

## **Telecommunications Final Access Determination inquiries**

**— non-price terms and conditions**

**Discussion Paper**

**Submission by iiNet**

**Public Version**

## 1. INTRODUCTION

This submission is made by iiNet Limited (**iiNet**) in response to the position paper entitled: *Telecommunications Final Access Determination inquiries — non-price terms and conditions Discussion Paper (the Discussion Paper)*.

Please note that this submission contains commercial in confidence information which is marked '[CIC]' and highlighted in yellow.

The Australian Competition and Consumer Commission (**ACCC**) is currently undertaking public inquiries into making new final access determinations (**FADs**) for:

- the six fixed line services<sup>1</sup>;
  - the Wholesale ADSL service (**WDSL**);
  - the Domestic Transmission Capacity Service (**DTCS**); and
  - the mobile terminating access service (**MTAS**),
- (the Declared Services)**.

The current FADs for the Declared Services specify certain price and non-price terms and conditions. The ACCC has divided the price terms into two categories:

- **Primary prices** - these are charges for direct use of the services, that is:
  - the monthly access prices for the ULLS, LSS, WLR and wholesale ADSL port service;
  - the usage charges for the LCS, MTAS, FOAS and FTAS and wholesale ADSL AGVC service; and
  - the annual charges for the DTCS.
- **Supplementary prices** - these refer to additional charges incurred in using the services, for example, connection and disconnection charges.

Due to the complexity and number of issues involved in determining the primary prices for the Declared Services, the ACCC decided to consult separately on:

- the primary prices for the Declared Services; and
- the non-price terms and supplementary prices for the Declared Services.

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<sup>1</sup> These are: the Local Call Service (**LCS**), Line Sharing Service (**LSS**), Fixed Originating Access Service (**FOAS**), the Fixed Terminating Access Service (**FTAS**), the Unconditioned Local Loop Service (**ULLS**) and the Wholesale Line Rental Service (**WLR**).

In May 2014 the ACCC issued a position paper entitled: *Telecommunications Final Access Determination inquiries – non price terms and conditions and supplementary prices Position Paper (the Position Paper)*. iiNet provided a response to the Position Paper which set out iiNet's views in response to the issues raised in the Position Paper (**the Position Paper Submission**).<sup>2</sup>

The ACCC has now decided to consult about non price terms separately and so the Discussion Paper deals only with issues relating to non price terms. iiNet welcomes the opportunity of responding to the Discussion Paper. iiNet's response is set out below.

## 2. STRUCTURE OF THIS SUBMISSION

The ACCC has three basic options as far as FAD non price terms are concerned. It can:

- not include any non price terms in the FAD;
- make a non-comprehensive or 'targeted' FAD; or
- make a comprehensive FAD.

iiNet believes that in considering which option should be taken, it is useful to consider the following four questions:

- Are the long term interests of end users (**LTIE**) better promoted with or without regulated non price terms being in existence?
- Is it necessary for an access seeker to enter into an access agreement in order to obtain access to a Declared Service?
- What are the different approaches that can be taken to giving effect to targeted FADs?
- Should it be necessary for an access seeker to have to negotiate with an access provider before the access seeker is able to obtain access on FAD terms (or terms that are consistent with FAD terms)?

This submission:

- considers the above four questions and the implications their answers have for which of the three options for FAD non price terms the ACCC should take;
- considers the important issue of change management; and
- provides iiNet's response to each of the questions raised in the Discussion Paper.

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<sup>2</sup> This submission was provided by Thomson Geer lawyers on behalf of iiNet.

### 3. OVERVIEW OF THIS SUBMISSION

iiNet believes that the LTIE is better promoted with regulated non price terms than without regulated non price terms. The reasons for this view are provided in section 4 below. Therefore, iiNet believes that the choice that the ACCC faces is between making:

- a comprehensive FAD; or
- a targeted FAD.

As regards targeted FADs, iiNet has identified two distinct models for targeted FADs as follows:

- The ACCC includes non price terms on a limited number of subject matter. The FAD does not include an obligation on the access provider to incorporate the FAD terms into its standard offer (**the Narrow Model**).
- The ACCC includes non price terms on a limited number of subject matter. The FAD includes an obligation on the access provider to incorporate the FAD terms into its standard offer (**the Reference Offer Model**).

