negotiations.

If an access provider frequently rendered incorrect invoices, how should this be addressed?

The ACCC considers that there should be responsibility on the access provider to provide accurate bills and that the terms and conditions of access can provide suitable encouragement for this to occur.

In this regard, the ACCC remains of the view that if three or more out of any five consecutive invoices for a given service are incorrect by five percent or more, the access seeker is entitled to additional interest of overpaid amounts. This way, the remedy is linked to the amount of money which the payer has been deprived, due to the incorrect billing.

Should an access seeker be required to pay disputed amounts prior to resolution?

The ACCC considers that the access seeker should be able to withhold a disputed amount provided a billing dispute is notified prior to the due date for payment of the invoice to which an amount relates. However, the ACCC does not consider it unreasonable that payment of a disputed amount be required where the billing dispute was notified after that payment was due.

What set-off rights should apply?

The ACCC considers that there should generally be no setting-off (netting) of bills, unless parties otherwise agree or where a party goes into liquidation. Further, any set-off arrangements negotiated between the parties should not effectively prejudice a party's right to dispute an invoice, or withhold payment until the billing dispute is resolved.

What limits should apply to delays in notifying an access seeker of incorrect invoicing (back billing)?

The ACCC recognises that legitimate delays can occur in an access provider invoicing an access seeker. However, unfair or unreasonable delays in notifying access seekers of incorrect billing and the use of retrospective billing have the potential to affect access seekers' ability to compete and to provide billing within specified timeframes.

The ACCC considers it fair and reasonable that the access provider be permitted to backbill, but that the right to backbill be limited so as to permit the access seeker to comply with specific timeframes as much as possible. In this regard, the ACCC remains of the view that six months from the date the invoice is issued is an appropriate limit on the extent of backbilling.

The ACCC also considers it fair and reasonable to take into account special circumstances which might arise in the case of services which are being billed for the first time and certain international services. In this respect, an access provider should be permitted to backbill such amounts within an extended period (a maximum of eight months), which would allow enough time for billing problems to be sorted out, subject to agreement with the access seeker, and provided such agreement was not unreasonably withheld.

There remains potential for an access seeker to be unable to bill its retail customers for some backbilled services, as well as the potential for earlier services not to be billed by the access provider. The ACCC considers that this results in a sharing of risk between the access provider and access seekers arising from incomplete or late billing for access, which could be due to a number of factors.

What period should be allowed to pay an invoice?

The ACCC has adopted the recommendation made by Optus that the model terms address the period within which an invoice should be paid. This term has been disputed in the past in respect of the ULLS. The ACCC has nominated thirty business days as the period within which invoices for core services should be paid, which represents an approximate doubling of the ten business days that Telstra has allowed.

The ACCC considers that this is appropriate given the complexity of core services and the potential benefits of arrangements which promote accurate billing. When payments fall due might itself not have an overly material impact on the access provider or access seekers; but the longer period will allow access seekers a more reasonable opportunity to check invoices prior to when they become due for payment and where appropriate withhold payment for incorrect invoices. In turn, this will better promote accuracy in billing for core services.

2.2 Creditworthiness and Security

The provisions concerning Creditworthiness and Security are set out in Clause B of the determination. These provisions concern the access provider's rights to make enquiries of the access seeker's ability to pay, and to require that security be provided.

These terms may be necessary to protect an access provider's interest in being paid for its services. However, they also have the potential to delay or frustrate an access seeker's ability to acquire core services, and to compete for the supply of services to end-users.

The ACCC considers that fair and reasonable terms of access would balance these considerations.

Submissions

Optus and other access seekers are of the view that security should be required only in more limited circumstances, and following a review of Ongoing Creditworthiness Information concerning the access seeker and when it is reasonably necessary to protect the legitimate business interests of the access provider.

Telstra considers that the access provider should have more discretion over when Ongoing Creditworthiness Information can be required, and that this information and any security should be provided more quickly. Telstra also objects to the presumption that security will be reduced at the request of an access seeker, and that specific confidentiality restrictions would attach to Ongoing Creditworthiness Information.

In-principle position

When should an access provider be able to require credit checks or security be given?

The ACCC considers that an access provider should not, as a matter of course, require security to be given or deny access before credit checks can be completed. This is because of the potential to frustrate access.

Rather, in the ACCC's view, these steps should only be taken when, on an objective basis, they can be considered necessary to protect the legitimate business interests of the access provider. The ACCC has reflected this objective more expressly in the model terms.

This could be when the access seeker first acquires services from the access provider, and hence does not have a credit history with the access provider, or on the occurrence of a subsequent event that could give rise to genuine concerns around the access seeker's ability to pay its debts.

The ACCC does not consider that a decision to require security should be deferred until all credit checks are completed in these circumstances, as this could unreasonably expose an access provider to the risk of default in the intervening period of supply, save for the situation where the access seeker has agreed to deferral of supply. That said where the credit checks establish that no security is necessary, or a lesser security

would suffice, the access seeker will be able to request that the security arrangements are adjusted accordingly.

The ACCC has maintained the proposed timeframes within which creditworthiness information should be supplied, and security posted, and not reduced them by five business days as Telstra sought. The ACCC considers the proposed timeframes strike the appropriate balance between not impeding an access seeker in developing and conducting its business operations, and the access provider's interest in managing its financial risks.

Should any factors (such as the size, stability and payment history of the access seeker and the duration of the relationship between the parties) be taken into account in determining the amount of security or in a creditworthiness review?

The access provider should determine on an objective basis the amount of security and any variation to that security. If the access seeker considers that the access provider has not acted reasonably in relation to an assessment of creditworthiness or the amount of security required, then the access seeker should be entitled to an expedited dispute resolution process.

What factors are appropriate to trigger a creditworthiness review or a variation in security?

The ACCC remains of the view that it would be unfair and unreasonable for an access provider to be able to require a creditworthiness review or a variation in security at will. However, it is reasonable for an access provider to require a creditworthiness review or a variation in security where the circumstances reasonably require it.

The ACCC considers that an access seeker should be able to request a reduction in security where the access seeker can demonstrate an improvement in the creditworthiness of the access seeker or can demonstrate that there has been a material change in the circumstances that gave rise to the need for that security.

The ACCC remains of the view that the access provider should treat each such request in good faith and not withhold its agreement to changes in security arrangements unreasonably. Such credit reviews have the potential to free working capital for the access seeker in situations where its current credit history and/or other data demonstrate that previous securities are no longer required, either at all or in full. The presumption reflects the situation that an access provider may otherwise have little incentive to reduce security requirements for access seekers that also compete in downstream markets. Where disagreement arises, expedited dispute resolution arrangements should apply.

What information should the access provider be able to obtain about an access seeker's creditworthiness?

The ACCC considers that the access provider may request creditworthiness information where circumstances reasonably require. Such information should include an audited balance sheet, audited profit and loss statement, credit rating, credit reports and a letter stating that the access seeker is not insolvent or under external administration.

Should access seekers be given more discretion to withhold commercially sensitive information to the reporting agency conducting a creditworthiness review?

Access seekers should not normally be required to provide commercially sensitive information to the access provider or a credit agency. This is because disclosure of such information could compromise its ability to conduct its business, given that the access provider will often be a competitor of the access seeker in downstream markets. If, however, disclosure of such information to a third party, such as a credit agency, would assist in resolving a dispute over creditworthiness provisions, then any such disclosure should only be made subject to appropriate confidentiality arrangements. The ACCC considers that this should be an express requirement given the sensitive nature of the information.

Does the access provider need to hold a security where it also has the ability to suspend or terminate services (discussed further below)? Is suspension/termination a legitimate remedy for failure to pay where a security is held as well? Should security be able to be drawn down only in breaches relating to payment of invoices?

The ACCC considers it reasonable that there be a security given over amounts owing (and to be owed) by an access seeker, as well as an access provider having a right of termination or suspension of services for contractual breaches.

Security protects a creditor's interest in being paid for a debt due, while the rights of termination and suspension protects a supplier from having to continue to supply services where there is reason to believe that the acquirer will not pay for them. While making this distinction, it is important to note that a security should not be used in a coercive manner or for a purpose other than intended. That is, a security should only be drawn down for a breach relating to a failure to pay a debt due.

2.3 Liability (Risk Allocation) Provisions

The Liability provisions are set out in Clause C of the determination. These provisions concern who should be responsible for damage to property or personal injury, i.e., to make repairs and/or compensate parties that have suffered loss. These provisions can also set caps on liability, and require parties to limit their losses to the extent they are able.

These provisions are important to the access provider as they can protect its legitimate business interests by not being liable for the conduct of access seekers, and better ensure that its network is operated in a safe and reliable manner. These terms can however impose significant barriers to entry, as access seekers could potentially be made to carry the risk of losses that are not under its sole control.

The ACCC considers that fair and reasonable terms of access would balance these considerations.

Submissions

Optus is of the view that an access seeker's liabilities should be more limited than as was proposed in the draft determination, including that an access seeker should not be liable to the access provider for claims arising from the conduct of end-users.

Optus is also concerned that the model terms may permit them being liable to pay charges on services before the access provider permits necessary interconnection, or commences supply of the service.

Optus also proposed that an access seeker have a contractual right to 'step in' to defend claims made against an access provider where the access seeker will be liable to indemnify the access provider.

Optus and access seekers consider that the model terms should address how liabilities under the Customer Service Guarantee (CSG) should be shared where the relevant service is supplied over an ULLS. Access seekers contend that Telstra should be liable to indemnify the access seeker where it is Telstra's conduct that gives rise to the CSG liability. Telstra objects to this being addressed in the model terms.

Optus also has made various suggestions to simplify drafting of these provisions.

In-principle position

Who should be liable for such risks as property damage or personal injury?

The ACCC considers that, as a general rule, liability provisions should apply to both parties and should place risk with the party which has the ability to control the risk. In relation to property damage to an innocent party or a third person caused by an intentional or negligent act or omission, each party should indemnify the other party.

Similarly, where the conduct is caused by an end-user, the ACCC considers that the service provider with the relationship with that end-user is in the better position to discourage the conduct or prevent its recurrence.

The ACCC has adopted various suggestions as to how this could be more simply reflected in the model terms.

What limits, if any, should be placed on liability?

The ACCC considers that a service provider should not be required to compensate for, or indemnify against, losses that it has no control over, including losses that another party could have reasonably avoided or mitigated. Consequently, the ACCC considers that terms of access should not re-assign liability for matters that are outside a party's control. Further, the ACCC considers that terms of access should require parties to take reasonable steps within their control that would mitigate losses that they or other parties may otherwise suffer.

In addition, reflecting the submission made by Optus, the ACCC considers that an indemnifying party should have rights to 'step in' and defend claims made against the indemnified party.

The ACCC also considers that an aggregate cap on liability can be appropriate in ensuring that an access seeker's contingent liabilities are not open-ended. The ACCC's view is that liability should be capped at the annual amount spent in acquiring access, or such other amount as may be agreed between the parties.

To avoid doubt, the ACCC has made it clear that an access seeker is not liable to pay for services where supply has not commenced, such as where necessary interconnection has not yet been permitted. The ACCC has not adopted other proposals raised by Optus around eligibility for rebates even where temporary or interim interconnection arrangements were made, as the ACCC does not consider these to provide a fair balance and could reduce incentives to arrange for interconnection on an interim basis.

Can an access provider's risks be reduced in other ways?

Operational rules may provide a means by which an access provider can reduce its risks regarding liability to a third party for conduct that is undertaken by or on behalf of an access seeker. For instance, a requirement that only technicians appointed or certified by Telstra can work on the network, or requirements that a service provider give appropriate consents or waivers can act to limit the access provider's risks. Hence, there appears potential for the access provider to avoid or at least reduce its risks without the access seeker facing open-ended indemnities or liability provisions.

Should exclusion or limitation of liability be permitted in relation to meeting specified performance standards if there is another mechanism for compensation?

