



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

VHA endorses the ACCC pursuing a comprehensive set of terms and conditions, which can act as a complete substitute for a commercial agreement. It is essential that the ACCC make FADs that present a viable alternative to an access agreement in circumstances where the parties cannot agree. It is also crucial that the non-price terms and conditions are implemented and the ACCC fundamentally changes the way fixed services are regulated so that Telstra's self-supply of these services does not put the rest of the industry at significant competitive disadvantage.

VHA has prepared a table of comments and proposed changes, shown in mark-up, to the NPTC that it considers the ACCC must, at a minimum, be dealt with in the FAD. This is set out in the **attached** table.

VHA restates its original position on the scope of the NPTCs and sets out our comments in two sections in the attached document:

1. A detailed response to the proposed terms and conditions (including individual additional terms where these are closely connected with the proposed terms); and
2. Additional categories of clauses which should be added to the NPTCs including a brief rationale.

VHA's has developed its comments on the NPTC on the basis of the following key principles:

- non-price terms and conditions must reflect the terms of a commercially reasonable agreement negotiated by parties with equal bargaining power;
- the service levels, fault management processes and other performance commitments within the terms must promote equivalence and offer no less protection to access seekers than those offered to the retail arms of vertically integrated access providers; and
- an access seeker or service provider may refer a dispute in relation to the terms and conditions to the ACCC for determination. The ACCC shall determine any dispute referred to it in this manner, according each party with procedural fairness and having regard to the matters set out in section 152BCA of the *Competition and Consumer Act 2010*(Cth) and the parties shall be bound by the terms of any such determination.

VHA response to draft non-price terms and conditions

No.	Draft non-price terms & conditions (NPTC)	VHA Comment	Proposal (shown in mark up)
<i>Schedule 1 Interpretation and definitions</i>			
1.	Billing Dispute Notice means a notice given pursuant to clause .2.10 in Schedule 2	Typographical error in the clause reference.	Billing Dispute Notice means a notice given pursuant to clause .2.10 in Schedule 2
2.	IIC means the internal interconnection cable	Typographical error, refers to another defined term which should therefore be capitalised.	IIC means the <u>Internal Interconnection Cable</u> internal interconnection cable
3.	Pair means the twisted pair of copper wires forming the internal interconnection cable	Typographical error, refers to another defined term which should therefore be capitalised.	Pair means the twisted pair of copper wires forming the <u>Internal Interconnection Cable</u> internal interconnection cable
4.	Party means a party to this FAD	The FAD is not an agreement and does not have parties.	Party means a party to <u>any agreement entered into on the terms of the this</u> -FAD
5.	Representative of a Party means each of that party's directors, officers, employees, agents, contractors, advisers and representatives, but does not include that Party's end-users or the other Party	Typically, a commercial agreement would include sub-contractors in this category.	Representative of a Party means each of that party's directors, officers, employees, agents, contractors <u>(including sub-contractors)</u> , advisers and representatives, but does not include that Party's end-users or the other Party
<i>Schedule 2 – Billing and notification</i>			
6.	Clause 2.2 provides that “The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 2”	Access seekers need certainty that the prices charged in accordance with the FAD are exhaustive.	The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 2, <u>which Charges are the sole Charges payable to the Access Provider in connection with the Access Seeker's acquisition of the Services.</u>
7.	Clause 2.3 provides that “The Access Provider must provide the Access Seeker with an	Invoices should be issued at regular intervals every month to allow efficiencies in	The Access Provider must provide the Access Seeker with an invoice <u>at regular intervals</u> each month in