For the reasons given in section 7 below, iiNet submits that a targeted approach based on the Narrow Model should be rejected. This leaves the ACCC with the following two options:

- make a targeted FAD on the basis of the Reference Offer Model; or
- make a comprehensive FAD.

iiNet's view is that the Reference Offer Model option would be more feasible because it would avoid the ACCC having to make a complete access agreement. However, if the ACCC is minded to take the comprehensive FAD option, iiNet has no objections to this. For iiNet what is important is that an outcome is achieved where:

- there is a clear obligation on the access provider to offer access on the basis of regulated terms as a starting point;
- it is not necessary for an access seeker to spend time and resources to achieve reliance on regulated terms; and
- as discussed in section 9 below, change management is appropriately dealt with so that:
  - an access seeker is able to obtain regulatory recourse in circumstances where the access provider seeks to impose unreasonable or anticompetitive unilateral changes to the terms of access; and
  - the access seeker is able to rely on updated regulated terms as soon as they are made.

iiNet believes that this outcome can be achieved through either a comprehensive FAD or a targeted FAD based on the Reference Offer Model.

In the event that the ACCC chooses to make a comprehensive FAD, iiNet believes that the ACCC should adopt the following process before making a draft decision:

- Adopt a base document that sets out the comprehensive terms (**the Consultation FAD**). The Consultation FAD can be based on:
  - existing FAD non price terms; and
  - additional terms sourced from an existing relevant contractual document such as the Telstra Wholesale Agreement (**TWA**) or a Standard Term Determinations of the New Zealand Commerce Commission.
- Release the Consultation FAD for comment and invite stakeholders to make submissions on any additions or amendments that they believe should be made to the Consultation FAD.

#### **4. ARE THE LONG TERM INTERESTS OF END USERS BETTER PROMOTED WITH OR WITHOUT REGULATED NON PRICE TERMS BEING IN EXISTENCE?**

Where a service is provided over natural monopoly infrastructure that is inefficient to duplicate, declaration of that service is likely to promote the LTIE.<sup>3</sup> iiNet believes that the circumstances that justify the declaration of a service also give rise to a significant imbalance in bargaining power between the access provider and the access seeker (i.e. if the access seeker wishes to operate in the relevant markets it must either duplicate natural monopoly infrastructure or obtain a service from the access provider in circumstances where the access provider could simply refuse to provide access). Although declaration of a service addresses this imbalance in bargaining power at the extreme end (i.e. the access provider can no longer simply refuse to provide access), it is still necessary to determine the terms and conditions on which access is provided. This means that, without further regulatory intervention, and subject to the obligation to comply with the standard access obligations, the access provider can use its dominant market position to impose terms and conditions of access that are designed to promote the interests of the access provider above all else, including the LTIE.

In determining whether something promotes the LTIE regard must be had to the objectives of:<sup>4</sup>

- promoting competition;
- achieving any-to-any connectivity; and
- encouraging the economically efficient use of, and the economically efficient investment in infrastructure.

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<sup>3</sup> See for example the reasoning in Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR Final Decision July 2009, at p.10.

<sup>4</sup> Section 152AB of the CCA.

iiNet agrees with the ACCC's view that particular terms and conditions promote the interests of end-users if they are likely to contribute towards the provision of:<sup>5</sup>

- goods and services at lower prices;
- goods and services of a high quality, and/or
- a greater diversity of goods and services.

iiNet also agrees with the ACCC's view that:<sup>6</sup>

- non price terms and conditions can directly affect the degree of competition and economic efficiency that develops in the supply of downstream services to end users, and that this, in turn, can determine the services that will be available to end users and the range of prices and quality on which end-users can acquire those services; and
- an access provider can potentially use its market power to impose terms and conditions of access to impose unreasonable terms and conditions of access.

Some examples of non price terms and conditions of access that promote the interests of the access provider but which detrimentally affect the LTIE include:

- A high upfront security payment.
- A mandatory requirement for the access seeker to have an unreasonably high amount of insurance cover.
- The access seeker having liability for risks that the access provider is best placed to control.
- An entitlement for the access provider to suspend or terminate a service for a minor breach of the agreement by the access seeker.
- An entitlement for the access provider to suspend one service for breach of the terms of access relating to a different service.
- An entitlement for the access provider to delay billing charges for a long period of time.
- An entitlement for the access provider to undertake planned network outages with insufficient notice.

