



Submission in response to ACCC
Discussion Paper

**Telecommunications Final Access
Determination inquiries – non-price terms
and conditions**

PUBLIC VERSION

December 2014

Contents

Section 1. Executive Summary	3
Section 2. Non price terms and conditions	4
Setting an effective fall-back position	4
Access obligations should only apply to providers with market power	5

Section 1. Executive Summary

- 1.1 Optus welcomes the opportunity to provide comments in response to the Discussion Paper on non-price terms and conditions (NPTCs) for telecommunications Final Access Determinations (FADs). In relation to NPTCs, Optus has previously indicated its support for:
 - (a) Model NPTCs to set out broad obligations;
 - (b) Drafting of specific NPTCs to be left to commercial negotiation; with a fall-back position based on model NPTCs; and
 - (c) Indication that ACCC will intervene where ongoing breaches of the model NPTCs are identified.
- 1.2 Optus sees merit in ensuring a level of consistency across key non-price terms that are common across all declared services. However, uniformity must not be the sole focus – a common approach should only be pursued where it is demonstrated that it promotes the long term interest of end-users (LTIE) for *all* declared services.
- 1.3 Further, competition concerns around NPTCs arise *only* where the access provider has significant market power (SMP) and is able to operate independent of market forces. It is only in these circumstances that an access provider can impose unfavourable NPTCs upon access seekers. This leads to two possible approaches to NPTCs:
 - (a) Model NPTCs can be developed to provide guidance to parties when agreement cannot be reached on drafting of specific NPTCs. This could be developed as a guidance document, and not as a FAD. The model terms would then be incorporated within service-specific FADs if a case is made that it promotes the LTIE.
 - (b) Drafting of a comprehensive set of NPTCs which would have legislative force as a stand-alone FAD. The FAD would only apply to access providers that have been assessed as having SMP in the relevant markets. Optus is wary of mandating a set of NPTCs for *all* access providers where the case has not been that there is an underlying problem. Access providers that do not have SMP are not able to unilaterally impose NPTCs that disadvantage access seekers. In the absence of this, the imposition of mandatory NPTCs would likely cause more detriment than benefit.
- 1.4 Optus does not believe it is practical for this omnibus inquiry to set out details for all NPTCs for every Declared Service. Moreover, any attempt to do so is unlikely to promote the LTIE and is likely to give rise to unintended consequences. Optus welcomes further consultation on the drafting of the model NPTCs and the circumstances under which they should apply to access providers.

Section 2. Non price terms and conditions

- 2.1 Optus reiterates that the current omnibus inquiry on non-price terms and conditions will help to ensure a level of consistency across key non-price terms that are common across all declared services. However, uniformity must not be the purpose of the Inquiry — a common approach should only be pursued where it is demonstrated that it promotes the LTIE for *all* declared services.
- 2.2 Optus supports retention of the model non-price terms and sees merit in the ACCC addressing non-price terms that have historically been problematic for access seekers. In particular, Optus cautions the ACCC against issuing a broad spectrum, one-size fits all FAD for non-price terms and conditions which fail to address some of the more specific concerns.
- 2.3 Optus does not believe it is practical for this omnibus inquiry to set out details for all NPTCs for every Declared Service. Moreover, any attempt to do so is unlikely to promote the LTIE and is likely to give rise to unintended consequences.

