Submission in response to ACCC
Draft Clauses

Non-Price Terms and Conditions

PUBLIC VERSION

January 2015

Contents

Section 1. Executive Summary

1.1 Optus welcomes the opportunity to comment on the proposed drafting of certain non-price terms and conditions (NPTC).

1.2 Optus supports the use of common terms as a fall-back position should the Access Provider and Access Seeker fail to reach commercial agreement. To that end, the terms should balance the interests of both parties. The provisions should also be drafted so as to encourage the parties to reach commercial agreement where possible. The terms should not be drafted in a manner to favour any one party or in a manner that discourages effective commercial negotiations.

1.3 In relation to other issues on which the ACCC is seeking submissions:

(a) Optus does not support the inclusion of mandatory regulatory flow-through provisions in the NPTC FAD. Optus supports the current commercial practice where parties are able to agree to forgo regulatory recourse in return for adequate compensation. Should the ACCC wish to include a specific term on this issue, Optus recommends a term that would reflect existing commercial practice.

(b) Optus does not support the inclusion of specific clause within the NPTCs relating to disclosure of information to ACCC or other government bodies. Under Part XIC Access Providers are required to submit to the ACCC a copy of all its access agreements. Therefore there is no need to insert such clause in access agreements.

(c) Optus strongly supports the equivalence obligations of Telstra in relation to regulated services. This obligation is contained in the Structural Separation Undertaking (SSU) and associated documents but it is not yet clear whether this is leading to real equivalence between Telstra Retail and Access Seekers using regulated services. Optus believes that the equivalence obligation should be an overarching driver of the development of *all* price and non-price terms and conditions. All FADs should ensure that Telstra provides regulated service on equivalent terms to Access Seekers and its retail divisions.

Section 2. Comments on specific clauses

2.1 Optus wishes to comment on the following schedules.

Schedule 1: Interpretations and Definitions

2.2 The definition of "confidential information" should be amended in the following manner:

(a) The term "first mentioned party" is not actually identified. Further, the definition is access provider-centric by only focusing on the "Services supplied". We therefore suggest that the words "the Service supplied under this FAD" in the 4th/5th lines are replaced with "the business of a party".

(b) Clause (d) should be amended to ensure that information remains confidential where it could be used to identify services acquired by Access Seekers. For example, an Access Seeker may be the major acquirer of a service, and aggregation of data may not protect the identity of the Access Seekers, quantity purchased, or purchase price. Optus recommends to replace " such that the Access Seeker cannot be identified by the information or any part of it" with "*such that services acquired by the Access Seeker cannot be identified by the information or any part of it*"

2.3 The definition of "people" can be deleted as it does not appear to be used in the document.

2.4 The definition of "reseller" (used in Schedule 11), only captures one level of reseller. That is a reseller that sells direct to end-user. It does not capture a reseller who on-sells to another distributor before the service is sold to the end-user. This is not uncommon for Optus Wholesale. Should amend to make clear reseller can sell to another wholesale provider.

Schedule 2: Billing and Notification

2.5 An additional clause should be included that requires Access Providers to provide, in a timely manner, any transactional data that is required to enable billing by access seekers. The clause should guarantee that Access Seekers receive a level of service equivalent to what the Access Provider provides to itself.

2.6 Optus accepts that Access Seekers are responsible for billing the End User. However, in order for an Access Seeker to be capable of billing its end-use customers in a timely manner, the Access Provider must provide, in a timely manner, any transactional data that is required to enable billing by Access Seekers.

2.7 Optus considers that the NPTC FAD should guarantee that Access Seekers receive a level of service equivalent to that it provides to itself and in particular it should specify that Telstra Wholesale will provide Access Seekers with the ULLS Completion Advice on the day of cutover.

Schedule 3: Creditworthiness & Security

2.8 Clause 3.2(b) requires further clarification, as it is not entirely clear to what "the amount paid or satisfied" is referring.

2.9 Clause 3.3 contains a minor typo in the 3rd line. The word "must" should be inserted between "and" and "be of an".

2.10 In clause 3.4 it is not entirely clear why the final two paragraphs in this section (relating to a replacement Bank Guarantee) are required. The Access Seeker already has an obligation to maintain the relevant Security (which may be a Bank Guarantee) for the period set out in clause 3.2(a). If these paragraphs are retained, it should be clarified how the 14 month period relates to the timeframe specified in clause 3.2(a).

Schedule 4: General dispute resolution procedures

2.11 Clause 4.2 currently enables the Access Provider to seek a determination from *any* independent third party. This should at least specify certain minimum qualifications or expertise and/or the type of third party that may be selected for this role. Alternatively, this could simply specify that the third party must be an arbiter from the ACDC (who also fulfils the requirements in clause 4.10(d)).

2.12 Clause 4.5 contains a minor typo: the part of the final sentence from "either party may…." onwards should be made a new paragraph (rather than being part of paragraph (c)).