Some of these terms, at their most extreme, could act as a barrier to entry. However, even if they do not act as a barrier to entry, they all have the potential either to impose unreasonable costs on access seekers or disrupt the access seeker's business which both

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<sup>5</sup> ACCC, Telecommunications services – declaration provisions: a guide to the declaration provision of Part XIC of the Trade Practices Act, July 1999, p. 33.

<sup>6</sup> Position Paper, at p.6.

have the potential to hinder competition and, as a result, have a detrimental impact on the LTIE.

Imposing unreasonable terms in respect of network access services as compared to resale services has the potential to affect access seeker decisions to invest in infrastructure that is used with those network access services (for example DSLAMS that are used with ULLS and LSS). This in turn will affect the quality of competition that the access provider faces and also the development of innovative and/or cheaper service offerings for end users. An example of terms and conditions that could hinder take up of network access services are unreasonable network migration terms.

Given the potential for an access provider to impose terms and conditions of access that will promote its own interests above all else, there is a real need for access seekers to have the ability to have recourse to regulated terms.

In light of the above, iiNet submits that not including any non price terms in the FADs is less likely to promote the LTIE than including non price terms in the FADs. Furthermore, not including any non price terms is inconsistent with how the access regime in Part XIC of the CCA is intended to work (this is considered further in sections 5 and 7 below). Therefore, iiNet submits that this conclusion supports the view that option 1 (i.e. not including any non price terms in the FADs) should be rejected.

**5. IS IT NECESSARY FOR AN ACCESS SEEKER TO ENTER INTO AN ACCESS AGREEMENT IN ORDER TO OBTAIN ACCESS TO A DECLARED SERVICE?**

iiNet submits that legally there is no requirement for an access seeker to enter into an access agreement in order to gain access to a declared service. It is clearly implicit from section 152AY of the *Competition and Consumer Act 2010 (CCA)* that an access seeker can request access on the basis of terms and conditions contained in a special access undertaking, binding rules of conduct or an access determination.

If it is accepted that an access seeker is not obliged to enter into an access agreement in order to obtain access to a Declared Service, then it must follow that the ACCC should make a comprehensive FAD. Otherwise, if the FAD is not comprehensive the parties will either face considerable uncertainty as to what the balance of the terms and conditions of access are, or be required to enter into an access agreement in order to avoid that uncertainty.

**6. WHAT ARE THE DIFFERENT APPROACHES THAT CAN BE TAKEN TO TARGETED FADS?**

iiNet has identified two distinct models for targeted FADs as follows:

- The ACCC includes non price terms on a limited number of subject matter. The FAD does not include an obligation on the access provider to incorporate the FAD terms into its standard offer (**the Narrow Model**).
- The ACCC includes non price terms on a limited number of subject matter. The FAD includes an obligation on the access provider to incorporate the FAD terms into its standard offer (**the Reference Offer Model**).

The ACCC's current approach is based on the Narrow Model. However, it is interesting to note that the effect of Telstra's Structural Separation Undertaking (**SSU**) obligations in respect of price terms means that, in practice, the Reference Offer Model applies in respect of price terms.<sup>7</sup>

The problems arising from the Narrow Model and how these problems can be overcome by the Reference Offer Model were discussed in detail in the Position Paper Submission. iiNet does not intend to repeat that discussion in this submission, suffice it to say that the Narrow Model leads to a situation where an access provider is at liberty to adopt and offer standard terms that are inconsistent with the FAD non price terms, meaning that if the access seeker wants to rely on the FAD terms, the access seeker must either:

- request access without an access agreement on the basis of the FAD alone. This leads to considerable, and in iiNet's view unacceptable, uncertainty about what the balance of the terms of access will be; or
- seek to negotiate an access agreement with the access provider that incorporates the FAD terms. This would include reviewing the access provider's standard terms, identifying any inconsistencies with FAD terms and then articulating to the access provider why changes are required. Negotiations may also include having to deal with arguments from the access provider that the access provider's standard terms are not in fact inconsistent with the FAD terms; or the access provider's standard terms are more appropriate than the regulated terms.

If the access seeker wants to avoid the uncertainty of reliance on the FAD alone and the costs and delays of negotiation, it will have no other option but to accept the access provider's standard terms. This can be contrasted with the Reference Offer Model where the access provider's standard terms will incorporate the FAD terms, thereby making the FAD terms the starting point of any negotiations between the access provider and the access seeker.