Setting an effective fall-back position

- 2.4 There is merit in the ACCC addressing non-price terms that have historically been problematic for access seekers. It is reasonable to expect that problems would continue where access providers with significant market power have imposed unreasonable terms in past agreements. However, it is unlikely that the LTIE will be promoted by setting detailed non-price terms and conditions for *all* Declared Services through this omnibus inquiry. An assessment of the impacts upon the LTIE is best undertaken during FAD inquiries for specific Declared Services.
- 2.5 The Discussion Paper notes that concerns have been raised in regards to the inequality of bargaining power between parties. This issue has similarly be raised in the context of access to the NBN; where it has been argued that there should be a mechanism for access seekers to approach the ACCC (for third-party intervention, where warranted) before an access agreement is settled. Inequality can only occur, however, where the access provider has SMP and is able to act independently of market forces and impose unilateral NPTCs.
- 2.6 However, Optus is wary of reading the incentives faced by, and the observed behaviour of, some access providers with SMP to other access providers. It is widely acknowledged there were some issues with unilateral NPTCs during the development of the NBN Co WBA. It must be noted that NBN Co is in a unique position not faced with other access providers. Optus has not faced the same issues with non-NBN Co access providers. It would not be proportionate to set regulated NPTCs to address a NBN Co-specific problem. It must be recognised that the vast majority of access agreements are agreed to without significant disputes on NPTCs. Optus is not aware of any 'take-it-or-leave-it' style of negotiations outside of NBN Co. It is within this context that the case for change should be considered.
- 2.7 Should the ACCC conclude that it is reasonable to determine a set of NPTCs that address problems from unequal bargaining positions, it should ensure that the NPTCs apply only to operators that have SMP.
- 2.8 However, there may be a level of consistency across the varying operators' non-price terms in regards to the issues covered – and therefore regulated NPTCs may be non-controversial. Optus notes the starting point in the October Discussion Paper which outlined the following general terms:

- (a) Billing and notification
- (b) Creditworthiness and security
- (c) General dispute resolution
- (d) Confidentiality
- (e) Communication with end-users
- (f) Suspension and termination
- (g) Changes to operating manuals.
- (h) Liability (risk allocation) and indemnity
- (i) Resale services
- (j) Disclosure of confidential information to regulatory bodies
- (k) Network modernisation and upgrade notice periods

2.9 Optus considers that there is merit in providing guidance on these common terms. Optus welcomes further consultation on the drafting of specific terms, including the identification of how the application of the drafting promotes the LTIE for each of the ADs for which the terms are proposed to apply.

Access obligations should only apply to providers with market power

- 2.10 The Discussion Paper asks how the relative bargaining power of parties should be taken into account when assessing regulated NPTCs. Optus believes first and foremost that any regulated NPTCs should only apply to parties that have sufficient bargaining power to be able to impose unfair contract terms on a unilateral basis – very few operators have such power. As such, Optus reiterates its previous comments that the ACCC ensure that SAOs and ADs apply only to access providers that have SMP in the relevant markets. This will provide the maximum net benefits to consumers and will reduce compliance costs and red tape burden on providers that do not have market power.
- 2.11 It has been recognised that the basis for policy concern in telecommunications is substantial market power.¹ The Productivity Commission recommended that declarations should only apply to access providers with substantial market power.² There is scope within Part XIC to limit the application of SAOs to access providers that have SMP.³
- 2.12 This would reduce the regulatory burden on industry. There would be no detriment to end-users as non-SMP operators cannot act independently of the market and are bound by market discipline. Access providers without SMP *cannot* impose NPTCs on a unilateral basis. And in particular, with reference to setting NPTCs, it would minimise unintended consequences and limit the potential for regulated contract terms to restrict the legitimate business activity of non-dominant firms.

¹ Productivity Commission, 2001, *Telecommunications Competition Regulation*, Report No. 16, p.17

² Productivity Commission, 2001, *Telecommunications Competition Regulation*, Report No. 16, Recommendation 9.4, p.283

³ Section 152BC(3)(a) and (i) and section 152BC(5)

- 2.13 The Act requires that ADs promote the LTIE. Optus submits that imposing regulatory obligations on parties that do not have SMP will not do this, as it results in:
- (a) No benefits to consumers as these operators cannot operate without regard to the market; and
 - (b) Significant compliance costs and red-tape burden on these firms.
- 2.14 Optus does not believe it is practical for this omnibus inquiry to set out details for all NPTCs for every Declared Service for every access provider. Moreover, any attempt to do so is unlikely to promote the LTIE and is likely to give rise to unintended consequences. However, should this occur, the obligations should only apply to access providers with SMP.
- 2.15 Optus welcomes further consultation on the drafting of the model NPTCs and the circumstances under which they should apply to access providers.