

Optus Submission to
Australian Competition and Consumer Commission
on
Draft Model Non Price Terms and Conditions
Public Version

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1. Introduction

- 1.1 Optus welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (ACCC) Draft Determination on the model non price terms and conditions 2008.
- 1.2 Optus supports the implementation of model non-price terms and conditions of access. In the past Optus has had great difficulties in negotiating equivalent terms of access with Telstra and it therefore considers that competition will only be promoted if equivalent access is provided to both the access seeker and access provider on a non-discriminatory basis. Optus believes that the proposed model terms are an important step in this direction.
- 1.3 Optus has a number of comments on each of the draft clauses, which are provided with the intention of strengthening the pro-competitive effect of the model terms. In some cases an alternative drafting is suggested, either in the body of the submission, or in the attachment. Optus has also suggested that the model terms cover a number of additional specific issues.

2. Clause A Billing and Notification

- 2.1 Optus accepts the ACCC's in-principle view to include Billing and Notification in the model non-price terms and conditions of access.

Matters upon which submissions are invited

- 2.2 The ACCC has invited views on the following particular matter:
- (a) Should the proposed model terms and conditions relating to billing and notifications (Clause A) also specify time periods within which invoices for core services should be paid? If so, what would be a fair and reasonable period to allow for payment of an invoice for each of the core services?
- 2.3 Optus considers that a time period should be specified and that 30 days would be a fair and reasonable period given that this is a standard industry practice.

Comments on the ACCC's in-principle position

Timeframe for billing disputes

- 2.4 The ACCC's in-principle position is that the Access seeker should be given a maximum timeframe of 6 months to notify a billing dispute.
- 2.5 In general, Optus considers that in-principle position proposed is appropriate. However Optus questions the practicality of the timeframe for notification and suggested by the ACCC.
- 2.6 Alternatively, Optus proposes that the maximum timeframe be extended to 9 months. This would better allow for the extraction of data to support analysis of the case for dispute, which can be very time consuming and complex.

Refunds

- 2.7 The ACCC stated in its draft decision that its in-principle position is that refunds or payment of money to another party should be paid within 1 month of resolution of billing dispute.
- 2.8 Optus considers that this is broadly acceptable. Payment should be made within 30 days after the agreed settlement.

Backbilling

- 2.9 The ACCC stated in its draft decision that its in-principle position is that access providers are permitted to backbill but the right to

backbill is limited so as to permit the access seeker to comply with specific timeframes as much as possible; and in special circumstance (billed for the first time and certain international services), access providers are permitted to backbill within an extended period (maximum of 8 months), subject to agreement with access seeker.¹

- 2.10 Optus considers in the special circumstance where access providers are to backbill, the maximum period should be in line with the ACIF recommendation of 3 months.

Suitability of the proposed drafting

- 2.11 Optus considers that the ACCC's statements in the draft determination explanatory statement have not always been appropriately reflected in the model terms and conditions.
- 2.12 Some comments on selected individual clauses follow.

A 5(b)(ii) Optus considers that the ACCC needs to define 'New Service'. It is unclear what new service refers to. Is this a new account or individual service? If it is an individual service, then the six month clause is largely redundant. Missed billing is usually only with new individual services.

A.7 Does not allow for deduction due to dispute. This clause is potentially interpretable as inconsistent with A.13 as it seems to prohibit the short payment of a settlement unless credit is issued. This clause may also be inconsistent with the dispute process and short payments made under that process.

A13 states that "...the access seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved." Optus considers instead of withholding payment of the full disputed Charge appearing on the invoice, it would be fair for the access seeker to withhold only the portion of the Charge that is in dispute.

A.17 There is no period within which the other party has to provide the relevant materials upon which it is to rely. Optus suggests that this information should be provided with 25 days of the Billing Dispute Notice. Proposed redraft:

Clause A.17: Each party shall, as early as practicable after the notification of a Billing Dispute pursuant to clause A.11 but in all cases within 25 Business Days of receipt of the Billing Dispute Notice (or longer period if agreed by the parties), provide..."

¹ ACCC, Draft Determination –Model Non-price Terms and Conditions September 2008, p15,16

A.18 Optus doubts whether setting a required number of days is feasible since there is large variation on the time it takes to resolve different disputes.

A20, A21 Given the complex nature of billing disputes, Optus submits the model terms and conditions should waive payment of interest when this is agreed to by the parties. It has been Optus' experience that payments to Telstra have to be withheld to get it to take a billing dispute seriously.

Further, Optus considers the ACCC's non-price terms should address the situation where the billing party is slow to respond to requests for information. This unnecessarily extends the dispute period and costs interest to the party requesting the information. This happens regularly in Optus' experience. Optus therefore considers that the billed party's requirement to pay interest should be waived if the billing party was unnecessarily slow to respond to requests for information.

A.24 This clause appears unnecessarily prescriptive

A.25 If the billing dispute is referred to mediation, there is no maximum period of time for the billing dispute to be mediated. Optus considers a maximum timeframe would be helpful and that three months is a reasonable timeframe. Proposed amendment:

Clause A.25: "Mediation shall be conducted in accordance with the mediation guidelines of the ACDC and concluded within three months of the proposal (unless the parties agree to extent this timeframe); or"

Additional matters relating to billing information

Timely provision of transactional data by the access provider

- 2.13 Optus submits that the model terms and conditions should further include clauses which ensure Telstra provides, in a timely manner, any transactional data that is required to enable billing by access seekers.
- 2.14 Optus accepts that access seekers are responsible for billing the End User. However, in order for an access seeker to be capable of billing its end use customers in a timely manner, Telstra must provide, in a timely manner, any transactional data that is required to enable billing by access seekers. At the very least, Telstra should provide such transactional data according to a timeframe consistent with the timeframe it follows when billing access seekers. There is at least one instance where this is not the case.
- 2.15 For each ULLS cutover, Optus receives a ULLS Completion Advice. This notification is sent via a batch file, four times daily. This is the only notification provided to Optus by Telstra Wholesale. This notification is crucial because it triggers Optus' own customer

billing. Optus cannot trigger billing for its own End Users until the ULLS Completion Advice is received.

- 2.16 According to the ACIF C569, the SLA for receiving this notification is one clear business day. Therefore, if a ULL is cutover on a Friday afternoon, Telstra may send Optus the ULLS Completion Advice on the following Tuesday – and still be technically compliant with the ACIF C569.
- 2.17 However, Telstra Wholesale commences billing Optus for the ULLS (line rental and calls) for a given customer *immediately* – i.e. starting on the actual day of cutover (Friday in the example above).
- 2.18 **CiC**
- 2.19 **CiC**
- 2.20 Optus has requested that Telstra Wholesale provide the ULLS Completion Advice on the day of cutover. However, while Telstra Wholesale have responded by attempting to send the ULLS Completion Advices on the day of cutover, Telstra have maintained that they are complying with the ACIF code by sending the ULLS Completion Advice within one clear business day.
- 2.21 It is clearly administratively feasible for Telstra Wholesale to provide the ULLS Completion Advice on the day of cutover – given that it is able to bill Optus for the same customer from the day of cutover. Optus considers it highly unlikely that Telstra itself would forego the opportunity to bill its own retail customers. It follows that it is highly likely that Telstra Retail is provided with the ability to bill its own end use retail customers from the day of cutover.
- 2.22 In summary, for this particular billing issue, the ACIF code requirement (one clear business day) does not require Telstra to provide access seekers with a service which is either timely or at an equivalent level to that it provides to itself.
- 2.23 Accordingly, Optus considers that the model non-price terms should specify requirements relating to the provision, timing and content of billing information. The terms should guarantee that access seekers receive a level of service equivalent to that it provides to itself and in particular it should specify that Telstra Wholesale will provide access seekers with the ULLS Completion Advice on the day of cutover.

