IT'S HOW WE CONNECT

TELSTRA CORPORATION LIMITED

FAD inquiry on non-price terms and conditions

Supplementary response to ACCC position paper

23 September 2014

Public version

1. Overview

In response to the Commission's Position Paper on non-price terms and conditions and supplementary prices (May 2014) (**Position Paper**), all respondents (with the exception of Vodafone Hutchinson Australia) submitted that it was not necessary for the Commission to determine a full set of non-price terms and conditions (**Reference Offer**).

iiNet, however, suggested that Telstra should be required to formulate a standard offer (which incorporates regulated terms by reference)[1] and Macquarie recommended that the final access determination (**FAD**) include a regulatory pull-through mechanism, whereby regulated FAD terms are automatically pulled across into Telstra's wholesale contracts.[2]

This supplementary submission responds to those access seekers' submissions.

In summary, it is Telstra's view that:

a) The statutory regime in Part XIC of the *Consumer and Competition Act 2010* (**CCA**) gives primacy to commercially negotiated outcomes. Access providers and access seekers are free to negotiate and agree terms of access to declared services. Regulated outcomes can and do serve as a reference point for the parties on certain aspects of such negotiations but, once an access agreement is entered into, a FAD has no effect to the extent to which it is inconsistent with the applicable access agreement.

b) In the interests of avoiding over-regulation and associated inefficiencies, and to give effect to the clear intention in Part XIC of the CCA, FADs should only include non-price terms and conditions where an issue has proved particularly contentious and is seen by the industry as an issue that needs addressing and thereby warrants regulatory intervention;

c) Once parties have concluded a commercial agreement these terms should apply for the duration of the particular agreement or until the agreement or acquisition of a service is terminated by a party, as applicable. There are practical commercial opportunities or triggers (such as expiry of service terms or whole of business arrangements) that provide a natural opportunity for the parties to seek to negotiate changes to existing terms (including on occasion, to reflect new or varied FAD non price terms) if a party wishes to do so.

d) It would be inefficient and contrary to the intention of the legislation and the long term interests of end users (**LTIE**) to require legacy network access providers to formulate a standard offer.

Telstra looks forward to making future submissions in this open consultation. In particular, Telstra intends to make submissions on suggested changes to the regulated non-price terms and conditions as previously drafted in the 2011 FADs (to reflect the 2008 Model Terms) to address differences between those terms and non-price terms and conditions in standard and updated commercial agreements. The latter terms reflect up-to-date processes as well as changes to key terms included by Telstra based on consistent feedback from access seekers to appropriately balance the risks of access providers and access seekers.

