

TELSTRA CORPORATION LIMITED

FAD inquiry on non-price terms and conditions
Response to ACCC Discussion Paper

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Public version



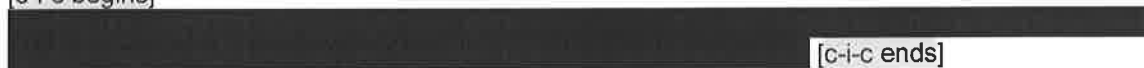
Executive summary

Telstra welcomes the opportunity to provide this submission in response to the Australian Competition and Consumer Commission's (ACCC) Telecommunications Final Access Determination (FAD) inquiries – non-price terms and conditions discussion paper (Discussion Paper).

As set out in our submissions in response to the ACCC's Position Paper, Telstra is of the view that the long term interests of access providers, access seekers and end users will be promoted by the ACCC maintaining its current approach of including only a targeted set of non-price terms and conditions (NPTCs) in the FADs.

When considering whether regulated NPTCs are needed, and if so the approach to be adopted by the ACCC in regulating them, the ACCC should be guided by the statutory hierarchy in Part XIIC of the Competition and Consumer Act 2010 (Cth) (CCA). The statutory hierarchy gives primacy to commercial negotiations and resulting access agreements.

[c-i-c begins]



[c-i-c ends]

This demonstrates that commercial negotiations with wholesale customers are producing quick, efficient and mutually beneficial outcomes, which will in turn benefit end users.

Unlike price related terms, the regulation of NPTCs in the FADs is not mandated by the CCA, and having evolved over 17 years, the NPTCs are currently operating in a mature and steady market. As a result, they are well understood and accepted by industry and there is no evidence of significant ongoing industry concerns regarding NPTCs.

Telstra view is that if the ACCC intends to include NPTCs in the FADs, it should continue with its current approach of addressing only a targeted set of NPTCs. The approach of effectively maintaining the status quo is appropriate given the change and challenges that consumers and the industry are facing as a result of the transition to the National Broadband Network (NBN). Retaining certainty and stability through the continued operation of a well understood and longstanding suite of NPTCs should be paramount.

Any NPTCs additional to those currently in the FADs should only be introduced if they relate to an aspect of access considered by the industry to be contentious and requiring regulatory intervention and only to the extent that inclusion of the individual clause can be shown to promote the long term interests of end users (LTIE). However, based on the responses to the Position Paper, no additional NPTCs are required or were sought by the significant majority of respondents.

Assuming the ACCC intends to retain NPTCs in the FADs, Telstra's position is that where FAD NPTCs relate to multiple declared services, they should be consistently drafted across the FADs in order to promote certainty and decrease costs of compliance.

Finally, in Telstra's view, there is no compelling case to warrant the introduction of comprehensive NPTCs. The current targeted NPTCs are well understood and accepted as they are the product of a competitive environment and commercial negotiations. Access seekers' responses to the Position Paper show that there is no general industry appetite or need for any form of comprehensive NPTCs in the FADs and numerous access seekers have expressed concern about both the ACCC's capacity and the length of time it would take to develop FADs specifying NPTCs for *all* aspects of access.



1. Introduction

The Discussion Paper seeks views on the issues that the ACCC considers relevant to determining NPTCs for the FADs for the fixed line services, wholesale ADSL service (**WDSL**), mobile terminating access service (**MTAS**) and the domestic transmission capacity service (**DTCS**).

As set out in our submissions in response to the ACCC's Position Paper of 15 July 2014 and 23 September 2014, Telstra is of the view that the long term interests of access providers, access seekers and end users will be promoted by the ACCC maintaining its current approach of including only a targeted set of NPTCs in the FADs and only to the extent that inclusion of the individual clause in question can be shown to promote the LTIE.

A number of questions in the Discussion Paper appear to be addressed primarily to access seekers and accordingly, Telstra has not addressed these questions in this response. Telstra reserves its right to make further submissions to the ACCC once it has had an opportunity to review access seekers' responses to such questions.

2. Assessment framework

The ACCC is guided in its consideration of these issues by the statutory framework and regime set out in Part XIC of the CCA.