The ACCC considers that as a general principle a party should not be prevented from further limiting or excluding liability where there is another mechanism for adequate compensation.

How should Customer Service Guarantee liabilities be treated?

The ACCC considers that it is appropriate for an access provider to indemnify against CSG liabilities that are caused by the access provider failing to connect new access services or repair faults on them within appropriate timeframes.

CSG liabilities arise where a fault on a standard telephone service supplied to a residential or small business customer is not repaired or new services not connected within legislated time limits. A standard telephone service is one that provides for voice calls to be made or received, typically over a fixed network. The access seeker acquires access services in order to supply a standard telephone service, and other services, to end-users.

It is the end-user's service provider that is the party liable to the end-user. However it is the access provider that controls when and how any necessary works are performed, while the access seeker liaises between the access provider and end-user. Consequently, there is the potential for CSG liabilities to be caused by an access seeker, the access provider, or both.

Industry has developed processes to apply where the standard telephone service is being supplied pursuant to a wholesale line rental and local call service. However, these arrangements do not apply to where the standard telephone service is supplied over the

ULLS. Accordingly, in the model terms, the ACCC has focused on the situation where the standard telephone service is supplied over an ULLS.

It is possible that an ULLS access seeker could seek for its retail customers to waive their rights under the CSG as Telstra suggested. However, this depends on end-user agreement, and pressing for such waivers could impede an access seeker in competing for customers.

2.4 General Dispute Resolution Procedures

The provisions establishing General Dispute Resolution Procedures are set out in Clause D of the determination. These provisions establish how disputes should be managed, including the timeframes that should apply. General dispute resolution procedures facilitate the resolution of disputes in an expeditious manner without the need to resort to legal proceedings. These procedures also provide necessary support to other terms and conditions of access.

Dispute resolution procedures can promote the interests of all service providers. However, a particular approach to dispute resolution could put unnecessary cost, or an unreasonable share of the cost on one service provider over another. Alternatively, timeframes may be too long, increasing the potential for access to be delayed unreasonably.

The ACCC considers that fair and reasonable terms of access would seek to resolve disputes over access quickly and minimise costs overall.

Submissions

Telstra suggested changes to the proposed timeframes for a number of the steps involved in resolving a dispute. Telstra also suggested that the obligation to disclose relevant materials be scaled back. Access seekers submitted that mediation should only be provided for where both parties agree to it.

The parties made opposing submissions on when a dispute should be able to be notified for arbitration under Part XIC of the Act, including whether all contractual dispute resolution must first be pursued. Optus suggests a dispute should always be able to be notified. Telstra suggests that permitting notification before all contractual arrangements were completed would reduce the incentives on parties' to resolve disputes pursuant to the contractual arrangements.

In-principle position

What timeframes should be provided?

The ACCC considers that timeframes for resolution of disputes should be stipulated as part of the dispute resolution procedure to the extent possible. In this regard, parties should have a sufficient (but not excessive) opportunity to research, explore and debate relevant matters concerning the issues in dispute.

The appropriate time for each step in the dispute resolution procedure may depend upon the nature and level of escalation of the dispute. For example, a dispute requiring

little factual analysis may be resolved fairly expeditiously; the same may apply to disputes that can be resolved without the need for escalation or external assistance.

Alternatively, a complex dispute or a matter which goes to expert determination may require detailed factual and/or supporting analysis and the preparation of submissions by the parties; these processes can take some time to complete and therefore a longer period may be required.

The ACCC has adopted Telstra's recommendation that the time allowed to resolve a dispute through negotiation be extended by five business days. This is to increase the prospect for these negotiations to be able to resolve more complex disputes. The ACCC did not extend other timeframes, as it is of the view that these would be unnecessary to promote prospects for timely dispute resolution.

What other principles should be reflected in the dispute resolution procedures?

The ACCC considers that fair and reasonable dispute resolution procedures should be consistent with the following principles:

- a party should be entitled to unilaterally terminate a dispute resolution procedure and pursue its remedies at law where the other party is not complying with the procedure or where it requires urgent interlocutory relief;

- parties should conduct any dispute resolution procedure in good faith and on a "without prejudice" basis;

- each party should as early as practicable during a dispute resolution procedure, provide to the other party any relevant materials on which it intends to rely (although this is not intended to impose the same obligation as to make discovery in litigation) – in this regard the ACCC did not adopt the views expressed by Telstra that this should be scaled back;

- the parties may by agreement escalate a dispute to a higher level in the dispute resolution procedure, such as referring a matter to a third party for mediation or expert determination;

- the dispute resolution procedures should to the extent possible:

    a) be guided by the objects of Part XIC of the TPA;

    b) be simple, flexible, quick and inexpensive;

    c) preserve or enhance the relationship between the parties to the dispute;

    d) take account of the skills and knowledge that are required for the relevant procedure;

    e) observe the rules of natural justice;

    f) place emphasis on conflict avoidance;

    g) encourage resolution of access disputes without undue reliance on legal procedures or recourse to arbitration;

h) create certainty of the process through encouraging industry commitment and achieving mutually accepted outcomes by the establishment of clear procedures; and

i) protect the confidentiality of the process.

Should alternative dispute resolution (ADR) be considered before arbitration or legal proceedings are commenced?

The ACCC considers that, as a general principle, parties should seek to resolve disputes through ADR prior to commencing legal proceedings or seeking arbitration, including under Part XIC of the Act.

This is because it is likely that disputes will resolve more quickly with less cost where parties are able to agree on an outcome, either amongst themselves or as part of a mediation or expert determination process they agree upon. The ACCC has however adopted the access seekers' proposal that mediation only be pursued at the agreement of the parties. This is because in the absence of this agreement, it is unlikely that mediation will be likely to lead to timely resolution of the dispute.

This is not to say that parties must always exhaust ADR proceedings before commencing legal proceedings or notifying a dispute for arbitration. For instance, where the parties agree that ADR measures are unlikely to resolve or narrow the dispute, or where the other party has not complied with an ADR process, then there should be no such restriction.

Further, legal proceedings should be able to be commenced or a dispute notified for arbitration where a party considers that there is an urgent need for injunctive relief or the making of an interim determination.

If a dispute is notified for arbitration, it is the ACCC's general practice is to consider for itself whether ADR processes may be of assistance in resolving the dispute. The ACCC can order parties to participate in such processes and/or defer arbitration while these processes are followed where it considers this is appropriate.

2.5 Confidentiality Provisions

The Confidentiality provisions are set out in Clause E of the determination. These provisions seek to ensure that confidential information used or obtained in the course of providing access is not used to the other party's detriment. An example of confidential information is the identity or other details of the service provider's end-user customers.

It will often be the case that one party will need to disclose confidential information to the other. For instance, the supply of a service across the access provider's network will necessitate the access seeker providing sensitive commercial information to the access provider. The access provider could be frustrated in providing access without the supply of this information.

If this information is disclosed, there is potential for the access seeker's interests to be harmed. Further, if the access provider also conducts a downstream operation in

competition with an access seeker, then there is the potential for the access provider to use the sensitive commercial information to gain a competitive advantage to the detriment of the access seeker. This would be contrary to the access seeker's interests, and would impede competition.

The confidentiality provisions potentially impose costs on service providers to establish and monitor appropriate arrangements to protect confidential information from misuse. They could also prevent information from being used where it was convenient to do so.

The ACCC considers that fair and reasonable terms of access would balance these considerations, and would require each party not to use or disclose the confidential information of the other party except for a purpose that has been agreed between the parties, and where it is necessary to do so.

Submissions

Telstra considers that it should have more opportunity to use confidential information supplied by an access seeker, such as details of an end-user that also acquires services from Telstra or another service provider by way of override codes. Similarly, Telstra considers it should be able to use aggregated information derived from confidential information that the access seeker has supplied, such as total services being acquired. Further, Telstra objects to access seekers being able to require the audit of how its confidential information is being used.

Optus considers that the proposed confidentiality provisions should be strengthened to require security measures to be introduced in line with what Telstra has committed to in its operational separation plan. Access seekers also consider that a standard form of confidentiality undertaking should be developed to facilitate use of confidential information of another party where this is required for particular purposes.

In-principle position

When should the access provider be entitled to use or disclose the access seeker's confidential information?

In the ACCC's view, fair and reasonable terms of access would require that confidential information should be used or disclosed only where it is necessary for a legitimate purpose to do so.

Examples of legitimate purposes for which use or disclosure may be necessary are undertaking planning, maintenance, provisioning, operations or reconfiguration of the network; for the purposes of billing the access seeker; or for another purpose agreed to by the access seeker.

The ACCC did not adopt Telstra's position that greater latitude should be provided in using an access seeker's confidential information.

In this regard, the ACCC considers that not only should confidential information be protected in the form that it is supplied by an access seeker, but that protection should extend to aggregated data. The use of aggregated data, such as an access seeker's actual or forecast data per exchange area or per state, for retail operations would also place an

access seeker at a considerable competitive disadvantage. It would provide an access provider with an ability to identify access seekers who could pose a greater competitive threat in the supply of downstream services, or specific exchange areas on which it should focus its marketing operations. These opportunities are clearly not available to an access seeker, and would not be available to the access provider save for its control over the core access services.

Consequently, if aggregated data is required for a legitimate purpose, such as network planning or assessing exchange capacity, then this should be identified to the access seeker and use restricted to those purposes, in the same way as individual data are treated.

Further, the ACCC considers that information supplied by an access seeker concerning an end-user of its services should not cease to be treated as confidential to the access seeker where the end-user also acquires other services from another service provider. Unrestricted use or disclosure of that information would be unfair and unreasonable, notwithstanding that the end-user may have a retail relationship with other service providers. Consequently, any end-user's details legitimately required by another service provider to the end-user should be obtained by those other service providers directly from the end-user.

By way of example, the number of local calls and/or originating and terminating PSTN minutes being used by the end-user would potentially be available to the access provider of the local call service and PSTN originating and terminating access services. This information would potentially be valuable to an access provider or other service provider wishing to supply services to that end-user. However, a reciprocal opportunity to access data concerning the end-user's use of other services is clearly not available to an access seeker, and would not be available to the access provider save for its control over the core access services.

Should service providers be required to consent to the use or disclosure of certain information for additional purposes when it is necessary to do so?

If confidentiality arrangements extend too far, then there is the potential for them to protect information that is not confidential, or restrict information being used in a way that is not harmful to the party's interests. This would not benefit access seekers, and could be detrimental to them to the extent that it inhibits an access provider from using information in a way that benefits all service providers. Consequently, there is potential for the model terms and conditions to on occasion require service providers to acknowledge that certain types of information can be used for particular purposes, even where it involves disclosure to another service provider. An example is provided below in the discussion concerning facilities access.

That said, the ACCC does not consider that confidential information should be used or disclosed where in the access provider's opinion it is "desirable or practicable" to do so. If it is the case that use or disclosure of confidential information would lead to a more efficient means of supply, then that potential use or disclosure of information should be subject to express consideration and agreement by the parties, rather than being a matter at the access provider's discretion to determine from time to time.

Should a party be entitled to check whether its confidential information is being misused?

The ACCC considers that a vertically integrated access provider could have an incentive to use to its commercial advantage confidential information that is provided by an access seeker. That said, the Commission notes section 152AYA of the TPA regarding the use of confidential information and common law remedies for breach of contract and breach of confidence should counter this incentive to some extent.

Accordingly, the ACCC does not consider that there should be a general right to check how confidential information is being treated, unless there is prima facie evidence of misuse or likely misuse of confidential information. In that limited circumstance, and to provide greater assurance that information is not being used inappropriately, then the ACCC remains of the view an independent party should be able to audit a party's use of confidential information and the sufficiency of its information handling procedures.

That said, the ACCC has modified its proposed position following Telstra's submission to provide that Telstra is to be consulted on the audit methodology and plan. This is to better ensure that the audit is restricted to those tasks reasonably necessary, and to otherwise ensure that the audit progresses at least cost and disruption.

