IT'S HOW WE CONNECT

TELSTRA CORPORATION LIMITED

FAD inquiry on non-price terms and conditions

Response to the ACCC's consultation on Other Matters

5 February 2015

Public version

Executive summary

Telstra provides this submission in response to the Australian Competition and Consumer Commission's (**ACCC**) request, in its email of 8 December 2014 (**ACCC's Email**), for comments on other matters (**Other Matters**) related to non-price terms and conditions (**NPTCs**) in the Final Access Determinations (**FADs**).

As set out in its submissions in response to the ACCC's Position Paper released in May 2014 (**Position Paper**) and Discussion Paper released in October 2014 (**Discussion Paper**), Telstra maintains that the long term interests of end users (**LTIE**) will be best promoted by the ACCC maintaining its current approach of including only a targeted set of NPTCs in the FADs.

The Other Matters on which the ACCC is seeking views and drafting suggestions are:

- recourse to new or varied regulated terms;
- disclosure of information to the ACCC or other regulators/government bodies;
- provision by Telstra of equivalent services to access seekers as supplied to its retail business; and
- providing the ACCC with a dispute resolution role for disputes relating to terms and conditions.

Recourse to new or varied regulated terms

Telstra recognises that wholesale customers want commercial agreements to be subject to negotiation at different points in time. Currently, there are a number of trigger points by which Telstra's wholesale customers have the opportunity to negotiate terms – either before entering into a contract or upon the customer terminating the contract. There are also opportunities for negotiation during the course of a contract. The ability to terminate a wholesale agreement and renegotiate terms and conditions is not a new or recent experience – it is the status quo under most Customer Relationship Agreements (**CRAs)** today and will continue as an option under the Telstra Wholesale Agreement (**TWA**). The topics of negotiation will vary by customer and can include topics which are the subject of FAD NPTCs. Negotiations will take place in a largely competitive environment, as the majority of service types acquired under Telstra's access agreements are unregulated.

It is, however, important to recognise that the statutory hierarchy and the legislative intent of Part XIC of the *Competition and Consumer Act 2010* (Cth) (**CCA**) do not envisage the inclusion of a FAD term that attempts to provide for automatic pull through of regulated NPTCs into access agreements on foot. The Part XIC regime gives primacy to commercially negotiated access agreements. Even if such a term was consistent with Part XIC, Telstra does not consider it would be in the LTIE because:

- negotiated NPTCs have developed in a largely competitive environment with the majority of service types acquired under Telstra's access agreements being unregulated; and
- there are commercial opportunities for access seekers to terminate and/or seek to re-negotiate the terms of access agreements.

Telstra believes that the commercial negotiation process is working effectively with very few formal disputes in relation to access agreements since 2009.

Telstra would be happy to discuss these aspects (and any other aspects) of its submission further with the ACCC.

Disclosure of information to the ACCC or other regulators/government bodies

Telstra supports a FAD term allowing an access provider to disclose an access seeker's confidential information to meet a reporting obligation or request by a regulator under Telstra's Structural Separation Undertaking (**SSU**).

Provision by Telstra of equivalent services to access seekers

It is not in the LTIE to include equivalence obligations in a FAD. Telstra is already required to provide equivalence under the Standard Access Obligations (**SAOs**) in Part XIC of the CCA and under its SSU. Duplication of regulation is likely to be inefficient and lead to uncertainty.

Providing the ACCC with a dispute resolution role

It is not in the LTIE to provide the ACCC with a dispute resolution role, given that:

- there is already a comprehensive dispute resolution regime in Schedule 4 of the current FADs which is adequate and appropriate in the event that parties cannot agree on such a clause commercially;

- amendments to Part XIC in 2011 were made to remove the ACCC's role as arbiter of terms and conditions of access and it is inconsistent with such a move to provide the ACCC with a dispute resolution role; and

- the current *ex ante* regulatory access regime already provides the ACCC with avenues to address issues that appear to be contentious at an industry level – through the FAD process or a binding rule of conduct (**BRoC**).