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	invoice each month in respect of Charges payable for the Service unless the parties agree otherwise.”	processing payments. Regular billing obligations should extend to credits as well as charges.	respect of Charges payable for <u>and applicable reductions (e.g. for service credits) applied to</u> the Service unless the parties <u>Parties</u> agree otherwise.
8.	Clause 2.6(a) provides that “An invoice is payable in full 30 Calendar Days after the date the invoice was issued or such other date as agreed between the parties.”	Access Seekers should have a period of 60 calendar days for payment from the invoice is received (i.e. a period within the control of the Access Seeker) in order to properly review and respond to the invoice and process payment.	An invoice is payable in full <u>30-60</u> Calendar Days after the date the invoice was issued or such other date as agreed between the parties <u>is received by the Access Seeker.</u>
9.	Clause 2.6(b) provides that “The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider.”	Access Seekers are permitted to set off or withhold payment in certain circumstances under the FAD and this needs to be reflected in this clause. In addition, Access Seekers should have a right of set off where they are owed monies by the Access Provider which are overdue to give them a practical and useful remedy.	<u>Except as otherwise provided in the FAD, t</u> The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider <u>or unless the Access Provider owes money to the Access Seeker under the FAD and the due date for payment of that money has passed without payment to the Access Seeker, in which case the Access Seeker may give prior written notice to the Access Provider before setting-off an amount not more than the amount owed.</u>
10.	Clause 2.6(c) provides that “All amounts owing and unpaid after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day authorised dealers bank bill rate published in the <i>Australian Financial Review</i> on the first Business Day following the due date for payment, plus 2.5 per cent.”	Given the financial consequences of the exercise of a right to charge interest for late payments, it is reasonable to build in some minimal safeguards to protect an access seeker (for example, in the event of an inadvertent failure to pay on time).	“All amounts owing and unpaid <u>within 10 Business Days</u> after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day authorised dealers bank bill rate published in the <i>Australian Financial Review</i> on the first Business Day following the due date for payment, plus 2.5 per cent, <u>provided that the Access Provider has re-sent the invoice together with a statement of the due date and that it is overdue and the</u>

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			<u>date on which the invoice will accrue interest to the Access Seeker within 5 Business Days of the due date.</u>
11.	Clause 2.8 provides that “where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise the administration and financial costs, the parties must consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties’ respective invoice dates and other procedures to allow set-off to occur efficiently.”	It is too restrictive for the set off rights to be limited to a liquidation event, these rights should mirror the termination rights on insolvency. In addition, defined terms should be used.	Clause 2.8 “where an <u>an event specified in clauses 6.8(a)-(i) occurs in relation to a party-Party goes into liquidation, in which case</u> the other <u>party-Party</u> may set-off. However, in order to minimise the administration and financial costs, the <u>parties-Parties</u> must consider in good faith set-off procedures for inter- <u>party-Party</u> invoices which may require the alignment of the <u>parties’-Parties’</u> respective invoice dates and other procedures to allow set-off to occur efficiently.”
12.	Clause 2.9 provides that “The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice. Nothing in this clause 2.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.”		<u>“The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice, including that invoices must be itemised in Australian dollars, sent to the Access Seeker’s designated address, be in an agreed format, ascertain which Service each of the Charges relates to and the manner in which the charges have been calculated.</u> Nothing in this clause 2.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.”
13.	Clause 2.26(a) provides that “either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation must be conducted in accordance with the mediation guidelines of the Australian Commercial Disputes Centre (ACDC) and concluded within	VHA submits that the ACCC should be able to have such disputes referred to it in order to give the ACCC an holistic view of the provision of declared services and the practical operation of the NPTCs.	“either party may provide a written proposal to the other party for the appointment of <u>the ACCC as arbitrator or</u> a mediator to assist in resolving the dispute. <u>Arbitration by the ACCC must be conducted according to a process which is not longer than three Months and is agreed in writing by the pParties and the ACCC.</u> Mediation must be conducted in accordance

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	three Months of the proposal (unless the parties agree to extend this timeframe); or”		with the mediation guidelines of the Australian Commercial Disputes Centre (ACDC) and concluded within three Months of the proposal (unless the parties <u>Parties</u> agree to extend this timeframe); or”
14.	Clause 2.31 provides (in part) that “... the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 2.7, plus 2 per cent...”	Proposal fixes an incorrect cross reference.	That section should be amended to read that “... the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 2. 7 <u>6</u> , plus 2 per-cent...”
<i>Schedule 3 – Creditworthiness and Security</i>			
15.	Clause 3.1 provides that “Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker’s sole cost and expense) provide to the Access Provider and maintain, on terms and conditions reasonably required by the Access Provider and subject to clause 3.2, the Security (as is determined having regard to clause 3.3 and as may be varied pursuant to clause 3.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.”	Amendments proposed clarify the interaction between clauses 3.1 - 3.3.	“Subject to clause 3.3 and u Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker’s sole cost and expense) provide to the Access Provider and maintain, on terms and conditions reasonably required by the Access Provider and subject to clause 3.2, the Security (as is determined having regard to clause 3.3 and as may be varied pursuant to clause 3.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.”
16.	Clause 3.2(a) provides in part “The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the Security specified in clause 3.1...”	Amendments proposed clarify the interaction between clauses 3.1 - 3.3.	“The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the any Security specified in provided under clause 3.1...”
17.	Clause 3.3 provides in part “The Security	Amendments proposed to make it clear that	“The Security (including any varied Security) may only