3. Clause B Creditworthiness and Security

- 3.1 Optus in general accepts the ACCC's in-principle view to include Creditworthiness and Security in the model terms and conditions of access.
- 3.2 However the need for security depends upon the particular counter party and the circumstances. Detailed security arrangement should

therefore be left to individual negotiations rather than be incorporated into the model terms.

Comments on the ACCC's in-principle position

- 3.3 Optus supports the ACCC's in-principle position on the Creditworthiness and Security provision. In particular, the access provider should not as a matter of course require security to be given or deny access before credit checks are completed. Checks should be required only when, on an objective basis, they are considered necessary to protect the legitimate business interests of the access provider².

Suitability of the proposed drafting

- 3.4 Optus considers the ACCC's in-principle position stated in its draft decision has not been accurately reflected in the proposed drafting.
- 3.5 In particular, it appears clause B.3 allows the access provider to seek security in all circumstances and the only consideration is the amount and form of security to be provided. This would make it unnecessarily more expensive for access seekers to provide the services.
- 3.6 Optus considers a minor amendment could be made to incorporate the ACCC's in principles. Optus proposes clause B3 should be amended as follows:

B.3. The Security (including any varied Security) shall only be requested when it is reasonably necessary to protect the legitimate business interests of the access provider and shall be of an amount and in a form which is reasonable in all the circumstances.

- 3.7 Optus considers the proposed amendment ensures that the access provider will only seek security where it is reasonably legitimate to do so and at the same time allow the amount and form of the security to be determined.

4. Clause C Liability (Risk allocation provisions)

- 4.1 Optus supports the ACCC's in-principle view to include Liability (Risk allocation) Provisions in the model terms and conditions of access. Comments are set out below and proposed drafting is set out in the Attachment.

² ACCC, Draft Determination –Model Non-price Terms and Conditions September 2008, p16-18

Matters upon which submissions are invited

- 4.2 The ACCC has invited views on the following particular matter:
- (b) Should the proposed model terms and conditions relating to Liability (Risk Allocation) Provision (Clause C) be further developed insofar as they address liabilities under the Customer Service Guarantee (CSG) standard? If so, what additional terms and conditions should be included in the model terms and conditions?
- 4.3 Optus considers that the proposed model terms should be further developed insofar as they address liabilities under the Customer Service Guarantee (CSG) standard.
- 4.4 Optus considers that in certain circumstances it would be appropriate for the access provider to contribute to CSG claims made against access seekers by their customers.
- 4.5 Particular terms are included in the Attachment.

Comments on the ACCC's in-principle position

- 4.6 Optus submits that the ACCC's proposed model terms and conditions on liability are unnecessarily complicated. These terms and conditions have changed little since 2003 and appear to be a legacy of access agreements from the early 1990s. They do not reflect modern standards of more concise and straightforward drafting.
- 4.7 These are "model" terms and conditions, not a telecommunications access code under s 152BJ. An access code must set out terms and conditions that are capable of being adopted in an access undertaking (s 152BK(1)). By contrast, model terms and conditions under s 152AQB do not need to be comprehensive.³
- 4.8 These model terms and conditions are not the ACCC's final word on the issue of non-price terms and conditions. The Act requires only that the ACCC have regard to these terms and conditions in the arbitration of an access dispute. Their chief purpose is to provide parties with guidance about the regulator's views, thus increasing regulatory certainty and expediting and simplifying commercial negotiations.⁴
- 4.9 In short, the ACCC should not seek to anticipate each combination of commercial terms that may arise in the negotiation of access to core services. Such an exercise is a practical impossibility. Rather, the ACCC should seek to publish model terms and conditions that provide guidance to parties on key issues by clearly and concisely

³ *Telecommunications Competition Bill 2002*, Explanatory Memorandum, page 41.

⁴ *Id.*, page 39.

documenting the essential principles that have guided the ACCC in its deliberations. Matters of detail, including issues not anticipated by the ACCC, can and should be addressed through an access dispute if the parties are unable to reach agreement.

- 4.10 Optus broadly supports the essential principles that have guided the ACCC. With this in mind, Optus provides the following comments on the clauses in the draft determination and proposes a series of changes to the model terms and conditions that will provide guidance to parties in concise and straightforward terms.

Clause C1

- 4.11 While the principle reflected in this clause is unobjectionable, Optus questions whether it is really necessary in a set of model terms and conditions. This is hardly a key principle, or an issue where there is a need for guidance to be provided to the market on the ACCC's likely views in order to narrow the scope for commercial disagreement.

Clause C2

- 4.12 Optus submits that this clause should be removed from the model terms and conditions. Clause C2 is similar in its terms to s 68A(1) of the TPA. However, a term such as clause C2 cannot be relied upon where the acquirer can show is not fair and reasonable (s 68A(2)). In deciding whether reliance would be fair and reasonable, a court must have particular regard to the factors in s 68A(3). These include:
- the relative strength of bargaining positions taking into account, among other things, the availability of equivalent goods or services and alternative sources of supply; and
 - whether the acquirer had the opportunity to acquire the goods or services under a contract that did not include such a term.
- 4.13 Both of these factors suggest that whether such a term would be reasonable would depend heavily on the circumstances of the case. For the ACCC to include such a term in its model terms and conditions suggests that the ACCC has arrived at the provisional view that such a limitation would be appropriate in all cases. While this would be an extraordinary stance from a regulator tasked with responsibility for consumer protection, Optus is not aware of the ACCC having arrived at a considered position on this issue. Given that reliance on such a limitation is dependent on the relevant circumstances, Optus submits that a more sensible and balanced approach is to exclude this clause from the model terms and conditions and to consider its use on a case by case basis in the event that parties cannot agree on its inclusion.

Clause C3

- 4.14 The ACCC supports the inclusion of a model term which limits the liability of the parties for consequential and similar types of loss. Optus suggests only that, for avoidance of doubt, this provision should also refer to the exclusion of economic loss.

Clauses C4 and C5

- 4.15 Optus supports the ACCC's proposed model terms and conditions with respect to an aggregate liability cap. Optus proposes no amendment to clause C4, but does suggest a number of consequential changes to clause C5.

Clause C6

- 4.16 Optus submits that this clause is redundant. The clause "limits" the liability of one party ("Party X") to the other ("Party Y") to the "remedies" provided under clauses C7 to C12. Yet each of these clauses provides for Party X to indemnify Party Y. Put another way, clause C6 limits the liability of Party X by reference to a series of clauses which provide that the liability of the Party X is, in effect, unlimited.
- 4.17 Further, by being expressed to be subject to clause C5 (the aggregate liability cap) but not clause C3 (consequential loss), there is the potential for confusion about whether the limitation on consequential loss applies to clauses C7 to C12.
- 4.18 Given that clause C6 is superfluous and confusing, Optus submits it should be deleted.

Clauses C7 to C12

- 4.19 In essence, clauses C7 to C10 provide for Party X to indemnify Party Y with respect to:
- death or personal injury, to the extent that it is caused by the negligent or intentional act or omission of Party X (clause C7);
 - all loss arising from or relating to damage to or loss of equipment, Facilities, Network or other tangible property of Party Y or any third person if caused by the negligence of Party X (clause C8);
 - making good any damage to or loss of equipment, Facilities, Network or other tangible property of Party Y or any third person if caused by any act or omission of Party X (clause C9); and
 - all loss arising from or incurred in connection with any claim by a third person against Party Y to the extent it relates any negligent act or omission by Party X (clause C10).