Telstra's response to access seeker submission on the Draft Terms

The ACCC's Email also invited comment on a set of non-price terms (**Draft Terms**). Telstra's comments on those Draft Terms were provided in a separate submission to the ACCC dated 14 January 2014. Telstra has reviewed the comments (and drafting suggestions) on the Draft Terms provided by other parties in response to the ACCC's Email. Although this submission does not comprehensively deal with all the issues Telstra considers are raised by those comments, section 5 of this submission sets out Telstra's responses in relation to some of matters where Telstra considers that the ACCC should not adopt the position suggested in those submissions.

1. Introduction

The Other Matters on which the ACCC seeks views relate to the FADs for the fixed line services,[1] mobile terminating access service (**MTAS**) and the domestic transmission capacity service (**DTCS**). Telstra has made a separate submission to the ACCC with respect to the Draft Terms. This submission relates to the Other Matters raised by the ACCC's Email. Telstra also addresses some of the matters raised in submissions by access seekers in relation to the Draft Terms and Discussion Paper.

As previously submitted, in contrast to price terms, there is no requirement under Part XIC for the ACCC to set NPTCs in FADs. To insert a particular NPTC in a FAD it must be shown that its inclusion is in the LTIE. To the extent that there is no industry contention or significant competition issue around a NPTC, Telstra considers that it would be inappropriate and inconsistent with legislative intention to include that NPTC in a FAD. In this regard, Telstra notes that very few of its 200 plus wholesale customers have made submissions on the FAD NPTCs and, of those who have made submissions, only a small subset of access seekers indicate a desire for:

- pull through of regulated terms into access agreements;
- a role for the ACCC in arbitrating disputes; or
- an equivalence term to be included in the FAD.

This submission is structured as follows:

a) Section 2 provides Telstra's position in relation to terms about recourse to new or varied regulated terms;

b) Section 3 provides Telstra's position on terms regarding the disclosure of information to the ACCC or other regulators/government bodies;

c) Section 4 provides Telstra's response to other matters raised by the ACCC, namely the provision of equivalent services by Telstra and a dispute resolution role for the ACCC; and

d) Section 5 provides Telstra's position in response to some of the matters raised by access seekers' submissions in relation to the ACCC's Draft Terms.

Telstra may make further submissions to the ACCC if necessary in light of access seekers' responses to the Draft Terms and Other Matters.

2. Terms about recourse to new or varied regulated terms

The ACCC has sought views on whether some sort of review mechanism can or should be included in the FAD NPTCs which would have the practical effect of "pulling through" new or varied regulated terms into access agreements.

As set out in previous submissions, Telstra considers that *automatic* recourse to new or varied regulated terms by pulling these through to an access agreement *on foot* is inconsistent with the statutory hierarchy and the intention of Part XIC, and is not in the LTIE. It is also of the view that the current NPTCs in the market are operating effectively, and there are a number of opportunities for parties to terminate or renegotiate access agreements.

2.1. Automatic pull through of regulated terms contrary to statutory hierarchy and LTIE

Telstra has previously set out the reasons why automatic pull through of regulated terms into access agreements on foot (which contain inconsistent terms) would be incompatible with the Part XIC legislative regime.[2]

[1] Unconditioned Local loop Service (ULLS); Line Sharing Service (LSS); Fixed Terminating Access Service (FTAS); Fixed Originating Access Service (FOAS), Wholesale Line Rental (WLR); Local Carriage Service (LCS); and Wholesale ADSL (WDSL).
[2] See, for example, Telstra, Supplementary Response to Position Paper, dated 23 September 2014.

Part XIC provides for the primacy of commercially negotiated agreements. A FAD term will not apply to the extent it is inconsistent with an access agreement. NPTC FAD terms are intended to be used when parties fail to reach agreement during negotiations or as a reference point on some matters during negotiation of the contractual terms to apply between the parties. That is, the FAD was intended to "*create a benchmark which access seekers can fall back on, while still allowing parties to negotiate different terms*".[3]

The pull through of regulated terms into access agreements on foot would be contrary to the LTIE as it 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.

