



Australian  
Competition &  
Consumer  
Commission

**Telecommunications  
Final Access Determination  
Inquiries  
Non-price terms and conditions**

**Final decision for MTAS and views for  
fixed line services and DTCS**

**August 2015**



Australian Competition and Consumer Commission

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## List of abbreviations and acronyms

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

# Glossary

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

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

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



# Executive Summary

This report relates to the public inquiries to make final access determinations for the MTAS, the fixed line services and the DTCS under the *Competition and Consumer Act 2010* (Cth). This report sets out the ACCC's final decision on the non-price terms and conditions for the MTAS. In respect of the fixed line services and the DTCS, the ACCC has not finalised its decision on non-price terms and conditions, although this report sets out the ACCC's current views on non-price terms and conditions for those services.

Consistent with the ACCC's draft view, the ACCC's final view is to make terms on the same matters which were addressed in the non-price terms of the Draft Final Access Determination instrument for the fixed line services (Appendix B to the ACCC's draft report) (Draft FAD instrument).<sup>1</sup>

However, in response to submissions, the ACCC has made some changes to its draft view in this report, in respect of:

- Regulatory recourse
- Billing and notification
- Creditworthiness and security
- Confidentiality
- Communication with end-users
- Suspension and termination
- Network modernisation and upgrade notice periods
- Changes to operating manuals

The ACCC has not made changes from its draft decision in respect of other matters, namely:

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

## ***Regulatory recourse***

Importantly, the ACCC's final view is to make terms on regulatory recourse (Schedule 14), which the existing FADs for the relevant services do not contain. The ACCC has made this decision on the basis of concerns that arose during the course of the FAD inquiries in relation

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<sup>1</sup> Available at: <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/draft-decision>

to access agreements which included clauses that could have the effect of excluding the application of regulated terms during the life of the agreement (entire agreement clauses).

The ACCC engaged with the relevant access provider about the ACCC's concerns. While the access provider has not removed its entire agreement clause, an access seeker is currently able to terminate the relevant access agreement on notice, and the access provider has proposed a number of amendments to the relevant access agreement to include ways by which an access seeker may be able to gain recourse to regulated terms through: **[c-i-c starts**

- [REDACTED]
- [REDACTED] **c-i-c ends].**

While not fully resolving the ACCC's concerns about the retention of the entire agreement clauses, the above measures provide for **[c-i-c starts** [REDACTED] **c-i-c ends]** the ability to terminate on notice. These issues are discussed further in sections 4.3 and 6.10.3.1.

While these changes have gone some way to address the ACCC's concerns, the ACCC maintains its view that the FAD terms (with some changes to those in the Draft FAD instrument) on regulatory recourse (schedule 14) are necessary to provide clear guidance on what the ACCC considers are reasonable arrangements with respect to seeking access to regulated terms. These terms will provide an appropriate benchmark for access seekers and access providers in the negotiation of access agreements relating to declared services. These terms broadly reflect a number of aspects of the access provider's proposal described above.

Schedule 14 provides that, unless otherwise agreed by the parties, where an access agreement is in place and the ACCC makes or varies a FAD or BROCC non-price term relating to that service then:

- parties must negotiate the proposed changes in good faith, where one party proposes to the other party (by written notice) to vary the access agreement to reflect that new or varied regulated term.
- either party may terminate an access agreement in respect of that service with no less than 120 Business Days' (around 6 months') notice.

Under the hierarchy in Part XIC of the CCA, schedule 14 will apply in the absence of commercial agreement on the particular matters which the Schedule addresses.

The ACCC notes that the FAD terms on regulatory recourse are triggered where the ACCC makes or varies a regulated non-price term for that service. Further, the FAD term on termination with notice (clause 14.2) only provides for termination in respect of the relevant declared service. The ACCC notes however that access providers and access seekers may have entered or seek to enter in to access agreements which relate to both declared and non-declared services.

The ACCC also notes that parties may agree to other commercial terms addressing the same matters as those addressed in Schedule 14, which are better suited to the nature of their agreements. Where parties do so, their terms of their access agreement will prevail over the regulated terms in Schedule 14 to the extent of any inconsistency.

## ***Other matters***

The ACCC also became concerned, during the course of the FAD inquiries, that some access agreements entered into contained terms which could authorise the use of wholesale customer confidential information that may otherwise be protected by important regulatory safeguards.

[c-i-c starts

[REDACTED]

i-c ends].

The ACCC has explored with the relevant access provider some changes (including removal of the authorisation from the relevant access agreements) and the access provider has proposed amendments to the terms of the authorisation to make its scope more certain.

The ACCC notes that schedule 6 of the FAD relates to use of confidential information and its terms set out what the ACCC considers to be appropriate use by an access provider of access seeker confidential information. These terms may provide guidance which parties can consider when deciding whether or not to agree to terms in their access agreements which authorise certain uses of their confidential information for the purposes of important regulatory safeguards.

## ***Important procedural matters***

This report sets out the ACCC's views on the schedules of NPTCs for the FADs that will apply for the fixed line services (including wholesale ADSL), the MTAS and the DTCS declared services. These schedules are referred to as the NPTC schedules in this report.

Consistent with the joint consultation on NPTCs to date, and for ease of reference, the ACCC has issued this joint report on the NPTC schedules for these services. However, the ACCC emphasises that:

- this report sets out the ACCC's final decision on the NPTCs as for the MTAS. The ACCC has included the NPTC schedules relevant to the MTAS in the FAD instrument attached to the primary prices decision for the MTAS. That FAD instrument is available on the ACCC's website at this [link](#).
- In respect of the fixed line services and the DTCS, the ACCC has **not** finalised its decision on NPTCs. The final decision for NPTCs as they relate to the fixed line services and the DTCS will be made when the ACCC makes final decisions on the primary and supplementary prices for those services later this year. This report does set out the ACCC's current views on NPTCs for these services, however.

References to final views in this report should be read as the ACCC's final decision in respect of MTAS NPTCs and current views in respect of NPTCs for fixed line services and the DTCS.

Appendix A to this paper contains a copy of the NPTC schedules.

## 2 Introduction

The Australian Competition and Consumer Commission (ACCC) is conducting public inquiries under Part 25 of the *Telecommunications Act 1997* into making final access determinations (FADs) under section 152BC of the *Competition and Consumer Act 2010* (CCA) for the seven declared fixed line services<sup>2</sup>, the MTAS and the DTCS.

This report sets out the ACCC's final decision in respect of NPTCs in the MTAS FAD. The report sets out the ACCC's current views in respect of NPTCs for the supply of the seven declared fixed line services and the DTCS.

### 2.1 Background

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

- the DTCS in March 2014 until 31 March 2019<sup>3</sup>
- the MTAS in June 2014 until 30 June 2019<sup>4</sup>
- the six fixed line services (not including wholesale ADSL) in April 2014 until 31 July 2019.<sup>5</sup>

The ACCC also declared the wholesale ADSL service in February 2012 until 13 February 2017.<sup>6</sup> Once a service is declared, the ACCC can make a final access determination (FAD) relating to access to the declared service. Such an access determination may specify how an access provider is to comply with the standard access obligations applicable to the provider, and any other terms and conditions of access to the declared service.<sup>7</sup>

The relevant declared services are currently regulated through FADs.<sup>8</sup> The ACCC has extended the existing FADs for the declared services, and each will now expire on the day before the new FADs come into force. The current FADs for the declared services specify price and NPTCs that apply where commercial negotiations do not result in agreement between the access provider and access seeker.

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<sup>2</sup> The fixed line services are the unconditioned local loop service (ULLS), line sharing service (LSS), wholesale line rental service (WLR), local carriage service (LCS), fixed originating access service (FOAS), fixed terminating access service (FTAS) and wholesale ADSL.

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

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

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

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

<sup>7</sup> Section 152BC(3) of the CCA.

<sup>8</sup> The current FADs for the relevant declared services can be found on the following webpage:  
<http://registers.accc.gov.au/content/index.phtml/itemId/971651>

## 2.2 Public inquiry process to date

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

In May 2014, the ACCC decided to consult on NPTCs and supplementary prices for all the declared services separately from consultation on price terms. The ACCC considered there was benefit in combining its consultation for NPTCs across all the relevant declared services given that a number of the terms were (and are currently) similar (or the same) across the services and may benefit from consistency. The ACCC also considered there was benefit in consulting separately on certain supplementary charges, given the number and complexity of the issues for the ACCC's inquiries into setting primary prices for the relevant declared services.

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

- In May 2014, the ACCC released a position paper, seeking submissions on the NPTCs and supplementary prices (Position Paper), to which it received 10 submissions and a further submission from Telstra.
- In October 2014, the ACCC released a discussion paper seeking further industry views regarding the regulatory option the ACCC should adopt when making NPTCs in FADs (Discussion Paper). The ACCC received seven submissions to the discussion paper.
- In December 2014, the ACCC sent a request to stakeholders asking for comments on the drafting of certain NPTCs (Request for comments on draft NPTCs). The ACCC received eight responses to its request.
- In March 2015, the ACCC released its draft decision on NPTCs (draft report). The ACCC received four submissions in response to its draft report.