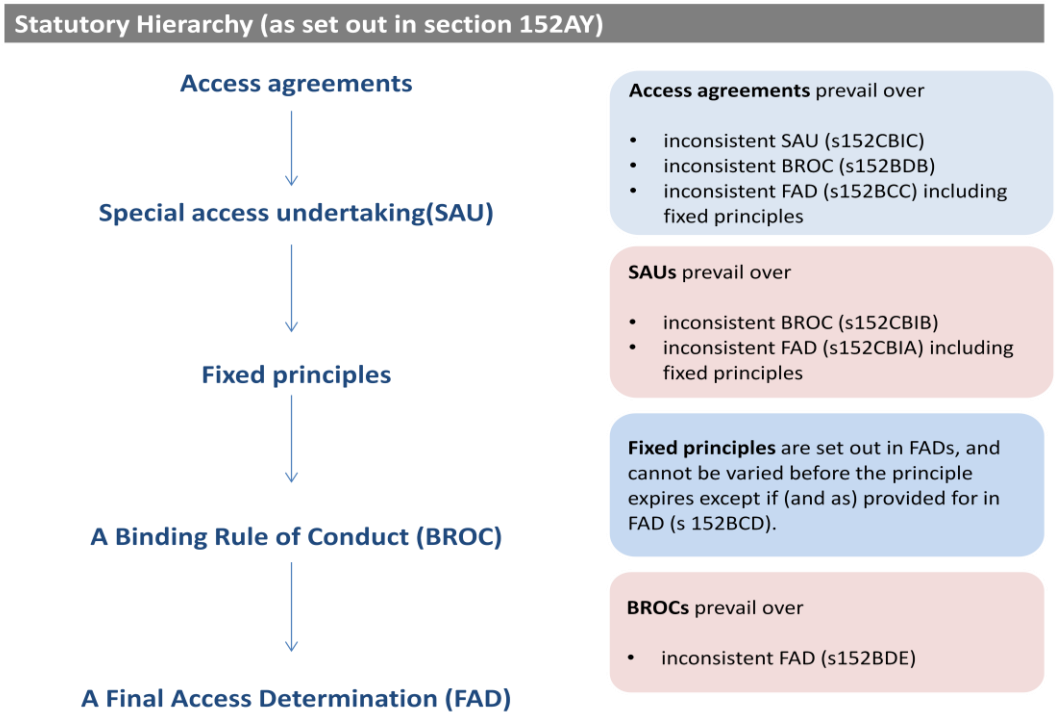
2. Statutory regime

Part XIC of the CCA sets out a regime whereby terms and conditions in certain regulatory "instruments" have no effect to the extent they are inconsistent with terms and conditions set out in other "instruments" (regulatory or commercial) that sit higher in the statutory hierarchy.

[1] See Telecommunications Final Access Determination inquiries – non-price terms and conditions supplementary prices Position Paper, Submission by Thomson Geer Lawyers on behalf of iiNet Limited, 15 July 2014 (**iiNet Submission**), p 10.
[2] See Telecommunications Final Access Determination inquiries – non-price terms and conditions supplementary prices , Macquarie Letter, (**Macquarie Submission**), p 3.

Access agreements sit at the top of the statutory hierarchy. Accordingly, the terms and conditions in special access undertakings (**SAUs**), access determinations or binding rules of conduct (**BROC**) have no effect to the extent they are inconsistent with terms and conditions set out in an access agreement. That is, the terms and conditions in an access agreement will prevail.

The hierarchy is illustrated in the diagram below.



The regime promotes certainty while giving primacy to commercially negotiated outcomes. This is clear on the face of the legislation and was reflected in the Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (**Explanatory Memorandum**) when it recognised that "*[c]arriers/CSPs and access seekers are free to negotiate on, and agree to, terms of access to declared services*" and provided that an "*access determination has no effect to the extent to which it is inconsistent with an access agreement applicable to those parties. In such a circumstance, the access to the declared service concerned is governed by the agreement reached between the two parties*."

3. Reference Offer for non-price terms and conditions

Telstra has previously made submissions in relation to whether the Commission should make a Reference Offer (in its original submission of 15 July 2014). This submission supplements those previous submissions.

An important element in the regulatory regime of Part XIC of the CCA is set out in sub-section 152BC(8). This section requires that FADs contain terms and conditions relating to price (or a method to ascertain price). In contrast, there is no equivalent requirement that FADs include non-price terms and conditions.

In the Explanatory Memorandum, the fact that a FAD need not include *all* terms and conditions of access was emphasised:

> *"It is intended that an access determination may deal only with terms and conditions about **certain** matters relating to compliance with the standard access obligations. It is not intended that an access determination must deal with the terms and conditions about **all** matters relating to compliance with the standard access obligations. To ensure the intended operation of this provision is clear (that an access determination is not required to deal with all terms and*

> *conditions), subsection (3)(a) expressly provides that an access determination may specify **any or all of** the terms and conditions on which a carrier or carriage service provider is to comply with any or all of the standard access obligations applicable to the carrier or CSP."*
>
> (Original emphasis)

It is clear from the words of the legislation itself (as well as from the Explanatory Memorandum), that it would not be appropriate to *automatically* include non-price terms and conditions in a FAD. It is essential to first assess whether their inclusion is necessary and would promote the LTIE. To the extent that current non-price terms and conditions are operating effectively, are well-accepted and able to be bilaterally negotiated with mutually beneficial outcomes, then inclusion of such non-price terms and conditions in a FAD would not be an appropriate or efficient outcome. It would not be in the interests of either access seekers or end users.