[C-i-C]

2.2. Current NPTCs working effectively and parties have opportunities to renegotiate

Since 2011, Telstra has entered into more than 1,300 access agreements and/or variation agreements across its customer base of over 200 wholesale customers. Commercial negotiations with wholesale customers are occurring regularly as "business as usual" and produce quick, efficient and mutually beneficial outcomes, which in turn benefits end users. This was recognised by the ACCC in the Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill* 2010 (**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*."[4]

As previously submitted,[5] Telstra's wholesale agreements (i.e. the CRA and the TWA) are umbrella supply agreements which cover the supply of both declared and non-declared competitive services. In fact, Telstra's access agreements cover mostly non-declared services[6] and Telstra is subject to substantial (and increasing) competition from other infrastructure providers in the domestic wholesale market. This means that Telstra is not in a position to leverage any perceived uneven bargaining power, nor does it seek to do so.

Telstra recognises that wholesale customers want commercial agreements to be subject to negotiation at different points in time. Currently, there are a number of trigger points by which Telstra's wholesale customers have the opportunity to negotiate terms before, during or on termination of a contract. The topics of negotiation will vary by customer and can include topics which are the subject of FAD NPTCs.

[C-i-C]

Given that NPTCs have developed in a largely competitive environment, are working effectively, and there are practical opportunities that provide an opportunity for the parties to seek to negotiate changes to existing terms, it is not in the LTIE to introduce a FAD term providing for the pull through of regulated terms into access agreements.

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[3] *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010,* Explanatory Memorandum, page 4.
[4] Explanatory Memorandum, p. 199.
[5] Telstra, Supplementary Response to Position Paper, 23 September 2014.
[6] Almost 90% of Telstra's wholesale service types on offer are not declared.

Telstra would be happy to discuss with the ACCC further.

3. Disclosure of information to regulatory bodies

The ACCC is considering the inclusion of a new sub-clause in the confidentiality provisions allowing access providers to disclose an access seeker's confidential information in accordance with a reporting obligation or a request from a regulatory authority or government body in connection with the SSU.

Telstra supports this approach.[7]

In its 14 January 2014 submission, Telstra proposed drafting in response to the ACCC's Draft Terms that would achieve this. Specifically Telstra suggested that new clauses 5.5 (j) and (k) of Schedule 5 (Confidentiality provisions) be inserted as follows:

> *(j) in the case of the Access Provider, in accordance with a reporting obligation or request from a regulatory authority or any other Government body in connection with the Access Provider's Structural Separation Undertaking; or*
>
> *(k) in the case of the Access Provider, in response to a request from a regulatory authority or any other Government body in connection with interception capability (as that term is used in Chapter 5 of the Telecommunications (Interception and Access) Act 1979 (Cth)) relating to a Service provided by the Access Provider to the Access Seeker under this Agreement.*

Telstra notes that Optus does not support Telstra's proposed new clauses on the basis that they are not necessary under Part XIC, as access providers may be required to submit to the ACCC a copy of access agreements. However, Telstra's proposed new clauses are not intended to be limited to the provision of access agreements. There is a variety of information that the ACCC and other regulatory or government bodies request on a confidential basis, and the proposed new clauses are intended to facilitate this.

It is also inefficient and onerous for regulatory or government bodies to have to negotiate with access providers or resort to exercising a legislative power in order to obtain information that could otherwise easily be provided.

4. Other matters

4.1. Equivalent services

Telstra considers that imposing an equivalence obligation under the FADs is contrary to the LTIE.