What relevance is Telstra's Operational Separation Plan provisions regarding confidentiality?

The need to protect confidential information has been recognised by the development of the Information Security Strategy (ISS) under the Telstra Operational Separation Plan (OSP). The ISS discourages disclosure of wholesale customer confidential information to other business units (with certain disclosures allowed under the provisions).

However, the ISS cannot be relied upon by an access seeker to protect its confidential information. This is evident from the disclaimer published at the front of the ISS, which states that:

> *"The publication of this ISS is not intended to confer any rights on any person. In particular, nothing in this ISS is to be taken as a representation that Telstra will act or refrain from acting in a particular way"*

Consequently, the ISS is not a substitute for robust contractual arrangements between the parties.

The ACCC has adopted the submission made by Optus, however, that adopting the ISS requirements in the model terms would provide greater assurance that the ISS measures are being implemented insofar as they concern an access seeker's confidential data. This is because should these provisions be available to access seekers through their contractual arrangements with Telstra, the access seeker would be in a better position to ensure compliance. This in turn would promote efficient entry and encourage access seekers to compete more vigorously.

Further, given the ISS measures were identified by Telstra, and the ISS has been in operation for a reasonable period, the ACCC considers that adopting them within the

model terms would not be contrary to Telstra's legitimate interests, or expose it to greater cost.

Should examples of Confidential Information be provided?

It has been suggested previously that the model terms and conditions of access should list particular types of information that are to be taken to be confidential information. The suggested list comprises forecasting information, bulk service qualification information, lists of telephone numbers to be transferred (ported) and any other information that is generated by an access provider in order to provide access to a particular service to the access seeker.

The ACCC is of the view that it is not necessary to identify in the model terms examples of the types of information that would likely comprise 'confidential information'. Further, doing so could lead to a party inadvertently using confidential information in an inappropriate way simply because it was not in a form that had been listed.

The definition of 'confidential information' is set out in Clause L of the determination.

2.6 Communications with End Users

The provisions relating to Communications with End Users are set out in Clause F of the determination. These provisions concern when and how a service provider can communicate with an end-user of the other party.

These provisions place limits on service providers from engaging in aggressive marketing strategies, which provide assurance to the access provider and all service providers that marketing to end-users will be done appropriately. This can be particularly important in providing greater assurance to access seekers that the access provider will not use its control over the network to 'win back' end-user customers. For instance, they can provide assurance that the access provider will not use interactions with an access seeker's end-user customers when fixing faults or connecting services for marketing purposes.

In the ACCC's view, fair and reasonable access terms should recognise that all service providers should have an equivalent opportunity to win and retain customers, and that service providers should not engage in misleading or aggressive tactics when dealing with end-users. These provisions should otherwise not seek to restrain competition between service providers.

Submissions

Telstra is of the view that it is impracticable for it to record communications with end-users of an access seeker as proposed in the draft determination. Telstra also considers that the model terms should provide it with an express right to contact end-users of an access seeker in the event of termination or suspension of the access seeker's services.

Telstra considers additional latitude should be given to market services, including that it should be able to inform end-users of access seekers that their current service (obtained from the access seeker) is supplied over Telstra's network.

In-principle position

What, if any, reciprocal obligations be imposed?

The ACCC is of the view that all service providers should represent themselves or the services that they offer fairly and accurately when dealing with end-users. This provides greater assurance against inappropriate marketing, which can be to the detriment of all service providers.

In particular, service providers should accurately represent whether the service provider is related to another service provider; the consequences for an end-user if they sign an authority to transfer their accounts or services; or the entity responsible for remedying faults, maintenance or suspension of a service.

The model terms provide that an access provider will only advise an end-user of an access seeker that it provides services to the access seeker it in response to a specific end-user inquiry. The ACCC remains of the view that this position is fair and reasonable. On the one hand, permitting this information to be volunteered more generally would better ensure that end-users are aware of the network being used to supply services. On the other hand, this information is susceptible to being misinterpreted by end-users in a number of ways, including that that the retail service supplied over the network will be the same regardless of the end-user's choice of service provider. Further, removing this limitation would potentially place the access provider on a better basis upon which to compete for end-users simply because of its control of the core access services.

What obligations should be imposed on an access provider?

The model terms provide for an access provider to communicate and deal with the access seeker's end-users in limited circumstances. Examples are where the communication relates to goods and services that the access provider currently supplies or previously supplies to that end-user; where it is necessary to communicate with the end-user to provide wholesale services; or in the case of an emergency.

The model terms and conditions also outline how an access provider should deal with enquiries from an end-user where that enquiry should be directed to access seeker.

The ACCC remains of the view that it is important to providing assurance that this contact is not being used for other purposes that records be maintained of each contact that occurs, and what was communicated.

The ACCC notes Telstra's submission that on some occasions this may not be feasible due to limitations in Telstra's systems, or due to the particular circumstances of that contact. The ACCC does not however accept that this means that records should not be kept. That said, the ACCC has revised its position such that communications should be recorded where systems to record those communications are, or could readily, be made available, such as all communications to or from Telstra's contact centres.

What rules, if any, should apply to technicians fixing faults or connecting services on behalf of another service provider?

As the network operator, it is the service provider that coordinates for faults to be fixed or new services connected. In the course of this work, technicians, who are employees or contractors of the access provider, may attend the end-user premises and discuss matters with the end-user. This will be the case even where an access seeker is supplying the end-user services. Consequently, there is the potential for this interaction to be used to win back the customer to the access provider.

The ACCC considers that it is important that the access provider direct its employees and contractors not to attempt to 'win back' a customer in these circumstances, and that the access provider should not encourage technicians to engage in marketing on its behalf when attending premises of end-users of the access seeker's services.

What contact should be provided for in the event that the access seeker's services are terminated?

The ACCC has not at this time adopted Telstra's position that it should be able to immediately contact end-users of an access seeker following Telstra's termination or suspension of services to that access seeker. Telstra notes that this contact could be necessary to ensure service continuity to end-users. However the extent to which such contact is necessary for this purpose is not clear, and some forms of contact could be inappropriate and/or heighten incentives to more quickly suspend or terminate access services.

2.7 Network Modernisation and Upgrade Provisions

The provisions relating to Network Modernisation and Upgrade are set out in Clause G of the determination.

'Network modernisation and upgrades' describe a broad spectrum of actions that could affect the network over which core services are supplied. These range from matters that have the potential to significantly disrupt services – such as the relocation of exchanges/nodes or altering the deployment class of equipment that the network will support – to matters that will have little consequence for the availability or quality of services. Further, these actions could be taken in responding to an unforeseen change in circumstances or an emergency, or could be taken in implementing planned network changes.

Making network changes that are necessary to supply new or additional services, or improve the quality of existing services, is a legitimate business interest of the access provider. Such changes can have a direct positive effect on the long term interests of end-users.

However, there could be many ways in which a network change can be implemented, and the potential to adversely affect other service providers could depend upon how the network changes are made. This could lead to a lessening of competition where service providers are discouraged from entering markets, or from competing for services supplied to all customers. In turn, this could lead to end-users being restricted in the

range of services that they can access, including services of differing quality and price, and be detrimental to their interests over the longer term.

In the context of the ULLS and PSTN OTA core services, changes in the network can mean that access seekers' equipment – such as particular DSLAMs or voice switches – will no longer be supported, or could no longer be used to supply the range of services that they presently can. Similarly, changing the location of a node or point of interconnection can directly reduce the ability of other service providers to acquire the core services and/or necessary interconnection, and potentially strand installed equipment.

Consequently, in the ACCC's view, fair and reasonable network modernisation and upgrade terms and conditions would balance the competing interests of the access provider and access seekers in a way that ensures that, over the longer term, end-users will more likely be able to obtain a wider range of services, including services of a higher quality and/or lesser price.

In particular, fair and reasonable terms of access would include access seekers being given sufficient notice of pending network changes, and for consultative processes to be established so that potential disruptions associated with notified network changes can be considered and where possible avoided or minimised.

Submissions

Telstra is of the view that the terms it has proposed in access undertakings should be adopted in the model terms. These address all network upgrades, not just major network upgrades, and provide fifteen weeks notice for each. All other submitting parties recommended the proposed six month notice period (with potential to agree a different period in particular cases) should be extended to as much as two years.

Telstra agreed with the proposition that network upgrades done as part of building the National Broadband Network (NBN) should be done subject to the agreement reached with government, but disagreed with the proposition that model terms should be expressed as continuing to apply where they were consistent with this agreement. Adam and others were of the view that guidance on reasonable notice requirements for NBN upgrades should also be given in the model terms.

Telstra opposed an obligation to negotiate in good faith over notified major network upgrades and, reflecting its approach that would see all network upgrades addressed in the model terms, recommended an exemption be provided from network upgrades that are done to remedy an emergency.

In response to a question posed in the report accompanying the draft determination, Optus provided its view on when the obligation to notify a major network upgrade should be triggered. Optus also suggested that the model terms prescribe details to be provided in the notice. Optus also sought details on whether affected services would be reconnected at no charge to an access seeker.

In-principle position

What, if any, network upgrades should be considered in the model non-price terms and conditions?

Although a broad scope of activities answer the description of a network upgrade, the ACCC is of the view that it should focus on 'major' planned network upgrades in the model terms and conditions.

It appears that service providers are able to agree to terms and conditions that should apply to other types of network upgrades. The ACCC understands that in the case of emergencies, it is not disputed that an access provider should be able to remedy the situation without first notifying all other service providers (provided they are notified of the matter as soon as it is practicable to do so).

Similarly, it appears reasonably well accepted that those planned network upgrades that have little potential to materially disrupt other service providers' services should not be subject to extensive notice periods or consultation requirements.

Further, the ACCC notes that government is consulting on the construction of a National Broadband Network, including the regulatory arrangements that should apply to it. It is possible that the construction of this network would involve the widespread upgrade of the largely copper-based customer access network to a fibre-to-the-node access network.

In the draft determination, it was proposed that the model terms should not apply to the National Broadband Network. The Commission has extended this position to apply to all network upgrades involving a coordinated program of capital works across exchange service areas.

It is not contentious that special arrangements that reflect the particular circumstances of a coordinated network upgrade involving a program of capital works that extends across exchange service areas, such as an upgrade to a National Broadband Network, would have to be developed. The ACCC considers that the government's consultative process would be the more appropriate forum within which those arrangements should be developed. Accordingly, the ACCC is of the view that the model non-price terms and conditions should not apply to coordinated network upgrades, such as the National Broadband Network.

What is a 'major' network modernisation and upgrade?

In the ACCC's view, a network modernisation and upgrade should be characterised as 'major' where it:

- includes the installation of Telstra customer access module closer to ULL end-users than a Telstra exchange building;
- requires the truncation of ULLS provided from Telstra exchange buildings, or the establishment of a new point of interconnection (or relocation of an existing point of interconnection) for a core service, or alteration of deployment classes of equipment used on a core service;

- results in a core service no longer being supplied or adversely affects the quality of a core service (or any services supplied by access seekers to their end-users using the core service).

What is the standard that should be reflected in the model non-price terms and conditions?

As a general proposition, the ACCC considers that major network modernisations and upgrades should occur in a manner that permits access seekers an opportunity that is equivalent to that of the access provider to manage potential consequences, including any associated disruption to current or planned operations. In the ACCC's view, this approach would represent fair and reasonable access terms and be likely to best promote the LTIE.

What notice period should an access provider give access seekers in relation to a 'major' network modernisation and upgrade?