## 2.3 Structure of the report

This report is set out as follows:

- Chapter 3 discusses the legislative framework and its application to NPTCs.
- Chapter 4 sets out the ACCC's regulatory approach to NPTCs.
- Chapter 5 specifies how each of the NPTC schedules will apply to the relevant declared services.
- Chapters 6 and 7 set out the ACCC's assessment of each of the NPTC schedules for common and service-specific terms, respectively, and the ACCC's assessment of amendments proposed by submissions to the draft report.
- Chapter 8 sets out the commencement and expiry of the NPTC schedules.
- Appendix A is a copy of the NPTC schedules.

## 3 Legislative framework and relevant considerations

The ACCC must take the matters specified in subsection 152BCA(1) of the CCA into account in making a FAD. These matters are:

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

Subsection 152BCA(3) of the CCA provides that the ACCC may take into account any other matters that it thinks are relevant when making a FAD.

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

### 3.1 ACCC approach

The ACCC sought submissions in the draft report about how it proposed to take into account the section 152BCA matters when considering non-price matters. The ACCC's views on the legislative matters were set out in Appendix A to the draft report, and in addition to that appendix, the ACCC also noted in section 2.2 of the draft report:

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

The ACCC did not receive any further submissions on the legislative matters. The ACCC therefore maintains its draft views regarding the section 152BCA(1) matters in this report (see Appendix A and section 2.2 of the ACCC's draft report). The ACCC has formed its final view on NPTCs by assessing:

- the overall regulatory approach to make a targeted set of NPTCs. This assessment is set out in Chapter 4 of this paper;
- how the NTPC schedules will apply to the relevant declared services (Chapter 5); and
- the substance of each NPTC schedule, and changes to those schedules proposed by submitters to the draft report, against the section 152BCA matters in Chapters 6 and 7.

## 3.2 Variation inquiry and binding rules of conduct

If a FAD results in unintended consequences or if circumstances change, the ACCC may consider initiating an inquiry into varying the FAD<sup>9</sup> or issuing binding rules of conduct (BROC).<sup>10</sup>

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

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

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<sup>9</sup> Section 152BCN of the CCA.

<sup>10</sup> Section 152BD of the CCA.



## 4 Regulatory approach to NPTCs

Consistent with its draft views, the ACCC's final view is to make a targeted set of NPTCs on certain matters only. However, it will continue to monitor issues of concern that arose during the course of the FAD inquiries and any competition concerns that arise from matters that prove contentious in commercial negotiations for access to declared services.

### 4.1 Summary of the ACCC's draft views

The ACCC's draft view was to make a targeted set of NPTCs which focussed only on those aspects of access where commercial agreement was less likely to result and where specific competition concerns were likely to arise. This can be contrasted to a Comprehensive FAD which is a comprehensive set of NPTCs for all aspects of access required to provide certainty in the absence of any access agreement.

The ACCC's draft view was to make a targeted set of NPTCs and not make a Comprehensive FAD. The evidence before the ACCC was varied and did not suggest a widespread problem of sufficient magnitude to warrant a more interventionist regulatory response (as would be provided by a Comprehensive FAD).

In the draft report, the ACCC noted concerns about entire agreement clauses and noted that it was working constructively with an access provider to provide for terms that will give an opportunity to access seekers to seek regulated terms. The ACCC considered that this was a matter of some relevance to the inquiry and that it would continue to monitor industry practices in relation to commercially negotiated access agreements.

### 4.2 Submissions

Telstra submitted that including NPTCs in the FADs is not necessary, but if the ACCC is minded to include NPTCs in the FADs for the relevant declared services, making a targeted set of NPTCs is the appropriate approach.<sup>11</sup> Similarly, NBN Co supported the ACCC's draft decision to make a Targeted FAD.<sup>12</sup>

While Macquarie Telecom agreed with the ACCC's reasons for making a targeted set of NPTCs rather than a Comprehensive FAD at this time, it also submitted that ultimately it is in the best interest of the LTIE to have a regulated set of comprehensive terms which apply in the absence of commercial agreement.<sup>13</sup> Macquarie Telecom also submitted that where the ACCC does not make a Comprehensive FAD, it is important that the targeted set of NPTCs are incorporated into the access agreement terms offered by access providers.<sup>14</sup>

iiNet submitted that the ACCC's proposed approach to making a targeted set of NPTCs does not promote the LTIE as well as an approach based on iiNet's proposed 'Reference offer model' would.<sup>15</sup> Under iiNet's Reference offer model, the ACCC would make terms covering some but not all terms of access, and also make an additional term which requires the access provider to incorporate the FAD terms into its standard contractual offer. iiNet maintained that its Reference offer model cannot properly be characterised as a Comprehensive FAD because the FAD itself does not impose a full set of terms.<sup>16</sup>

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<sup>11</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 5.

<sup>12</sup> NBN Co, submission to the ACCC Draft Decision, Public Version, 11 May 2015, p 1.

<sup>13</sup> Macquarie Telecom, submission to ACCC Draft Decision, 29 May 2015, p 3.

<sup>14</sup> Macquarie Telecom, submission to ACCC Draft Decision, 29 May 2015, p 3.

<sup>15</sup> iiNet, submission to the ACCC Draft Decision, 8 May 2015, p 7.

<sup>16</sup> iiNet, submission to the ACCC Draft Decision, 8 May 2015, p 8.



iiNet agreed with the ACCC that developing a Comprehensive FAD which is fit for purpose would be a significant task that would involve significant regulatory burden, and therefore a Targeted FAD is more appropriate where the ACCC has rejected a Comprehensive FAD. iiNet submitted however that its Reference offer model would involve lower cost to the ACCC and industry as a whole and would achieve access agreements that are consistent with regulated NPTCs.<sup>17</sup> iiNet therefore considered that its Reference offer model would better promote the LTIE than a narrower FAD such as the ACCC's draft targeted set of NPTCs.

### 4.3 ACCC final views

Consistent with its draft views, the ACCC's final view is to make a targeted set of NPTCs on certain matters only. As noted above, Telstra<sup>18</sup> and NBN Co<sup>19</sup> supported a targeted approach, and Macquarie Telecom agreed with a targeted approach at this time.

The ACCC considers that the effect of iiNet's Reference offer model would be similar to a Comprehensive FAD in that the standard contractual offer (incorporating regulated terms) would provide a full and alternative set of terms to a commercial access agreement (not containing regulated terms). iiNet's Reference offer model therefore presents a material increase in regulation and a more interventionist approach by requiring the access provider to incorporate FAD terms into its standard contractual offer, and offer those terms to access seekers. This approach would also involve more costs compared to making a targeted set of NPTCs. Specifically, costs imposed on the access provider to incorporate FAD terms into its standard contractual offer, and regulator costs in monitoring compliance with that requirement.

The ACCC's draft view was to adopt a targeted approach and not a Comprehensive FAD. While the ACCC noted the potentially significant costs of a Comprehensive FAD, the ACCC also decided that a Comprehensive FAD was not warranted because the evidence before it was varied and did not suggest a widespread problem. Specifically, the ACCC considered that there was insufficient evidence to support a view that there was a significant imbalance in bargaining power which had adversely impacted the competitive process.

Since its draft report, the ACCC has not been presented with any new evidence that would now suggest that an increase in regulation, for example, through implementing a Comprehensive FAD or iiNet's Reference offer model, is warranted.

That said, through the course of the current FAD inquiries, the ACCC has become aware of recent examples of NPTCs which have been of concern, and some contention in commercial negotiations about the inclusion of Draft FAD instrument terms which allow for regulatory recourse in access agreements. The ACCC will continue to monitor these concerns.

From the ACCC's review of access agreements lodged with it (under s 152BEA, now amended), it was clear that some access agreements include an entire agreement clause that could have the effect of excluding the application of regulated non-price terms during the life of the agreement.

**[c-i-c begins:** [REDACTED]  
[REDACTED]  
[REDACTED] **end c-i-c].**

The ACCC has had constructive engagement with the relevant access provider to try to resolve concerns about this clause. The ACCC has also made FAD terms on regulatory recourse which provide clear guidance on what the ACCC considers are reasonable arrangements with respect

<sup>17</sup> iiNet, submission to the ACCC Draft Decision, Public Version, 8 May 2015, pp 8-9.

<sup>18</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 5.

<sup>19</sup> NBN Co, submission to the ACCC Draft Decision, Public Version, 11 May 2015, p 1.