Telstra is already required, both under the SAOs in Part XIC of the CCA and under the SSU, to provide equivalence on a number of matters as regards the supply of declared services. The equivalence obligations in Part XIC operate at both a high level in relation to the provision of services generally (e.g. s152AR(3)(a)) and more granularly in relation to matters such as ordering and provisioning, fault detection, handling and rectification (e.g. s152 AR(3)(c)). Telstra' SSU has an overarching equivalence commitment in relation to the supply of regulated services and specific equivalence obligations in relation to matters such as systems and processes for issuing tickets of work and order management processes for activation of orders, as well as information equivalence. The ACCC has visibility of Telstra's compliance with these obligations through quarterly reporting on metrics approved by the ACCC and a confidential monthly compliance report which details any equivalence issues received from wholesale customers or from the ACCC or identified by Telstra in that month. These are substantial protections for wholesale customers and it is unclear what additional protection would be provided by including equivalence obligations in the NPTC FADs.

[7] See Telstra's responses to the wholesale ADSL FAD inquiry in 2013 where Telstra raised this issue.

Telstra considers that to the extent equivalence issues could previously have been said to be contentious, those issues are now comprehensively dealt with in the SSU and are not regularly raised during contractual negotiations. As Telstra has previously submitted, a NPTC should only be introduced into a FAD if it relates to a contentious industry wide issue and only to the extent that inclusion can be shown to promote the LTIE.

The introduction of duplicate regulation would increase uncertainty and risk inconsistency in regulatory regimes which would be contrary to the LTIE.

4.2. Terms providing the ACCC with a dispute resolution role

The ACCC has sought comments on whether it should make a term that "*would provide that the ACCC has a dispute resolution role for disputes relating to terms and conditions*". It is unclear which terms and conditions would be the subject of the ACCC's dispute resolution role. Telstra assumes it to mean disputes relating to terms and conditions in a FAD. Alternatively, the ACCC may be considering the inclusion of a term in the FAD to the effect that it may arbitrate in relation to terms and conditions in an access agreement. For completeness, Telstra considers both scenarios below.

ACCC as arbiter of disputes relating to terms and conditions in a FAD

Telstra considers that it would not be in the LTIE for a term to be included making the ACCC the arbiter of disputes relating to terms and conditions in a FAD for the following reasons.

(a) Existing dispute resolution schemes are appropriate and adequate

There is already an appropriate and adequate process for resolving potential disputes about FAD terms in Schedule 4 of the current FADs (and in Schedule 4 of the Draft Terms), including for a third party independent arbiter and reference to an Expert Committee.

(b) The ex ante regulatory regime does not contemplate an arbitral role for the ACCC

The pre-2011 "negotiate-arbitrate" access regime was intentionally removed in 2011 and replaced with an *ex ante* form of regulation, because:

- it was clear that the "negotiate-arbitrate" model was not producing effective outcomes for industry or consumers;[8]
- the "negotiate-arbitrate" model had proven to be complex and delay prone;[9] and
- in practice, determining terms and conditions of access under Part XIC had proven to be time-consuming and litigious.[10]

It was replaced by the current regime under which the ACCC does not have an arbitral role but may instead specify upfront terms and conditions of access in a FAD. The ACCC has the power to prosecute and enforce compliance with the FAD term in the Federal Court. To now introduce a term which provides that the ACCC is to arbitrate disputes on FAD NPTCS would be inconsistent with legislative intent of moving away from the old negotiate-arbitrate regime.

Telstra also considers that it would be inappropriate for a body that drafts particular terms and conditions to then arbitrate if there is a dispute about the interpretation of those terms and conditions. Once drafted and put into operation and relied upon by the parties, if there is a dispute about interpretation, it would be more appropriate for an independent arbitrator to determine the correct interpretation of the term. In Telstra's view, to suggest otherwise goes against universally held principles of probity.

VHA's response to the Position Paper suggests that, as a key principle in developing its suggested dispute resolution term (whereby the ACCC is arbiter):

> *"… an access seeker or service provider may refer a dispute in relation to the terms and conditions to the ACCC for determination. The ACCC shall determine any dispute referred to it in this manner, according each party procedural fairness and having regard to the matters set out in section 152BCA and the parties shall be bound by the terms of*

[8] Explanatory Memorandum, p.4.
[9] Explanatory Memorandum, p.48.
[10] Explanatory Memorandum, p.47.

any such determination. VHA noted that a similar approach has been adopted to the resolution of disputes arising in connection with NBN Co's recently accepted SAU and considered it would be likewise in the LTIE to do so here".