This regime provides that – unlike price terms and conditions – the ACCC is not required to include NPTCs in FADs. The regime also provides that the ACCC must take into account whether the inclusion and substance of a FAD NPTC will, among other matters, promote the LTIE.

2.1. Criteria for inclusion of NPTCs

The CCA does not mandate a FAD which includes *all* relevant terms and conditions (other than the requirement to include terms relating to price¹). Rather, it sets out statutory criteria to which the ACCC must have regard in making a FAD, including whether the determination will promote the LTIE.

The Explanatory Memorandum emphasised that a FAD need not include *all* terms and conditions of access as follows:

*"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"* (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 NPTCs in a FAD. It is essential to first assess whether a particular NPTC is necessary and would promote the LTIE.

The inclusion of new or additional NPTCs in a FAD would not be an appropriate or efficient outcome and would not promote the LTIE in the existing environment because:

- the NPTCs currently operating in the market are well understood and accepted by industry;
- they are able to be bilaterally negotiated with mutually beneficial outcomes; and
- there are no identifiable contentious issues which are the subject of general industry concern or dispute being raised by a majority of stakeholders.

In the absence of any general industry concern or a contentious issue, 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 states that:

¹ Section 152BC(8).



"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."

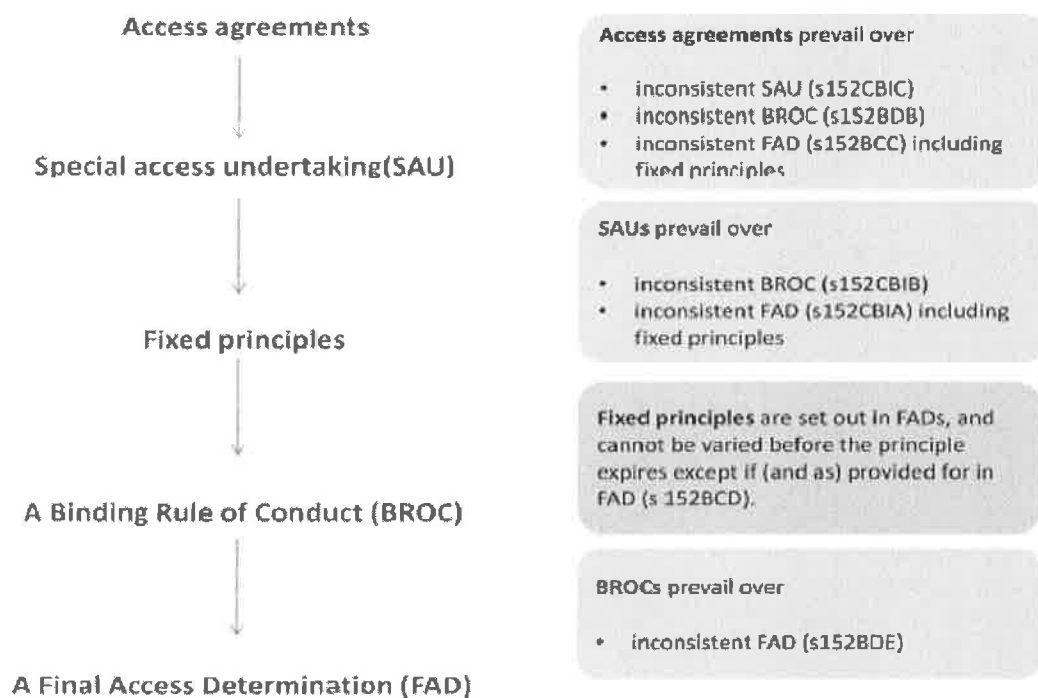
In the interests of avoiding over-regulation and resulting inefficiencies, the ACCC should only consider including NPTCs in the FADs where it is satisfied that the particular NPTC is necessary to address a particular competition concern or issue of contention to the industry. The ACCC should then examine the competition concern or issue of contention and satisfy itself that the inclusion of the particular NPTC will directly promote the LTIE of the carriage service(s) in question. The existing more targeted set of NPTCs in the current FADs meet this threshold test, many existing terms having arisen in the context of access disputes under the previous regime under Part XIC.