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	(including any varied Security) may only be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services, and be of an amount and in a form which is reasonable in all the circumstances. As a statement of general principle the amount of any Security is calculated by reference to..."	the Access Provider must take into account the Access Seeker's credit rating (which is an objective criterion).	be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services, and be of an amount and in a form which is reasonable in all the circumstances <u>(including any leading credit rating agency's assessment of the Access Seeker)</u> . As a statement of general principle the amount of any Security is calculated by reference to..."
<i>Schedule 4 – General dispute resolution procedures</i>			
18.	Clause 4.2 provides in part "...For the purposes of this clause 4.2, the independent third party may include an arbiter from the ACDC."	Sub-section 152BC(7) provides that an access determination such as the FAD may grant the Commission powers. VHA submits that the ACCC should be able to have such disputes referred to it in order to give the ACCC an holistic view of the relationship between Access Providers and Access Seekers, the practical operation of the FAD NPTCs and to inform the ACCC of the operation of the market for declared services.	"...For the purposes of this clause 4.2, the independent third party may include <u>the ACCC or</u> an arbiter from the ACDC."
19.	Clause 4.4(b) provides "if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within a further five Business Days to refer the Non-Billing Dispute to an Expert Committee under clause 4.11, or by written agreement submit it to mediation in accordance with clause 4.10"	Sub-section 152BC(7) provides that an access determination such as the FAD may grant the Commission powers. VHA submits that the ACCC should be able to have such disputes referred to it in order to give the ACCC an holistic view of the relationship between Access Providers and Access Seekers, the practical operation of the FAD NPTCs and to inform the ACCC of the operation of the market for declared services.	Clause 4.4(b) provides "if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties <u>Parties</u> may agree in writing within a further five Business Days to refer the Non-Billing Dispute to <u>the ACCC pursuant to clause 4.9A,</u> an Expert Committee under clause 4.11, or by written agreement submit it to mediation in accordance with clause 4.10" Consequential amendment is required to clauses

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			<p>4.5(a) “under clause 4.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation pursuant to clause 4.4(b); or,”</p> <p>Insert new clause 4.9A “</p> <p><u>(a) Where a Non-Billing Dispute is referred to the ACCC by way of written agreement between the pParties pursuant to clause 4.4(b), the pParties must abide by any applicable guidelines published by the ACCC concerning the procedure to be followed;</u></p> <p><u>(b) Unless inconsistent with any such published guidelines, the written agreement between the pParties to refer the Non-Billing Dispute must include a statement of the relevant matters; and</u></p> <p><u>(c) If there are no such published guidelines, the written agreement between the pParties to refer the Non-Billing Dispute must also include a statement of the proposed procedure to be followed, which is subject to negotiation with and agreement by the ACCC.”</u></p>
20.	Clause 4.8 provides that “All communications between the parties during the course of a Non-Billing Dispute are made on a without prejudice and confidential basis.”	Suggested clarification.	Clause 4.8 provides that “All communications between the parties <u>Parties</u> during the course of a Non-Billing Dispute <u>in connection with that Non-Billing Dispute</u> are made on a without prejudice and confidential basis.”
21.	Clause 4.11(d) provides that “The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed	Sub-section 152BC(7) provides that an access determination such as the FAD may grant the Commission powers. VHA submits that the ACCC should be able to have such disputes referred to it in order to give the	“The Expert Committee must include an independent chairperson agreed by the parties <u>Parties</u> or, if not agreed, a nominee of the ACCC <u>ACDC</u> . The chairperson must have the qualifications listed in

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	in paragraphs 4.10(d)(i), (ii) and (iii)."	ACCC an holistic view of the relationship between Access Providers and Access Seekers, the practical operation of the FAD NPTCs and to inform the ACCC of the operation of the market for declared services.	paragraphs 4.10(d)(i), (ii) and (iii)."
<i>Schedule 5 – Confidentiality provisions</i>			
22.	Clause 5.1 provides (in part) that "Subject to clause 5.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not..."	Use of defined term.	"Subject to clause 5.4 and any applicable statutory duty, each party-Party must keep confidential all Confidential Information of the other party-Party and must not..."
23.	Clause 5.5(a) provides "to those of its directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential Information is reasonably required to be disclosed for the purposes of this FAD;"	Use defined term and include 'advisers' (note this is also captured in clause 5.5(b)).	"to those of its directors, officers, employees, agents, contractors (including sub-contractors) and r Representatives to whom the Confidential Information is reasonably required to be disclosed for the purposes of this FAD;"
24.	Clause 5.5(i) provides "as required by the listing rules of any stock exchange where that party's securities are listed or quoted."	A commercial agreement would extend this to parent companies, recognising that corporate structures are commonly complex.	"as required by the listing rules of any stock exchange where either that party's-Party's securities are listed or quoted, <u>or the securities of a related body corporate to a Party are listed or quoted;</u> "
25.	Proposed new clause 5.5(j)	A commercial agreement would typically also allow disclosure in order to obtain funding and in connection with any prospective sale of the business or assets.	<u>"to third parties where either the disclosure is required to secure or maintain funding from a bank or other financial institution, to secure or maintain funding by issuing shares or debt to any third party or in connection with the prospective sale of any business or assets of a Party's or a Party's related body corporate; and"</u>