In Telstra's view, inclusion of non-price terms and conditions in a FAD should only be considered where it is necessary to address an issue that requires regulatory intervention (e.g. a particularly contentious issue which remains of concern within the industry and is not able to be resolved through commercial negotiation). Where this is not the case, the commercial negotiation process will always be more efficient and more flexible in addressing the different concerns of access seekers than regulatory intervention, hence the existence of the statutory hierarchy in Part XIC of the CCA. This is reflected in the Explanatory Memorandum which provides that:

> *"Access agreements will enable access providers and access seekers to negotiate and agree alternative access arrangements that are mutually beneficial and provide more efficient outcomes than access determinations."*

Accordingly, in the interests of avoiding over-regulation and resulting inefficiencies, the FADs should only include those non-price terms and conditions that the Commission considers necessary to address a particularly contentious issue.

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Telstra's views on Reference Offers are also largely reflected in the various submissions made by access seekers to the ACCC in response to its Position Paper. Specifically:

- iiNet and Optus submitted it was neither desirable nor practical for the Commission to make a complete set of terms and conditions of access;[3]
- Macquarie submitted that the Commission should focus on controversial non-price terms and conditions and making these a fallback position for when commercial agreements cannot be reached;[4]
- NBN Co was of the view that the Commission should only make non-price terms and conditions for those terms where commercial agreement is unlikely to result;[5]
- NextGen stated that the FAD should only deal with a limited set of terms and conditions, noting that such an approach would expedite the regulatory process. Nextgen noted that the "*general reason for having non-price terms and conditions covered by a FAD relate to having a base fallback (or default) positions should there be a failure to reach agreement in commercial negotiations* …";[6] and

[3] iiNet Submission, p 8; Optus, Submission in Response to ACCC Position Paper, 15 July 2014, p 10.

[4] Macquarie Submission, pp3-4.

[5] NBN Co, Telecommunications Final Access Determination Inquiries: Non-price terms and conditions and supplementary prices, letter, 15 July 2014, p 2.

[6] Nextgen, Submission on Telecommunications Final Access Determination Inquiries: Non-price terms and conditions and supplementary prices, July 2014, pp4-5.

- Basslink noted that creating a comprehensive suite of non-price terms and conditions for a declared service (in this case, the DTCS) would not be practical because there is no 'one size fits all' set of reasonable terms for access.[7]

Telstra agrees with these views and believes they support the need to ensure (and protect) the primacy of commercially negotiated bilateral outcomes, with the regulated terms and conditions which have been specifically developed to address issues of contention providing one opportunity for access seekers and access providers to consider how they may wish to treat such issues .

4. Access agreements and regulated outcomes

As noted above, both iiNet and Macquarie made submissions to the ACCC in response to its Position Paper relating to the interaction between access agreements and regulated FAD terms and conditions.

Macquarie argued for the Commission to include a regulatory pull through mechanism in the FAD as follows:

> "*… non-price terms and conditions in the FAD should be made regarding the pass-through of relevant regulatory decisions. The need for such provisions arises from the primacy of access agreements over regulatory decisions as noted in the Position Paper. From the time when amendments were being contemplated to the access regime as set out in Part XIC of the CCA, Macquarie has consistently argued that regulatory decisions should in fact prevail over commercial access agreements*".[8]

iiNet expressed the view that the FAD should contain an obligation that an access provider formulates a standard offer (to be made available to all access seekers on request) which incorporates the FAD terms.[9]

For the reasons set out below, neither of these is a possibility under the Part XIC regime, and each would lead to uncertain and inefficient outcomes, contrary to the LTIE.