**7. SHOULD IT BE NECESSARY FOR AN ACCESS SEEKER TO HAVE TO NEGOTIATE WITH AN ACCESS PROVIDER BEFORE THE ACCESS SEEKER IS ABLE TO OBTAIN ACCESS ON FAD TERMS (OR TERMS THAT ARE CONSISTENT WITH FAD TERMS)?**

iiNet submits that while an access seeker and access provider should be free to negotiate and enter into an access agreement that contains terms that are different to default regulated terms, if reliance on some or all of the regulated terms is treated as an end result that an access seeker must negotiate to get to rather than the default starting position for negotiations about a possible access agreement, then the access regime under Part XIC of the CCA is not working as intended. This is clear from the Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (the CCS EM)*<sup>8</sup>. The following statement in the CCS EM clearly explains how the access regime under Part XIC of the CCA is intended to work: (emphasis added)<sup>9</sup>:

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<sup>7</sup> Clause 18.3 of the SSU requires Telstra to publish a 'Rate Card' with 'Reference Prices'. By virtue of Schedule 8 of the SSU, the Reference Prices for any declared services must be consistent with any regulated prices.

<sup>8</sup> The Act which enacted the current access regime in Part XIC of the CCA.

<sup>9</sup> At pp.52, 53



1. *The ACCC would declare a service, and set standard price and non-price terms of access for the declared service in an access determination.*
2. *An access provider would be obliged to offer the declared service to any access seeker on the terms set down in the access determination. The two parties could still negotiate different terms.*

Therefore, regulated terms should be the starting point for any negotiations that may take place between the parties. Regulated terms should not be an end point that access seekers have to spend time and resources to get to. iiNet submits that requiring an access seeker to spend time and resources negotiating with an access provider simply to achieve reliance on FAD terms acts as a potential barrier to entry and/or hindrance to competition. This is particularly the case when the access provider is Telstra, an organisation that has vast resources at its disposal to tie access seekers up in unnecessary (and ultimately potentially fruitless) negotiations. In this regard, iiNet notes that Telstra Retail is not required to negotiate its terms of access.

In light of the above analysis, iiNet submits that a targeted FAD approach based on the Narrow Model should be rejected.

## 8. CONCLUSION ON WHICH OPTION THE ACCC SHOULD TAKE

As discussed in section 2 above, the ACCC has three potential options as regards non price terms:

- not include any non price terms in the FAD;
- make a non-comprehensive or 'targeted' FAD; or
- make a comprehensive FAD.

For the reasons given in section 4 above, iiNet submits that the option of not including any non price terms in the FADs should be rejected. For the reasons given in section 7 above, iiNet submits that a targeted approach based on the Narrow Model should also be rejected. This leaves the following two options:

- make a targeted FAD on the basis of the Reference Offer Model; or
- make a comprehensive FAD.

As stated in the Position Paper Submission, iiNet's view is that the Reference Offer Model option would be more feasible because it would avoid the ACCC having to draft a complete access agreement. However, if the ACCC is minded to take the comprehensive FAD option, iiNet has no objections to this. iiNet submits that what is important is that an outcome is achieved where:

- there is a clear obligation on the access provider to offer access on the basis of regulated terms as a starting point; and

- it is not necessary for an access seeker to spend time and resources to achieve reliance on regulated terms.

iiNet believes that this outcome can be achieved through either option.

## 9. CHANGE MANAGEMENT

Change management describes the process of changing or varying the terms and conditions on which access is provided. Change management gives rise to the following issues:

- Should an access provider be permitted to vary the terms of access without the consent of the access seeker and, if so, in what circumstances?
- How should future regulated terms be dealt with?

Each of these issues are considered in turn.

### 9.1 **Should an access provider be permitted to vary the terms of access without the consent of the access seeker and, if so, in what circumstances?**

iiNet accepts that in order to run its business effectively, an access provider should be permitted to vary its operational systems, procedures and processes and there may be circumstances where it is either unnecessary or unreasonable to require the access provider to obtain the access seeker's consent for a variation to the access provider's operational systems, procedures or processes. However, an access provider's entitlement to vary its operational systems, procedures and processes has the potential to disrupt the business of the access seeker. Therefore, it is important that the terms relating to variations appropriately balance the interests of the access provider and the interests of access seekers.

iiNet notes that Schedule 10 of the current WDSL FAD deals with the variation of 'operational documents'. Schedule 10 provides as follows:

#### *10.1 Operational documents concerning the Service may be amended:*

- (a) by the Access Provider from time to time to implement or reflect a change to its standard processes, subject to:*
  - (i) giving 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and a market-up copy of the proposed new operational document that clearly identifies all amendments; and*
  - (ii) 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*
- (b) otherwise, by agreement of the parties.*

10.2 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.