In its submission, Telstra proposed that the model terms should adopt the notice arrangements that it had included in its ULLS access undertakings. Those terms were rejected by the ACCC[24] and the Australian Competition Tribunal[25], which expressed the following views:

> *…The concern we have about the Network Modernisation Provisions is that the definition of "Network Upgrades" covers such a wide range of activities that the minimum period of notification of 15 weeks is not necessarily appropriate or reasonable in respect of the range of the activities encompassed in the definition. Some of the network upgrades, such as removal or replacement of the ULLS with fibre optic cable, or its decommissioning, would require access seekers to plan major infrastructure works, or acquire and install new equipment and, in the case of the decommissioning of the ULLS, the need to market new services to end-users. These activities may well take longer to plan, implement and install than the minimum notice period of 15 weeks proposed by Telstra. That notice period is also likely to place access seekers at a significant competitive disadvantage with Telstra because some of Telstra's network upgrades will require more than 15 weeks to plan and carry out.*

And further:

> *…What is missing from the undertakings, and what is required having regard to the breadth of the activities covered by the definition of "Network Upgrades" in the undertakings, is a provision which either tailors particular periods of notice to particular types of network upgrades or the provision of an arbitration or dispute resolution procedure if an access seeker wants to contend that the period of notice of a particular network upgrade by Telstra is unreasonable and inadequate, having regard to the nature of the particular network upgrade.*

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[24] ACCC, *Assessment of Telstra's ULLS monthly charges undertaking, final decision,* August 2006
[25] *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at paragraphs 304 and 321

The ACCC remains of the view that 15 weeks is too short a period in which to plan and implement arrangements in response to a major network upgrade.

One possible response by an access seeker to a major network upgrade is the migration to other services such as wholesale DSL and/or line rental services. As noted in Section J, arrangements made by an access provider for a managed network migration of services could be expected to take at least eight of these fifteen weeks, although up to twelve weeks has been set aside for an access provider to make these arrangements. This is from the time that the migration is requested by the access seeker, which will be some time after the network upgrade is notified.

Additional time would be required by an access seeker to investigate the consequences of the notified network upgrade, including raising other solutions with the access provider and exploring all options available to it, and where migration to another service is to be considered, negotiating the terms and conditions of supply of those services.

Other responses by an access seeker to a major network upgrade could include replacing its equipment, moving its equipment to a new node or point of interconnection, and/or acquiring additional services, such as transmission to/from a new point of interconnection. These responses would similarly be expected to take considerable time in sourcing and/or constructing necessary facilities, equipment and services in order to maintain operations during and following the network upgrade.

In the ACCC's view, access seekers should generally receive an equivalent period of notice of a planned network upgrade as the access provider effectively receives. 'Equivalent notice' requires that access seekers are notified as soon as practicable of an initial approval being given for the planning of a network upgrade. Arrangements that only provide for access seekers to receive the same notice as an access provider's retail or wholesale business units may not be sufficient in all cases. Such a period of notice could put access seekers and the access provider on an equivalent footing on which to notify end-users or downstream wholesale customers. However, unlike the access provider's business units, access seekers may also need to plan their own complimentary works at the node and may need to negotiate access to other facilities or the supply of substitute or ancillary services.

The ACCC is of the view that it should nominate in the model terms criteria to determine when notice should be provided to access seekers, as early notice is essential to implementing an equivalence obligation. In this regard, the ACCC has largely adopted the approach recommended by Optus.

Further, the ACCC considers that a minimum notice period should also be specified for major network modernisation and upgrade. This is because an 'equivalence standard' alone may not provide sufficient certainty to service providers of the likely notice periods that would apply. This in turn could frustrate access seekers in developing processes that will be suitable to respond to notifications within available timeframes. On the other hand, if access seekers can be confident that they will generally receive at least a certain period of notice for each major network modernisation and upgrade, then they can develop processes that permit appropriate responses in that time frame.

There is the potential for a minimum notice period to unduly delay a particular network modernisation and upgrade. Alternatively, a minimum notice period that is specified to apply in general may be insufficient in a particular instance. Accordingly, all service providers should consider the legitimate concerns expressed by others in deciding whether to adhere to a minimum notice period for a particular network modernisation upgrade, and where appropriate agree to alter the length of notice to apply in that case.

Consequently, in the case of a major network modernisation upgrade of a type addressed in the model terms, the ACCC's view is that a minimum period of six months notice should be provided to access seekers. This is generally in line with minimum periods that have been established internationally. The ACCC has not adopted a longer notice period as recommended by access seekers, as on balance the ACCC does not consider that this would be appropriate for sporadic major network upgrades, which are the type of upgrades addressed in the model terms.

In contrast, the ACCC notes that the two year period adopted in New Zealand and cited by access seekers relates to a coordinated upgrade of the existing network in many service areas to a fibre to the node (FTTN) network, which is not the subject of these model terms.

This minimum notice period could be curtailed, or extended, however, in particular instances where the access provider and all access seekers potentially affected by the network modernisation and upgrade agree to that other period being substituted. For instance, a major network modernisation and upgrade with far reaching effects could require an additional period of notice, similar to what could be appropriate when the ACCC makes a significant change to regulation. Service providers should not withhold agreement unreasonably.

The ACCC considers that this represents 'fair and reasonable terms' and balances the competing interests of an access provider and access seekers, and over the longer term will best promote the interests of end-users.

What consultation arrangements should apply in respect of major network upgrades?

Access arrangements have provided for limited consultation with access seekers in respect of possible location of plant and facilities as a consequence of network modernisation and upgrade. The ACCC considers that consultation and negotiation over network upgrades should also extend to other aspects of a major network upgrade, including:

- the scope of the network upgrade and/or the manner in which it will be undertaken;
- the time at which the network upgrade will be undertaken (which is discussed above in respect of notice periods);
- the terms of supply of additional or alternative services.

Further, if the parties cannot reach agreement during this consultation and negotiation, then they should each have recourse to the general dispute resolution procedures.

The ACCC's remains of the view that this level of consultation is necessary to ensure that access seekers have an opportunity equivalent to the access provider to manage the potential consequences of a major network upgrade, including any associated disruption to their current businesses. In other words, this level of consultation appears necessary to ensure that any interruption of access to the core services will be avoided, or minimised where unavoidable, and access will be available to the 'modernised' network. To reinforce the importance of reasonable and timely consultation, the ACCC has adopted the recommendation of Optus as to the matters to be included in the notice.

This is not to say that all potential adverse consequences for individual access seekers would be able to be avoided through consultation and negotiation. It is important to note that in many cases an access provider will be providing core services to multiple access seekers (and other services) over a common network. Accordingly, for proposals that concern changes which generally affect network availability or performance, and/or a range of service providers, the interests of all service providers and end-users would need to be considered when addressing concerns and/or possible solutions that may be expressed by individual service providers.

Should an access seeker be entitled to recover the costs incurred by an access seeker due to having to re-locate facilities or take other steps in response to a major network upgrade, or have other works performed by the access provider?

The ACCC's view is that an access provider should not be required to indemnify an access seeker against costs incurred in having to re-locate facilities or in responding to other major network upgrades. Similarly, the ACCC does not consider that as a general rule the access provider should have to perform associated work without charge, for instance, reconnecting existing or substitute services.

It is not clear that such an indemnity for costs is necessary at this time to protect the legitimate interests of access seekers, or to provide necessary certainty to allow access seekers to invest in equipment and facilities. This reflects, in part, the view that notification and consultation arrangements (as discussed above) can safeguard against unnecessary and/or unreasonable network upgrades, and can act to minimise harm arising from the manner in which network modernisations and upgrades are implemented.

2.8 Suspension and Termination

The Suspension and Termination provisions are set out in Clause H of the determination. These provisions concern the circumstances in which an access provider may suspend or terminate a service of an access seeker, including timeframes for an access seeker to rectify their conduct.

These terms are important to the access provider, as they are a means by which it can protect its legitimate business interests in being paid for the services it provides. Further, it may be necessary to disrupt services due to an emergency affecting the network. However, there are other means by which an access provider could protect its legitimate business interests, such as drawing down on a security previously given by the access seeker.

These provisions are also important to access seekers, as they can ensure that their businesses are not disrupted for trivial matters, and that they have a reasonable opportunity to remedy any substantive default that has occurred.

Accordingly, the ACCC considers that fair and reasonable terms of access would balance these competing interests.

Submissions

Telstra submitted that there should be additional circumstances in which it can suspend or terminate services without first giving notice to the access seeker. Adam and other service providers suggested that an access seeker should be able to nominate the remedial action that should be taken to avoid its services being suspended. Optus stated its view that there should be flexibility to extend a remediation period beyond 20 business days where it would take the access seeker a longer period to complete the necessary steps.

Optus also considered the provisions should be expressed in a more reciprocal manner, and sought clarification around whether withholding payment on a disputed bill could provide a trigger for the suspension of services.

In-principle position

When should an access provider be entitled to suspend or terminate a service?

The ACCC did not expand the list of circumstances in which services should be able to be suspended or terminated without first giving notice as it considers that notice remains appropriate in the circumstances Telstra outlined in its submission.

Consequently, the model terms provide that an access provider should be able to suspend and/or terminate services without first giving notice to the access seeker in the case of an emergency or a matter which is reasonably likely to pose a threat to property or persons, or where the access seeker is insolvent. In those cases, the access provider should give notice of the suspension or termination as soon as practicable.

In situations where an access seeker is in breach of an access agreement, it is proposed that the access provider should be entitled to suspend and/or terminate a service after giving notice of its intention to do so and providing an appropriate opportunity for the breach to be remedied. For clarification, where an access seeker that was entitled under the access agreement to withhold payment on a disputed invoice, then withholding that payment until resolution of the billing dispute would not be a breach of the agreement and so would not trigger a suspension or termination notice.

The ACCC remains of the view that a fixed term should be specified for remediation, and that a notice period of 20 business days is appropriate. The ACCC has however adopted the suggestion that an access seeker should be able to nominate the means by which it can remedy the breach that has given rise to the suspension or termination notice, rather than being tied to the particular actions that the access provider nominates. This potential will better ensure that appropriate remedial actions can be completed within a 20 business day period.

Should there be a right to suspend or terminate services for repeated breaches of an agreement?

The ACCC considers that there should not be a general right to suspend a service or terminate an agreement for persistent breaches, or that there should be a right to continue to suspend services after a particular breach has been remedied. That is, before a service could be suspended or an agreement terminated the processes provided in clause H would still have to followed. This is to ensure that the access seeker has an opportunity to redress each alleged breach before suspension or termination can occur.

When can an access seeker terminate an agreement?

Clause H4 of the model terms provide for access seekers to terminate an agreement in certain circumstances following the giving of notice. The ACCC considers that this is clause is sufficient to allow the access seeker to terminate an agreement when appropriate to do so, and so has not varied the model terms in the way suggested by Optus.

2.9 Changes to Operating Manuals

The provisions relating to Changes to Operating Manuals are set out in Clause I of the determination. These terms concern the access provider's right to make amendments to its operational manuals, such as its ordering and provisioning manual, without the agreement of an access seeker.

An access provider can require flexibility to alter its operations in order to properly manage its network. This can benefit all service providers and end-users by better ensuring available network capability is efficiently utilised.

On the other hand, operating manuals can dictate the precise way in which a core service can be accessed, and so require an access seeker to develop its systems and processes so that the access seeker can act consistently with them. Consequently, changes to these manuals can affect an access seeker's legitimate interest in being able to acquire a core service and compete for the supply of end-user services.

Accordingly, the ACCC considers that fair and reasonable access terms should seek to balance these considerations.

Submissions

Optus and other access seekers oppose the model terms providing an access provider the latitude to make unilateral changes to operating manuals.

In the alternative, Optus suggests that the model terms make clear that a service party that disagrees with a particular change that has been made to an operational manual can notify a dispute to Telstra (with Telstra and/or under Part XIC of the Act) in respect of that matter. Adam and others recommend that the model terms nominate details of how changes to manuals are to be notified.

In-principle position

When should an access provider require the agreement of an access seeker before it could change an operating manual?

The ACCC considers that access seeker agreement should only be required when the change is not necessary to reflect or implement a change in standard operating procedure. In other words, agreement should be required where the procedures to be implemented are not to apply to all service providers.

When should an access provider consult with an access seeker over a change to an operating manual?