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26.	Proposed new clause 5.5(k)	A commercial agreement would typically also allow disclosure within the corporate group.	<u>“to any related body corporate or Representative of a related body corporate of a Party provided that such recipients treat the information as confidential and agree to be bound by the requirements of this clause.”</u>
<i>Schedule 5 – Suspension and termination</i>			
27.	Clause 6.1(b) provides that “where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider’s Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency;”	The Access Provider must be required to also consider any reciprocal threat arising from the suspension before suspending the Service. Any potential threat to the Access Provider’s end users must be balanced against the potential impact on the Access Seeker’s end users, both are equally important. A potential hazard to equipment on the other hand, is not sufficiently serious to warrant suspending services, having regard to the likely impact on end users.	“where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider’s Network may pose a threat to safety of persons, hazard to equipment , threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency <u>and that threat outweighs the threat to safety of persons, threat to Network operation, access, integrity or Network security or any likely impact on the activities of authorised persons responding to an Emergency arising from the suspension of that Service;</u> ”
28.	Clause 6.1(e).	Typographical error.	The paragraph reference “e)” should be deleted (but the text of the clause remain).
29.	New clause 6.5A	The Access Provider has the right to terminate the agreement for material breach but not the Access Seeker. This right should be reciprocal.	<u>“If the Access Provider breaches a material obligation under this agreementFAD, the Access Seeker may give the Access Provider written notice of the breach and if that breach is not resolved within 10 Business Days may terminate the agreementFAD with immediate effect and without incurring any additional charges.”</u>
30.	Clause 6.10 provides that “Without prejudice to the parties’ rights upon termination of the supply of the Service under this FAD, or expiry	It is unreasonable for the Access Seeker to pay for the services during suspension, when the services are not being provided.	“Without prejudice to the parties’ <u>Parties’</u> rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access

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	<p>or revocation of this FAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD.”</p>		<p>Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, <u>or for any period when supply of the Service is suspended</u>, subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD.”</p>
31.	New clause 6.11	<p>No reconnection fees should be payable where the Service is suspended through no fault of the Access Provider. It is the Access Provider who owns and manages the network and properly bears the cost of ‘no fault’ or ‘own fault’ network disruption.</p>	<p><u>“If the Service is suspended pursuant to clauses 6.1(a)-(b), the Access Provider must not charge any fees for reconnection of the Service or reprovision of the Service once the suspension is lifted.”</u></p>
<i>Schedule 7 – Liability and Indemnity</i>			
32.	<p>Clause 7.1(a) provides that “the 12 Month period commencing on the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider</p>	<p>This proposal ensures that an Access Seeker does not face an unfairly low liability cap in the early days of provision of the Service.</p>	<p>“the 12 Month period commencing on the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or <u>reasonably forecast to be</u> payable by the Access Seeker to the Access Provider for the Service provided by the Access</p>

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	in that initial 12 Month period”		Provider in that initial 12 Month period.”
33.	Clause 7.6 provides that “Subject to clauses 7.3 and 7.4, a Party has no Liability to the other Party for or in respect of any consequential, special or indirect Loss or any loss of profits or data.”	Such losses can be reasonably foreseen as a result of breach of the FAD or negligence and therefore responsibility for these losses should be borne by the at fault Party as part of the normal apportionment of risk in a commercial arrangement.	“Subject to clauses 7.3 and 7.4, a Party has no Liability to the other Party for or in respect of any consequential, special or indirect Loss or <u>except that a Party is liable for</u> any loss of profits or data.”
<i>Schedule 8 – Communication with end users</i>			
34.	<p>Clauses 8.2(a) - (c) provide that</p> <p>“(a) in relation to goods and services which the Access Provider currently supplies or previously supplied to the end-user provided that the Access Provider only communicates and deals through its Retail Business Unit;</p> <p>(b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;</p> <p>(c) where the Access Provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;”</p>	These communications do not pertain to the services being provided and therefore do not relate to the Agreement. Accordingly, they should be deleted to avoid any doubt about the Parties’ right to communicate with their customers.	<p>“(a) in relation to goods and services which the Access Provider currently supplies or previously supplied to the end-user provided that the Access Provider only communicates and deals through its Retail Business Unit;</p> <p>(b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;</p> <p>(c) where the Access Provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;”</p>
35.	<p>Clauses 8.2(d)-(e) provide that</p> <p>“(d) in a manner or in circumstances agreed by the Parties; or</p> <p>(e) in or in connection with an Emergency, to</p>	The only circumstances in which the Access Provider should be able to contact an Access Seeker’s customer in that capacity is as agreed between the Parties or in an emergency where it is not practicable to	<p>“(d) in a manner or in circumstances agreed by the Parties <u>in advance</u>; or</p> <p>(e) in or in connection with an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property <u>and it is not practicable to notify</u></p>