10.3 Where operational documents concerning the Service are amended in accordance with clause 10.1 and the Access Seeker believes that the amendments:

- (a) are unreasonable; or
- (b) deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;

*the Access Seeker may seek to have the matter resolved in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD*

Subject to one concern, iiNet believes that the approach in schedule 10 of the WDSL FAD to the variation of operational documents is reasonable because it appropriately balances the interests of the access provider and access seekers by:

- not requiring the access provider to obtain the consent of the access seeker for all variations to operational documents; and
- giving the access seeker recourse to independent third party intervention where the variation is unreasonable.

iiNet believes that Schedule 10 of the WDSL FAD is consistent with the following broader principle:

*An access provider's entitlement to make a unilateral variation to any terms of access, should be subject to an access seeker's entitlement to seek independent recourse if the access seeker believes the variation is unreasonable.*

For ease of expression, this will be referred to as the **Independent Recourse Principle**.

The concern iiNet has with Schedule 10 of the WDSL FAD is in respect of how it implements the Independent Recourse Principle. This is done by application of the dispute resolution rules in Schedule 4 of the WDSL FAD. Schedule 4 of the WDSL FAD does not include any recourse to the ACCC. In this regard, iiNet submits that there is an important distinction between:

- a dispute about a breach of terms and conditions of access; and
- a dispute about what the terms and conditions of access should be.

iiNet submits that a dispute about whether or not it is reasonable to make a variation to existing terms is akin to a dispute about what the terms of access should be because it effectively amounts to the access provider saying to the access seeker:

*The terms of access are currently X but I am going to change them to Y.*

Given that it is clearly part of the ACCC's role to make default terms of access (i.e. decide what the terms of access should be), iiNet believes that the ACCC is best placed to deal with a dispute about whether or not an access provider should be permitted to vary the terms of access.

[CIC starts] [CIC ends]

## 9.2 How should future regulated terms be dealt with?

In circumstances where the ACCC makes a comprehensive FAD and an access seeker relies on the comprehensive FAD without entering into an access agreement, the issue of reliance on future regulated terms will take care of itself (i.e. reliance on future regulated terms would occur automatically as the FAD is updated and/or overridden by any binding rules of conduct (**BROCs**)).

However, in circumstances where there is only a targeted FAD, it is necessary to appreciate, and deal with, the distinction between:

- incorporating a particular term of a FAD into an access agreement; and
- allowing regulated terms as they exist from time to time to flow through to the access agreement.

This distinction is most easily demonstrated by the following two scenarios in the context of monthly charges:

- Scenario 1 - The ACCC sets the monthly charge for ULLS at \$16. The access agreement includes a term which states 'the monthly charge for ULLS will be \$16'. In this scenario a particular term of the FAD has been incorporated into the access agreement. However, if the ACCC subsequently changes the monthly charge, this change will not automatically flow through and will be overridden by the terms of the access agreement which state that the monthly charge is \$16.
- Scenario 2 - The ACCC sets the monthly charge for ULLS at \$16. The access agreement includes a term which states 'the monthly charge for ULLS will be as determined by the ACCC in an access determination or binding rule of conduct as in force from time to time in accordance with Part XIC of the Competition and Consumer Act 2010'. In this scenario, if the ACCC subsequently changes the monthly charge, this change will automatically flow through to the access agreement.

Clearly, it is open for an access seeker and access provider to enter into an access agreement that seeks to lock in terms as per scenario 1 or that seeks to exclude regulated terms altogether. However, consistent with the analysis in sections 5 and 7 above, the default position should be that future regulated terms will flow through. Therefore, iiNet submits that if the ACCC does decide to make a targeted FAD, the obligation on the access provider to offer the FAD terms should be consistent with the approach in scenario 2 rather than the approach in scenario 1.