- 4.20 Clauses C11 and C12 provide for the access seeker to indemnify the access provider with respect to all loss arising out of:
- the reproduction, broadcast, use, transmission, communication or making available of any material (including data and information of any sort) by the access seeker and end user customer of the access seeker using a core service (clause C11); and
 - “breach of a person’s rights” or defamation involving the use of a core service (clause C12).
- 4.21 There is considerable overlap between several of these provisions. For example:
- clause C8 (relating to property damage that is the result of negligence) appears to be a subset of clause C10 (which relates to any loss involving negligence);
 - clause C8 (relating to property damage that is the result of negligence) appears to be a subset of clause C9 (which relates to property damage resulting from any act or omission); and
 - clause C12 (relating to liability for defamation) appears to be a subset of clause C11 (relating to liability for any information transmitted over a core service).
- 4.22 The connection between several of these provisions is difficult to understand. For example, clause C10 is made subject to clause C11. Yet there appears to be no reason for this.
- 4.23 Finally, it is not apparent what the ACCC means when it refers, in clause C12, to liability for a “breach of a person’s rights”.
- 4.24 In short, there is significant scope to rationalise and simplify clauses C7 to C12. Optus proposes a series of indemnities, under which Party X indemnifies Party Y with respect to:
- death or personal injury, to the extent that it is caused by the negligent or intentional act or omission of Party X;
 - making good loss or damage to property that results from any act or omission of Party X; and
 - any loss that results from a claim by a third party against Party Y that results from Party X’s negligence.⁵
- 4.25 Optus also proposes that the access seeker indemnify the access provider with respect to the reproduction, broadcast, use, transmission, communication or making available of any material (including data and information of any sort) by the access seeker using a core service.

⁵ In each case, this includes the acts and omissions of Party X’s “People” (as defined).

- 4.26 This is done on the basis that clause C11 already picks up liability for defamation and any "breach of a person's rights" that might result from the transmission, etc of information. However, it excludes liability for the acts of an end user. One of the principles that underpins the ACCC's model terms and conditions is that risk should be allocated to the party that is able to control it. The access seeker has no means to prevent a third party from using the network to defame a person. While the access seeker can require an indemnity from the end user, this will be of no value if the end user is impecunious, leaving the access seeker to bear a liability for actions over which it has no control.
- 4.27 While Optus considers that the best approach is to remove any indemnity for the actions of an end user, an alternative option may be to limit the access seeker's indemnity to the extent that it is able to recover from the end user. However, it may be better to consider this option in the context of a specific access dispute.
- 4.28 Finally, it is unusual for Party X to indemnify Party Y, but to then have no control over Party Y's management of a claim. Without such control, there is nothing to prevent Party Y incurring liability on Party X's behalf by, for example, making admissions. Some form of step-in rights are essential where an indemnity is granted. Optus has proposed such a clause.

Clause C13

- 4.29 Optus supports this provision, subject to two qualifications:
- it should be made clear (for the avoidance of doubt) that this clause applies to each of the indemnities referred to in paragraphs 11.6 and 11.7 above; and
 - it should be made clear (for the avoidance of doubt) that this clause applies to all contractual relationships of the innocent party (not merely agreements with customers in the form of a SFOA).

Clauses 14 to 16

- 4.30 Optus supports each of these provisions.

Clause 17

- 4.31 Taken together with clauses C18 to C21, these clauses seek to limit the liability of an access provider to an access seeker with respect to (among other things):
- delays in establishing a POI;
 - delays in supplying an interconnection service;
 - delays in supplying a service; and

- service interruptions.
- 4.32 Optus notes at the outset that this provision potentially conflicts with Division 10 of Part XIC, which empowers the Federal Court to order that an access seeker be compensated if an access provider has hindered or prevented the fulfilment of a SAO. This could include delaying or interrupting the provision of a service. The Court’s power to award compensation is not limited in the manner envisaged by clause C17. Optus assumes the ACCC does not purport to limit the remedies available under Division 10.

Clauses C18 to C20

Temporary alternative arrangements

- 4.33 In each of clauses C18 to C20, there is a provision relating to temporary alternative arrangements in the event of a delay in establishing a POI, interconnection service or core service. The nature of these provisions differ:
- clause C18 says the access provider must supply an alternative POI “if practicable” (for all practical purposes, this will be a judgement of access provider); and
 - clauses C19 and C20 simply state that the access provider “may” provide a temporary alternative.
- 4.34 Clause C18 is inadequate, and clauses C19 and C20 impose no obligation at all. Optus submits that where there is a delay in establishing a POI, interconnection service or core service, it is entirely fair and reasonable to expect an access provider to use its best endeavours to provide a comparable, temporary alternative at the same cost.

Waiver of charges

- 4.35 Clauses C18 and C20 make no provision for the waiver of charges where there is a delay in establishing a POI or supplying a core service. This stands in contrast with clause C19(b)(i), which expressly provides that the access provider must not charge for services which are not provided due to the delay. This distinction is inexplicable. There can be no basis for an access provider to be entitled to demand payment for a service it has not provided. Optus submits that, for each of these provisions, there must be no charge for services which are not provided due to delay.

Additional compensation

- 4.36 Each of clauses C18 to C20 provide that, once the relevant POI or service has been established, the access provider must pay an additional amount, equal to the Applicable Percentage of the Recurring Charges, payable over the Fee Waiver Period (i.e. the period of the delay). The Applicable Percentage of the recurring charges payable for the service is:

- 50% (for the first and second month);
 - 75% (for the second and third month); and
 - 100% (for the fifth and subsequent months),
- 4.37 Subject to one qualification (see following paragraph) Optus supports these provisions as sensible measures that provide a real incentive to an access provider to deliver services as contracted.
- 4.38 In each of clauses C18 to C20, this sum is payable only if a temporary alternative is not provided. Optus is concerned that, once a temporary alternative is established, the access seeker will have no incentive to complete the order by supplying the POI or service for which it has contracted. While an alternative form of service may be acceptable on a temporary basis, it is rarely a substitute for the service originally ordered (if it was, the access seeker would have ordered the alternative in the first place). It is vital that access providers are not permitted to supply less effective alternative forms of POI or service instead of these services they are contractually bound to provide. Optus submits that an appropriate and effective incentive would be established if the Applicable Percentage was payable even where a temporary alternative has been provided. This will ensure that the alternative option is, in fact, temporary.

Clause C21

- 4.39 Optus notes that there is no obligation on the access provider to waive charges during the “Outage Period” (i.e. the agreed repair period). This means that an access seeker is expected to pay for a service that is not being supplied. Optus considers this an extraordinary position for the ACCC to adopt by way of a model term and urges the ACCC to amend this provision in the terms suggested.
- 4.40 In relation to delays beyond the Outage Period, Optus supports the principle that:
- no charges are payable by the access seeker; and
 - no compensation is payable by the access provider.

Clause C22

- 4.41 Optus recognises that the limitation on consequential loss must be eased in order to accommodate the additional compensation payable under clauses C19 to C21. However, Optus submits that this could be achieved more clearly by referring to these provisions in the consequential loss clause itself.

Clause C23

- 4.42 Optus submits that the current provisions relating to compliance with obligations under s 118A of the Telecommunications

(Consumer Protection and Service Standards) Act 1999 (Cth) are inadequate.