Telstra submits that a mere request or raising of an issue by a party with the ACCC in the context of a new FAD process does not pass this threshold, and accordingly, would not be in the LTIE. At the very least, Telstra would expect that a party with a genuine concern or issue would raise it first at the commercial level, and make reasonable attempts to negotiate commercially before seeking regulation. Telstra is not aware of any new issue that meets this test.

2.2. Statutory hierarchy

In 2010, the legislature established a new access regime in Part XIC of the CCA whereby the ACCC could make up-front terms and conditions on certain aspects of access to declared services but which recognised and instilled the primacy of commercial agreements. To do this, it created a "statutory hierarchy" of instruments whereby certain "instruments" have no effect to the extent they are inconsistent with terms and conditions set out in other "instruments" that are higher in the statutory hierarchy and where access providers must comply with their obligations in accordance with the "higher" instruments. The hierarchy is illustrated in the diagram below.

Statutory Hierarchy (as set out in section 152AY)



As shown, commercially negotiated access agreements sit at the top of the statutory hierarchy.

Access providers and access seekers are free to negotiate and agree terms of access to declared services. 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).

This regime promotes certainty and efficiency by giving primacy to commercially negotiated outcomes. Parties are free to negotiate *all* the terms and conditions that will govern the supply of services (declared or otherwise) to be acquired by an access seeker. These terms and conditions apply across the broad range of services Telstra's wholesale customers will acquire. Almost 90% of services which are on offer to access seekers are not declared and are offered in a competitive environment. [c-i-c begins]

[c-i-c ends] This demonstrates that commercial negotiations with wholesale customers are occurring regularly as "business as usual" and are producing quick, efficient and mutually beneficial outcomes, which will in turn benefit end users.

In order to promote commercially efficient outcomes, the statutory regime does not give the ACCC the power to include a term in the FAD that obliges an access provider to automatically "pull through" regulated terms and conditions into an existing access agreement. If this were possible, the ACCC would effectively be reversing the statutory hierarchy and undermining the fundamental principles associated with the primacy of the commercially negotiated contract. Similarly, the statutory regime does not allow for the inclusion in a FAD of a term directing an access provider to include certain terms in any access agreement – including by formulation of a standard offer which must, on request, be included in an existing access agreement. Instead, the ACCC must have regard to the mandatory statutory criteria in section 152BCA(1) and any other matters it considers relevant. However, these other matters must not be considered or relied on by the ACCC at the expense of giving the appropriate and sufficient weight to the mandatory statutory criteria.

Accordingly, once an access agreement is entered into, an access provider must comply with its obligations in respect of declared services in accordance with the terms of that agreement and a FAD has no effect to the extent that it is inconsistent with the applicable access agreement. Rather, FAD terms (other than those relating to price) are intended to be used when parties fail to reach agreement during negotiations or as a reference point on some aspects during negotiation of 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.

3. Approach to regulation of NPTCS in FADs

The inclusion of NPTCs in the FADs is unnecessary because unlike price related terms, their regulation is not mandated by the CCA, and the NPTCs, having evolved over 17 years, are currently operating in a mature and steady market. As a result, they are well understood and accepted by industry and there is no evidence of significant ongoing industry concerns regarding NPTCs.

If, however, the ACCC intends to include NPTCs in the FADs, it should continue its current approach of addressing only a targeted set of NPTCs. This approach would best promote the LTIE, would be most likely to achieve the objectives of certainty and stability for industry and is the most commercially viable approach. Such an approach was also supported by the majority of those access seekers who responded to the Position Paper, with the vast majority of access seekers not responding at all and thus not raising issues in relation to the Position Paper.

3.1. Targeted set of NPTCs is the most commercially viable approach

As set out above, Telstra's view is that primacy should be given to commercially negotiated outcomes in accordance with the statutory hierarchy in Part XIC of the CCA. This allows access seekers and access providers the freedom to negotiate and agree terms of access to declared services and is the most efficient means of addressing bilateral needs.