<sup>20</sup> Introduced by Telstra on 31 March 2014 and is designed to replace the existing Customer Relationship Agreement on which most access agreements between Telstra and its wholesale customers are based.

to seeking regulated terms. These terms will provide an appropriate benchmark for access seekers and access providers in the negotiation of access agreements (Schedule 14 of the NTPC schedules). While the access provider has proposed some changes to address ACCC concerns, the ACCC will continue to monitor whether there are continuing concerns around the operation of this clause. The relevant clause is discussed in more detail below in section 6.10.3 under the ACCC's final views on regulatory recourse terms.

Overall the ACCC maintains its view that a targeted approach will promote the LTIE by ensuring, on an as needs basis, that there is regulatory fall back for specific matters that have typically raised competition concerns. The NPTC schedules are contained in Appendix A to this report. They cover key commercial terms of access which facilitate the commercial supply of the service. The ACCC discusses each of the NPTC schedules in the following chapters.

While the ACCC is making a targeted set of NPTCs, the ACCC will continue to monitor any competition concerns arising from matters that prove contentious in commercial negotiations, and:

- Where it considers it appropriate to do so (subject to the relevant provisions of the CCA) it will consider making a BROC to urgently address matters as they arise.
- It will also examine any unreasonable NPTCs or conduct around those NPTCs in an enforcement context under Part XIB or Part XIC of the CCA. For example, whether that conduct amounts to non-compliance with the standard access obligations by access providers.

## 5 Application of NPTCs to relevant declared services

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

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

### 5.1 Summary of the ACCC's draft views

The ACCC's draft decision was that the terms listed above will apply commonly to all the relevant declared services.

The ACCC's draft view was that the following provisions should only apply to certain declared services:

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

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

The ACCC's draft view was also to include a carrier-specific exemption in the wholesale ADSL FAD. Specifically, the ACCC included a term in its Draft FAD instrument in respect of wholesale ADSL exempting all non-Telstra access providers from the category A SAOs in relation to the supply of wholesale ADSL. This applies to both FAD price and non-price terms. The ACCC made this draft decision for the same reasons as set out in the ACCC's draft Report on primary prices.<sup>21</sup>

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<sup>21</sup> ACCC, *Public inquiry into FADs for fixed line services – primary price terms, Draft Decision*, March 2015. See Chapter 16.

The ACCC's draft view was to not include carrier specific exemptions in the remaining fixed-line services, MTAS or DTCS FADs.

The issue of carrier-specific exemptions for the relevant declared services will be determined in the ACCC's final decision on primary prices for those services and is not discussed further in this report.

## 5.2 Submissions

Reflecting its submission to the Discussion Paper, Telstra believes that network modernisation and upgrade notice periods (Schedule 10 of the Draft FAD instrument) should only apply to fixed line services and wholesale ADSL because the basis on which those clauses were included in those FADs do not apply to MTAS or DTCS.<sup>22</sup> Telstra considered extending these provisions to MTAS or DTCS creates unnecessary and onerous obligations on access providers and is not in their legitimate business interests.<sup>23</sup>

In contrast, other parties (TPG<sup>24</sup>, Optus<sup>25</sup>, iiNet<sup>26</sup> and Macquarie Telecom<sup>27</sup>) submitted in response to previous ACCC papers that these terms should apply commonly to MTAS and DTCS.

Macquarie Telecom supported the ACCC's finding that terms (which Telstra argued should apply to only some services) regarding liability and indemnity, communication with end-users, network modernisation and upgrade notice periods, and changes to operating manuals, should apply to all the relevant declared services in a consistent way.<sup>28</sup> Macquarie Telecom argued that this should promote efficiency in contract management and lower compliance costs for access providers.

## 5.3 ACCC final views

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

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

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<sup>22</sup> Telstra, submission to the ACCC Draft Decision, Public version, 8 May 2015, p 12.

<sup>23</sup> Telstra, submission to the ACCC Draft Decision, Public version, 8 May 2015, p 12.

<sup>24</sup> TPG, submission to the Position Paper, Public Version, 17 July 2014, p 4.

<sup>25</sup> Optus, submission to the Discussion Paper, Public Version, 12 December 2014, section 2.9.

<sup>26</sup> iiNet, submission to the Discussion Paper, Public Version, 12 December 2014, section 10.

<sup>27</sup> Macquarie Telecom, submission to the ACCC Draft Decision, Public Version, 29 May 2015, p 5.

<sup>28</sup> Macquarie Telecom, submission to the ACCC Draft Decision, Public Version, 29 May 2015, p 5.

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

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

Applying the non-price terms and conditions to the services as listed above is in line with the ACCC's draft decision. The ACCC considers that applying the terms as listed above reflects the legitimate business interests of an access provider and access seekers. Where the terms have common application this will increase efficiency in contract management for access seekers and access providers, and lower compliance costs for access providers. Where the terms are specific, they ensure that the terms do not apply unnecessarily to access providers in their legitimate business interests.

Submissions to the draft report are discussed below.

As noted above, Telstra resubmitted that the network modernisation and upgrade notice period terms are not relevant to MTAS or DTCS, and should therefore only apply to fixed line services. The ACCC notes that these terms currently apply to DTCS in the current DTCS FAD.

Consistent with its draft decision, the ACCC considers that notice and consultation on network modernisation is a matter which is relevant to MTAS and DTCS despite these services being provided on networks that are not the copper access network. The ACCC considers that it is still in the interests of access seekers to be aware of outages which affect their service, even though access seeker DSLAMs or voice switches are not affected or require relocation. The ACCC considers that other access seeker equipment may be affected, and even in the absence of an impact on access seeker equipment, notification and consultation requirements about network changes are relevant to the MTAS and the DTCS. This is in the interests of persons who have rights to use the declared service<sup>29</sup> and contributes to the economically efficient operation of a telecommunications network<sup>30</sup> by allowing access seekers to better manage their end-user service outages caused by network changes.

The ACCC notes that the current FADs' definition of network<sup>31</sup> is not limited to the copper access network, and the definition of major network modernisation and upgrade is service neutral and includes network changes that result in a service ceasing or its quality being adversely affected.<sup>32</sup> The ACCC therefore considers that the schedule could apply to MTAS and DTCS.

However the ACCC also recognises that some of the notification requirements require information on ESAs and distribution areas to be provided by Telstra to the access seeker, and these types of information may not be relevant to the MTAS and the DTCS. Further the ACCC does not consider the terms on coordinated capital work programs to be relevant to the MTAS and the DTCS. The ACCC has therefore made a separate version of the schedule for MTAS and DTCS which removes these clauses in the schedule (in recognition that not all the clauses

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<sup>29</sup> Section 152BCA(1)(c) of the CCA.

<sup>30</sup> Section 152BCA(1)(g) of the CCA.

<sup>31</sup> For example, see definition of 'Network' of the current fixed line services FAD, Schedule 1 – Interpretation and Definitions (available at: <http://registers.accc.gov.au/content/item.phtml?itemId=1179318&nodeId=e1aea762cbf387da992aee73c5511b3b&fn=Final%20access%20determinations%20as%20varied%20on%2018/06/2014.PDF>)

<sup>32</sup> For example, see definition of 'Major Network Modernisation and Upgrade' of the current fixed line services FAD, Schedule 1 – Interpretation and Definitions (available at: <http://registers.accc.gov.au/content/item.phtml?itemId=1179318&nodeId=e1aea762cbf387da992aee73c5511b3b&fn=Final%20access%20determinations%20as%20varied%20on%2018/06/2014.PDF>)

in the schedule will apply to the MTAS and the DTCS).<sup>33</sup> There are two versions of schedule 10 contained in the NPTC schedules attached to this report, one of which relates to fixed line services, and the other which relates to MTAS and DTCS, and the schedules are marked accordingly.

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<sup>33</sup> The clauses that have been removed for the MTAS and DTCS version of schedule 10 because they are not relevant for those services are the clauses numbered in the Draft FAD Instrument as 10.4(a) and (b), 10.7(a)(ii)(1) and (b), 10.10-10.18 and 10.20.

## 6 Common terms

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

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

Submissions to the ACCC's draft report on the above terms and the ACCC's assessment of the terms are set out in the rest of this chapter.

### 6.1 Billing and notification

#### 6.1.1 Summary of the ACCC's draft views

The ACCC's draft view was to make billing and notification terms setting out the access provider's responsibilities to provide accurate bills within specified timeframes and how the access provider will be paid for the services it supplies. The draft terms also specified procedures for resolving billing disputes which included an escalation process from representatives of the parties to mediation. In its draft decision, the ACCC also made two changes to the terms on billing and notification.

The key change was to amend clause 3.14 which originally provided that a Billing Dispute Notice must be given to the access provider within six months of the invoice containing the disputed amount. The ACCC changed this to specify that the Notice must be given to the Access Provider, as soon as practicable after the Access Seeker becomes aware a Billing Dispute exists but within six months. This change was made to address Telstra's concerns that access seekers may delay notification of disputes to obtain the penalty interest payable for repeated billing errors by the access provider under clause 3.31.