- 4.43 The obligations themselves are enshrined in statute. They are not obligations to which parties are required to commit under an agreement for the supply of a core service. A provision which states that the parties should agree further procedures relating to compliance simply suggests that there is some intermediate step between the imposition of the obligation and compliance with it. To the extent that any additional procedures or provisions are required in order to ensure and facilitate compliance, they should be set out in the model terms themselves. Optus has proposed terms and conditions to this effect.

Suitability of the proposed drafting

- 4.44 See Attachment.

5. Clause D General Dispute Resolution procedures

- 5.1 Optus supports the ACCC's in-principle view to include General Dispute Resolution procedure in the model terms and conditions of access.

Comments on the ACCC's in-principle position

- 5.2 Optus supports the ACCC's in-principle position stated in its draft decision. In particular alternative dispute resolution should be considered before arbitration or legal proceedings but this is not to say parties must always exhaust ADR proceedings before notification of a dispute for arbitration.⁶

Suitability of the proposed drafting

- 5.3 Optus however considers the ACCC's in-principle position stated in its draft decision has not been accurately reflected in the proposed drafting.
- 5.4 The draft Clause D6 states that "*A party may not commence legal proceedings in any court or commence any arbitration whether pursuant to Part XIC of the TPA or otherwise ...unless ...the Non-Billing Dispute has been referred for resolution in accordance with the dispute resolution procedure*".
- 5.5 This appears to be inconsistent with the ACCC's in-principle position as this clause imposes a requirement that parties should

⁶ ACCC, Draft Determination –Model Non-price Terms and Conditions September 2008, p20,21

only commence an arbitration after having pursued a dispute resolution process.

- 5.6 Optus is very concerned that the inclusion of this clause would allow parties the opportunity to use legal action as a delay mechanism in dispute proceedings. Such an outcome is clearly not in the interests of end users.
- 5.7 Furthermore Optus submits that it is not always practical to enter into a dispute resolution process especially when parties do not mutually agree to participate or that it involves complex issues that are unlikely to be resolved in a dispute resolution process.
- 5.8 Accordingly, Optus proposes the terms “or commence any arbitration whether pursuant to Part XIC of the TPA” to be deleted from Clause 6.

6. Clause E Confidentiality provisions

- 6.1 Optus supports the ACCC’s in-principle view to include Confidentiality provisions in the model terms and conditions of access.

Matters upon which submissions are invited

- 6.49 The ACCC has invited views on the following particular matter:
 - (c) Is the definition of ‘confidential information’ (Clause L) appropriate? Should a standard form of confidentiality undertaking be included to support the model terms and conditions relating Confidentiality Provisions (Clause E)? If so, what form should this confidentiality undertaking take?
- 6.50 Optus considers that the ACCC should adopt a standard form of confidentiality undertaking.
- 6.51 The ACCC may take the view that confidentiality requirements are a private matter, to be addressed through negotiation between the parties involved. However, there are two problems with this approach. First, the time and resources required to achieve this result are likely to be substantial. Well resourced parties, primarily the incumbent, are better able to afford this time and resources than are less resourced parties - that is, access seekers. Second, there is likely to be an imbalance of power in such negotiations in favour of the access provider.
- 6.52 Consequently, the ACCC should specify a standard form of confidentiality undertaking. It should seek to be clear and unambiguous in its terms, in order to minimise required correspondence and negotiations. It should be administratively simple and minimise compliance costs. To the extent it meets these goals a generic regime would impact uniformly on both access providers and

access seekers, and reduce the time and resources access seekers would need to devote to procedural issues.

Comments on the ACCC's in-principle position

- 6.53 Optus supports the ACCC's in-principle position. In particular, confidential information should be used or disclosed only where it is necessary for a legitimate purpose.
- 6.54 Optus considers examples of legitimate purpose for disclosure of confidential information would be where end users consent to the disclosure in ensuring a smooth connection of service.
- 6.55 For example, Telstra is able to reject an Optus ULLS order due to the presence of a complex service attached to the service number. In that case, Telstra should provide Optus with information such as the type of complex service the number is attached to so that Optus can remove the complex service to allow a ULLS request to continue.

Suitability of the proposed drafting

- 6.56 Optus considers the draft clauses are appropriate and the ACCC's in-principle position has accurately been reflected in the proposed drafting.
- 6.57 Optus however would further propose to the ACCC to include a clause which contains an obligation on the access provider to ensure it establish and maintain security measures to safeguard the confidential materials, particularly when (as concurred by the ACCC) the Information Security Strategy (ISS) under the Telstra Operational Separation plan cannot be relied upon by an access seeker to protect its confidential information.
- 6.58 Accordingly, Optus proposes that the following amendment to Clause E7:

Each party must co-operate in any action taken by the other party to:

- (a) *protect the confidentiality of the other party's Confidential Information and establish and maintain security measures to safeguard the Confidential Information from unauthorised access, use, copying reproduction or disclose.*

7. Clause F Communications with End-Users

- 7.1 Optus supports the ACCC's in-principle view to include Communications with End-Users provisions in the model terms and conditions of access.

- 7.2 Optus supports the ACCC's in-principle position stated in its draft decision. This is particularly so when access seekers often have to rely on the Access Provider's technicians to perform services which means that access seekers are placed in a vulnerable position should the access provider try to 'win back' customers.
- 7.3 Optus further considers the in-principle position has accurately been reflected in the draft determination.

8. Clause G Network Modernisation and Upgrade provisions

- 8.1 Optus supports the ACCC's in-principle view to include Network Modernisation and Upgrade provisions in the model terms and conditions of access.
- 8.2 Optus generally supports the ACCC's in-principle position but is concerned with some of the proposed drafting. Optus' comments are addressed below.

Matters upon which submissions are invited

- 8.3 The ACCC has invited views on the following particular matter:
- (d) What event, such as a decision made by a particular committee or executive in respect of a major network modernisation or upgrade, should trigger the access provider's obligation to notify access seekers under the Network and Modernisation and Upgrade Provision (Clause G)?
- 8.4 Optus considers that the access provider's obligation to notify access seekers should be triggered by its approval (at Board level, or senior management level) of a project (or funding for a project) that includes the Major Network Modernisation and Upgrade. This issue is discussed further below.

Suitability of the proposed drafting

Access Seekers Need Sufficient Notice to Avoid Disruptions

- 8.5 Optus agrees with the concept proposed in clause G.1(a) whereby the access seeker is given sufficient time to consider potential disruptions and where possible avoid or minimise the disruptions.
- 8.6 Optus supports the need for access seekers to be provided with a substantial notice period if Major Network Modernisation and Upgrades proceed. Major Network Modernisation and Upgrades require access seekers (there is likely to be more than one affected by each upgrade) to alter the existing service or provide a new substitute service.