In addition to the problem of achieving the flow through of updated regulated terms, a further problem with the approach in scenario 1 that arises in the context of non price terms is that it is possible for the access provider to draft its standard terms in a manner that appears to be consistent with the FAD terms but on closer scrutiny the terms may either actually be inconsistent, or have the potential to be inconsistent. For example, clause 7.13 of the WDSL FAD provides as follows:

*Nothing in this Schedule 7 excludes or limits a Party's entitlement to damages under Part 5 of the Telecommunications (Consumer Protection and Service standards) Act 1999.*

It is clear from this clause that the rights of an access seeker under Part 5 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999 (TCPSS Act)* should not be limited by the terms of access. **[CIC begins] [CIC ends]**

As regards how an approach based on scenario 2 can be implemented, this is reasonably straightforward and an example of a term that could be included in the access provider's reference offer that will implement an approach based on scenario 2 is set out below:

*The terms of access for [name of declared service] are to be determined in accordance with the following order of precedence (with (a) having the highest precedence and (c) having the lowest precedence):*

*(a) the terms of any in force binding rule of conduct made by the ACCC under section 152BD of the Competition and Consumer Act 2010 as applicable to [name of declared service];*

*(b) the terms of any in force final access determination made by the ACCC under section 152BC of the Competition and Consumer Act 2010 as applicable to [name of declared service];*

*(c) the Non Regulated Terms [These contain the balance of the terms not covered by the regulated terms so as to make the terms of access comprehensive]*

## **10. RESPONSE TO ACCC QUESTIONS IN THE DISCUSSION PAPER:**

### **1. Please set out the relevant considerations that you think the ACCC should have regard to when considering each of the mandatory criteria in determining the appropriate NPTCs to include in any FAD.**

The mandatory matters that the ACCC must take into account under section 152BCA(1) are:

- whether the determination will promote the long term interests of end users of carriage services or services supplied by means of carriage services (LTIE);
- the legitimate business interests of the access provider;

- 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; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

Each of these considerations will be considered in turn.

### **The LTIE**

This was considered in detail in section 4 above.

iiNet believes that terms and conditions of access that reasonably balance the interests of the access provider and access seekers will be most likely to promote the LTIE. For example, a regulated term on credit management that provides that an access provider can only require an upfront security payment from an access seeker in circumstances where the access provider has reasonable grounds to believe that the access seeker presents a credit risk, would appropriately balance:

- the access provider's interest in avoiding unreasonable credit risks; with
- the access seeker's interests to enter the market and compete.

In balancing the access provider's and access seeker's interests, this term will promote competition by removing a potential unreasonable barrier to entry from being erected while at the same time protecting the legitimate interests of the access provider.

### **The legitimate business interests of the access provider**

It is clear that an access provider's legitimate business interests do not extend to allowing it to behave like a monopoly when setting prices for declared services.<sup>10</sup> Consistent with this principle, an access provider's legitimate business interests should not extend to requiring terms and conditions of access to be one sided in favour of the access provider. Therefore, iiNet submits that a requirement to have regard to the legitimate business interests of the access provider is not inconsistent with the objective of setting reasonable and balanced regulated non price terms.

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<sup>10</sup> See for example, ACCC, Resolution of telecommunications access disputes – a guide, March 2004 (revised) (Access Dispute Guidelines), p. 56.

### **The interests of all persons who have rights to use the declared service**

This requires consideration of the interests of access seekers. Requiring terms and conditions of access that achieve a reasonable balance between the interests of the access provider and the interests of access seekers is not only appropriate from a fairness perspective, it is also consistent with promoting competition and the LTIE because if access seeker interests are ignored, it is likely to result in an uneven competitive playing field in favour of the access provider. Therefore, seeking to achieve an outcome that appropriately balances the interests of the access provider with the interests of access seekers is consistent with, and a necessary part of, an approach that seeks to set terms and conditions that promote competition and the LTIE.

### **The direct costs of providing access to the declared service**

iiNet submits that this consideration is not directly relevant to non price terms.

### **The value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

iiNet submits that this consideration is not directly relevant to non price terms.

### **The operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility**

Clearly, the ACCC should not include any terms in a FAD that are inconsistent with 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**

In the context of non price terms, this consideration has particular relevance to operational procedures. iiNet submits that this consideration is captured within the broader LTIE consideration because operating a carriage service, a telecommunications network or a facility in an inefficient way is unlikely to lead to outcomes that will promote the LTIE.

## **2. Are there any 'other matters' that should be considered when making NPTCs in FADs?**

Consistent with the analysis in sections 5 to 7 above, iiNet believes that the ACCC should also take into account how the access regime under Part XIC of the CCA was intended to operate. iiNet submits that the access regime was intended to operate in a manner that made regulated terms the starting point, and not the end point, of any negotiations between the access provider and access seeker.