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	the extent it reasonably believes necessary to protect the safety of persons or property.”	notify the Access Seeker in advance and have the Access Seeker contact their customers.	<u>the Access Seeker and for the Access Seeker to make the communication with its customers.”</u>
36.	Clause 8.6(a) provides that “it has any special relationship with or special arrangements with the other Party;”	Each Party should have the right to control its media exposure.	“it has any special relationship with or special arrangements with the other Party; <u>or use the other Party’s name, trade marks or get up directly or indirectly in media releases, public announcements or public disclosures without the other Party’s prior written consent.”</u>
37.	Clause 8.7 provides that “Where a Party communicates with an end-user of either Party, the first mentioned Party shall ensure that it does not attribute to the other Party: (a) blame for a Fault or other circumstance; or (b) the need for maintenance of a Network; or (c) the suspension of a Service, provided that this requirement does not require a Party to engage in unethical, misleading or deceptive conduct.”	It is reasonable for a Party to attribute responsibility to the other Party where this is objectively ascertainable or otherwise agreed and will assist in the development of clear and useful communications with end users.	Clause 8.7 provides that “Where a Party communicates with an end-user of either Party, the first mentioned Party shall ensure that it does not attribute to the other Party: (a) blame for a Fault or other circumstance; or (b) the need for maintenance of a Network; or (c) the suspension of a Service, <u>unless the Parties have investigated the matter and agreed that it is properly attributable to that Party or relates to the exercise of that Party’s rights under this FAD and</u> provided that this requirement does not require a Party to engage in unethical, misleading or deceptive conduct.”
<i>Schedule 9 – Network modernisation and upgrade notice periods</i>			
38.	Clause 9.1(b) provides that “consulting with the Access Seeker, and negotiating in good faith, any reasonable concerns of the Access Seeker, in relation to the Major Network	We suggest clarifying that the negotiation is not solely to discuss but to address the reasonable concerns of the Access Seeker.	“consulting with the Access Seeker, and negotiating in good faith, <u>to address</u> any reasonable concerns of the Access Seeker, in relation to the Major Network Modernisation and Upgrade.”

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	Modernisation and Upgrade”		
39.	Clause 9.6(b) provides that “the Major Network Modernisation and Upgrade will result in the Service no longer being supplied.”	It is reasonable to require the Access Provider to prepare an individual notification where the Access Seeker’s Service is likely to be interrupted given the potential impact on end users.	“the Major Network Modernisation and Upgrade will result in the Service no longer being supplied <u>or supply of the Service being or likely to be interrupted.</u> ”
40.	Clause 9.7(b) provides that “weekly reports about the anticipated cutover dates for the Access Seeker’s affected Services, beginning no less than five weeks prior to the anticipated commencement date for the Major Network Modernisation and Upgrade.”	The Access Seeker must be provided with notice of the likely impact on end users in order to manage end user expectations and experience and to minimise the impact on end users.	“weekly reports about the anticipated cutover dates for the Access Seeker’s affected Services, beginning no less than five weeks prior to the anticipated commencement date for the Major Network Modernisation and Upgrade <u>and including the duration of any reasonably anticipated suspension, outage, impairment or other impact on the Service; a description of the reasonably anticipated suspension, outage, impairment or other impact on the Service and the timeframe during which this is forecast to occur.</u> ”
41.	New clause 9.15A	The Access Seeker must be provided with at least 10 Business Days written notice of likely impact on end users in order to manage end user expectations and experience and to minimise the impact on end users.	“ <u>The Access Provider must provide to the Access Seeker at least 10 Business Days notice of any impact on the Service, including the duration of any reasonably anticipated suspension, outage, impairment or other impact on the Service; a description of the reasonably anticipated suspension, outage, impairment or other impact on the Service and the timeframe during which this impact is forecast to occur.</u> ”
42.	New clause 9.26	It is reasonable to require the Access Provider to undertake scheduled works outside peak hours.	“ <u>All scheduled maintenance including any Major Network Modernisation and Upgrade or Coordinated Capital Works Program must be undertaken between 11pm and 6am (both in the place where the work is to be performed and the place where end users are</u>