In Telstra's view this is an incorrect interpretation of NBN Co's SAU. Under NBN Co's SAU, the ACCC's role is limited to approving or rejecting the appointment of proposed Resolution Advisors, Pool Members, Panel Terms and Dispute Guidelines (as defined in NBN Co's SAU) and to approving or directing the termination of Resolution Advisors or Pool Members. It does not provide the ACCC with any arbitral role.

(c) The ACCC has several avenues to address contentious industry issues

There are several avenues for the ACCC to address issues that are contentious in the industry — in particular, it can address concerns in a FAD process or with a BRoC. Further, if there is a dispute concerning whether an access provider is providing services *in accordance with* a FAD term, the ACCC has the power to prosecute and enforce compliance with the FAD term in the Federal Court. These are the roles clearly contemplated for the ACCC under the post-2011 access regime.

ACCC as arbiter of disputes relating to an access agreement

Although Telstra assumes the ACCC to mean disputes relating to terms and conditions in a FAD, it is possible that the ACCC is suggesting that it would consider including in the FAD a term to the effect that it may arbitrate in relation to terms and conditions in an access agreement.

Telstra considers that such an approach would not be workable because clauses in an access agreement do not typically distinguish between how they apply to declared services versus how they apply to non-declared services. This creates practical issues should different dispute resolution procedures apply to declared and non-declared services (noting that the ACCC would not have power to set terms and conditions for non-declared services). By way of example, if the ACCC were to arbitrate in relation to how a payment clause operated in respect of declared services, but a different dispute resolution process applied to determine how that clause operated in respect of non-declared services, the parties are potentially left in a situation where they have to apply two different sets of payment regimes to the two categories of services, in circumstances where it was clearly never the intention of the parties to differentiate those processes.

In summary, Telstra considers that the ACCC should not be provided an arbitral role through an NPTC in the FAD because:

- parties have proved themselves capable of negotiating access agreements without needing to resort to the ACCC to arbitrate disputes;
- the dispute resolution processes provided in Schedule 4 of the current NPTCs in the FAD are appropriate and adequate;
- it would be inconsistent with the post 2011 regime which has replaced the "negotiate-arbitrate" model;
- where there are significant, contentious issues in the industry, the ACCC can, if required, set appropriate new non-price terms through a FAD or BroC process; and
- to the extent that the ACCC's role extended to NPTCs in access agreements, this would be unworkable given that access agreements relate to both declared and non-declared services.

5. Response to submissions in relation to Draft Terms

Telstra does not propose in this submission to respond in a comprehensive way to all of the matters raised by access seekers in their responses to the Draft Terms or in their previous submissions. However, Telstra has chosen to address various issues which Telstra considers to be of particular concern or significance. Telstra may make further submissions in relation to those

responses, potentially as part of its response to the ACCC's draft FAD decision.

Telstra's response to particular submissions in relation to the Draft Terms is set out in the Appendix A.

Appendix A: Response to points raised by access seekers in relation to Draft Terms