- 8.7 Without substantial notice there would not be sufficient time for multiple access seekers to plan, obtain approval for, obtain funding for and build infrastructure for replacement or substitute services.
- 8.8 The service to which these terms will apply are core declared services, which are provided by landline. Avoiding or minimising potential disruptions for landline services is more difficult than for wireless services.
- 8.9 Accordingly, it is likely that in the event of any Major Network Modernisation and Upgrade access seekers will have to plan, obtain approval for, obtain funding for and build infrastructure for replacement or substitute services, if they are to avoid or minimise potential disruptions.
- 8.10 The result of not providing access seekers with sufficient notice to provide alternative or substitute services is that end users would be forced to accept the access provider's alternative service or not providing any service. This would not be consistent with the LTIE.
- 8.11 Clause G.1(a) provides for a notice period being the greater of 'an equivalent period of notice' or 6 months. Optus address both of the possible notice periods below.
- 8.12 The term 'equivalent period of notice' is used in clause G.1(a).
- 8.13 Optus agrees with this concept as it gives access seekers time to plan, obtain approval for, obtain funding for and build infrastructure for replacement or substitute services.
- 8.14 The term 'equivalent period of notice' is not defined.
- 8.15 Optus believes that the term 'equivalent period of notice' is subject to multiple definitions. The definition of "equivalent period" could vary from when the first tentative approvals for the upgrade are made, to, when the upgrade plan was at a point of not being able to be revoked. These two possibilities are vastly different points in time.
- 8.16 If access seekers are to avoid or minimise potential disruption, then Optus suggest that the term 'equivalent period of notice' should be defined in a way the provides access seekers with a period of time of broadly similar length to the period the access provider has to make decisions in regard to the affected services.
- 8.17 Accordingly, Optus propose that "equivalent period of notice" be defined to mean a number of things which all commence at the beginning of the planning stages for such upgrades.
- 8.18 Optus suggest the following definition would be suitable.
- 8.19 A new clause G.10 be inserted as follows.

G.10 For the purposes of this clause G, an 'equivalent period of notice' includes, the period of notice commencing at the earlier of:

- (a) *the time that the access provider approves, at a general level, the Major Network Modernisation and Upgrade, this includes approval of a project that includes the Major Network Modernisation and Upgrade;*
- (b) *the time that the access provider approved at, a general level, the funding for the Major Network Modernisation and Upgrade, this includes approval of the funding of a project that includes the Major Network Modernisation and Upgrade; or*
- (c) *any other time it can be said that the access provider has committed to the Major Network Modernisation and Upgrade.*

8.20 In regard to the minimum period of six months, this is the minimum default period of notice of the Major Network Modernisation and Upgrade.

8.21 Optus suggests that six months is insufficient time for multiple access seekers to plan, obtain approval for, obtain funding for and build infrastructure so they can provide replacement or substitute services.

8.22 A more appropriate minimum timeframe would be 12 to 24 months, depending on the upgrade being undertaken.

8.23 **CiC**

8.24 **CiC**

8.25 **CiC**

8.26 **CiC**

8.27 **CiC**

8.28 Accordingly, Optus seek the following amendment to clause G.1.

G.1 “... provides itself (and in any event not less than 12 - 24 months written notice with the exact period to be agreed between the parties based on a what is reasonable as a result of the Major Network Modernisation and Upgrade) before any such ...”.

8.29 Optus does not believe that the obligation of the access seeker to consider ‘in good faith’, an amendment to the period of notice (clause G.5) as sufficient to address the issues discussed above.

8.30 The clause G.5 obligation to consider ‘in good faith’ does not incorporate any requirement of reasonableness on behalf of the access provider and does not require the access provider to do anything that is not in its interest.

- 8.31 In practice, access seekers will be requesting more time than that which has been given in the notice.
- 8.32 As any delay to a Major Network Modernisation and Upgrade has a negative financial impact on the access provider the access provider has no incentive to allow access seekers more time, regardless of the reasoning provided by access seekers.
- 8.33 Clause G5 allows access providers to satisfy G5 without ever having to accept any of the reasoning of an access seeker.

The Notice of a Major Network Modernisation and Upgrade has to be Sufficiently Detailed

- 8.34 Optus submit that there needs to be a minimum level of detail in the notice, provided under clause G.1(a), of a Major Network Modernisation and Upgrade.
- 8.35 Currently, the proposed clause G does not require any minimum level of information to be provided.
- 8.36 In the past Optus has received notices simply stating that a certain piece of infrastructure is going to be unavailable from a certain date.
- 8.37 Major Network Modernisation and Upgrades affect core declared services to numerous end-users of multiple access seekers.
- 8.38 Optus believe that the provision of some basic information will definitely assist in reducing the effect on end-users. Without this information access seekers are not in a position to know how to optimise their networks and services in the most efficient manner and in the short timeframe given by the access seeker.
- 8.39 **CiC**
- 8.40 **CiC.**
- 8.41 **CiC**
- 8.42 **CiC**
- 8.43 **CiC**
- 8.44 Optus suggest that access seekers need information such as:
- (i) the exact services that will be affected;
 - (ii) whether the whole, or only part of, the services will be affected;
 - (iii) opportunities access seekers will have to maintain the current services by replacing the infrastructure affected;

- (iii) what, if any, steps the access provider is going to take to minimise disruption to the access seekers services;
- (iv) information regarding any alternative service or services the access provider will provide to access seekers on a temporary, or permanent, basis;
- (v) the timeframe of the Network Upgrade;
- (vi) charges associated with re-connection of service;
- (vii) the timeframe for no further connection of services; and
- (viii) other reasonably requested information in regard to the Network Modernisation and Upgrade.

8.45 Based on the wording above, Optus suggests that clause G be amended to include the following new clause G.10.

8.46 “G.10 All notices provided under clause G.1(a) must include the following information:

- (a) the exact services that will be affected;
- (b) the exact manner in which the services will be affected, including whether the services will be affected, in whole or, in part;
- (c) the date, or dates, on which the services will be affected;
- (d) whether alternative services will be offered to access seekers on a temporary or permanent basis and essential detail of those alternative such as the date of supply, cost and interconnection requirements;;
- (e) what steps the access provider is taking to minimise disruption to the services;
- (f) what actions the access seeker can take to minimise disruption to its customers; and,
- (g) details of who the access seeker can contact to obtain all reasonably requested information about the Network Modernisation and Upgrade;

Access Provider should work with access seekers to reconnect services

8.47 Optus further submits that the model price terms and conditions should further include clauses which place an obligation on Telstra

to work with the affected access seekers in the event of a network modernisation to facilitate reconnection of services.

- 8.48 As shown in the examples of relocation of facilities at **CiC** Telstra has not assisted Optus to reconnect its services elsewhere.
- 8.49 Optus further considers it is unreasonable that access seekers have to pay Telstra costs of reconnection of existing services, given that the relocation is undertaken at Telstra's discretion and Telstra has not sought access seekers' agreement before relocating its facilities. Currently, access seekers are obliged to vacate and remove or reconnect ALL services at their own cost. **CiC**
- 8.50 Optus considers that the model price terms and conditions should place an obligation on Telstra to facilitate reconnection of services at no charge. That is, no connection charge should be payable where network modernisation is undertaken at Telstra's discretion and Telstra has not sought access seekers' agreement before relocating its facilities.

9. Clause H Suspension and Termination

- 9.1 Optus accepts the ACCC's in-principle view to include Suspension and Termination in the model terms and conditions of access.

Comments on the ACCC's in-principle position

- 9.2 Optus generally accepts the ACCC's in-principle position on Suspension and Termination. Optus however is concerned that:
1. The proposed termination provisions do not address circumstances in which an access seeker would be entitled to terminate part, or all of, the services or agreement as a result of contractual breaches of the access provider; and
 2. In some circumstance, remedial actions requested by access provider might take longer than 20 business days.
- 9.3 Optus considers the provision should allow the 20 business days to be extended in circumstance where reasonably required as a result of the remedial action requested by the access provider. This prevents the situation where the access provider requests remedial action that cannot be undertaken within 20 business days and therefore is able to engineer a right to terminate part or all of the services.