In the ACCC's view, in all other cases an access provider should provide 20 business days notice of planned changes to an operating manual before implementing a change. In that period, the access provider should consider in good faith any comments made by access seekers concerning the proposed amendment, including suggested alternatives to the proposed change or implementation.

What if an access provider implements a change that the access seeker disagrees with?

The dispute resolution procedures should be available in this instance to deal with disputes that arise from planned or recent changes to the operating manuals. Recourse would also be available in arbitration should an access dispute be notified in respect of the particular matter. This has been made clear in the final determination.

How should changes be notified to service providers?

The ACCC considers that the model terms should provide that changes to operating manuals relevant to a service should be promptly notified to all access seekers for that service. The ACCC considers that this would require an up to date copy of the manual being provided, together with the changes made from the previous manual being clearly identified, either by way of list, revision log and/or shown in mark-up.

2.10 Ordering and Provisioning

Terms relating to Ordering and Provisioning are set out in Clause J of the determination. These terms set provide for how service orders are to be placed, and how those orders are to be fulfilled, i.e., how ordered services are to be established.

2.10.1 Managed Network Migrations (MNMs)

Telstra has developed a MNM process in response to access seeker demand. A MNM involves Telstra project managing the transfer (i.e. cancellation and reconnection) of multiple services that are being supplied at an exchange to the access seeker from one wholesale service (e.g. wholesale ADSL) to another (e.g. ULLS).

Many aspects of the MNM process appear to work well and are satisfactory to access seekers. However, access seekers have disputed certain aspects of the MNM process, and in arbitrating notified access disputes, the ACCC has varied the generally applying arrangements. Terms that have been raised for consideration include:

- notice periods
- minimum order numbers
- the availability of after-hours provisioning
- the manner in which jumpering work is to be performed
- restrictions on the number of exchanges that can be accessed per day.

Telstra currently supports MNMs of wholesale PSTN and/or wholesale ADSL services to the ULLS, as well as MNMs of wholesale ADSL services to the LSS. Access seekers have expressed strong interest in the development of a MNM process of LSS to ULLS, however Telstra does not currently support this MNM.

Importantly, the cancellation and reconnection of services during a MNM are co-ordinated, resulting in minimal loss of service to the end-user. Also, as a result of the volume of work to be performed at the one exchange and the extended notice period involved, necessary work can be arranged at a lesser unit cost, meaning that the work can be performed more efficiently. For instance, the technician(s) need travel only once to the exchange to complete all associated work as opposed to having to make multiple trips if the work was dispatched in a less co-ordinated way.

Consequently, the availability of MNM processes is in the interests of access seekers, as it promotes their ability to compete on their merits for end-user services. In this regard, without MNM processes, access seekers would be less able to transfer their customers onto their own DSLAM networks, and thereby control the range and quality of services that they can supply. The lesser unit costs associated with MNMs also lowers the access seeker's cost base where these are passed on in the form of reduced connection charges.

Similarly, the availability of MNM processes will promote competition, by removing barriers to end-users entering markets and building scale through wholesale products before investing in DSLAM networks. The entry of additional service providers and investing in competing DSLAM networks will promote competition in downstream services by increasing the range and quality, and potentially reducing the price of, the services that service providers can supply.

On the other hand, developing and supporting MNM processes can divert certain of the access provider's resources, and so there is the potential for MNM arrangements to be contrary to its legitimate business interests. That said, the ability to offer MNMs can also promote an access provider's business interests by reducing its cost base by realising economies of scale (such as in travel and jumpering costs), and increase overall demand for the access network.

Accordingly, developing model terms and conditions to apply to MNMs that are fair and reasonable and promote the LTIE will require the balancing of competing considerations.

Submissions

Telstra made a number of objections to these provisions as proposed, while access seekers generally supported them. Telstra is of the view that there is no need for model

terms to address MNMs, as demand is now minimal and looking ahead issues previously identified by access seekers are unlikely to arise.

Telstra considers that there should be a minimum of 30 services to be migrated before a MNM can be ordered, and that the notice period should remain at 84 days as this fits into access seeker business plans and allows Telstra to plan the MNM. Adam and other access seekers consider 56 calendar days could be excessive, but accept that this time frame represents a reasonable compromise between access seekers' wish for more timely completion of MNMs and possible need to manage available labour.

Telstra also considers that in practice the number of services specified between the 56 calendar day notice and the 20 business day notice always differs, and that Telstra never cancels an MNM because of this.

In Telstra's view after hours MNMs would be of little benefit to access seekers, as the cutovers are likely to fall outside standard or extended local number portability (LNP) hours. Until LNP concludes in respect of the cutover service – which may not be until the next day, the access seeker may be unable to terminate calls on the line. Adam and other access seekers support the option of requesting after-hours cutovers, and acknowledge that the cost of after-hours work will exceed work done in business hours.

Telstra considers that the proposed limits on when it can apply limits on the number of exchanges per state per day that an access seeker can schedule for a MNM are unduly complex given that MNMs are being used less and less by access seekers. Telstra also questions the rationale for seeking to remove its limits as access seeker forecasts have fallen within these limits and this is likely to continue. Adam and other access seekers propose that further detail be provided as to how Telstra should notify access seekers of any limitations that are to be imposed.

In-principle position

Should there be a minimum number of services to transfer at the exchange before a MNM can be ordered?

Service providers have disputed whether there should be a pre-requisite number of wholesale services to be transferred at the exchange before a MNM could be ordered. These views concern whether a minimum number of services is necessary to ensure that the costs of the MNM will be recovered from the charges payable. A minimum of 30 or 50 services has been suggested by the access provider. Access seekers suggest no minimum, or a minimum of 10 services.

The ACCC remains of the view that there should not be a minimum number of wholesale services at the exchange before a MNM can be ordered, as this would act to delay or deny access to more efficient MNM processes; and hence would introduce a barrier to competition. Further, access seekers could be exposed to unnecessary risk of having to abandon a MNM simply through losing customers during the MNM ordering process.

Ensuring cost recovery is a matter that can be addressed in the applicable tariff structure, and there is no need for a minimum number of services to apply for this

purpose. For instance, a two part tariff can ensure that Telstra's fixed costs of project managing a MNM will always be recovered regardless of the scale of the MNM.

What period of notice should be given by an access seeker when ordering a MNM?

It is reasonable to provide a longer period of notice for MNMs to other orders, so that technicians can be arranged to complete the order. To a lesser extent, other project management tasks will also need to be performed and these would also require some period of notice.

The MNM process as it was developed provides for three forecasts to be submitted, at 84 calendar days, 56 calendar days and 20 business days respectively. It is only the last forecast that provides details of the actual services to be cutover; the first two forecasts indicate the number of services and the exchange from which they are supplied.

Access seekers dispute the necessity of providing three forecasts, and complain of what they see as too great a delay between submitting a MNM and the services being cutover. Telstra remains of the view that an 84 day, 3 stage, notice process provides necessary assurance that it will be able to perform the MNM.

In the ACCC's view, an 84 day, 3 stage, notice process goes beyond what is reasonably necessary, and hinders competition. Consequently, the ACCC remains of the view that MNMs should be cutover within 56 calendar days of the order being submitted (or where an unexpected event prevents this, as soon as practicable after that period).

What ability should there be to vary details of a forecast MNM?

Access seekers are concerned by the risk of having their MNM orders cancelled where they seek to vary the number of services that were forecast to be cutover as part of an order. Access seekers acknowledge that changes in forecasts could be due to errors in submitting their forecasts, but consider that it is only to be expected that there will be some divergence in actual and forecast data as they typically can win or lose customers at the exchange during the forecast period.

Telstra has previously expressed the view that restrictions on varying details of a MNM order from those provided in the forecast are necessary to allow the efficient project management of the MNM, including ensuring that adequate technician labour can be arranged. That said, Telstra has confirmed that in practice it does permit flexibility to change forecasts at its discretion, and does not cancel MNMs on this basis.

In the ACCC's view, fair and reasonable MNM terms should provide assurance to access seekers that modest changes in services to be cutover would not lead to the cancellation of the MNM. The ACCC considers that variations of up to 10 per cent when submitting the 20 business day forecast should always be accommodated without risk to the nominated cutover day.

Further, where a MNM cannot be completed on the nominated cutover day, for example, due to a more significant increase in the number of services to be cutover from a previous forecast, the ACCC considers that the MNM cutover should be rescheduled to a day on which necessary technician resources can be made available, and not cancelled completely.

The ACCC considers that appropriate incentives can be provided to access seekers to support the MNM process without cancelling MNMs. Liability to pay cancellation fees for late withdrawn orders, and/or the threat of rescheduling for more significant variations will provide an appropriate discipline on access seekers to submit reasonably accurate forecasts. Further, the tariff structure can ensure that costs of a MNM are recovered in all cases, including where the number of services to be cutover is reduced.

Should there be limits on the number of exchanges per state per day?

As a general principle, rationing mechanisms can be necessary from time to time to protect the access provider's legitimate business interests and/or the interests of other access seekers that otherwise may not be able to have equivalent access – in this case, to MNM processes. Where there is a need for a rationing process, it should be closely targeted to the resource to be rationed, and should be kept under review to ensure that it remains necessary. Otherwise these rules can become arbitrary and restrictive.

Access seekers have raised concerns over limits on the number of exchanges per state per day at which MNM cutovers can occur, due to the potential for these limits to delay finalising their migration to the ULLS. For access seekers with extensive MNM programs, there is a potential for significant delay; for more modest MNM programs, the effect will be less. Telstra states that due to reductions in access seeker demand for MNMs, retaining daily limits would be unlikely to materially delay access seekers.

Telstra has previously expressed the view that these limits can provide a useful means by which to ration its resources amongst different access seekers that are seeking to undertake MNMs. However it is clear from Telstra's submissions that this is currently not the case given the modest nature of current demand for MNMs.

The ACCC does not accept that a rationing mechanism such as daily limits on MNMs should be left in place simply on the basis that its continuation would be unlikely to delay access seekers by much. That said, it is not clear whether demand for MNMs will remain at current levels. For instance, introducing MNMs from the LSS to the ULLS could lead to strengthening MNM demand.

Consequently, the ACCC remains of the view that fair and reasonable MNM terms would not include daily limits on MNMs on an ongoing basis. Where a limit is necessary, it should only be of limited duration and occur pursuant to a transparent process – that is where the limit and reasons for it have been notified to access seekers.

The ACCC does not accept that publishing a notice such as this would be unduly complex or be an unreasonable imposition on Telstra. The ACCC notes the suggestions made by Adam and other access seekers as to how such a notice could simply be given. It would in any case only be if MNM demand strengthened significantly that such a notice could be required.

Matters that could be included in the notice include the nature of the limit, the area to which it relates, and details of the available labour capacity in that area to process and/or complete MNMs per day and the demand that is being realised and/or forecast. Such a notice should also provide the period for which the limit will be in operation, which should be for no more than two months.

The access provider should not unreasonably refuse requests to vary or withdraw a notice should it be asked to do so by an access seeker. Should the access seeker dispute the appropriateness of a notified limitation, the dispute resolution processes would be available, and if necessary the matter could be notified to the ACCC for arbitration.

In any such arbitration, the ACCC would likely look to the access seeker to establish that the limitation will have a material effect on its ability to complete its MNMs in a timely manner. The ACCC would also likely look to the access provider to justify the proposed limit having regard to the prevailing capacity and forecasts submitted by access seekers for the relevant area.

Should MNMs be performed after hours at the election of the access seeker?

Some access seekers have requested that MNM cutovers to the ULLS be performed on an 'after hours' basis, so that they have greater flexibility for ULLS connections to be made at a time that best suits their needs. Telstra has reserved the right to do this at its election, but generally does not appear to support after hours MNM cutovers for all access seekers.

'After hours' connections of the ULLS in a MNM process could benefit access seekers, and their end-user business customers, by ensuring that any disruption to the end-user's service will occur at a time that has less adverse consequences. The ACCC considers that this is the case even if the associated LNP could not for some reason be completed until the following morning.