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			<u>affected), unless otherwise agreed in writing between the Parties acting reasonably.”</u>
43.	New clause 9.27	A non-discrimination / equivalence obligation is reasonable to ensure that the Service provided is of equal quality and these provisions are not used to surreptitiously degrade the quality of service provided to the Access Provider’s competitors / customers.	<u>“The Access Provider must not discriminate against Access Seekers in scheduling outages and in particular, Services must not be restored to the Access Provider before they are restored to the Access Seeker.”</u>
44.	New clause 9.28	The Access Provider should be subject to a general obligation to minimise disruption to end users when upgrading its network, excepting emergencies.	<u>“The Access Provider must use reasonable endeavours to minimise disruption to Access Seekers and all end users affected by works relating to a Network Modernisation and Upgrade or Coordinated Capital Works Program, whether those end users are its own customers or an Access Seeker’s customers except during an Emergency.”</u>
<i>Schedule 10 – Changes to operating manuals</i>			
45.	Clause 10.1 provides that “allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and giving reasonable consideration to any comments which the Access Seeker has made on the proposed amendments; and”	If the Access Provider has the ability to unilaterally alter the terms and conditions of service, it is fair for the Access Seeker to be have its reasonable requests implemented by the Access Provider.	Clause 10.1 provides that “allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and <u>implementing any giving reasonable</u> consideration to any comments which amendments the Access Seeker has made on <u>requested in relation to</u> the proposed amendments; and”
46.	Clause 10.2 provides that “Upon completion of the process set out in clause 10.1, the Access Provider must notify the Access Seeker and make available to the Access Seeker a copy of the new operational document.”	These operating documents form part of the terms and conditions of supply. Given the ACCC’s critical role in developing the non-price terms and conditions, it is important that it has a complete view of the terms and conditions of access.	“Upon completion of the process set out in clause 10.1, the Access Provider must notify the Access Seeker <u>and the ACCC</u> and make available to the Access Seeker <u>and the ACCC</u> a copy of the new operational document.”

No.	Draft non-price terms & conditions (NPTC)	VHA Comment	Proposal (shown in mark up)
47.	Clause 10.3(b) provides that “deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;”	It is inappropriate for one Party to unilaterally have the power to amend the supply terms to be less favourable to the other Party without recourse to dispute resolution procedures.	“result in deprive the Access Seeker of a fundamental part of the bargain it obtained <u>ing the Service on less favourable terms of supply</u> under this FAD <u>or discriminate in favour of the Service Provider or other Access Seekers or have an adverse impact on the Access Seeker or its end users from an operational, financial or business perspective;</u> ”
<i>Schedule 12 – ULLS and LSS</i>			
48.	Clause 12.6 provides that “If the cutover of Services cannot occur within the 56 Calendar Day forecast period because of a significant variation between the 56 Calendar Day forecast and the 20 Business Day forecast, the Access Provider must take all reasonable steps to ensure that cutover occurs as soon as practicable following the conclusion of that period.”	This clause is critical to the ability of Access Seekers to offer quality services to end users. It is not enough that the Access Provider takes reasonable steps after nearly 3 months have passed after the cutover is requested. The Access Provider should be required to use best endeavours after this point.	“If the cutover of Services cannot occur within the 56 Calendar Day forecast period because of a significant variation between the 56 Calendar Day forecast and the 20 Business Day forecast, the Access Provider must take all reasonable steps <u>use its best endeavours</u> to ensure that cutover occurs as soon as practicable following the conclusion of that period.”
49.	Clause 12.10 provides that “The Access Provider may refuse a requested MNM cutover date where it would be inconsistent with a capacity limitation notice (Limitation Notice) it has published.”	Given the ACCC’s critical role in developing the non-price terms and conditions for the provision of this Service, it is important that it has a complete view of how it is supplied and that Access Seekers are able to easily obtain critical documents.	“The Access Provider may refuse a requested MNM cutover date where it would be inconsistent with a capacity limitation notice (Limitation Notice) it has published. <u>The Limitation Notice must be published on the Access Provider’s website, a copy must be given to the ACCC and to Access Seekers on request (which request may be a general standing request to be sent all Limitation Notices in an agreed format to an agreed recipient).</u> ”

Additional key non-price terms and conditions

The FAD lacks key non-price terms and conditions which would prevent the ability of an Access Seeker to execute the terms as an agreement and require further negotiation with the Access Provider, thus defeating the purpose of the FAD. In order to preserve the utility of the FAD, VHA requests the inclusion of terms concerning the following matters.