#### 6.1.2 Submissions

iiNet and Macquarie Telecom questioned the need for the ACCC's draft amendment to clause 3.14 (to provide that an access seeker has to notify a billing dispute as soon as practicable) because commercial realities will incentivise access seekers to notify billing disputes promptly

rather than purposely delay them.<sup>34</sup> iiNet and Macquarie Telecom suggested that should the ACCC retain the amendment, the term 'reasonably' should precede the word 'practicable'.<sup>35</sup>

Telstra repeated the submissions it made to the ACCC's Request for comments on draft NPTCs and submitted that the ACCC further consider them. Specifically, Telstra re-submitted:

- that the scope of the definition of 'Billing Dispute' should be clarified in regards to what can be disputed as it is unreasonably broad.<sup>36</sup>
- clause 3.7 should allow an access provider to take action to recover debt against an access seeker who has failed to pay from the date the amount is due, rather than requiring the access provider to wait 20 Business Days.<sup>37</sup>
- clause 3.12 be amended to ensure that a payment of an invoice (containing a Charge which is being disputed) is unable to be withheld by an access seeker indefinitely where a dispute resolution process may be terminated for a reason other than it being 'resolved'.<sup>38</sup>
- clause 3.31 include a new reciprocal sub-clause to discourage vexatious Billing Disputes brought by an access seeker, by charging higher penalty interest where the access seeker has been disputing bills in bad faith i.e. where three or more out of 5 consecutive billing disputes are resolved against the access seeker.<sup>39</sup>

### 6.1.3 ACCC final views

For the reasons set out in section 5.1.3 of the draft report, the ACCC has retained a schedule of terms about billing and notification and its proposed amendments to clauses 3.9 and 3.14.

In relation to submissions to the ACCC's draft report:

- The ACCC has adopted iiNet's proposed amendment to clause 3.14 to provide that the access seeker has to notify the billing dispute as soon as 'reasonably' practicable. This change is in the interests of access seekers as it ensures that access seekers will still be able to raise a billing dispute where it was not reasonable for it to do so at an earlier time.
- The ACCC has not adopted Telstra's proposed amendment to the definition of 'Billing Dispute'. The ACCC considers that the current broad drafting appropriately captures disputes relating to a charge or invoice as distinguishable to those dealt with as general disputes under Schedule 5 of the NPTC schedules.
- The ACCC does not consider it necessary to adopt Telstra's proposed amendment regarding clause 3.7 to remove the 20 Business Day grace period. A period of 20 business days is commercially reasonable for an access seeker to rectify non-payment before debt recovery by an access provider is permitted.
- The ACCC has adopted Telstra's proposed amendment to clause 3.12 to provide that (when a Charge is being disputed) the access seeker may withhold payment until the matter has been 'otherwise terminated' (e.g. where the dispute is rejected) in addition

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<sup>34</sup> iiNet, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 4, Macquarie Telecom, submission to the ACCC Draft Decision, 29 May 2015, p 6.

<sup>35</sup> iiNet, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 4, Macquarie Telecom, submission to the ACCC Draft Decision, Public Version, 29 May 2015, p 6.

<sup>36</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 201, p 10.

<sup>37</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 10.

<sup>38</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 10.

<sup>39</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 10.



to the matter being 'resolved'. This will provide greater certainty to parties regarding this clause and is in the interests of both access seekers and access providers.

- Regarding Telstra's submission on clause 3.31, the ACCC considers that Telstra's concerns regarding any vexatious disputes by access seekers is already protected by the requirement under clause 3.10 which states 'A Billing Dispute must be initiated in good faith'.

## 6.2 Creditworthiness and security

### 6.2.1 Summary of the ACCC's draft views

The ACCC's draft decision was to make terms regarding creditworthiness and security. The terms set out the creditworthiness and security requirements an access provider may seek from an access seeker, the types of information that may be requested and the grounds upon which an access provider may request the information. The ACCC made two changes to the schedule in relation to clauses 4.3 and 4.8.

The material change was to amend subclause 4.8(e) to provide an extra 'any other information' category, where agreed to by parties, for 'ongoing creditworthiness information'. Ongoing creditworthiness information is information an access seeker may be required to supply an access provider to prove the creditworthiness of the access seeker.

### 6.2.2 Submissions

Telstra repeated earlier submissions that it had made during the consultation process, specifically:<sup>40</sup>

- Clause 4.1 should provide that the provision of security should be a precondition to the supply of a service under the FAD.<sup>41</sup>
- Clause 4.5 should be amended to require that the security be provided by an access seeker within 10 Business Days (rather than 20).<sup>42</sup>
- Clause 4.8(a) should be amended to include further types of ongoing creditworthiness information, for example, management prepared balance sheets.<sup>43</sup>

Telstra commented on the ACCC's amendment to clause 4.8(e) which provided a new category of 'ongoing creditworthiness information', namely, 'any other information reasonably required ... to assess the Access Seeker's creditworthiness as agreed between the parties'.<sup>44</sup> Telstra submitted that those additional words 'as agreed between the parties' would render the new category ineffective, as there would be a requirement for up-front agreement.<sup>45</sup>

Macquarie Telecom also made a submission on the new sub-clause 4.8(e) suggesting that these other categories of information should be agreed to at the time of entering the access agreement. Macquarie Telecom argued that this is necessary otherwise it would provide an access provider an open-ended ability to ask for any other information.

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<sup>40</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, pp 9-10.

<sup>41</sup> Telstra, Response to the ACCC's proposed non-price draft terms, 14 January 2014, p 7; Telstra submission to ACCC Draft Decision, Public Version, 8 May 2015, p 10.

<sup>42</sup> Telstra, Response to the ACCC's proposed non-price draft terms, 14 January 2014, p 7; Telstra submission to ACCC Draft Decision, Public Version, 8 May 2015, p 10.

<sup>43</sup> Telstra, Response to the ACCC's proposed non-price draft terms, 14 January 2014, p 9; Telstra submission to ACCC Draft Decision, Public Version, 8 May 2015, p 10.

<sup>44</sup> Telstra, Response to the ACCC's proposed non-price draft terms, 14 January 2014, p 7; Telstra submission to ACCC Draft Decision, Public Version, 8 May 2015, p 10.

<sup>45</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 10.

In relation to clause 4.3, Macquarie Telecom submitted that the ACCC should amend the clause to make it clear that the amount and form of security should be determined reasonably by the access provider 'taking into account all the circumstances'.<sup>46</sup>

### 6.2.3 ACCC final views

For the reasons set out in the ACCC's draft report at section 5.2.3, the ACCC maintains its draft view to make terms regarding creditworthiness and security.

The ACCC has considered Telstra's submissions and re-confirms its decision not to adopt Telstra's proposed changes, specifically:

- Regarding clause 4.1, it is not appropriate to require that security is a precondition to supply, as this may act as a barrier to supply and may impede competition which is not in the LTIE.
- Regarding clause 4.5, the current timeframe of 20 Business Days is appropriate and reducing the timeframe to 10 Business Days is likely to be commercially unreasonable particularly where there are significant increases in security to be provided by access seekers.
- Regarding Telstra's concerns about the new subclause 4.8(e) (which allows parties to agree to other categories of ongoing creditworthiness information), the ACCC will not remove the requirement that it be subject to agreement. It is important that any new categories of information are agreed upon by both parties because the provision of creditworthiness information is subject to other FAD obligations<sup>47</sup>, and not providing Ongoing Creditworthiness Information itself is a breach of a material term or condition of the FAD. The drafting of subclause 4.8(e) reasonably balances access provider interests in allowing flexibility to request other types of information, and access seeker interests in requiring some certainty as to what constitutes this other information and the extent of access seeker FAD obligations.

In relation to Macquarie Telecom's submission regarding subclause 4.8(e), the ACCC considers that the current drafting already allows the other information categories to be agreed at the time of entering the agreement. The FAD term specifies that other categories are to be agreed before the request is made which could include when the agreement is entered into. In relation to Macquarie Telecom's concern about an open-ended ability for access providers to request other types of information, the ACCC considers that it is in the interests of access providers to have this ability, and that this ability is subject to agreement.

In regards to clause 4.3, the ACCC has adopted the change proposed by Macquarie Telecom to ensure that when access providers determine the security they 'take into account all the relevant circumstances'. This will provide more certainty to the access provider about its obligations under that clause.

## 6.3 General dispute resolution

### 6.3.1 Summary of the ACCC's draft views

The ACCC's draft decision was to make terms in relation to general dispute resolution procedures to establish how disputes should be managed. The procedures provide for escalation within and between the parties to either an Expert Committee or to mediation before legal proceedings. Also, the ACCC's draft view was to:

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<sup>46</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p 7.

<sup>47</sup> For example, clause 4.5 provides an access seeker must supply Ongoing Creditworthiness Information to an access provider within 15 Business Days of receipt of a request.