Suitability of the proposed drafting

Termination Rights of access seekers

- 9.4 As discussed elsewhere, Optus is concerned that the proposed clauses do not provide for termination by access seeker in the circumstances set out in Clause H2F(a), (b) and (c), e.g. non-payment by the access provider or breach of a material obligation.
- 9.5 According Optus proposes Clause H to be amended in the following manner:
- make clause H.2 mutual (and make all other consequential amendments), or
 - insert new clauses that deals with suspension and termination by the access seeker.
- 9.6 Optus further considers the non-payment clause H(2) should be amended to ensure the service does not terminate in the event that there is a billing dispute on hand.

Termination for a breach of a Fundamental Term

- 9.7 Optus submits that Clause H uses the phrase “material obligation” when referring to a contractual breach that gives the other party a right to terminate part, or all of, the agreement.
- 9.8 It is not in dispute that many contractual counter parties are comfortable with and use the phrase “material obligation” for this purpose.
- 9.9 Optus believes that the most recent judicial opinion favours the use of the phrase “fundamental term”.

Remedial Action May Take More Than 20 Business Days

- 9.10 As discussed elsewhere, Optus also submits that when an access seeker institutes remedial action as specified in the Suspension Notice, set out in clauses H.2(f) and H.4(d)(iii), that the 20 Business Day period be extended where reasonably required as a result of the remedial action requested by the access provider.
- 9.11 Optus suggest that both clause H.2(f) and clause H.4(d)(iii) be amended to read, “...within 20 Business Days (or other period as is reasonable as a result of the remedial action requested in the Suspension Notice)...”.

10. Clause I Amendment of Operational Manuals

- 10.1 Optus accepts the ACCC’s in-principle view to include amendment of operational manuals in the model terms and conditions of access.

Comments on the ACCC's in-principle position

Unilateral amendment

- 10.2 Optus does not accept the ACCC's in principle position stated its draft determination. In particular, Optus considers that the access provider should not be entitled to amend the operational manual on a unilateral basis. Given that the procedures to be implemented are to apply to all service providers, amendments should be made only with access seekers' agreement.
- 10.3 Optus accepts the access provider requires an ability to amend its Operational Manuals but there is always a risk that the unilateral right of variation:
- will be used to impose an obligation on that access seeker that is unreasonable, or
 - will be used for purposes that deprive the access seeker a fundamental part of the bargain it obtained when entering into the agreement.
- 10.4 In the past, Optus has received from the access provider unilateral changes in the Operations Manual that were unreasonable or deprived Optus of a fundamental part of the benefits that it had been entitled to under the agreement signed with Telstra. This issue is discussed further below.

Capacity Threshold

- 10.5 **CiC**
- 10.6 **CiC**
- 10.7 **CiC**
- 10.8 **CiC**

Forecasting Process

- 10.9 As mentioned elsewhere, Optus has to provide Telstra with detailed forecasts for ULLS at the exchange. Telstra has recently imposed more onerous restrictions on the forecasting timelines through amendments on the ULLS Operational Manual.
- 10.10 The amendment allows Telstra to "suspend, defer or reject some of all ULLS Requests for the relevant period" when:
- Optus fails to provide the forecasts in a "timely manner"; or
 - Optus submits the forecasts in an incorrect format; or

- The period of the ULLS Requests Optus differs significantly from the Forecasts provided for that period.”⁷

10.11 Optus considers the amendment is unreasonable and unfair when the obligations are not material obligations that should allow Telstra to suspend all ULLS requests for the relevant period.

Complex Service

10.12 Optus notes that end-users often have complex services associated with the service number.

10.13 Telstra has amended the ULLS operational manual by including the following clause:

“The Customer or their End User must request the removal or dissociation of a Complex Telephone Service which exists on a Communication Wire on which ULLS has been requested to prior to a ULLS Request being submitted (or the relevant request will be rejected)”.

10.14 Optus considers the amendment is unreasonable as Optus cannot guarantee all complex services can be identified when submitting the ULLS Request to Telstra. In addition, this is impractical when it comes to current point of sale procedures and when managing expectations of end users. Often Optus and the end users are not aware of the existence of the complex service until Telstra notifies Optus that the Communication wire does not pass the Service Qualification (SQ) due to line conditioning.⁸ This rejection notification can be received in the next available file or up to two clear business days after the initial ULLS Request.

Retargets –Cutover date and time

10.15 Telstra further amended the ULLS Operational Manual to the effect that it removes its obligation from contacting Optus via phone when Telstra cannot meet a Cutover date and time and that it does not provide Optus with an opportunity to confirm if the reschedule time is acceptable.

10.16 In Clause 11.7.1 of the ULLS Operational Manual, the following changes are made:

⁷ Telstra OPM, 14 Forecasting Process

⁸ When a ULLS Request is submitted to Telstra, an access seeker will request Telstra to perform a Service Qualification (SQ) query which checks the availability of the ULLS service.

~~“Telstra must contact the Acquirer by telephone as soon as practicable to renegotiate a new Cutover date/time. Telstra will use reasonable endeavours to offer the earliest next available Cutover date/time to the Acquirer. The Acquirer will confirm whether the new Cutover date/time is acceptable and upon acceptance Customer. Telstra will confirm the Cutover date/time by a renegotiation advice.”~~

- 10.17 Other examples of unreasonable amendments of the Operational Manual by Telstra include:
- 10.18 The insertion of “*Service Qualification does not take account of proposed Network Upgrades and it is the Customer’s responsibility to check for Network Upgrades in accordance with notification processes available from time to time...*”;
- 10.19 The deletion of “remove the line conditioning if requested by the Acquirer”⁹ in the event that the communication wire does not pass the Service Qualification due to line conditioning;
- 10.20 The insertion of “*The Customer must endeavour to balance Cutover activity volume across any given day between AM and PM appointments*” in Section 8.2, p.28 of the Manual;
- 10.21 In the case of a completed transfer which is an Invalid Transfer due to end user rescinding the transfer within the cooling off period, Telstra has amended the time for Reversals from 10 business days to 2 business days¹⁰;
- 10.22 In the event that the access seeker address supplies mismatch with the Telstra’s systems, Telstra amended the relevant clause to words of the following effect “If the Customer makes excess enquiries to Telstra...as reasonably determined by Telstra, Telstra may review this enquiry mechanism in conjunction with the Customer in accordance with the escalation process (described in paragraph 11) or the service review process (described in paragraph 16) to agree a suitable solution which results in queries returning to a reasonable level. If a solution cannot be agreed or has not been effected in the required time, Telstra may cease to offer it”. Optus submits the amendment is unreasonable as the volume of queries generated is outside Optus’ control.
- 10.23 The insertion of the clause Network Upgrades:
- “Under the Telstra Unconditioned Local Loop Service Schedule, Telstra may conduct Network Upgrades that affect Unconditioned Local Loop Services. Additional information about Network Upgrades will be provided to Customers as relevant processes are developed, for example, by the way of upgrades to this OPM, Customer Announcements or a separate Network Upgrades Operations Manual.”*¹¹

⁹ Clause 7 p23

¹⁰ Clause 13.2

¹¹ Clause 8.5 p33

- 10.24 Optus considers the Network Upgrades clause is unreasonable as it does not include a minimum notice period and details of the notice. (discussed above in Network Modernisation and Upgrade Provisions)

Suitability of the proposed drafting

- 10.25 For the reasons noted above, Optus suggests that amendments should be made only with access seekers' agreement and / or that the following clause I.2 and I.3 be added.