Schedule 5: Confidentiality

2.13 In clause 5.10 please confirm whether an "or" should be inserted at the end of sub-paragraph (a)(i), and that it is correct that an "or" has been included at the end of sub-paragraph (b).

2.14 Before the Access Provider discloses any confidential information of the Access Seeker to a credit reporting agency, the Access Provider should be obliged to notify the credit reporting agency of the confidential nature of the information and to require the credit reporting agency to agree to confidentiality provisions no less onerous than the terms of clauses 5.1, 5.5, 5.6 and 5.7.

2.15 Please also note comments on the definition of Confidential Information above in paragraph 2.2.

Schedule 6: Suspension and Termination

2.16 Clause 6.1(e) contains a formatting error. The final paragraph should not be numbered "(e)", as it applies to all of the preceding sub-paragraphs.

2.17 Clause 6.2(d) should be amended so that the Access Provider is subject to a fixed time period (just as the Access Seeker is under this regime). Therefore replace "as soon as reasonably practicable" with "within 20 Business Days". This is consistent with the previous model terms.

2.18 Clause 6.2(e) should be amended as a 10 Business Day timeframe is short in this context. Therefore "10" should be replaced with "20". Again, the Access Provider should be subject to a fixed time period. Therefore also replace "as soon as reasonably practicable" with "within 20 Business Days".

2.19 In clause 6.2(f) sub-paragraph (ii), move the words from "until…." onwards on to a new line/paragraph – this is a minor formatting issue only.

2.20 We query why in clause 6.5 only Access Providers have the benefit of the termination rights in this clause. Mutual rights to terminate the Service (to the extent applicable) would be a more reasonable and balanced position. In the previous Model Terms, these termination rights were mutual, that is, both parties had the right to terminate.

2.21 Amend clause 6.2(d)(iii) to be consistent with previous comments in relation to "10 business days". It should be replaced with "20 business days".

Schedule 7: Liability and Indemnity

2.22 Clause 7.3 should not limit the indemnity to death of or injury to a party's representatives only – it should extend to third parties (and hence a reference to "or to a third party" should be added after "other Party" in the 2nd line).

2.23 Similarly, clause 7.4 should be extended to damage to third party property (by adding a reference to "or a third party" after "of the other Party)" at the end of the 2nd line.

Schedule 8: Communication with End-Users

2.24 Optus is concerned in clauses 8.3(b) and 8.3(c) that Access Providers are in a position where its staff may install and maintain services on behalf of Access Seekers. In this capacity, the staff of an Access Provider must not engage in any marketing activity on behalf of its retail divisions.

2.25 Optus notes that this is consistent with obligations under the Migration Plan which prevent Telstra from marketing its retail services when conducting work on behalf of NBN Co. This should be replicated in the non-price and terms for all regulated services.

2.26 Optus submits that clause 8.3(c) be amended to delete the words after "but may otherwise …".

Schedule 10: Changes to operating manuals

2.27 In clause 10.1(a)(i), insert the words "no less than" before "20 Business Days".

2.28 An additional clause should also be added so that where the changes to standard processes have a significant impact on Access Seekers, the Access Provider must give 60 business days notification. An obligation on the Access Provider to give reasonable consideration to any comments which the Access Seeker makes on proposed amendments is not sufficient.

2.29 A new subclause should be inserted under clause 10.1 which states *"Any material change to the Target Repair Times, Target Response Times or the Enhanced Service Assurance Option, will need to be agreed by both parties."* Such a clause will ensure that core service level agreements cannot be changed unilaterally through changes to Operational Manuals or other documentation. These SLAs, which are core to the nature of the product should either (a) be outlined in details in the NPTC for the service specific FAD ; or (b) if included in Operational Manuals not able to be altered unilaterally.

2.30 **[CiC]**

2.31 The proposed drafting in Schedule 10 also allows changes to Technical Specifications documents, which would allow amendments as per the 20 day notification period. It could be possible, therefore, for the Access Provider to alter the technical specifications of the service, with 20 days' notice, to have the effect of downgrading the service. Optus suggests a further subclause in clause 10.1 which states that "*The Access Provider may not make any changes which would have the effect of reducing the functionality, capability, or speed of the service, without agreement of the Access Seeker."*

Schedule 11: Resale Services

2.32 Schedule 11 should apply to all services provided by the Access Provider, not just to wholesale ADSL.

Schedule 12(a) and (b): Ordering and Provisioning Processes

2.33 In clause 12.17 an additional clause should be added to make clear that the presence of a complex service should not restrict the acquisition of a ULLS service even if the request has to be managed manually.

2.34 In clause 12.23 “commencement date” needs to be defined. Access Providers should support Connect Outstanding process within 3 months of a request from Access Seekers.

Section 3. Other matters

3.1 The ACCC also requested, in its December communications, that it is seeking stakeholder views and drafting suggestion on terms addressing matters in relation to:

(a) Terms about recourse to regulated terms;

(b) Disclosure of information to ACCC or other government bodies; and

(c) Other non-price matters including ensuring Telstra provide equivalent services and a dispute resolution role for the ACCC.