**3. Are non-comprehensive or targeted FADs a commercially viable alternative to supply of declared services pursuant to access agreements?**

As discussed in sections 7 and 8 above, a targeted FAD based on the Narrow Model is not viable but a targeted FAD based on the Reference Offer Model could be viable.

**4. Have commercial negotiations on NPTCs in access agreements been effective in obtaining competitive outcomes in relevant markets. Please explain why or why not.**

[CIC begins] [CIC ends].

iiNet respectfully submits that a more relevant question for the ACCC to ask is:

*Does the access provider offer regulated terms as the starting point for commercial negotiations?*

As discussed in section 7 above, a scenario where an access seeker has to spend time and resources simply to achieve an access agreement that is consistent with regulated terms is inconsistent with how the access regime under Part XIC of the CCA is intended to work.

[CIC starts] [CIC ends]

**5. How have parties used previous regulated terms and conditions in negotiating access agreements? How have these regulated terms and conditions affected the bargaining power of parties?**

Please refer to the answer to question 4. Under the circumstances, iiNet does not believe that the existence of a limited number of non price terms (with no express obligation on Telstra to offer those terms) improves iiNet's bargaining power.

**6. How should the ACCC take account of the relative bargaining power of parties in its assessment of the mandatory criteria in s.152CBA of the CCA, when considering the approach to take in regulating NPTCs?**

iiNet assumes that the statutory reference in this question is intended to be to section 152BCA of the CCA rather than section 152CBA. As stated in section 4 above, the inequality in bargaining power between the access provider and access seekers has the potential to lead to non price terms that are one sided in favour of the access provider. As explained in section 4 above, such terms do not promote the LTIE as well as reasonable terms that appropriately balance the interests of the access provider and access seekers. The relevance of the other mandatory considerations was considered in the response to question 1.



7. **Do your current access agreements or terms currently being negotiated for future access agreements allow for recourse to regulated terms during the life of the agreement? If so, please provide examples of the specific clauses and describe how they operate.**

[CIC starts] [CIC ends]

8. **When and how have you incorporated or requested regulated NPTCs for access agreements in the past? In your response, describe at what stage this occurred (E.g. at the expiry of a contract, during the term of the contract pursuant to variation clauses) and whether you consider the end result was consistent with competitive outcomes and the LTIE.**

Please refer to the answer to question 4 above.

9. **What do you consider are the issues on which agreement is less likely to be reached and should, therefore, be the subject of NPTCs?**

For the purposes of responding to this question, iiNet is using the word 'agreement' to refer to a 'Genuine Agreement' as that term is used in the Position Paper Submission and not to the mere act of entering into an access agreement.

Whether or not agreement can be reached largely depends on the approach of the access provider. If the access provider offers reasonable and balanced terms, then agreement is likely to be reached on those terms. However, if the access provider chooses to push for terms that are one-sided in favour of the access provider, then agreement is less likely. Given the inequality in bargaining power between the access provider and access seeker, the access provider has the ability to include one-sided terms in relation to a wide variety of subject matter (some examples of the types of one-sided terms that can have harmful effects on the LTIE are included in section 4 above).

iiNet notes that this question will not be relevant if the ACCC decides to make a comprehensive FAD.

10. **Do you consider that the currently regulated NPTCs (discussed in Chapter 3) should be included in the new FADs? Please provide reasons for your views, by reference to the statutory criteria outlined in Chapter 2.**

Subject to our view that the ACCC should make a comprehensive FAD or a targeted FAD based on the Reference Offer Model, iiNet considers that the currently regulated NPTCs should be included in the new FADs. The currently regulated NPTCs do not cover the field of the terms required to acquire a declared service, as such they cannot be solely relied upon by an access seeker requesting access to a service from Telstra.

The currently regulated NPTCs have been subject to public scrutiny numerous times, both as model non-price terms under the previous access regime and as FADs under the current legislation. iiNet considers that there are aspects of the currently regulated NPTCs that require minor amendment in order to better reflect the CCA's

statutory criteria and if the ACCC decides to include the currently regulated NPTCs in the FAD, iiNet will provide submissions on these points. That being said, iiNet considers that overall the terms as currently drafted provide a fair position that promotes the LTIE by balancing the needs of the access provider and access seekers in a manner that is designed to promote competition and encourage efficient investment in network infrastructure.

**11. Please provide reasons justifying the inclusion in a FAD of the clauses identified in section 3.3 of this paper or in response to Question 3 above, by reference to the statutory criteria outlined in Chapter 2.**

In iiNet's opinion, the reasons that justify the ACCC making regulated terms more broadly (discussed in section 4 above) justify the ACCC making regulated terms in respect of the matters discussed in section 3.3.