4.1. Regulatory pull through into access agreements

When discussing regulatory pull through of FAD terms and conditions into access agreements, it is helpful to distinguish the three categories of FAD terms which exist:

- price terms;
- service specific non-price terms and conditions (e.g. network modernisation; LSS and ULLS migration); and
- generic or boilerplate terms and conditions that are not service specific (e.g. billing and creditworthiness).

As regards price terms for core charges in FADs, it is Telstra Wholesale's commercial practice to draft declared service schedules which point to the Structural Separation Undertaking (**SSU**) rate card price or the FAD price terms that apply from time to time. Any variation to the SSU rate card price or applicable new price terms in a FAD then flows through automatically irrespective of whether the Service Schedule is in term or is out of term but continues to be supplied on a 'roll over' basis.

As regards service specific non-price terms and conditions, Telstra is not aware of any new service specific terms or conditions in dispute.

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[7] Basslink, DTCS FAD Inquiry 2014: Non-price terms and conditions and supplementary prices, letter, 15 July 2014, p 2.
[8] Macquarie Submission, p 3.
[9] iiNet submission, p 10.

As regards generic or boilerplate terms and conditions in FADs, the FAD terms act as a useful reference point for negotiations. In practice, Telstra Wholesale and its customers have shown an overwhelming preference for a single supply agreement covering both price and non-price terms and conditions for declared and undeclared services. This requires a negotiated document that adopts a single set of terms to avoid inefficient duplication and to make the contracts easier to administer. In such circumstances the regulated FAD terms may not always be the most appropriate for the supply agreement.
Telstra's position is that commercial terms once agreed by the parties in an access agreement should apply for the duration of the particular agreement or until a party terminates the agreement, as applicable.

Telstra's wholesale agreements (i.e. the CRA and the Telstra Wholesale Agreement (**TWA**)) are umbrella supply agreements which cover the supply of both declared and non-declared competitive services. At present, there is no customer of Telstra Wholesale that only acquires declared services. Rather, wholesale customers purchase multiple products such that whole of business and other multi-product deals are, therefore, a normal part of Telstra Wholesale doing business. In this context there are practical commercial opportunities or triggers (such as expiry of service terms or whole of business arrangements) that provide a natural opportunity for the parties to seek to negotiate changes to existing terms (including on occasion, to reflect new or varied FAD non-price terms) if a party wishes to do so.

The variety of services on offer by Telstra Wholesale (regulated and unregulated) has resulted in a wide range of commercial arrangements and constructs covering whole of business and other types of incentive based deals. Since 2011, Telstra Wholesale has entered into more than 1300 access agreements and variations across its customer base of over 200 customers. This demonstrates that practical opportunities for customers to negotiate can and do occur with regular frequency.

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An important objective for Telstra Wholesale is to ensure that the migration to the NBN over the coming years is as smooth as possible for its customers. This is consistent with the company's business strategy for FY15 and beyond to meet customer demand in the newer non-regulated competitive areas of the wholesale market and progressively become less dependent on heavily regulated copper access services.

The structural changes resulting from the roll out of the NBN will change Telstra wholesale's customer base. As the NBN rolls out:

- some of our larger current wholesale customers will acquire wholesale services directly from NBN Co;
- other customers will still want access to the commercial scale and expertise that Telstra Wholesale can offer and will obtain NBN services using us as an intermediary; and
- still other customers will pursue a hybrid approach, acquiring some services directly from NBN Co in some regions and continuing to obtain other services via Telstra Wholesale in others.

The commercial incentives are therefore strong to ensure that Telstra's wholesale agreements are and remain fit for purpose to meet the new challenges and opportunities of a competitive and developing wholesale market. As Stuart Lee, GMD, Telstra Wholesale, states: "*In this environment of change, Telstra Wholesale must further improve our customer focus. We will not be at the centre of the last mile access business – just one of many players*."[10]

For these reasons, Telstra believes that a proposal to require automatic pull through of regulated terms is unnecessary.