- amend clause 5.8 to make it clear that the communications exchanged during the course of a non-billing dispute and ‘in connection with that Non-Billing Dispute’ are made on a without prejudice and confidential basis.
- amend clause 5.2, which concerns appointing the person who hears whether a dispute is a non-billing dispute so that it specifies that they hold certain qualifications (listed at new sub-clause 5.2(a)).

### ***ACCC as arbitrator***

Despite submissions from iiNet, Vocus and VHA, the ACCC’s draft view was that it is not appropriate to amend Schedule 5 so that the ACCC has a role as arbitrator for any disputes about access agreement terms (or variations to them), nor did it make a role for the ACCC to arbitrate disputes under the FAD. The ACCC’s reasons for this are set out in section 5.3.3.1 of the draft report.

## **6.3.2 Submissions**

Macquarie Telecom understands the ACCC’s reasons for not taking a role as arbitrator and supports the amendments to clause 5.2. The ACCC did not receive any other submissions regarding the draft report in relation to the terms regarding general dispute resolution.

## **6.3.3 ACCC final views**

For the reasons set out in the draft report at 5.3.3, the ACCC confirms its draft decision to retain a schedule specifying terms on general dispute resolution which deal with disputes arising from the terms of the FAD.

## **6.4 Confidentiality**

### **6.4.1 Summary of the ACCC’s draft views**

The ACCC’s draft view was to make terms on confidentiality obligations that apply to both parties. In addition, the ACCC’s draft view was to:

- Insert a new sub-clause (proposed by Telstra) regarding disclosure of confidential information without obtaining the consent of the other party, to a regulator or other government body pursuant to SSU or its interception capability obligations (new sub-clauses 6.5(j) and (k)). The draft sub-clauses required Telstra to notify the relevant regulator of the confidential nature of the information disclosed. This requirement would have applied reciprocally to access providers and access seekers.
- Amend clause 6.5(a) (as proposed by Telstra), regarding permitted disclosure of confidential information to the Disclosing Party’s employees and the circumstances in which this may occur. The ACCC amended the clause to recognise that an access provider may be supplying multiple services to a wholesale customer and that disclosure of the confidential information may be required in the supply of those services.

### **6.4.2 Submissions**

In relation to new subclauses 6.5(j) and (k), iiNet made submissions including:

- Where a request is made to disclose the access seeker’s confidential information to a government or regulatory authority, that the terms be amended to make it clear that disclosure cannot be made unless ‘the Access Provider cannot comply with the

reporting obligation without making the disclosure'.<sup>48</sup> Macquarie Telecom made a similar comment.<sup>49</sup>

- That where a request for information is made from a regulator or other Government body in connection to the access provider's SSU (but where there is no obligation to disclose), that prior to disclosure, the disclosing party notify the other party of the request and plans to comply with the request.<sup>50</sup>
- That in response to a request for information from a regulator or Government body in connection with interception capability, the Disclosing Party inform the other party as soon as reasonably practicable after receiving the request, that it intends to comply with the request.<sup>51</sup>

Macquarie Telecom supported the inclusion of new sub-clauses 6.5(j) and (k).<sup>52</sup> However it suggested that the clause be amended to reflect:

- That the disclosing party provide 'written' notice to the other party that it is going to disclose the information of the other party.<sup>53</sup>
- That the disclosing party has given enough notice to allow the other party the opportunity to protect the confidentiality of its information'.<sup>54</sup>
- A requirement that the disclosing party notifies the other party that it has received the request from the regulator or other Government body, and allows the other party to provide input into how its confidential information is disclosed.<sup>55</sup>

### 6.4.3 ACCC final views

For the reasons set out in the draft report at section 5.4.3, the ACCC has made terms about the confidentiality obligations which apply to both parties. Consistent with its draft decision, the ACCC has decided to retain the minor amendments it made to subclauses 6.5(a) and 6.10. The ACCC has also decided to retain new subclauses 6.5(j) and (k) but with further amendments in response to submissions to the draft report.

Regarding submissions to the draft report, the ACCC has decided to make amendments relating to 6.5(j) and (k) (disclosure of confidential information to regulators or other government bodies). These amendments give effect, in substance, to some of iiNet and Macquarie Telecom's proposals. Specifically, the clauses will now require:

- that the disclosure can only be made to a regulator or other government body where the disclosing party cannot comply with the request without disclosing the Confidential Information of the other party. This is an additional safeguard which is in the interests of access seekers because it protects against unnecessary disclosures.
- the disclosing party notify the other party that its confidential information will be disclosed after it has received the request from the regulator or government body unless otherwise prohibited by law. This will not require a disclosing party to seek from the other party consent about the disclosure.

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<sup>48</sup> iiNet, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 5.

<sup>49</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p 8.

<sup>50</sup> iiNet, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 5.

<sup>51</sup> iiNet, submission to ACCC Draft Decision, Public Version, 8 May 2015, pp 5-6.

<sup>52</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p 7.

<sup>53</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p 8.

<sup>54</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p 8.

<sup>55</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p 8.

The ACCC has decided not to adopt iiNet's and Macquarie Telecom's other proposed amendments as these would impose more processes around disclosures to the regulator/other government bodies and compromise the timeliness and efficiency of the disclosure process.

In the ACCC's view the above amendments will assist in safeguarding a party's confidential information (as it will know of the disclosure) while recognising the efficiencies in allowing the other party to disclose this information to regulators or governments without consent from the first party. In turn, these safeguards are also likely to promote certainty for parties about how their confidential information will be used which, in respect of access seekers, is likely to promote efficient use of the services and underlying infrastructure.

Separately, the ACCC also became concerned, during the course of the FAD inquiries, that some access agreements entered into contained terms which could authorise the use of wholesale customer confidential information that may otherwise be protected by important regulatory safeguards. [c-i-c starts [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] c-i-c ends].

The ACCC has explored with the relevant access provider some changes (including removal of the authorisation from the relevant access agreements) and the access provider has proposed amendments to the terms of the authorisation to make its scope more certain.

The ACCC notes that schedule 6 of the FAD sets out what the ACCC considers to be appropriate use of access seeker confidential information by an access provider. Importantly, schedule 6 specifies, among other things, that a party must not use or copy such information except as set out in this FAD.<sup>56</sup> Clause 6.4(a) then provides that access seeker confidential information can be used by the access provider for certain specified purposes, including for the purposes of supplying services to the access seeker, network planning, and for other purposes agreed to by the access seeker.<sup>57</sup> Clause 6.4(b) provides that confidential information must only be disclosed to personnel who in the access provider's reasonable opinion require the information to carry out the specified purposes.

The ACCC considers that these terms set out appropriate standards for use by an access provider of access seeker confidential information. These terms aim to ensure that access seeker confidential information (obtained by an access provider in the course of supplying an access seeker) is not misused by an access provider to obtain an advantage. These terms may provide guidance which parties can consider when deciding whether or not to agree to terms in their access agreement that authorise certain uses of their confidential information for the purposes of important regulatory safeguards.

## 6.5 Communication with end-users

### 6.5.1 Summary of the ACCC's draft views

The ACCC draft view was to make terms in relation to communications with end-users. These terms specify when and how a service provider can communicate with an end-user of the other party. The ACCC's draft view was to amend clause 9.6(a) so that a party cannot use the other party's name, trademarks, etc., unless consent is given.

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<sup>56</sup> Clause 6.1(a) NPTC schedules.

<sup>57</sup> Clause 6.4(a) NPTC schedules.

## 6.5.2 Submissions

Macquarie submitted that clause 9.6(a) (use of another party's trademarks, logos or branding cannot occur without consent) be amended to include 'unless otherwise agreed'. This allows parties to use the other party's branding or trademarks where agreed. The ACCC did not receive any other submissions regarding NPTCs on communications with end-users.

## 6.5.3 ACCC final views

The ACCC confirms its view from the draft Report to make a schedule of terms that deal with communication with end-users. The ACCC considers that these are important terms of access in assuring access seekers that access providers cannot misuse their position as wholesale provider to market goods and/or services to end-users.

The ACCC has made one change to its draft decision in view of Macquarie Telecom's submission. The ACCC has amended clause 9.6(a) to make clear that parties can agree to the other party's use of its trademarks, logos or branding.

## 6.6 Suspension and termination

### 6.6.1 Summary of the ACCC's draft views

The ACCC's draft decision was to make NPTCs that relate to how the relevant declared services can be suspended and terminated. These draft terms were set out in Schedule 7 of the Draft FAD instrument and were changed in two respects:

- providing access seekers a new right to terminate supply where an access provider has ceased to carry on business (currently the right is only available to the access provider under certain FADs)<sup>58</sup> (new subclause 7.5A)
- amendments to clause 7.10(b) requiring an access provider to refund sums paid upon termination for services which have been suspended for 10 or more days for the period exceeding that 10 day period.