**12. Are there any additional NPTC matters you consider the ACCC should address in FADs, beyond those already identified in Chapter 3? Please provide reasons for your views, by reference to the statutory criteria outlined in Chapter 2.**

If the ACCC decides to make a comprehensive FAD, it will need to make a FAD that addresses all terms of access.

**13. Do you consider that the current industry structure or environment justifies the need for a FAD that provides comprehensive NPTCs? Please provide reasons.**

As discussed in sections 7 and 8 above, iiNet believes that if the ACCC does not make a comprehensive FAD, it will need to make a targeted FAD based on the Reference Offer Model.

**14. What do you consider would be an appropriate mechanism for implementing a comprehensive FAD?**

In iiNet's view what is important is that the inequality in bargaining position between the access provider and access seeker is addressed. Making a comprehensive FAD that contains reasonable and balanced terms of access is one way to do this. In iiNet's view, there are two approaches that can be taken to making a comprehensive FAD:

- the ACCC can draft its own balanced and fair terms for inclusion in the FAD (for ease of expression referred to as **the Drafting Approach**); or
- the ACCC can take an existing contract (for example Telstra's TWA) and identify where changes are required in order to achieve balanced and fair terms (for ease of expression referred to as **the Review Approach**).

Given that the ACCC has already drafted some FAD non price terms, iiNet believes that the most appropriate approach would be an approach that combines the Drafting Approach with the Review Approach so that:

- the terms that the ACCC has already drafted are included in the FAD (subject to any necessary improvements – see the response to question 10 above);

- additional terms dealing with change management are included (see section 9 above); and
- the balance of the terms are drawn from an existing relevant contractual document with any necessary amendments to make the terms balanced and reasonable (in order to identify any required changes, it would be necessary for the ACCC to release the contractual document for consultation).

**15. If you think the ACCC should give further consideration to developing a comprehensive FAD, please nominate and/or provide an appropriate set of terms and conditions of access you consider the ACCC should use as a basis for setting comprehensive NPTCs in a FAD.**

Please see the response to question 14 above. As regards the base contractual document to use for consultation to set the balance of the terms of access, an obvious contender would be Telstra's TWA. However, iiNet notes that the ACCC is also contemplating using Standard Term Determinations of the New Zealand Commerce Commission. iiNet has no strong views either way.

**16. Please identify other issues (not listed at 7.3.1) which should be the subject of common terms for fixed line services, MTAS and DTCS and provide reasons why these should be considered by the ACCC. Please provide drafts of any proposed terms.**

iiNet believes that the matters identified at 7.3.1 are appropriate, subject to the points made in section 9 above regarding dealing with change management.

**17. Please identify other issues (not listed at 7.3.2) which should be the subject of service-specific terms and provide reasons why these should be considered by the ACCC. Please provide drafts of any proposed terms.**

Please see section 9 above as regards suggested drafting relating to change management. iiNet has no additional specific drafting at this time.

**18. Do you agree with the ACCC's indicative approach to the commencement, expiry, and review of NPTCs as set out in section 7.3.3? Please provide reasons.**

iiNet is in broad agreement with the approach set out in section 7.3.3 of the Discussion Paper. iiNet believes that including a role for binding rules of conduct is appropriate and the ACCC's proposed approach is consistent with how the current access regime under Part XIC of the CCA was intended to operate.

**19. How do you think the ACCC should consult on comprehensive NPTCs before the release of a draft decision?**

iiNet's views on the approach the ACCC should take to making a comprehensive FAD are set out in response to question 14 above. iiNet believes that before making a draft decision the ACCC should :

- Adopt a base document that sets out the comprehensive terms (**the Consultation FAD**). The Consultation FAD can be based on:
  - the existing FAD non price terms; and
  - additional terms sourced from an existing relevant contractual document such as Telstra's TWA or a Standard Term Determinations of the New Zealand Commerce Commission.
- Release the Consultation FAD for comment and invite stakeholders to make submissions on any additions or amendments that they believe should be made to the Consultation FAD.

The ACCC can then consider whether any requested additions or amendments would better satisfy the relevant statutory criteria as compared to if the requested additions or amendments are not made. The ACCC would then be in a position to make a draft decision.

**iiNet Limited**  
**12 December 2014**