[10] Stuart Lee, GMD, Telstra Wholesale, AmCham Luncheon, 29 Nov 2012, Speech, *Telstra's strategy, the transition to the NBN and Telstra Wholesale*

A FAD term requiring the pull through of regulated terms into access agreement would also be impractical and inappropriate. The pull through of regulated terms into access agreements on foot would:

- create uncertainty as to the terms of supply that apply between parties;
- allow for cherry picking of terms between the regulated and commercial alternatives; and
- create inefficient duplication as different non-price terms and conditions would need to be developed for declared services and for non-declared services, which would not sit well with wholesale customers' preference for an efficient single supply agreement covering both regulated and unregulated services.

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It is for the reason of promoting commercially efficient outcomes that the statutory regime does not provide the Commission with the power to include a term in the FAD that obliges an access provider to automatically pull through regulated terms and conditions into an access agreement. If this were possible, the Commission could effectively reverse the statutory hierarchy and undermine the fundamental principles associated with the primacy of the commercially negotiated contract.

4.2. Standard form of access agreement

As noted above, iiNet expressed the view that the FAD should contain an obligation that an access provider formulate a standard offer which incorporates (by reference) the FAD terms, arguing that the Commission has power to do this pursuant to subsections 152BC(1)(e) and (j) which provide that a FAD can impose other requirements on an access provider in relation to access to the declared service and that a FAD can deal with any other matter relating to access to a declared service.[11]

Telstra does not believe the text or intent of Part XIC supports this view.

Firstly, it would be contrary to the statutory hierarchy to direct an access provider to include certain terms in any access agreement. While this could be seen as an attempt to usurp the primacy given to access agreements under Part XIC, the reality is that any attempt to do so would not be effective at law. The primacy of the commercially negotiated outcome under Part XIC would always ensure that an access provider and seeker could agree to a different arrangement.

Secondly, it was never the intention of the legislature that legacy network access providers be required to formulate standard offers of supply (unlike NBN Co, which is subject to a different regime that "keys off" its standard form of access agreement – discussed in more detail below). The Explanatory Memorandum emphasised that Part XIC is intended to preserve the freedom of parties to negotiate: "*Carriers/CSPs and access seekers are **free** to negotiate on, and agree to, terms of access to declared services*" and although "*[a]ccess agreements entered into between providers and access seekers will have to be lodged with the ACCC … **approval by the regulator will not be required***" (emphasis added).

FAD terms are intended to be used when parties fail to reach agreement or as a reference point on some aspects during negotiations on the contractual terms to apply between the parties, whether those terms would be the FAD term or alternative terms (or a mix of both). They were never intended to be used to restructure the statutory hierarchy and direct an access provider to offer a standard form of agreement that would apply as a default.

Further, in contrast to the specific statutory requirement on NBN Co to formulate a Standard Form of Access Agreement (**SFAA**) under section 152CJA, there is no requirement under Part XIC for a

[11] iiNet submission, p 10.

legacy network access provider to formulate a standard offer. Nor is there a statutory power granted to the Commission to require an access provider to do so.

The lack of any equivalent statutory obligation on legacy access providers further evidences that it was never intended that legacy access providers be required to formulate standard offers which reflect regulated terms or incorporate regulated terms by reference.

A standard form of agreement in the NBN context makes sense given that NBN Co is operating in a new regulatory environment and is subject to non-discriminatory obligations. In this context the SFAA serves as a useful form of standardisation. However, where non-price terms and conditions have long been established and apply across numerous services (which are, in the main, undeclared), there is no need to create a non-discriminatory standardised approach to contractual terms and negotiations. This was clearly the view of the legislature when it created the access regime under Part XIC. A standard form of access agreement in this context would be both undesirable and inefficient, as there is no 'one size fits all' set of reasonable terms for access to declared services.

Access agreements are a proven efficient means of settling non-price terms and conditions for legacy network services. In circumstances where access agreements have enabled *"access providers and access seekers to negotiate and agree alternative access arrangements that are mutually beneficial and provide more efficient outcomes than access determinations",*[12] the proposal for a standard form of agreement is not only contrary to the legislative regime and intent, but also contrary to the long term interests of access seekers and end users.

[12] Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010