### 6.6.2 Submissions

Telstra submitted that the ACCC's drafting changes to clause 7.10(b) of the Draft FAD instrument do not reflect the changes which the ACCC intended to make.<sup>59</sup> Telstra reiterated the comments it made in response to the ACCC's Request for comments on draft NPTCs. Specifically:-

- Regarding sub-clause 7.5(b) which allows an access provider to terminate supply of a service if an access seeker ceases to carry on business for a period of 10 consecutive Business Days, Telstra submitted that this should not be subject to a period of 10 days.<sup>60</sup>
- Regarding sub-clause 7.5(d) (access provider can terminate supply of a service if an access seeker breaches a material obligation under the FAD and that breach impairs its ability to supply other customers), Telstra submitted that this right to terminate

<sup>58</sup> The current wholesale ADSL and DTCS FADs only provide this right to terminate to the access provider (clauses 6.5 in both the wholesale ADSL and DTCS FADs), while the MTAS and the fixed line services FADs provide a reciprocal right to both parties (clauses 6.4 and 14.5 of the MTAS and the fixed line services FADs, respectively). All the current FADs are available at: <http://registers.accc.gov.au/content/index.phtml/itemId/971651>

<sup>59</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 12.

<sup>60</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 10.



should be triggered for any material breach regardless of whether its ability is so impaired.<sup>61</sup>

- Regarding sub-clause 7.5(e) (an access provider can terminate supply of a service where the Access Seeker commits a material breach) should not provide for a period in which an access seeker can remedy the breach, where the breach is incapable of being remedied.<sup>62</sup>

iiNet acknowledged the ACCC's reasons for including new clause 7.5A (access seeker right to terminate where access provider has ceased to carry on business) but questioned its utility.<sup>63</sup> iiNet suggested that the ACCC could consider including a separate schedule that sets out all the circumstances where an access seeker is permitted to cease acquiring services<sup>64</sup>, including a right to terminate a service on a reasonable period of notice.<sup>65</sup>

Macquarie Telecom suggested that clause 7.5A be changed to allow an access seeker a right to terminate where the access provider has ceased supply of the service for a period of 5 rather than 10 consecutive Business Days.<sup>66</sup>

### 6.6.3 ACCC final views

For the reasons set out in the draft report at section 5.6.3, the ACCC's final decision is to retain NTPCs that relate to how the relevant declared services can be suspended and terminated. These terms are set out in Schedule 7 of the NTPC schedules and contain only minor changes to the draft decision.

The ACCC maintains its draft view to make changes to clause 7.10(b) (refund sums paid for services suspended for 10 or more consecutive Business days for that period). The ACCC has adopted some changes in line with Telstra's submission, to clarify the intended effect. These are the only changes from the draft decision to the schedule.

In respect of Telstra's submissions on sub-clauses 7.5(b), (d), and (e), the ACCC maintains its draft view not to adopt Telstra's proposed changes. Specifically, the ACCC considers that:

- Removing the 10 day trigger period from subclause 7.5(b) (termination where access seeker has ceased carrying on business) would remove an important safeguard for continuity of supply for access seekers where they only cease business for a very short period.
- The drafting of sub-clause 7.5(d) should not be changed to allow termination of services for any breach of a material FAD obligation. Rather, an access provider can already suspend services for any breach under clause 7.2, and suspension is an adequate and proportionate remedy.
- Sub-clause 7.5(e) should also not be changed. The ACCC maintains its view that a breach notice and remedy period should apply to all material breaches, even where an access provider considers the breach is incapable of remedy. This will allow the access seeker an opportunity to prove that the breach can be remedied.

iiNet questioned the utility of clause 7.5A. Clause 7.5A had some industry support and the ACCC has decided to retain it because it provides some certainty to access seekers about

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<sup>61</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 10.

<sup>62</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 10.

<sup>63</sup> iiNet, Submission to ACCC Draft Decision, Public Version, 8 May 2015, p 6.

<sup>64</sup> iiNet, Submission to ACCC Draft Decision, Public Version, 8 May 2015, p 6.

<sup>65</sup> iiNet, Submission to ACCC Draft Decision, Public Version, 8 May 2015, p 6.

<sup>66</sup> Macquarie Telecom, Submission to ACCC Draft Decision, Public Version, 29 May 2015, p 8.

when they can cease acquiring a service where it is clear that an access provider cannot supply them (where the access provider has ceased carrying on business).

Regarding iiNet's support for a broader schedule which sets out all circumstances when an access seeker can cease acquiring services, the ACCC has decided to not include such a schedule. In the absence of stronger support and a competition concern, the ACCC considers these matters can be adequately dealt with by commercial negotiation.

Regarding iiNet's submission to include a right to terminate services on a reasonable period of notice, the ACCC has made a termination clause which would allow an access seeker (and access provider) to terminate their entire access agreement with 120 Business Days' notice when regulated terms are made or varied (see section 6.10). The ACCC considers that beyond this, there is no reason for making FAD terms which address termination of individual services more generally.

The ACCC has not adopted Macquarie Telecom's suggested change to clause 7.5A because it does not consider a period of 5 Business Days of cessation of supply should warrant permanent termination of the service by an access seeker.

## 6.7 Changes to operating manuals

### 6.7.1 Summary of the ACCC's draft views

The ACCC's draft decision was to include NPTCs relating to changes to operating manuals in Schedule 11 of the Draft FAD instrument with some changes in response to submissions. Those terms specify how an access provider can unilaterally change, with notice and consultation, its operating manuals to vary standard processes. They also provide for referral of certain disputes on those changes to the general dispute resolution process under the FAD.

The ACCC made two changes to subclause 11.1:

- A change to clarify that the process for changing manuals in Schedule 11 only applies to manuals 'that have been provided' to access seekers (and not those that have not).
- A change to 11.1(a)(ii) to require access providers to 'reasonably implement' (rather than only give reasonable consideration to) access seeker comments on changes to operating manuals.

### 6.7.2 Submissions

Macquarie Telecom opposed the ACCC's draft decision to amend clause 11.1(a) because it would mean that the clause will only apply to documents 'provided' to the access seeker by the access provider.<sup>67</sup> That is, there is a loophole for the access provider to make changes to operating manuals that have not been provided to an access seeker. Macquarie agreed with the ACCC's draft decision to make other changes to Schedule 11.<sup>68</sup>

Telstra opposed the change to clause 11.1(a)(ii). It submitted that while it may be possible for Telstra to 'implement' access seeker comments on changes to operating manuals, it may not be in the interests of all other access seekers' or in Telstra's interests.<sup>69</sup> Telstra also submitted that the drafting was uncertain.<sup>70</sup> Further, Telstra submitted that the ACCC's change could

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<sup>67</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p 9.

<sup>68</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p 9.

<sup>69</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 11.

<sup>70</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 11.



require Telstra to re-notify changes it has reasonably implemented, and the clause 11.1 process would repeat with no obvious end point.<sup>71</sup>

### 6.7.3 ACCC final views

For the reasons set out in section 5.7.3 of the draft report, the ACCC's final decision is to retain a schedule containing terms about changes to operating manuals with the below changes to clause 11.1.

The ACCC notes Macquarie Telecom's concern that the ACCC's change to clause 11.1 will mean that Schedule 11 only applies to operational documents 'that have been provided' to the access seeker. The ACCC limited the application of clause 11.1 in this way because of Telstra's concern that not limiting it would mean that Telstra would have to consult on changes to all its operational documents including those which do not affect access seekers. However the ACCC acknowledges Macquarie Telecom's concern that clause 11.1 should apply to documents which have not been provided but should be provided to the access seeker because it affects the supply of the Service, or affects the rights/obligations of an access seeker. Accordingly, the ACCC has made changes to clause 11.1 to broaden its application to cover documents which should be provided. This will ensure that access providers do not avoid the process in Schedule 11 by not providing the relevant operational document to the access seeker.

In response to Telstra's concerns regarding clause 11.1, the ACCC maintains its draft view to amend clause 11.1 to subject access providers to a firmer commitment to implement (rather than only consider) access seeker comments about changes to operational documents. However, the ACCC has amended the clause to make it clearer as follows:

- An access provider may amend operational documents to implement or reflect a change to its standard processes, subject to:
  - allowing the access seeker to provide comment and, where provided, the access provider has reasonably considered those comments, and
  - implemented any such comments where the access provider considers it reasonable to do so.

For the purposes of the above, an access provider in considering whether it is reasonable for it to implement any comments may consider whether the changes reflect all access seeker and the access provider's interests (new clause 11.1B).

In response to Telstra's concerns, the ACCC does not consider that the drafting of clause 11.1 as amended would require access providers to re-consult on access seeker comments that it has implemented, thereby resulting in the clause 11.1 process to be repeated in a 'loop'.