No.	Requirement	Rationale
50.	Detailed service descriptions (including by reference to objective technical standards and measures such as resiliency)	<p>This is required for both parties to have a common understanding of the scope of a service or service feature in order to properly map each particular service or feature to a set charge. Industry standards offer an objective baseline for the standard to service to be provided, and are accepted and adhered to by service providers in competitive markets. There are different levels of protection available for a service. Given that the level of protection will be incorporated into a service provider's pricing model, it is essential that there is a common understanding between the parties as to the scope of protection involved.</p>
51.	Service levels (including testing obligations), provision of credits where such service levels are not met and a general standard of care	<p>Committed services levels are essential for an access seeker to maintain a quality network and offer quality of service to end-users and to be assured that it is getting the service it is paying for. Critical service levels will include metrics around: availability, provisioning (including delay) and rectification of faults. In competitive markets for the provision of services, service levels are recognised and accepted as fundamental to quality of performance. In addition, a general non-discrimination requirement in the Agreement is required to support these service levels and to enable the Access Seeker to obtain remedies for breach of the agreement (which will be practical and tailored to the particular harm) in the event that this statutory requirement was breached.</p> <p>Testing is an integral step in ensuring that a service that a service provider is contracted to provide will achieve the required functionality prior to "go live" and the access seeker relying on the service to on-deliver services to end-users. In the absence of service levels and testing commitments, an access seeker has little assurance that the service will be available and operate as specified.</p> <p>The application of service credits for failures to meet service levels is a commonly used tool in commercial services agreements in competitive markets to incentivise service providers to adhere to agreed performance standards. An access seeker's entitlement to service credits should be in addition to its other rights and remedies (though in calculating any damages or other restitution for which a service provider may be liable in relation to a service level breach, the amount of any service credits paid in relation to the breach can be taken into account).</p> <p>Services should be provided in accordance with minimum industry standards. In a competitive</p>

No.	Requirement	Rationale
		market, where service providers compete on the quality of their service offering, it is standard practice to provide contractual assurances to customers about the level of care that will be applied in the provision of services.
52.	Fault monitoring (including a positive obligation on the Access Provider to actively monitor the Service to detect faults), reporting and management.	Service monitoring is critical to ensure faults are detected and efficiently resolved to minimise impacts on Access Seekers and end-users. There should be an incentive for either party to report faults so that they can be addressed as expeditiously as possible to avoid or minimise impact on end-users. Fault management is critical to ensure the service meets fundamental quality requirements.
53.	Equipment	<p>It may often be necessary for a service provider to install or locate equipment in an Access Seeker's facility. It is reasonable to expect the Access Provider to do so in a manner that does not adversely impact the Access Seeker or its business, and to bear the responsibility for doing so in a professional manner. Similar obligations should apply when equipment is decommissioned. Title in equipment should be unaffected by its location, risk should be borne by the Party at whose premises it is located.</p> <p>Any equipment which an Access Seeker will need in order to access and use the service should be specified by the Access Provider.</p>
54.	Regulatory events	Changes to pricing for declared services, or agreed changes to other charges, must be implemented promptly and Access Seekers should be kept informed of any delays in introducing the new charges.
55.	Tax	It is standard for commercial agreements to provide for the treatment of GST and tax (including any changes to the taxation regime). Such clauses are typically required before agreements can be executed in order to provide clarity and certainty around pricing.
56.	Term and termination rights	It is typical for commercial agreements to specify a fixed term and to give the parties the right to terminate on specified occurrences, including for convenience. There is no ability for the Access Seeker to terminate the FAD for commercial reasons. Such a position is commercially unacceptable and would need to be negotiated. VHA proposes that an access seeker should have a right of termination for convenience, which can be exercised at any time, on 30 days notice. Such termination should be without liability, other than an obligation to pay the balance of any charges