Schedule	Proposal from Submitter	Telstra's response
3 – Credit-worthiness and Security	Optus has queried why the final two paragraphs of clause 3.4 should be retained in light of the requirement to maintain the security under clause 3.2(a) for the relevant period.	Telstra considers that these paragraphs do provide rights over and above the rights in clause 3.2(a) because they clarify what must happen if a bank guarantee has an expiry date. Namely, a replacement must be procured no later than 2 months prior to expiry of the original bank guarantee. This is important because often the access seeker may have a large debt that is secured by a bank guarantee. It is too late once a guarantee expires and there is no replacement. The access provider must have a right to have the bank guarantee replaced **before** expiry of the original bank guarantee in order to protect its legitimate commercial interests. Telstra strongly objects to any suggestion that these paragraphs be removed.
4 – General Dispute Resolution Processes	Vocus and iiNet have proposed that the ACCC should have a dispute resolution role where there is a dispute about the variation of the terms of access by the access provider (such as a variation to operational documents under Schedule 10).	Where the access provider has a right to vary certain terms (whether under FAD terms, or under commercially agreed terms), a dispute about any variation proposed or made under that term will be a dispute about whether the access provider has acted within the scope of the variation right. This is a matter of interpretation of the variation right and Telstra does not see any reason why that dispute should be treated as a special case and subject to a different dispute resolution process to any other dispute as to interpretation of a term. In Telstra's view, creating a parallel dispute resolution process involving the ACCC to resolve a particular category of disputes is confusing and unnecessary as well as being contrary to the intention of Part XIC as set out in section 4(b) of Telstra's submission.
6 – Suspension and Termination	Optus has proposed that clause 6.2(e) and clause 6.5(d)(iii) (which is incorrectly referred to as 6.2(d)(iii) in the Optus submission) be amended so that the "10 Business Days" is replaced with "20 Business Days".	Telstra strongly disagrees that the time period in clause 6.2(e) should be extended beyond the current 10 Business Days. Clause 6.2 applies in circumstances where there is a "Suspension Event" – namely, either a failure to pay money, or a court determining there has been action by the access seeker that results in contravention of a law. Likewise, in the case of clause 6.5(d)(iii), where the access seeker has breached a material obligation under the FAD, it is not fair or reasonable for the access provider to have to wait 20 Business Days for the access seeker to remedy. Given the seriousness of the events described in these clauses and the likely detrimental impact on the access provider, Telstra considers 10 Business Days strikes the right balance between providing the access seeker with a fair time to rectify, without unduly prejudicing the access providers legitimate commercial interests.

Schedule	Proposal from Submitter	Telstra's response
10 – Changes to Operating Manuals	Optus has proposed that: (1) access providers should give 60 Business Days' notice of changes to standard processes that have a significant impact on access seekers; (2) a new subclause under clause 10.1 should provide that: "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." (3) a new subclause under clause 10.1 should provide 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."	Telstra strongly disagrees with all of these proposed changes. Specifically: (1) Telstra disagrees that changes to Operational documents should in any circumstances be subject to a mandatory 60 Business Day notice period. That is far too long to hold up operational changes of any nature. Where Telstra is aware that an upcoming change to a process will impact access seekers, Telstra may, where appropriate, engage in trials with customers before "commercially releasing" the process (as was the case with Telstra's "Priority Connect" changes recently). Once process changes have been tested and bedded down, then the operational documents themselves can be amended and formally notified to access seekers. The suggestion of a 60 Business Day notice period for changes is operationally unworkable and inefficient and would significantly hamper the introduction of process changes, most of which benefit Telstra Wholesale's customer base. Telstra notes that it had proposed limiting the consultation right in this clause to where there was a material adverse impact on the access seeker to avoid the situation where minor changes require a consultation process that could result in conflicting feedback from a number of customers, and to avoid the risk of Telstra making a change to suit one customer which then raises a concern for another customer who was previously unconcerned with Telstra's proposed change. Further, in Telstra's experience it is very rare that its right to change its systems has been raised as a concern by its customers. In those cases, Telstra would listen to its customers' requests and would seek to accommodate them if possible. (2) Telstra disagrees that changes to repair and response times and service assurance options should only be able to be made with the agreement of the access seeker. Changes to these types of matters must be made across the customer base and should not be able to be held up where, say, one customer does not agree to the changes. In circumstances where the access provider is already obliged to comply with equivalence obligations under the SAOs and the SSU, a further restriction on changes (which must already meet the equivalence requirements) is unnecessary and unworkable. (3) Telstra disagrees that there should be a further restriction on Operational documents effecting changes that may affect certain characteristics of the declared service. Telstra is already required to supply a declared service that it supplies to itself in accordance with the service description specified in the declaration instrument. Further, Telstra is required to supply that service subject to the equivalence obligations in the SAOs and the SSU. To add a further requirement that no change may be made (regardless of whether the particular characteristic is supplied by Telstra to itself) would be to go beyond the statutory regime for declared services.