## 6.8 Liability (risk allocation) and indemnity

### 6.8.1 Summary of the ACCC's draft views

The ACCC's draft view was to make liability (risk allocation) and indemnity terms, setting out who should be responsible for damage to property or personal injury. The clauses set liability caps and require parties to limit their losses to the extent that they can.

The ACCC's draft view was to also amend clause 8.8. The amendment clarifies the objective in limiting the indemnity where various actions of the other party have caused or contributed to (rather than where those actions have directly resulted in) the liability which is the subject of the indemnity claim.

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<sup>71</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 11.

## 6.8.2 Submissions

Macquarie Telecom supported the amendment made to the schedule on liability and indemnity.<sup>72</sup> The ACCC did not receive any other submissions regarding liability (risk allocation) and indemnity.

## 6.8.3 ACCC final views

For the same reasons as set out in section 5.8.3 of the draft report, the ACCC has decided to retain the schedule on liability and indemnity as amended in its draft report. There are no further changes to the terms in the NPTC schedules.

## 6.9 Network modernisation and upgrade notice periods

### 6.9.1 Summary of the ACCC's draft views

The ACCC's draft view was to make terms relating to Network Modernisation and Upgrade notice periods. These terms set out when an access provider must notify, consult and negotiate with access seekers before commencing a major network modernisation and upgrade<sup>73</sup>, or before it implements a coordinated capital works program (which affects access seeker services).<sup>74</sup> The terms also require an access provider to provide a three year forecast of coordinated capital works describing its investment plans.<sup>75</sup>

### 6.9.2 Submissions

While Macquarie Telecom supported the ACCC's amendment to clause 10.6(b) requiring an access provider to provide individual notification where a service has been suspended for 20 Business Days, it queried the 20 Business Days' trigger.

### 6.9.3 ACCC final views

For the reasons set out in the draft report in section 5.9.3, the ACCC's final view is to make terms about network modernisation and upgrade notice periods. These terms are set out in schedule 10 of the NPTC schedules. Except for changes to how some terms apply (discussed in section 5.3), the ACCC has not made any other changes to its draft decision on these terms.

The ACCC has not adopted Macquarie Telecom's proposed amendment to clause 10.6(b). In line with its draft views, it considers that 20 Business Days appropriately balances the compliance costs to an access provider of issuing an individual notification for suspended services relative to the impact on an access seeker from the suspension of the service. The ACCC considers this represents a reasonable balance of the interests of access providers and access seekers.

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<sup>72</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p 8.

<sup>73</sup> Briefly, Major Network Modernisation and Upgrade is defined as an modernisation or upgrade that (a) involves the installation of the Access Provider's customer access modules closer to end-users than an Exchange; (b) requires the removal/relocation of the Service provided from Exchanges and the establishment of a new POI (or relocation of an existing POI) for the Service; or (c) results in a Service no longer being supplied or adversely affects the quality of that Service, but does not mean an Emergency Network Modernisation Upgrade or an NBN related upgrade.

<sup>74</sup> See subclauses 9.19 and 9.20 of the final FAD terms, respectively, Coordinated capital works means a planned Major Network Modernisation and Upgrade with respect to the Service that extends across more than one ESA but which does not include an Emergency Network Modernisation and Upgrade.

<sup>75</sup> See subclause 9.10 of the final MTAS FAD.



termination by either party under clause 14.2 does not permit an access provider to suspend, interrupt or terminate the supply of a declared service where the access seeker has requested supply of the declared service to continue under a regulatory instrument or replacement agreement<sup>78</sup> (Macquarie expressed similar views).<sup>79</sup>

Macquarie Telecom strongly supported the inclusion of Schedule 14 in the FAD terms to allow for review or termination of access agreements when regulated terms are made by the ACCC.<sup>80</sup> Macquarie submitted that this schedule is in the LTIE because it ensures that key regulatory safeguards can be incorporated into access agreements.<sup>81</sup> However, it is concerned that access providers may seek to include entire agreement clauses which may have the effect of trumping any regulated terms.<sup>82</sup>

Macquarie Telecom also submitted that only the access seeker should have the right to terminate the access agreement under clause 14.2 as this will ensure access seekers will have continuity of supply.<sup>83</sup>

Telstra submitted:

- it does not agree with the draft decision to include FAD terms about regulatory recourse.<sup>84</sup>
- where access agreements are negotiated for the exchange of value, these arrangements should prevail without the risk of being overturned by a new regulated term as this may change the value of the deal initially negotiated.<sup>85</sup>
- there are a number of triggers for negotiation or re-negotiation which can be initiated by either party. For example, the expiry of whole of business incentives.<sup>86</sup>
- should the ACCC retain the regulatory recourse schedule, it should extend the time period in clause 14.2 (this clause relates to termination of an access agreement with notice when regulated terms are made).<sup>87</sup> In the ACCC's draft decision, the time period for notice was 'no less than 40 Business Days'. Telstra submitted that eight weeks is a very short period of time for an access seeker to be able to either re-negotiate terms (where a termination clause acts as a trigger for renegotiation), or obtain service from another wholesale provider.<sup>88</sup> Telstra submitted that a six month notice period should apply instead.<sup>89</sup>

## 6.10.3 ACCC final views

### 6.10.3.1 'Entire agreement' clauses in access agreements

As noted above, in mid-2014, the ACCC became aware of an entire agreement clause in some access agreements that could have the effect of excluding the application of regulated non-price terms during the life of the agreement.

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<sup>78</sup> iiNet, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 6.

<sup>79</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p. 4.

<sup>80</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p. 2.

<sup>81</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p. 2.

<sup>82</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p. 3.

<sup>83</sup> Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p. 4.

<sup>84</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015p 6.

<sup>85</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 8.

<sup>86</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 8.

<sup>87</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 8.

<sup>88</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 8.

<sup>89</sup> Telstra, submission to ACCC Draft Decision, Public Version, 8 May 2015, p 8.

[c-i-c begins: [REDACTED]  
[REDACTED]

- [REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED] c-i-c ends]

During this inquiry on NPTCs, industry has expressed concerns about the potential effect of these clauses. The ACCC has had constructive engagement with the relevant access provider about those concerns. While the access provider has not removed the entire agreement clause, an access seeker is currently able to terminate the relevant access agreement on notice and the access provider has also proposed some changes to its access agreement terms, specifically [c-i-c starts [REDACTED]

- [REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] c-i-c ends]

While not fully resolving the ACCC's concerns about the retention of the entire agreement clause, the ACCC recognises that the above measures may provide some recourse to regulated terms through [c-i-c starts [REDACTED]  
[REDACTED] . c-i-c ends]

The ACCC's final view is that, despite the outcomes of engagements between the ACCC and the relevant access provider, it will make FAD terms (with some changes) which address regulatory recourse. In this regard, the ACCC notes that these regulatory recourse terms provide clear guidance on what the ACCC considers are reasonable arrangements for access seekers to obtain regulatory recourse. These terms will provide an appropriate benchmark for access seekers and access providers, which can be considered in the negotiation of access agreements. The ACCC's decision on these FAD terms is set out below.

**6.10.3.2 FAD terms on regulatory recourse**

The ACCC's final view is that the NPTC schedules should include terms regarding regulatory recourse (schedule 14) but with changes to the draft terms, which will apply in the absence of commercial agreement on the particular matters addressed in that schedule.

Schedule 14 provides that, unless otherwise agreed by the parties, where an access agreement is in place for a declared service and the ACCC makes or varies a FAD or BROCC non-price term relating to that service then:

- parties must negotiate the proposed changes in good faith, where one party proposes to the other party (by written notice) to vary the access agreement to reflect that new or varied regulated term.
- either party may terminate an access agreement in respect of that service with no less than 120 Business Days' (around 6 months') notice.

The ACCC does not agree with Telstra's submission that the regulatory recourse issue is not a substantive issue that is in dispute or has been raised as a significant issue by access seekers.

Rather, the ACCC has received submissions in support of terms on regulatory recourse from iiNet, Macquarie Telecom, VHA and Vocus.<sup>90</sup> The ACCC is also aware that one access seeker has had difficulty in negotiating the inclusion of Schedule 14 of the Draft NPTC instrument (terms on regulatory recourse) in its access agreement.

The ACCC considers that FAD terms on regulatory recourse are likely to promote the LTIE. Recourse to regulated terms, compared to no recourse, is more likely to improve the reasonableness of terms of access and in turn promote competition on its merits and the LTIE in the relevant markets. Access to regulated terms may rebalance unequal bargaining power between the access provider and access seekers in the following ways:

- access seekers can leverage regulated terms during commercial negotiations to achieve more reasonable terms of supply, and/or
- where an access seeker requests and incorporates regulated terms into its access agreement, those terms would be more reasonable terms of access compared to unregulated terms on the same matter.

Submissions and changes to the ACCC's draft view are discussed below.