Consequently, the ACCC remains of the view that an after hours connections service would promote competition and be in the interests of access seekers, as it would remove a potential barrier to access seekers acquiring the ULLS. Further, as Telstra reserves the right to perform after hours work, there would appear potential for such work, at least in certain instances, to be more efficient and in its own interests.

On the other hand, developing an after hours option to be available on request may require additional negotiation with contractors and the development of some business processes (such as augmenting billing systems). This could be contrary to the legitimate business interests of the access provider, especially where demand for the option is uncertain.

The ACCC notes that there appears to be current demand for after hours work from business customers, implying that there would be demand for after hours MNMs from access seekers that supply services to such customers. In this regard, for instance, Telstra offers business customers an after hours internet and broadband connectivity service.[26]

As Adam and other access seekers have acknowledged, this is not to say that the costs of performing MNMs would necessarily be the same when performed after hours, as technicians and support staff may charge an extra fee or higher labour rate. However, any additional cost that is caused by after hours work would be able to be recovered through appropriate tariff arrangements. In other words, the legitimate business

[26] Telstra's '*Our Customer Terms –Internet Direct and Business Broadband Section'* Clause 7.2

interests of the access provider concerning a particular after hours MNM can be served through setting appropriate tariffs that recover costs associated with after hours work.

Consequently, the ACCC's view is that fair and reasonable MNM terms should provide access seekers with the option of MNM cutovers being performed after hours.

Is there potential to apply terms and conditions similar to the model terms and conditions to services other than ULLS?

While not a core service, and hence outside the scope of this determination, there is the potential for the model MNM terms and conditions to inform the ACCC's approach to fair and reasonable terms for LSS MNMs.

2.10.2 ULLS ordering and provisioning processes

Industry has developed non-exhaustive arrangements for the ordering, provisioning and customer transfer of the ULLS. These arrangements have been documented in industry codes and or are reflected in other regulation. For instance, ACIF Code 569:2005 specifies various processes that are available for the ordering and provisioning of a ULLS. Clause 8.11 of this code notes that:

> *…This Code is intended to be consistent with the principles set out in the Trade Practices Act 1974 (Cth) and, in particular, the standard access obligations. If a Party believes that a provision of this Code is not consistent with the standard access obligations, an AP (access provider) and AS (access seeker) may agree or seek to agree alternative or additional ordering and provisioning arrangements to those contained in this Code. (definitions added)*

Access seekers have expressed concerns and notified access disputes concerning the failure to develop additional ULLS ordering and provisioning processes. For example:

- the ordering and provisioning of ULLS on lines with soft dial tone only at multi-dwelling units
- the ordering and provisioning of transfers from the LSS to the ULLS.

Developing and supporting ordering and provisioning processes is important to all service providers as it can limit their ability to efficiently commence supply to end-users, including winning end-users from other service providers. Consequently, these processes can be in the interests of access seekers, and the access provider, by allowing them to better compete for end-users. By promoting competition, these arrangements can benefit the LTIE, as it will be more likely that end-users will be able to acquire a greater range of services, including new services or services of differentiated quality and price.

These processes can impose costs on all service providers, and especially on the access provider in the development phase. However, as has been recognised by industry, in the longer term these costs are outweighed by more efficient operational arrangements that flow from a standardised approach. In the explanatory statement to ACIF Code 569:2005, it is noted that:

> *…There are costs associated with the establishment and maintenance of the operational support systems and bilateral arrangements required to implement the processes outlined in the Code. It is expected that these costs will be outweighed by the benefits derived from the implementation of standard industry practices.*

The ACCC considers that fair and reasonable ordering and provisioning terms should balance these considerations.

Submissions

Telstra is of the view that the additional ordering and provisioning processes that were identified in the draft determination – an in place vacant ULLS processes (iVULL) and LSS to ULLS processes, should not be required due to insufficient demand to justify development costs. Optus and other access seekers support the development of these additional ordering processes. Adam and others stated that it should be made clear that the LSS to ULLS process is to be available where another service provider places the ULLS order.

Telstra indicated that ordering processes should be established for what it terms an upper spectrum service to be supplied over access seekers' ULLS lines. Optus also raised for consideration the circumstance where an existing copper path is available but the previous customer service has not been cancelled.

Optus raised for consideration the situation where complex services (e.g., a call forward service) are present on the line. Optus states that Telstra will reject a ULLS order in this case until the complex services have been separately cancelled, but does not advise the access seeker of what the complex services are so that they can be more readily cancelled. Optus proposes that Telstra should be required to advise the access seeker of all complex services on the line at the time of rejecting a ULLS order for this reason.

Optus also raised the limits that have been imposed in Telstra's Operating Procedures Manual (OPM), which on their face restrict access seekers to a daily maximum number of ULLS cutovers at an exchange, and on a national basis. Optus acknowledges that these limits are not always being enforced, but states that where they are enforced the connection of a significant proportion of its ULLS orders is being delayed.

Telstra also expressed the view that if the model terms are to include additional ordering processes, they should stipulate that development costs should be recovered from access seekers that wish to use those processes. Adam and other access seekers indicated that less time should be allowed for implementation of new ordering processes.

In-principle position

Should an iVULL ordering and provisioning process be supported?

This process is potentially relevant to where there is an existing copper path to the end-user premises, but no current service (i.e. the line has soft dial tone only). An example is where an end-user moves into premises that have previously had a fixed-line service and the previous copper path has not been reassigned.

Access seekers have raised concerns, and notified an access dispute, concerning what they see as deficiencies in the current ULLS ordering and provisioning process that could be used to activate an ULLS in this circumstance. Access seekers support the iVULL process, and state that the existing process imposes unnecessary cost and delay.

The ACCC accepts Telstra's view that supporting an additional ULLS ordering and provisioning process could impose significant development costs. However, in the absence of an iVULL ('in-place Vacant ULL) process – which is set out in Annexure 2 of the determination, the ULLS would be ordered and provisioned under the existing VULL process. The VULL process requires 'truck rolls' to end-user customer premises, and so will take longer and involve additional cost as compared to a connection under an 'iVULL process', as well as compared to the reconnection of a retail or wholesale line rental service.

Consequently, once the iVULL process is established, there will be ongoing cost savings to the access provider and access seeker, as unnecessary truck rolls are avoided. As noted above, industry has recognised that development costs of ULLS ordering and provisioning processes can be outweighed by ongoing benefits. Further, any additional systems development costs can be recovered through cost based ULLS connection charges.

There could also be the risk that a particular iVULL order will fail, due to the existing copper path not supporting the desired deployment class for the ULLS. In these circumstances, the access seeker would still be required to pay the costs incurred in respect of the iVULL order to that point, and would need to use the VULL ordering and provisioning process should it wish to continue with its order.

Accordingly, the ACCC remains of the view that fair and reasonable ULLS ordering and provisioning terms require Telstra to support an iVULL process.

Should an LSS to ULLS MNM (or single) ordering and provisioning process be supported?

Telstra is of the view that there is uncertain demand for a single process that would cancel a current LSS and activate a new ULLS on the line, and that developing a transfer process could expose it to development costs that it may be unable to recover.

Access seekers continue to complain, as they have in other regulatory proceedings before the ACCC, (and have lodged access disputes about) the already available processes they must follow in order to acquire the ULLS on a LSS line.

These processes involve first cancelling the existing LSS before the new ULLS can be ordered. This causes an end-user to lose an ADSL service for at least 9 calendar days, and more likely around 12 calendar days. Also, the end-user must be directly involved in the transfer process (unless the service provider is to remain the same), by cancelling the current service with the losing service provider. In short, these processes are not integrated or represent least cost operations.

Consequently, they can be contrasted to Telstra's *One Factory approach* to managing operations, which has been implemented as part of its *End to end transformation* program. This approach is said to be driven by four guiding principles:

- Do it once;
- Do it 'right' for the customer;
- Do it in an integrated way; and
- Do it at the lowest unit cost.[27]

This issue has been the subject of some consideration in industry and regulatory processes. In 2006, Telstra advised industry that it was considering developing a LSS to ULLS process, and Telstra submitted to the ACCC its anticipated costs of doing so within formal cost claims it made in support of access undertakings that it proposed for the ULLS. These cost claims continue to inform access charges for the LSS and ULLS.

As Telstra notes, this issue has also been considered in a Communications Alliance (CA) roundtable, which was convened in response to an ACCC inquiry. The resulting majority report concluded that an integrated process should not be developed, as it was felt that the likely demand for such a process would not be sufficient to justify the development time and resources involved. On the other hand, the report considered that end-user involvement appeared unnecessary and ways to avoid this should be considered.

The report was provided after a consultative process involving CA members. After receipt of the draft report, the ACCC undertook further consultation with Chime Communications (iiNet) and TPG Internet, who are significant LSS and/or ULLS access seekers but not members of CA. The latter consultation process identified more substantial demand and support for LSS to ULLS processes than identified by the CA roundtable.

More recently, the ACCC considered this issue in the course of the inquiry into Telstra's exemption application in respect of the WLR and LCS. Following receipt of the further advice from Chime Communications and TPG, the ACCC made the application of the exemption given to Telstra to LSS access seekers who purchased WLR and/or LCS conditional on the development of suitable LSS to ULLS migration processes.

The ACCC is of the view that developing LSS to ULLS MNM and transfer processes will be likely to promote competition and be in the interests of access seekers, as it will remove an impediment to acquiring the ULLS on lines currently being used to acquire a LSS. Transferring services in this way can enable the end-user's current service provider to compete over greater dimensions of supply and further differentiate its products on a price and non-price basis. Further, developing these transfer processes will make end-users more able to access competing offers from other ULLS based service providers. Hence, these processes can promote competition, which is in the interests of the access seeker, and the LTIE.

In this regard, the envisaged LSS to ULLS transfer process is not only applicable where the ULLS access seeker is the current LSS access seeker on the line, but also where

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[27] Sol Trujillo, Telstra CE, *A company in decline - a time for diagnosis, Presentation to the FT Making Transformations Work Conference, London, 30 September 2008*, published 1 October 2008 <www.telstra.com.au/abouttelstra/media/>

another service provider with a firm order for the end-user's DSL service wishes to acquire the ULLS.

On the other hand, supporting an additional ULLS ordering and provisioning process can have implications for the access provider in terms of how its resources are used. In the development phase, the access provider's (and to a lesser extent an access seeker's) resources will be required to identify the steps to be undertaken in the process, and undertaking consultations, and to make any necessary changes to systems. That said, once necessary processes are developed, cost savings will arise from co-ordinated LSS cancellations and ULLS connections.

The ACCC remains of the view that the likely development costs would not be insurmountable, based upon Telstra's previously supplied cost estimates. Elements of existing ADSL/PSTN to ULLS processes, which are documented in ACIF code 569:2005 and Telstra's OPM will be able to be drawn upon. While the exact tasks (such as the necessary jumpering) will differ to an extent, the type of issues and process to be addressed will be broadly similar for LSS to ULLS processes.

Accordingly, the ACCC remains of the view that fair and reasonable ULLS ordering and provisioning terms would require the access provider to support LSS to ULLS transfer processes (for single service and MNMs). Such a process is in the interests of access seekers, and end-users, by removing impediments to the acquisition of the ULLS on lines with LSS. These arrangements can also be in the interests of the access provider by permitting more efficient connection and cancellation processes. Further, the direct costs of systems development and processing orders can be recovered through cost based charges.

There could be a number of matters to be addressed in developing an appropriate LSS to ULLS process. To overcome the current concerns arising from the absence of such processes, in the ACCC's view, an appropriate LSS to ULLS process should minimise end-user service disruption, and not require end-user involvement in cancelling the redundant service.

