



**Nextgen submission on Draft Terms for the
“Telecommunications Final Access
Determination inquiries — non-price terms
and conditions”**

January 2015

INTRODUCTION

The Nextgen Group (Nextgen) welcomes the opportunity to make this submission in response to the ACCC's recent request for comments on the proposed drafting of non-price terms and conditions (NPTCs) which may be included in forthcoming Final Access Determinations (FADs).

As outlined in our earlier submissions on the proposed NPTCs, Nextgen supports the ACCC's consideration of non-price terms and conditions and supplementary prices, and recognises that any FAD in this area has the potential to provide a 'fallback' set of terms and conditions for both access seekers and access providers in situations relating to the provision of a declared service where a commercial agreement cannot be reached.

While Nextgen has previously indicated that there could be merit in the development of comprehensive as opposed to targeted NPTCs, it has also stressed that the drafting of such a term set requires considerable care. To this end, our primary sentiment in relation to the ACCC's set of Draft terms is that the fallback terms should not unduly compromise the interests of access providers for the benefit of access seekers – as outlined in this submission, there are a number of areas within the proposed Draft terms which cross this threshold and should be reconsidered.

As Nextgen is primarily involved in the provision of transmission services, the comments made within this submission accordingly reflect this perspective.

1 COMMENTS

In respect of the draft terms Nextgen's comments mainly relate to the following areas:

- Schedule 1 – Interpretation and definitions;
- Schedule 6 – Suspension and termination;
- Schedule 7 - Liability and Indemnity; and
- Schedule 9 - Network modernisation and upgrade notice periods

Below we have outlined our concerns, and proposed wording (in red font), for each of the areas above.

Schedule 1 - Interpretation and definitions

We submit that the following term should be included:

Excluded Loss means indirect, consequential and special loss, and loss of revenue, savings, opportunity, goodwill or data and business interruption costs.

With a corresponding change being made to the definition of 'Loss', as shaded:

Loss includes liability, loss, damage, costs, charges or expenses (including reasonable legal costs), **but does not include Excluded Loss.**

Schedule 2 - Billing and notification

We propose deletion of the following clause (either 2.20 or 2.21 – numbering is not always clear):

- 2.20. Where the Access Provider is to refund a disputed Charge, the Access Provider must pay interest (at the rate set out in clause 2.6) on any refund. Interest accrues daily from the date on which each relevant amount to be refunded was paid to the Access Provider, until the date the refund is paid.

Schedule 4 - General dispute resolution procedures

We propose amendment of the following clause, as shaded:

4.10 (in relation to the Expert Committee)

- i) The Expert Committee has the right to conduct ~~any inquiry as it thinks fit~~ **reasonable enquiries**, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute

More generally, Nextgen queries whether it is appropriate for an Expert Committee to be involved in dispute resolution, noting they are not intended to be arbitrators as such, but only a source of expert advice.

Schedule 6 – Suspension and termination

We propose amendment of the following clause, as shaded:

6.1 or 6.2 (again, numbering is at times unclear)

Delete the wording "b) a Court determines that (and the decision is not subject to an appeal)", and replace with **"the Access Provider reasonably believes that"** as it is too restrictive and costly to make such determinations subject to a court decision.

6.6, words added for clarification as indicated below, as shaded:

Without prejudice to the Parties' rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access Provider must, **if termination is for a reason other than the Access Seeker's default**, refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. **If termination of the supply of a Service is by the Access Provider for the Access Seeker's default, or by the Access Seeker without cause, then the Access Seeker must pay all Charges that would have been payable from the date of termination of the Service through to the end of the contracted term for the supply of that Service.** In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either Party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD

Schedule 7 - Liability and Indemnity

We propose amendment of the following clauses, as **shaded**:

7.1 (b) any subsequent 12 Month period commencing on any anniversary of the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in the 12 Month period immediately prior to that anniversary.

For the purposes of this clause 7.1, Liability arises when the act or omission giving rise to the Liability occurs, not when any claim is made by a party under this FAD in connection with that Liability. **Liability of a Party does not include Excluded Loss.**

7.2. The liability limitation in clause 7.1 does not apply to the Access Seeker's liability to pay the Charges for the Service provided under this FAD, **or the liability of a Party for personal injury or death.**

7.3. **Subject to clauses 7.8 and 7.11**, each Party indemnifies the other Party against all Loss arising from the death of, or personal injury to, a Representative of the other Party, where the death or personal injury arises from ...

7.4. **Subject to clauses 7.8 and 7.11**, each Party indemnifies the other Party against all Loss arising from any loss of, or damage to **tangible property of the other party (or the property of a representative of that party)** where the loss or damage arises from ...

7.5. **Subject to clauses 7.8 and 7.11**, each Party indemnifies the other Party against all Loss arising from a claim by a third person against the Innocent Party to the extent that the claim **relates to arises from** a negligent act or omission by the first Party or by a Representative of the first Party.

7.8. The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 7 to the extent that the liability the subject of the indemnity claim is **the direct result of caused or contributed to by**:

- a) a breach of this FAD;
- b) an act **causing or** intended to cause death, personal injury, or loss or damage to property;
or
- c) a negligent act or omission

Schedule 9 - Network modernisation and upgrade notice periods

In relation to clause 9.1, we submit that it is not feasible for a carrier to submit their network upgrade program for negotiation by all of its customers. The likelihood of never reaching agreement with everyone is high, and it will hinder a carrier's ability to undertake network upgrades. On account of this, clause 9.1 (b) should be amended as follows:

b) consulting with the Access Seeker, ~~and negotiating in good faith~~ regarding any reasonable concerns of the Access Seeker, in relation to the Major Network Modernisation and Upgrade.

Further to the proposed amendment above, we also submit that all clauses pertaining to the 'Coordinated Capital Works program) be deleted, as it is not feasible or reasonable to submit carriers to such obligations vis a vis their customers – the clauses in question appear to be/are 9.9 thru to 9.21. (i.e. they include the 'negotiations in good faith' section. We have not reproduced the relevant terms here, but are happy to clarify for the ACCC if requested.

2 CONTACT DETAILS

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