No.	Requirement	Rationale
		<p>owing.</p> <p>In addition, an Access Seeker should have the right to terminate the agreement for failure to perform to an acceptable standard (which requires the specification of service levels) as well as for material breach (see proposed amendments above).</p>
57.	Warranties	<p>Warranties would typically be provided in relation to no infringement of third party rights (including intellectual property rights) and a service provider having in place all required licences, approvals etc required to provide the service.</p>
58.	IP	<p>It is standard in commercial agreements for the Service Provider to indemnify the Access Seeker against loss suffered by it in connection with a claim that the supply or use of the Services infringes the intellectual property rights or other rights of any person.</p> <p>In the event of an intellectual property claim that affects the supply of the services, the service provider should be obliged to procure a right to continue using the relevant intellectual property or to replace or modify the affected service in a manner acceptable to the access seeker (acting reasonably), ensuring that there is no adverse effect on the functionality or performance of the relevant service and the modified or replaced service does not have an adverse effect on the information systems or networks of the access seeker and complies with the relevant specifications.</p> <p>In addition, it is standard to protect the parties' rights in pre-existing IP and materials.</p>
59.	Insurance	<p>A service provider should be required to effect and maintain appropriate levels and types of insurance cover, for the duration of the provision of services and for an appropriate time thereafter, e.g. professional indemnity, public liability insurances, etc.</p>
60.	Network use	<p>Without prejudice to any requirement to perform its obligations, both a service provider and access seeker should be responsible for the safe and lawful operation and management of their own networks.</p>
61.	Governance	<p>Each party should be required to comply with all laws applicable to its obligations under these terms. The Service Provider must have in place and maintain all relevant government or regulatory approvals required for it to perform the services.</p> <p>In the event of a defined regulatory event occurring, either Party should have the ability to initiate</p>

No.	Requirement	Rationale
		<p>discussions with the other to determine the consequential effect on the parties' rights and obligations and any changes to the terms required to address this. Both parties should be obliged to negotiate any consequential changes to the terms in good faith. Any dispute as to how the terms should be changed to reflect the regulatory event should be managed in accordance with the dispute resolution process, including referral to the ACCC for arbitration if required by either party.</p> <p>The Service Provider should be obliged to issue monthly reports to the access seeker in relation to the services.</p> <p>In the event of any inconsistency between the head terms of an agreement or Final Access Determination and the access provider's operational manuals (as amended from time to time), the head terms of the agreement / FAD should prevail to the extent of the inconsistency.</p> <p>A service provider should be obliged to keep records of the transactions for 7 years (or longer if required by law), and to make them available to the access seeker or an independent auditor upon the access seeker's request.</p> <p>The service provider should also be required to cooperate and provide reasonable assistance to an auditor.</p> <p>Each party should bear the costs of an audit, unless the audit reveals the service provider has overcharged the access seeker, in which case the service provider should pay the access seeker's audit costs.</p>
62.	Boilerplate	<p>Commercial contracts contain standard boilerplate provisions which need to be negotiated and inserted before execution. Standard provisions are:</p> <ul style="list-style-type: none"> • Governing law - Victoria or New South Wales. • A variation to any term should be required to be in writing and signed by both parties. • No waiver of a right or remedy should be effective unless it is in writing and signed by the party granting it. • A failure or delay in exercise, or partial exercise, of a right arising from a breach should not result in a waiver of that right.

No.	Requirement	Rationale
		<ul style="list-style-type: none"> • Any term that is prohibited or unenforceable in any jurisdiction should be ineffective as to that jurisdiction to the extent of the prohibition or unenforceability, and this should not invalidate the remaining terms nor affect the validity or enforceability of that term in any other jurisdiction. • The rights, powers, authorities, discretions and remedies arising out of or under an agreement should be cumulative and not exclude any other right, power, authority, discretion or remedy of either party. • Except where a term expressly provides otherwise, a party should be free to exercise a right or give or withhold consent or approval in its absolute discretion, without any requirement to act reasonably or give reasons, and conditionally or unconditionally. • Any assignment, novation or other transfer of rights or obligations should be subject to the other party's prior written consent, but with certain exceptions. • Any rights or obligations of the parties which by their nature survive expiry or termination of the arrangement should not be affected by expiry or termination. In addition, certain terms should be identified as surviving the expiry or termination of the arrangement between the parties, including confidentiality, liability and termination. • Notices should be required to be in writing, addressed to a party's nominated addresses, delivered by hand, pre-paid ordinary post or fax, and be deemed to take effect once received unless a later time is specified.
63.	Interpretation	<p>Commercial contracts contain standard interpretation provisions which need to be negotiated and inserted before execution. Standard additional provisions are:</p> <ul style="list-style-type: none"> • a reference to an act, statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to an act or statute includes all regulations, proclamations, ordinances and by-laws issued under that statute • a reference to a document includes all amendments or supplements to, or replacements or novations of, that document

No.	Requirement	Rationale
		<ul style="list-style-type: none"><li data-bbox="931 256 2051 320">• the words “including”, “such as”, “for example” and “particularly” and similar expressions do not imply any limitations.