More specifically, LSS to ULLS processes should provide for end-user service disruption of less than three hours. This target timeframe has recently been specified by the European Regulators Group (ERG) for MNM processes in its report on best practices on regulatory regimes in wholesale unbundled access and bitstream access.[28]

Further, the ACCC considers that the principle that end-users should not be required to first cancel a service before they can churn service providers is generally applicable not just to these churn arrangements. The ACCC notes that various industry arrangements are in place to facilitate end-user churn. The ACCC considers that fair and reasonable model terms and conditions would provide for each of the access provider and access seeker to provide necessary support to such churn arrangements. This could include matters such as providing standing consents to the churn of their end-user customers on the gaining service provider obtaining a firm order from the end-user and submitting a valid service order to the access provider.

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[28] ERG, *Report on ERG best practices on regulatory regimes in wholesale unbundled access and bitstream access,* June 2008

Should advice on complex services be provided to access seekers?

The ACCC considers that an access provider should be required to provide details of complex services on a line to an access seeker with a firm order from the end-user, in instances where the cancellation of these services is required to enable a ULLS to be provisioned. The ACCC is of the view that fair terms would require the access provider to provide this information so that the end-user choice of service provider can be fulfilled and competition not impeded. This information could accompany either a ULLS Query Rejection or a ULLS Rejection advice. Further, the ACCC considers that any necessary system changes to implement this approach could be implemented within six months.

The ACCC notes that this issue has been raised in an industry process where a view was expressed that privacy concerns may prevent the access provider advising details of complex services to the access seeker. However, the ACCC understands that the Privacy Commissioner has been consulted and not raised any concerns in relation to this information being provided to an access seeker with a firm order from the end-user for the purposes of provisioning a ULLS.

Other provisioning processes – ULLS provisioning where previous customer service not cancelled (Connect Outstanding)

This issue arises where a previous customer's service remains active on the line to an end-user's premises. An example of when this could occur is where a previous occupant of the premise has moved without cancelling or transferring their service.

Where a PSTN service is ordered on a line with a previous customer service still active, processes already exist by which the current service can be cancelled upon the new end-user supplying proof of occupancy. The ACCC is unaware of any legitimate reason why these processes cannot be applied to the situation where the new end-user service is to be supplied by an access seeker over a ULLS.

Accordingly, the ACCC is of the view that fair terms would require the access provider to immediately cancel a previous customer service on receiving proof of the new end-user's occupancy. Further, the ACCC considers that any necessary processes could be implemented within six months.

Should daily limits be imposed on ULLS connections

As discussed above, the ACCC is wary of any limits being imposed upon access given their obvious potential to adversely effect competition. While some limits can be necessary from time to time where resources are scarce, any such limits must be reasonable, reflect current constraints and not unduly impact some service providers over others. Further, they should remain only until additional resources can be made available, and should not entrench poor service levels.

In the case of the daily limits that Telstra has written into the OPM, it is clear that they are not always necessary as they are not always enforced. Further, the actual limits appear arbitrary. Consequently, the ACCC considers that fair terms would not limit access to the ULLS in the manner currently set out in the Telstra OPM.

2.10.3 ULLS transfers

The ACCC is aware of concerns expressed by end-users concerning difficulties that they have experienced in churning between ULLS-based service providers. This is notwithstanding that ACIF Code 569:2005 specifies a Transfer ULLS (TULL) ordering and provisioning process that is intended to support churn between ULLS based services.

Submissions

Telstra is of the view that the ability of some access seekers to submit ULLS transfer orders means that possible impediments to more widespread use of TULL processes could already be overcome by access seekers. Telstra is also of the view that the model terms do not provide the opportunity to properly address this issue, as this would require arrangements between access seekers to be altered.

Adam and other access seekers support the inclusion of provisions around TULL processes being included in the model terms, but did not identify particular measures that could be introduced in the model terms to facilitate TULL processes and associated end-user customer churn.

In-principle position

In the draft determination, the ACCC proposed to address possible impediments to TULL processes. However, at this time, it is not clear how the model terms would materially facilitate more effective or wider use of exisiting TULL processes. While the ACCC remains concerned by the apparent impediments to end-user churn despite the current TULL process, it has not sought to advance possible means to address this in this final determination.

2.11 Facilities Access

Terms and conditions relating to ‘Facilities access’ are set out in Clause K of the determination.

These terms and conditions set out how an access seeker can access Telstra facilities in order to acquire a core service, and interconnect its own equipment in order to supply services to end-users. Of the core services, ‘facilities access’ terms and conditions are relevant to the ULLS and, to a lesser extent, PSTN OTA services.

The relevant facilities could include distribution frames, space at or adjacent to the exchange (internal or external to existing buildings) in which to install the equipment to be interconnected and ancillary facilities, such as power plant, security and air-conditioning. Designated space in a Telstra exchange for access seeker use is referred to as TEBA space.

Telstra has developed processes and other arrangements by which facilities access can be requested. However, access seekers still have difficulty in negotiating facilities access terms and conditions to their satisfaction. In this regard, access seekers have made complaints, and an access dispute has been notified, regarding facilities access.

More specifically, access seekers are concerned by the potential for them to be denied access to an exchange when there is available capacity. They are also concerned by the potential for extensive delays in gaining access to available and/or expanded capacity at an exchange, and what they see as insufficient consultation arrangements around facilities access.

Telstra submitted that the ACCC does not have the power to make model terms and conditions on facilities access. Telstra was also of the view that addressing facilities access in the model terms represents unnecessary regulation, as Telstra has already responded to access seeker concerns and the model terms largely reflect positions Telstra has already reached. Telstra further stated that the ACCC will be able to maintain oversight of these arrangements through the record keeping rule that has been issued to Telstra. Access seekers on the other hand, generally supported the ACCC's proposals regarding facilities access, and made suggestions around how they could be bolstered.

The ACCC has included facilities access terms in the determination as it considers that it is able to do so, and that it is appropriate to provide guidance on this issue.

The ACCC acknowledges that Telstra has in some respects responded to access seekers' concerns, but is of the view that there is the potential for its response to be expanded and/or refined. Further, the ACCC is encouraged by Telstra's view that many of the model terms reflect Telstra's current practices. The ACCC is however of the view that continuing to make model terms which reflect current practices can provide greater assurance to all service providers as to the ACCC's views in respect of those practices.

Further, in the ACCC's view, model terms which develop and/or lend further support to facilities access arrangements are important to access seekers, as difficulties in gaining access to facilities effectively limits their ability to acquire core services and supply services to end-users. Consequently, improving facilities access arrangements can be in the interests of access seekers by allowing them to better compete for end-users. By promoting competition, these arrangements can benefit the LTIE, as it will be more likely that end-users will be able to acquire a greater range of services, including new services or services of differentiated quality and price.

In this regard, the ACCC's model terms are largely directed to providing a more robust framework to support negotiations over facilities access, including through greater transparency of Telstra's decision making process. Consequently, the ACCC does not consider that its oversight role is a substitute for the model terms. Nor does the ACCC accept that in providing guidance on model terms the ACCC is imposing further regulation on Telstra.

That said, facilities access terms can impose costs on all service providers, and especially on the access provider. Further there is the potential for an unreasonable share of the costs of providing facilities access to fall upon an access provider or other service providers. Accordingly, the ACCC considers that fair and reasonable ordering and provisioning terms should balance these considerations.

2.11.1 Denial of access due to unavailable capacity at the exchange ('exchange capping')

Submissions

Telstra submitted that it should not be required to notify access seekers of exchanges approaching full capacity, as Telstra considers it has no way of knowing this. Access seekers supported this proposal.

Optus submitted that the model terms should provide for the access provider to work with the access seeker to identify and implement possible options to remove capacity constraints at exchanges.

Optus is also of the view that too much discretion is given to Telstra to deny access on the basis of reasonably anticipated requirements. Optus considers that access should be denied on this basis only if Telstra has firm plans to use the relevant facility within 6 months, and all access seekers have an equivalent opportunity to reserve capacity for their own reasonably anticipated requirements. Adam and other access seekers also supported initiatives to provide access seekers with processes more equivalent with those Telstra used in its own access to exchange facilities.

In response to a question the ACCC had posed, Optus advised that allocation of terminal blocks on the customer side of the MDF is a viable means by which to overcome capacity limits on the MDF. Telstra stated that it uses customer side terminations where other means to overcome capacity limits are not available.

Adam and other access seekers made suggestions around how Telstra should notify capped exchanges.

Telstra submitted that it should not have to disclose commercially sensitive information relating to Telstra exchanges and reasonably anticipated requirements. Optus also expressed reservations around access to service providers' requirements. Adam and other service providers submitted that matters such as the identity of access seekers waiting to gain access to the exchange should be routinely disclosed to other access seekers.

In-principle position

When should an exchange be capped?

Given the possible consequences of advising access seekers generally that an exchange is 'capped', and/or rejecting a submitted request for access to an exchange (PSR) on the basis of capacity constraints, the ACCC considers that fair and reasonable access terms would require that these decisions should be based on the most recent and accurate information, having regard to fair and reasonable criteria.

Further, there could be a number of ways in which the capability of a facility could be enhanced, which would permit additional facilities access to be provided. The ACCC considers that fair and reasonable access terms would require that these potential improvements should be considered when deciding whether to cap the exchange.

Possible solutions to increasing space at a 'racks-capped' exchange are:

- The TEBA space being increased or a second TEBA space being constructed;
- Use of the existing TEBA space being optimised, e.g., by removing redundant equipment;
- An external cabinet being built adjacent to the exchange building – although this could be a second best approach given the costs involved and increased potential in the technical and operational quality of core services and interconnection as compared to the scenario where TEBA space is available.

Possible solutions to increasing the capability of a Main Distribution Frame (MDF) include:

- Use of space on the MDF being optimised by reassigning MDF blocks such as those no longer required by service providers – this could potentially include MDF blocks on both the customer and equipment side of the MDF; and/or removing redundant junction and CAN cables;
- Extending the capability of the MDF by adding additional modules – although the physical limits of the exchange building may ultimately preclude further extensions; and/or replacing low density blocks with newer higher density blocks ('MDF compression');
- Constructing and using a second distribution frame, although this could be a second best approach given the costs involved and increased potential for differences in the technical and operational quality.

This is not to say that the access provider must always be the party that undertakes these improvements. Although it could be preferable for certain works to be undertaken only by the access provider, there is the potential for some works to be performed by the access seeker with necessary support from the access provider and/or other access seekers. This is discussed below.

The ACCC considers that this approach balances the interests of access seekers, by better ensuring that they are not delayed or denied access to facilities unnecessarily, and the interests of the access provider in that it does not require it to perform tasks that are unnecessary, or do things it could not readily do. Further, existing information and processes can be drawn upon, including the use of recent information concerning the facilities.

Consequently, the ACCC's view is that a decision to 'cap' an exchange, and/or deny access to a facility on the basis of unavailable capacity, should not be made unless:

- a recent inspection of the facility has been made and floor plans etc have been verified;
- the potential for building works or other solutions by which to increase capacity has recently been investigated; and
- where the decision is based upon reasonably anticipated requirements of the access provider or another service provider (discussed below) – all relevant details of those requirements including timing have been documented, and all necessary internal approvals or contractual arrangements necessary for the implementation of that requirement have been established.

How should access seekers be able to gain assurance that decisions to cap an exchange are reasonable?

In the ACCC' view, fair and reasonable access terms would permit access seekers to verify that an exchange is genuinely capped, and/or to develop proposals by which the capability of facilities at the exchange could be enhanced.

In this regard, the ACCC considers that access seekers should be able to inspect, or have an independent person inspect, capped exchanges and the associated documentation on which the decision to cap the exchange was based. This would balance the access seekers' interests in gaining assurance that the access provider's decisions were reasonable, with the access provider's interests that its resources are not unnecessarily diverted, e.g., as could be the case if it were to be required to prepare independent expert reports prior to capping an exchange.

Further, it will mean that access seekers will be able to consider for themselves ways in which genuine capacity constraints could be overcome through enhancements to capability. This is important as it could often be the case that, relative to the access provider, an access seeker without current access to facilities will have a stronger incentive to ensure that these issues are properly assessed.