3.2 Optus addresses these issues below.

Recourse to regulated terms

3.3 Optus has not had a problem with the ability to access regulated terms (either as an access seeker or access provider) during the terms of an access agreement, outside of negotiating with NBN Co. Optus does not see the merit in addressing this issue in the NPTC FAD.

3.4 It is common commercial practice for access seekers to *agree* to forgo recourse to regulated rates in return for consideration from the access provider. For example, the access provider may offer a discount on its commercial rates if an access seeker agrees not to request regulated rates during the contract. Such a situation is not problematic so long as it is the result of a commercial negotiation and both parties agree. Problems arise where the access provider unilaterally decides to exclude the right to terms of an FAD in an access agreement. This has only occurred with NBN Co, and is possible due to the unique position of NBN Co. Issues that are specific to NBN Co are best dealt through the SAU process or regulatory oversight of the SFAA/WBA.

3.5 Optus does not see the need to intervene to impose mandatory recourse to regulated terms during the term of an access agreement. In Optus' experience, most access agreements do this by referring to the regulated rate schedules in the relevant Access Determination. If the access agreement goes for a period longer than the relevant Access Determination (an unlikely event given that Access Determinations last for 3 to 5 years), parties update the schedule as per the new regulatory decision.

3.6 **[CIC]**

3.7 Should the ACCC wish to include a specific term on this issue, Optus recommends a term that would reflect existing commercial practice. For example, a term that requires access agreements to permit variations of regulated pricing during the term of the contract (e.g. by including reference to the regulated rate rather than insert actual pricing), unless otherwise agreed by both parties.

Disclosure of information to ACCC or other government bodies

3.8 Optus does not support the inclusion of specific clause within the NPTCs relating to disclosure of information to ACCC or other government bodies.

3.9 Optus notes that under Part XIC Access Providers are required to submit to the ACCC a copy of all its access agreements. The ACCC has the power to collect terms of all access agreements. Therefore there is no need to insert such clause in access agreements.

3.10 Optus further considers that should other government bodies wish to have access to terms and conditions of access agreements, the bodies can negotiate directly with relevant providers or can seek access under legislative powers available to the relevant government bodies. Optus does not support the use of regulated NPTCs to extend the powers of government bodies to collect information.

Other terms for Telstra provide equivalent services and a dispute resolution role for the ACCC

3.11 Optus strongly supports the equivalence obligations of Telstra in relation to regulated services. This obligation is contained in the Structural Separation Undertaking (SSU) and associated documents. The SSU imposes specific equivalence metrics and an overarching equivalence obligation. The SSU enables Telstra to develop metrics which will measure equivalence for its own services. For example:

(a) Clause 11.4 for LSS and ULLS states that "Telstra will establish order management system and other measures in relation to … in order for Telstra to meet the Equivalence and Transparency Metrics available to those services";

(b) Clause 11.5 for DTCS states that "*Telstra will establish order management and other measures in relation to Service Activation and Provisioning of orders for, and rectifying Faults relating to, the Domestic Transmission Capacity Service in order for Telstra to meet the Equivalence and Transparency Metrics applicable to that service.*"

3.12 Both clauses in effect permit Telstra to determine its own test for equivalence. Optus has previously submitted that such a regime has the potential to undermine the intent of the SSU – that is, to enable Access Seekers to use regulated services to compete against Telstra on a level playing field in related downstream markets.

3.13 Optus is concerned that such an outcome is not yet occurring. For example, the service assurance metric for ULLS is based on a residential grade service, even though ULLS is used as an input to SMB and corporate broadband services in the related downstream retail markets. Telstra uses copper lines to supply residential and business products. Similarly, Access Seekers use ULLS to supply residential and business products. However, the equivalence metric only refers to residential ADSL services. Telstra is able to comply with the specific SSSU metrics and provide non-equivalent wholesale inputs used for downstream business grade services.

3.14 An example of this is the refusal of Telstra to offer business grade service assurances greater than offered to its wholesale customers. Telstra currently for ULLS offers a maximum business assurance of twelve hours restoration, 7am to 9pm Monday to Saturday. On the other hand, Telstra offers its retail customers a range of express options up to guaranteed four hour restoration, 24 hours a day, seven days a week. [1]

3.15 In short, Optus believes that the equivalence obligation should be an overarching driver of the development of *all* price and non-price terms and conditions. All FADs should ensure that Telstra provides regulated service on equivalent terms to Access Seekers and Telstra retail customers. Optus, therefore, sees merit in clarifying equivalence obligations and measurement metrics in either the broad NPTCs, or within service specific NPTCs.

3.16 Optus recommends the drafting of terms in the NPTC FAD which has the effect of requiring Telstra to offer the same service assurance terms and conditions as it offers to its own customers.

[1] See Telstra's Standard Form of Agreement, Telstra Service Assurance and Telstra Provisioning Commitment Section.