"I.2 Where the Operational documents are amended in accordance with clause I.1 and the access seeker believes that:

- (a) the changes are unreasonable; or*
- (b) deprive the access seeker with a fundamental part of the bargain contained in the agreement;*

the access seeker can commence a non-price dispute in relation to the changes to the Operations Manual only on the basis set out in paragraphs (a) and (b).

I.3 Where an access seeker commences a dispute in accordance with clause 1.2 the access provider is barred from arguing that clause I.1 gives the access provider the power and right to unilaterally amend the Operational document."

11. Clause J ULLS Ordering and Provisioning Process

- 11.1 Optus supports the ACCC's in-principle view to include ULLS Ordering and Provision Process in the model terms and conditions of access.

Matters upon which submissions are invited

- 11.2 The ACCC has invited views on the following particular matter:
- (e) Would access seekers use the additional ULLS ordering and provisioning processes under Clause J? Should the model terms and conditions provide for a six month period to develop the additional ULLS ordering and provisioning processes under Clause J? If not, what other period (if any) should be allowed? Should the model terms and conditions provide more detailed requirements concerning each supporting the existing Transfer ULLS (T-ULLS) ordering and provisioning process? If so, what terms and conditions should be specified?

- 11.3 Optus considers that it would be likely to use the additional ULLS ordering and provisioning processes under Clause J. A six month period would be appropriate to develop the additional ULLS ordering and provisioning processes under Clause J.

Comments on the ACCC's in-principle position

- 11.4 Optus supports the ACCC's in principle position on the ULLS Ordering and Provisioning Process provision.

Additional Model Terms for Other Aspects of Access

- 11.5 The ACCC has invited views on whether model terms and conditions should be specified for other aspects of access to core services in addition to those already identified.
- 11.6 Optus wishes to raise a number of other aspects of access which are set out below.

The Capacity Threshold issue

- 11.7 Optus submits the model terms and conditions should include clauses which ensure Telstra will not unreasonable limits the number of services that can be provisioned per day per exchange.
- 11.8 Telstra limits the number of services that can be provisioned per day per exchange to such an extent that it materially reduced the services that Optus could sell. **CiC**
- 11.9 This occurred where there was no such limit previously included in the agreement and where other limits were in the agreement they were included in parts of the agreement that the access provider could not unilaterally amend.
- 11.10 The application of the cap restricts Optus from competing with Telstra especially when Telstra does not apply this capacity threshold to itself. **CiC**
- 11.11 **CiC** It appears that Telstra uses its best endeavours to deploy its workforce in accordance to its own needs.
- 11.12 To prevent Telstra from unreasonably limiting the number of services that can be provisioned per day per exchange would facilitate the supply of services to end-users by access seekers and would not be unduly burdensome to Telstra. Accordingly this would represent fair and reasonable terms and conditions of access.

The "Connect Outstanding" issue

- 11.13 Optus submits the model terms and conditions should include clauses which ensure Telstra will assist access seekers to connect new occupants at a premise with the ULLS where the existing

occupant of that premise has not cancelled its existing telephone service.

- 11.14 Optus has difficulty in connecting these new occupants, since Telstra typically refuses to connect the customer in these circumstances until the old service has been cancelled. A key issue is that Telstra does not accept any documentary proof of occupancy from the new resident in the case of a ULLS connection. Optus' usual process for connection in such circumstances is to connect the customer on a resale WLR service and then migrate over to ULLS. The entire process takes on average 27 days.
- 11.15 Optus considers this issue could be resolved if Telstra would act immediately to disconnect the old service and facilitate connection of the new service on receiving proof of occupancy.
- 11.16 Adopting this approach would facilitate the supply of services to end-users by access seekers in circumstances where the existing occupant of that premise has not cancelled the service. It would not be unduly burdensome to Telstra to act immediately on receiving proof of occupancy. Accordingly this would represent fair and reasonable terms and conditions of access.

The “service levels” issue

- 11.17 Optus considers the ACCC should include a requirement around service levels in the model terms and conditions. Presently these tend to be on a best efforts basis with limited, if any, service levels.
- 11.18 The ACCC should consider developing some general principles to assist in the development of service levels that will help promote the interests of end users. As a minimum this should include the following conditions:
- Access providers should be obliged to provide levels of service on a non-discriminatory basis and equivalent to that which they provide to themselves; and
 - Access providers to consider requests from access seekers to develop SLAs with agreement not to be unreasonably withheld.

The “Complex services” issue

- 11.19 Optus submits the ACCC should include in its model terms and conditions clauses that ensure Telstra can perform real time service qualification and that Telstra provides access seekers with details of the types of complex services attached to a given service number.
- 11.20 When a ULLS Request is submitted to Telstra, an access seeker will request Telstra to perform a Service Qualification (SQ) query which checks the availability of the ULLS service. Currently, service qualifications performed by Telstra do not inform Optus of the type(s) of complex service attached to a particular service number.

- 11.21 In many cases the customer does not know the type of complex service on the line since these are legacy services that are no longer used. Therefore often Optus and the end user are not aware of the existence of the service until Telstra notifies Optus that the Communication wire does not pass the Service Qualification (SQ) due to line conditioning. Access seekers need to be able to inform the customer of the type of complex service so the customer can be provided with all of its options (including disconnecting the existing service if it is no longer required or if a substitute service would be suitable).
- 11.22 Service qualifications performed by Telstra typically inform access seekers that a complex service is attached, but will provide no further details. The result is that in these circumstances Optus has to turn away the end-user due to the lack of information – even though it might in fact be the case that Optus could indeed meet all the customer’s requirements.
- 11.23 Further, the SQ performed by Telstra can take up to two clear business days after the initial ULLS Request before the rejection notification is received. This represents a poor experience for end users, particularly if Optus has to subsequently reject the orders. This process is also impractical when it comes to current point of sale procedures and when managing expectations of end users.
- 11.24 Optus submits that to require Telstra to provide access seekers with details of the particular types of complex services attached to a given service number, and to perform service qualifications in “real time” (i.e. on the same day), would facilitate more efficient access to the ULLS by access seekers, thereby benefiting end users – and is unlikely to be unduly burdensome to Telstra. Accordingly this would represent fair and reasonable terms and conditions of access.

Provisioning time frames, Copper quality, and Fault handling

- 11.25 Optus would observe that the model terms and conditions do not appear to address some important concerns. In particular, Optus submits that Telstra does not provide access seekers with a level of service equivalent to that it provides to itself, particularly in the areas of time frames for supply of new customers; capacity thresholds on daily ULLS cutovers for supply of new customers; copper quality; and fault handling.
- 11.26 The model terms should address these issues, which are set out in more detail below. To do so would facilitate access seekers’ supply of ULLS-based services to end-users – and is unlikely to be unduly burdensome to Telstra.

Provisioning time frames

- 11.27 Provisioning time frames differ according to the ULLS Band. To initiate a ULLS order, Optus sends an ULLS request to Telstra who will respond with acceptance or rejection. If the order is accepted,

Optus will then send a Cutover Notification advice which will nominate a cutover date. This Cutover date must be from five to thirty Clear Business Days from the date of receipt of the Cutover Notification by Telstra for Bands 1 and 2, and from ten to thirty Clear Business Days after the date of receipt of the Cutover Notification by Telstra for Bands 3 and 4.