#### **Clause 14.1 – Negotiation in good faith**

The ACCC does not accept Telstra's view that the regulatory recourse terms will lead to the value of access agreements being 'overturned' by new regulated terms and has not made any changes to reflect this concern. Schedule 14 does not require regulated terms to be pulled through to access agreements and maintains the Part XIC regulatory hierarchy. The schedule only commits access providers and access seekers to negotiate about the inclusion of regulated terms, and parties are therefore able to negotiate to not include the regulated term (and thereby retain any balance of value in the original terms of the agreement).

The ACCC's final view is to make changes to clause 14.1 to ensure that negotiations are concluded within a reasonable time period of 20 Business Days unless a longer period is agreed between the parties. This will ensure that parties are unable to undermine negotiations through a protracted process and that parties reach a resolution and finalise terms of access in a timely manner (20 Business Days), while also recognising that parties may wish to agree to a longer period. This term is in the LTIE because it means that protracted negotiations will not be a barrier to more reasonable terms of access (regulated terms) and access seekers will obtain supply on those terms sooner, which is likely to promote competition in downstream markets for the relevant services. Further, the ability of parties to agree to a period that is longer than 20 Business Days is in their interests as it provides for flexibility around negotiation timeframes.

The ACCC has removed the proposed FAD obligation which required a party who refuses any variation to the Access Agreement or refuses a variation proposed by the other party to give reasons to the other party for the refusal (subclause 14.1(e) of the Draft FAD instrument). The ACCC's final view is that the benefits of such a commitment are likely to be minimal given that a party would have already been privy to the negotiations and may be aware of these reasons. These small benefits are likely to be outweighed by the administrative costs imposed on the relevant party in providing reasons for a refusal. The ACCC considers that this amendment to the draft FAD terms appropriately takes account of the legitimate business interests of access providers and access seekers.

The ACCC has decided to add a new clause 14.1A which was not in the Draft FAD instrument. Clause 14.1A provides that if the negotiation in good faith process in clause 14.1 does not result in a variation to the access agreement, this is not a Non-Billing or Billing Dispute for the

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<sup>90</sup> iiNet, submission in response to ACCC consultation of 8 December 2014, paragraph 4; Macquarie Telecom, submission to ACCC Draft Decision, Public Version, 29 May 2015, p 3; Vodafone response to ACCC Discussion Paper, Public Version, 12 December 2014, pp 8-9; Vocus, submission in response to request for comments on draft non-price terms and conditions, 14 January 2015, paragraph 2.



the need for further regulatory action. This could include making a BROC or varying the FAD, or enforcement action under Part XIB and XIC of the CCA.

## **6.11 Other matters**

### **6.11.1 Summary of the ACCC's draft views**

In the ACCC's draft report, the ACCC decided to not include terms which would aim to ensure that an access provider would provide equivalent supply of the relevant declared services to access seekers as those provided to itself. Nor did the ACCC make terms about change management – that is how an access provider can generally change the terms in access agreements.

### **6.11.2 Submissions**

The ACCC did not receive any submissions on these two matters.

### **6.11.3 ACCC final views**

Consistent with the reasons set out in sections 5.10.3.3 and 5.10.3.2 of the draft report<sup>93</sup>, the ACCC's final decision is not to make terms that address the equivalent provision of services or change management.

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<sup>93</sup> ACCC, *Draft Decision on NPTCs and connection charges for fixed line services*, March 2015, p 41-42.



## 7 Service-specific terms

The ACCC has made the following service-specific terms that only apply to certain declared services.

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

### 7.1 Wholesale ADSL: Resale provisions

#### 7.1.1 Summary of the ACCC's draft views

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

#### 7.1.2 Submissions

Telstra reiterated its previous views that access seekers who provide services to resellers should ensure that their resellers comply with the FAD terms and should be liable for non-compliance by their resellers.<sup>94</sup> Telstra submitted that this obligation would not impose additional costs on an access seeker because access seekers would generally 'back to back' the relevant obligations to ensure that the actions of its reseller do not put the access seeker at risk of a breach of FAD terms.<sup>95</sup>

#### 7.1.3 ACCC final views

For the reasons set out in the draft report in section 6.1.3, the ACCC's final view is to retain a schedule of terms regarding the resale of wholesale ADSL. The ACCC has not made any changes to its draft view in its final view on the NPTC schedules.

The ACCC has decided not to adopt Telstra's proposed additional clause. The ACCC considers that a clause making access seekers liable for non-compliance by their resellers would expose access seekers to significant liability for events potentially outside their control. This would be a potential barrier to entry for resellers and could have an adverse effect on potential competition in the relevant markets. The ACCC does not consider that relying on access seekers to 'back to back' their relevant obligations would necessarily resolve this concern. The ACCC has therefore decided to not include Telstra's proposed additional clause.

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<sup>94</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 10.

<sup>95</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 10.

## **7.2 ULLS and LSS: Ordering and provisioning processes (Managed Network Migrations and LSS to ULLS transfer)**

### **7.2.1 Summary of the ACCC's draft views**

The ACCC's draft view was to make NPTCs on certain ULLS and LSS provisioning processes. Schedule 13(a) of the Draft FAD instrument specifies terms regarding ULLS and LSS ordering and provisioning which involve Managed Network Migrations (MNM). The clauses set out when an access seeker can request to connect ULLS or LSS as part of a MNM, how access seekers are to forecast their MNM requirements, and when an access provider can refuse an MNM. They also specify that an access provider must provide information regarding complex services that have caused a service qualification query to fail.

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

The ACCC's draft view was to make changes to what is now clause 13.10 and clause 13.23.

### **7.2.2 Submissions**

Telstra submitted that there was limited demand for MNM in recent years, and did not anticipate that there will be any significant demand for MNMs over the life of the FAD. Telstra therefore suggested that it was not necessary for the ACCC to determine charges for MNM.<sup>96</sup> The ACCC considers that the extent to which MNM is being used is also relevant to whether the ACCC should make NPTCs on MNM ordering and provisioning processes.

The ACCC did not receive any other submissions to its draft decision with regards to the ordering and provisioning of MNM connections for the ULLS and LSS.

### **7.2.3 ACCC final views**

For the reasons set out in the draft report at section 6.2, the ACCC's final view is to include the ordering and provisioning terms which will apply in the ULLS and LSS FADs as amended by the ACCC's draft decision. The ACCC has not made any further amendments to those terms.

Following Telstra's submission and comments regarding the lack of demand for MNM process, the ACCC sought information from access seekers on their current and future use of MNM services for the ULLS and LSS.

While most access seekers agreed with Telstra's comments that there had been limited use of MNM process in recent years, some access seekers did note that they are currently using these services and may use them in the near future. Those access seekers suggested that FAD terms regarding MNM services act as a benchmark in their negotiations.

In light of access seekers' comments, the ACCC considers that there is merit in retaining the NPTCs on MNM ordering and provisioning processes as they may be used during the life of the next fixed line services FAD. The ACCC will consider specific MNM connection charges in the final decision on primary prices for the fixed line services.

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<sup>96</sup> Telstra, submission to the ACCC Draft Decision, Public Version, 8 May 2015, p 19.

## **7.3 ULLS: Intact Vacant ULLS processes**

### **7.3.1 Summary of the ACCC's draft views**

The ACCC's draft view was not to include an intact vacant ULLS (iVULL) process in the ULLS FADs. An iVULL process is relevant where there is an existing copper path to the customer's premises, but no current service over that path (intact vacant path) and an access seeker seeks a ULLS connection using that intact vacant path.

### **7.3.2 Submissions**

The ACCC did not receive any submissions in regards to iVULLS processes.

### **7.3.3 ACCC final views**

In line with the ACCC's draft report (section 6.3.3), the ACCC's final view is not to include an iVULLS process in the ULLS FADs. The ACCC has not received any new evidence from stakeholders that there are current competition concerns or that commercial negotiation is failing to establish an appropriate process for ULLS provisioning via an intact vacant path.

## **7.4 Other service-specific matters**

As noted in the draft report, the ACCC notes that there were submissions about other service-specific matters which relate to service-specific charges, that is, the special linkage charge for the DTCS. The ACCC will consider those submissions in the primary price inquiry for DTCS. The ACCC's final decision is not to make service-specific NPTCs for MTAS.

## **8 Commencement and expiry**

### **8.1 Summary of the ACCC's draft views**

The ACCC's draft view was that NPTCs for the fixed line services (including wholesale ADSL), the MTAS and the DTCS would commence and expire when the price terms for those FADs commence and expire.

### **8.2 Submissions**

Macquarie Telecom supported the commencement and expiry of the fixed line services FADs provided that regulated terms are not excluded by entire agreement clauses in access agreements.<sup>97</sup>

### **8.3 ACCC final views**

The ACCC confirms its views from the draft report. The NPTCs for each of the relevant declared services will commence when their primary price terms commence.

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<sup>97</sup> Macquarie Telecom, Submission to the Draft Decision, 29 May 2015, p 3.

## **Appendix A: NPTC schedules**