Consequently, the ACCC's view is that an access seeker or a representative should be able to inspect an exchange and associated documentation where that exchange has been placed on a published list of capped exchanges, or an application for facilities access has been rejected on the basis of capacity constraints.

What consultation should occur in capping an exchange and/or proposals to enhance capability of facilities at the exchange?

In the ACCC's view, fair and reasonable terms of access would provide for an access provider to consult with an access seeker over a decision to cap an exchange. That is, when placing an exchange on a list of capped exchanges or denying a request for access, the access provider should, if requested to do so, provide an access seeker with the reasons for the decision and an opportunity to have the matter reconsidered. This would provide an opportunity, for instance, for an access seeker's proposals to enhance capability to be considered.

The ACCC considers that the existing general dispute resolution procedures provide a suitable framework within which these discussions could take place. However for this to provide a genuine opportunity to assess the reasonableness of the decision, and to make constructive proposals to overcome capacity constraints, the ACCC considers an access seeker should be entitled to inspect documents that relate to:

- The capacity (actual and potential) of the facilities including:
    - The floor plan of the exchange – which will show the location of the distribution frames; TEBA space; space reserved for the access provider's own equipment; the power room; the air conditioning room; administrative, maintenance, equipment and storage space; and vacant space;

- An inventory of active, inactive, and underutilised facilities at the exchange used to supply core services and/or permit interconnection of equipment for the purpose of supplying services to end-users;
- Particulars of any approved plan to expand the capacity of the exchange or particular facilities, including the anticipated time frame for completion;
- Details of any consideration that has been given to the possible increase in capacity of facilities such as converting other space in exchanges to TEBA space; and

- Other matters on which the decision has been based such as the requirements of the access provider and existing access seekers present at the exchange (current and reasonably anticipated).

In the ACCC's view, this meets the interests of the access seeker, and the access provider, that facilities be used efficiently, and that improvements to existing facilities are only undertaken when they are necessary. Further, any potential for additional costs to be imposed on the access provider, or the access seeker, is minimised by using existing dispute resolution processes and limiting the information to be provided to that which would have been necessary for the access provider to properly make its decision.

The ACCC does not agree with views expressed by some service providers that information should be withheld from access seekers or a nominated representative because it is commercially sensitive. The ACCC considers that current dispute resolution processes, including the arbitration process, have well established confidentiality procedures which govern information sharing arrangements between the parties. The ACCC considers that similar confidentiality procedures could be employed where discussions on exchange access are taking place within the dispute resolution framework agreed between the parties. In this regard, the ACCC's views on confidentiality arrangements are discussed above in section 2.5.

Should the access provider's requirements and/or those of other service providers with rights of access to facilities be considered?

In deciding to 'cap an exchange', or deny access in response to a request for access on the basis of capacity constraints, it would appear appropriate for Telstra to consider its own reasonably anticipated requirements and those of other service providers with existing rights to acquire services at the exchange, measured at the time the request for access was made.

This is not to say that all interests of the access provider or existing access seekers at an exchange should be given precedence over the interests of a new access seeker. There may be a number of ways in which the reasonably anticipated requirements of a service provider can be accommodated, only some of which could lead to access being delayed or denied to an access seeker.

In the ACCC's view, fair and reasonable access terms would require that the criteria used to make these assessments, including the timeframe over which it would be reasonable for requirements to be forecast, be available to all service providers. Further, particular decisions to deny or limit access to facilities on this basis should be well

documented so that other service providers, and if necessary the ACCC, can assess whether these requirements are reasonably anticipated.

The ACCC has not sought to further limit Telstra's ability to reserve capacity for its own use in the way Optus suggested. Consequently, Telstra will still be able to take into account its own reasonably anticipated requirements in accordance with its written policy notified to access seekers. Should dispute arise over the reasonableness of this Telstra policy, or the application of that policy in any instance, then that is a matter that can be addressed through dispute resolution.

Telstra advises that consistent with the Trade Practices Act the requirements of access seekers present at the exchange are considered in making facilities access decisions. The ACCC does not consider that it is necessarily appropriate to permit other access seekers not present at the exchange to reserve capacity at that exchange, as this runs the risk of capacity being allocated on a first-to-ask basis and does not at this time appear necessary to permit access seekers to expand into additional exchange service areas.

Should listings of capped exchanges be published?

The publication of 'capped exchange' listings can obviously be of assistance to access seekers in developing their business plans, as it signals when facilities access cannot be provided. Access seekers support these lists being published.

In the ACCC's view, these listings should continue to be published. While there could be the potential for access to be frustrated by inaccuracies, such as listing an exchange as capped when it has available capacity, the ACCC considers that other measures outlined in respect of facilities access can provide necessary assurance that published lists will be accurate.

In the ACCC's view, there is the potential for listings of capped exchanges to be improved in two respects. First, they could be more regularly updated and changes notified to access seekers. For instance, these lists might not always be updated when considering applications for access or subsequent construction proposals. Consequently, there appears potential for Telstra to make any necessary changes to the lists and notify them to access seekers more regularly.

Further, the ACCC remains of the view that there is the potential for notice being provided to access seekers when an exchange is reaching full capacity, and this would be of assistance to access seekers in planning their business operations. Accordingly, it has maintained the proposal that Telstra use reasonable efforts to notify access seekers of exchanges approaching full capacity. While Telstra argued against this, the ACCC considers that Telstra can take reasonable steps to identify such exchanges in the ordinary course of its operations. For instance, the ACCC notes that Telstra currently assesses the extent to which an exchange is approaching capacity as part of its evaluation of access seeker requests to locate equipment in the particular exchange. The ACCC considers that it would be reasonable for Telstra to publish such information once this type of assessment is undertaken.

2.11.2 Exchange Queuing

Submissions

Adam and other access seekers submitted that a queued access seeker should be advised of the identity of other queued access seekers, and given updates as to its progress in the queue.

In-principle position

When should access seekers be required to queue?

Access seekers are concerned about the potential for substantial delay in accessing exchange facilities, especially where more than one access seeker has submitted a request for access (PSR). An access seeker may need to wait for access seekers 'queued' ahead of them to commence and finish their works – such as constructing a rack, installing their equipment and running jumpers – before they can commence their deployment. At exchanges in which many access seekers are seeking access, this may require an access seeker to wait months or years for access.

In the ACCC's view, fair and reasonable terms of access would require 'queuing' only where reasonably necessary for health and safety reasons and/or to ensure network reliability.

As a general rule, the ACCC considers that a PSR that is limited to constructing racks, running jumpers, or other minor works within an existing TEBA space should not be queued simply because similar work is being undertaken by another access seeker. That is, where two or more service providers wish to access TEBA space for this purpose, they should be allowed to do so concurrently. Any restrictions on this should be on a case by case basis where there are reasonable grounds to believe that concurrent access in that instance would compromise health and safety or network reliability.

Where a new TEBA space is required, or additional power, air-conditioning or similar ancillary services need to be provided to an existing TEBA space, then it would be less likely that the TEBA space could be accessed by another service provider until the 'common infrastructure' work was completed. In this case, the PSR should be queued.

The ACCC considers that this approach balances the interests of access seekers to access facilities without unnecessary delay, and the access provider's interest in its exchanges being operated safely without risking network reliability.

The ACCC has not adopted the submission of Adam and other access seekers that Telstra should queue for access. The ACCC is of the view that service providers, including the access provider, should not queue except where clearly necessary. Given that the access provider maintains separate exchange space for its own use, there is little potential for it to be clearly necessary for Telstra to have to queue with access seekers. Further, discontinuing the current arrangements whereby an access provider can access separate exchange space to access seekers would be a significant change.

What arrangements should apply to 'keep the queue moving'?

On those limited occasions where it will be necessary to queue, it will be important that the access provider and all access seekers cooperate so that queues keep moving.

In the ACCC's view, the facilities access terms and conditions can encourage this cooperation by:

- Providing clear guidance to all service providers as to the timeframes in which they will perform necessary tasks to approve and complete PSR and associated works;
- Encouraging the access provider to make available sufficient resources, in terms of its own staff and approved contractors, so that agreed timeframes can generally be complied with;
- Encouraging access seekers to provide prompt notifications on matters that will impact likely commencement dates for queued works, and the access provider to notify those matters to all queued access seekers;
- Encouraging the access provider not to unreasonably withhold consent to minor changes to a design construction proposal (DCP), or to reject a DCP because of subsequent changes to technical specifications.

Further, should an access seeker report that Telstra certified contractors (such as electricians) have advised that they will not be available to complete works within a reasonable timeframe, the ACCC considers the access provider should act upon those reports and where necessary certify additional contractors.

Access seekers should also make all reasonable efforts to meet agreed timeframes, including DCP Order validity periods. The validity period is the period in which approval to fulfil the proposal submitted remains current. Where these cannot be met, then there is the potential for 'split builds' to be approved in the interim, whereby other access seekers could use downtime at the exchange to complete their queued works. There is also the potential for a 'split build' to be used whereby access seekers can access the exchange at different times of day.

The ACCC has adopted the submission of Adam and other access seekers that the access provider should advise a queued access seeker of others in the queue. This is to increase the transparency of the queue process and to further facilitate discussion between access seekers about possible means by which to progress through the queue more quickly.

The ACCC has also adopted the suggestion made by these access seekers that access seekers be advised of progress through the queue. The ACCC considers that a listing of updated queue positions can be provided by the access provider when a previously queued access seeker completes its works and passes JCI at that exchange.

In respect of each of these matters, the ACCC is of the view that information that concerns the identity and/or queue position of another access seeker is not commercially sensitive.

2.11.3 Building common infrastructure

Submissions

Adam and other access seekers submitted that greater support should be provided to an access seeker to vary a DCP without losing a place in the queue when the varied DCP would facilitate a parallel or joint build, and other queued access seekers would not be delayed as a result. As noted previously, Telstra and Optus objected or expressed reservations to commercially sensitive information being disclosed to other service providers.

In-principle position

What arrangements should apply to support an access seeker in undertaking common infrastructure works at an exchange?

There is the potential for common infrastructure work that will support a current access seeker and all other service providers who want to access the exchange in the future.

This would both increase the potential for such works to be undertaken, as the associated costs could be effectively shared across service providers that will make use of the common infrastructure, and diminish the risk that incremental upgrades and associated delays would be regularly required at an exchange.

The ACCC considers that fair and reasonable access terms would facilitate common infrastructure works being undertaken on this basis by either the access provider or the access seeker.

Where common infrastructure works are to be required before facilities access can be given, but the access provider does not propose to conduct the necessary works, the ACCC considers that the access seeker should be provided information that would enable it to consider whether it should undertake the works. This information would include forecast demand for facilities access at the exchange, and details of other PSRs that have been recently submitted in relation to that exchange, as this will be necessary to assess the potential for costs to effectively be shared across other service providers.

In addition, the ACCC has decided to adopt the suggestion made by Adam and other access seekers that the access provider should not unreasonably withhold consent to a variation to a DCP where the variation is to facilitate a parallel or joint build and other queued access seekers would not be delayed. This has been adopted due to its potential to facilitate the building of common infrastructure by a queued access seeker.

The ACCC considers that this approach promotes the interests of access seekers by better facilitating necessary facility enhancements. It is also in the access provider's interests, as it enables access seekers to develop proposals by which common infrastructure could be built rather than leaving this as the sole responsibility of the access provider.

Further, existing arrangements can be drawn upon, such as existing forecast arrangements and TEBA credit provisions, rather than new arrangements being established.

There could initially be some sensitivity by some service providers around the level of detail that could be shared in this way. For instance, there may be some sensitivity around demand forecasts and other access seeker specific information. The ACCC notes Optus' and Telstra's concerns in this respect. However, this information would also appear relevant to an access seeker in developing common infrastructure proposals, and so there would appear merit in it being disclosed. Further, confidentiality arrangements such as those discussed under section 2.5 above can be utilised to ensure that any commercially sensitive information is not disclosed more widely or used for another purpose.