- 11.28 The effect of this is that for Bands 1 and 2 the connection can only occur, at absolutely best case, 7 days (and more typically 9 days) after we take the order from the End User and in Bands 3 to 4, 12 days after connection. This applies to both in-place services as well as services that require a new connection. The delays in the provisioning process expose Optus to potential loss of customers and/or significant CSG claims.
- 11.29 By contrast, Telstra Retail can take an order from a customer and connect the service within 2 days if there is an in place service. Clearly access seekers' provisioning time frames are not equivalent.
- 11.30 In addition to these transactional issues, Telstra has placed an arbitrary cap (Capacity Threshold) on daily ULLS cutovers at an exchange level AND at a macro overall daily level. **CiC** The application of the cap is not applied 100% of the time but Optus has no visibility as to how, or when, it will apply.
- 11.31 **CiC** The application of this capping is unnecessary especially as Optus provides detailed forecasts at the exchange level for the next 3 months and macro forecasts for the next year. Telstra appears to make little attempt to size its workforce in response to access seekers' demand forecasts.
- 11.32 By contrast, it is a safe assumption that Telstra uses best endeavours to deploy its workforce in accordance to its own needs. **CiC**

Copper quality

- 11.33 On copper quality, while Telstra has been willing to attempt to rectify telephony faults within the CSG periods, it has not been willing to rectify any fault that manifests itself in a degradation of the quality of the broadband service experienced by the end user customers of access seekers. Such faults are not given any SLA by Telstra.

Fault handling

- 11.34 On fault handling, the level of service provided by Telstra Wholesale to access seekers has been poor. Optus has a CSG obligation to its own customers to repair faults within a specified period of time. To meet our obligation, we rely on Telstra to provide maintenance on the copper (but not the Customer Premises Equipment), i.e. POI to Network Boundary. Over the last six months Telstra Wholesale's performance in meeting SLAs has been particularly poor. **CiC**

- 11.35 In summary, Telstra has not met its obligation of providing equivalent supply, quality of service and fault handling performance.
- 11.36 Accordingly, Optus considers that the model non-price terms and conditions should specify requirements relating to the provision of equivalent supply, quality and fault handling of the declared service. In particular, it should specify terms which guarantee access seekers an equivalent level of service (with specified SLAs for each and penalties if these are not met) in the following areas:
- time frames for supply of new customers;
 - capacity thresholds on daily ULLS cutovers for supply of new customers;
 - copper quality; and
 - fault handling.

Suitability of the proposed drafting

- 11.37 In general Optus accepts the proposed drafting.
- 11.38 Optus accepts clause J19 that “*access seeker must accept any risk to the quality of, connectivity of and suitability for providing voice and/or data services on the existing copper path.*”
- 11.39 Optus however proposes that the ACCC should further include a clause which stipulates Telstra will provide equivalent supply, quality of service and fault handling performance (as discussed above) to that which it supplies to itself.

12. Clause K Facilities Access

- 12.1 Optus supports the ACCC’s in-principle view to include Facilities Access in the model terms and conditions of access.

Matters upon which submissions are invited

- 12.2 The ACCC has invited views on the following particular matter:
- (f) Should the model terms and conditions regarding facilities access include as a means to overcome capacity limits on the MDF the allocation of terminal blocks on the customer side of the MDF? Would published listings of exchanges approaching full capacity benefit service providers? Should model terms and conditions allow service providers to access other service providers’ requirements on an ‘as needs basis’? Should such access be restricted to certain personnel or an independent third party? Would confidentiality undertakings be necessary?

12.3 Optus considers that:

- the model terms and conditions regarding facilities access should include a means to overcome capacity limits on the MDF the allocation of terminal blocks on the customer side of the MDF;
- published listings of exchanges approaching full capacity would benefit service providers; and
- the model terms and conditions should not allow service providers to access other service providers' requirements on an 'as needs basis', since such information is commercially sensitive.

Comments on the ACCC's in-principle position

12.4 Whilst Optus broadly supports the ACCC's proposed terms and conditions relating to facilities access, there are several areas where Optus believes further provisions are required in order to ensure that access will be provided on terms that are fair and reasonable, in what has become a major area of dispute between access providers and access seekers in recent years.

12.5 Set out below are Optus comments on the ACCC's proposed terms and conditions. Optus' proposed amendments to these terms and conditions are set out in the Attachment.

Clause K.3 – options to satisfy an access seeker's request

12.6 Optus supports the requirement that an access seeker consider ways to satisfy an access seeker's request before refusing access. The examples given in clause K.3 are useful, and several additional options have been suggested. However, it must be made clear that these are not exhaustive.

12.7 It should also be an explicit requirement that, having considered available options, the access provider is then bound to work with the access seeker to identify and implement the most timely and cost-effective option. Clause K.3A is intended to achieve this.

12.8 Optus also recognises that there may be cases where it is genuinely not possible to provide access to an exchange for the purposes of enabling the access seeker to acquire a core service. However, it must also be recognised that alternative forms of interconnection, using facilities located outside of the exchange, may not provide a technical and operational quality of interconnection that is equivalent to that which the access provider supplies to itself. If external interconnection is the only option available, the parties should be required to negotiate in good faith to implement the option that provides a technical and operational quality of interconnection that is as close as possible to that which the access provider supplies to itself.

Clause K.4 – reasonably anticipated requirements

- 12.9 While Optus supports increased transparency surrounding the capping of exchanges, there are two serious omissions in this proposed term:
- (a) That it does not address the issue of when it is acceptable for an access provider to refuse access to an exchange based on a claim that the capacity is required to satisfy the access provider's "reasonably anticipated requirements"; and
 - (b) That no provision is made for the access seeker to reserve capacity for its own requirements prior to the capacity being locked up by the access provider.
- 12.10 Optus submits that these have the potential to be major sources of dispute between access seekers and access providers that need to be addressed in the model terms and conditions.
- 12.11 Optus' chief concern is that there is a need for a limit on the length of time for which the access provider can reserve capacity for its own requirements. Claims that capacity is required years into the future cannot, in Optus' submission, be based on requirements that are "reasonably anticipated".
- 12.12 To address this issue, Optus proposes that space in an exchange may only be reserved for future requirements if the access provider has firm plans to use the space within a reasonable period of time, which is not to exceed six months. This is reflected in amendments to clause K.4.
- 12.13 Optus has also proposed amendments to clause K.4 to provide that an access provider can only refuse access on the basis of its reasonably anticipated requirements if it has first given the access seeker a reasonable opportunity to reserve capacity for the access seeker's reasonably anticipated requirements. If facilities access is to be provided on a fair, reasonable and non-discriminatory basis, access seekers must have the same ability as the access provider to reserve capacity for their own future needs before it is locked up by the access provider.

Clause K.9 – verification of the access provider's decision

- 12.14 Optus has proposed minor amendments to clause K.9 to ensure that:
- an access seeker can verify the access provider's decision both by requesting information and arranging for an inspection; and
 - it is clear that the access provider has a right to inspect the exchange itself. It is vital that an access provider is not able to delay the process through a disagreement as to the identity of the independent person.

Clause K.14 – information relating to Common Infrastructure Works

- 12.15 Optus does not believe it is reasonable to require the access seeker to demonstrate that it is considering undertaking Common Infrastructure Works. Such a requirement could be misused by an access provider to delay works that would allow access to be granted.

Clause K.26 – certification of contractors

- 12.16 At page 47 of its draft decision, the ACCC stated that:

"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"

- 12.17 Optus supports the ACCC's decision, but notes that no provision has been inserted into the proposed model terms to reflect this. Optus has proposed a new clause K.26 to apply the ACCC's decision.

Suitability of the proposed drafting

- 12.18 See Attachment.