A targeted set of NPTCs in the FADs promotes the statutory hierarchy set out above and would best promote the LTIE. On the other hand, Telstra considers that including any new or additional



NPTCs in the FADs, or developing a comprehensive set of NPTCs in the FADs, is unnecessary and would not be in the LTIE given that:

- regulation of NPTCs is not mandated by Part XIC of the CCA;
- the current NPTCs are well understood and accepted and there is no evidence of issues of significant ongoing concern to industry or to the majority of access seekers; and
- commercial negotiations of NPTCs have produced competitive, efficient and expeditious outcomes, and access seekers and providers have sufficient and adequate bargaining power to negotiate mutually agreeable access agreements.

A targeted set of NPTCs is also more aligned with the position accepted by the ACCC in relation to the NBN Co Special Access Undertaking (SAU) process. In the NBN environment (where access seekers would be operating in a new access environment as opposed to operating in a mature and steady environment), the ACCC was willing to accept high level non-price principles. The ACCC appeared to accept that the industry could negotiate the specific terms of access – with the potential for any particularly contentious issues to be raised as the subject matter for an access determination or BRoC. It would therefore be inconsistent with this position if the ACCC was to set FAD NPTCs to apply to the acquisition of legacy copper-based declared services. This is particularly in the current context where NPTCs are well understood by industry and operating effectively in a competitive environment, and industry is moving towards providing services over the NBN.

NPTCs are not mandated by the CCA

The regulatory regime described in section 2.2 above, in which NPTCs, unlike price related terms, are not mandated by the CCA, reflects the broad industry view that access seekers and access providers are primarily concerned with *price* terms in their commercial negotiations for obtaining and providing access.

This view is also confirmed by access seekers' responses to the Position Paper, where emphasis was placed on ensuring that the FAD pricing terms be established, rather than desiring any form of Reference Offer or other comprehensive NPTCs. For example, Macquarie Telecom submitted that "*NPTCs are less significant than the price terms of access. The ACCC should prioritise its work on determining price terms for the declared services*".² Macquarie Telecom and Nextgen also submitted that NPTCs are "*not overly contentious*" and are "*relatively non-controversial*".³ VHA accepted that in relation to MTAS, NPTCs "*have not played a crucial role in the mobile industry and have generally not been a source of contention between carriers*" and that "*non-price terms for fixed line services have been well-established for some time now and VHA is not aware of any specific areas of concern in relation to their operation*".⁴ Similarly, the small number of responses from access seekers to the Discussion Paper also supports the view that the majority of access seekers do not have concerns with NPTCs.

NPTCs are well understood and accepted

The industry has reached a mature and steady state in relation to the NPTCs underpinning the supply of legacy declared services. This has led the industry to a significant level of certainty, with current commercial arrangements being a highly efficient means of addressing bilateral needs. This is a far different state of maturity to that of a new regulatory regime for new products and services where terms of supply are in the early stages of industry negotiation or development.

Telstra considers that in the next five years, as the transition to NBN occurs, the primary focus of the industry, the ACCC and the Government must be the effective rollout of the NBN and the successful transition of end users from the legacy fixed line network to the NBN. The stability of NPTCs (relative to current pricing) will ensure that this transition is supported in the most efficient and least disruptive manner possible. Such stability will allow the industry to transition to the NBN while operating under a well understood set of NPTCs with respect to the fixed services, wholesale ADSL, MTAS and DTCS.

² Macquarie Telecom at pages 1,4 and 5.

³ Macquarie Telecom at page 5; NextGen at page 4



That NPTCs are well understood and accepted by industry is reflected in the very small number of access seekers who responded to the Position Paper, nearly all of whom stated that the current NPTCs are working well and did not raise any new issues, either with particular NPTCs or generally. Further, a limited number of service-specific NPTCs which were previously the subject of arbitrations or disputes (or extended commercial negotiations) have now been long settled. Based on access seekers' responses to the Position Paper, there is no evidence of any contentious issues (i.e. ones in respect of which a number of access seekers are unlikely to be able to reach commercial agreement with access providers or which have a history of being the subject of dispute) that necessitate the introduction of additional NPTCs in the FADs.

NPTCs are developed in competitive environments and have produced competitive outcomes

Under the statutory regime, parties are free to negotiate *all* the terms and conditions (both price and non-price) for declared and non-declared services to be acquired by an access seeker. Given that almost 90% of services which are on offer to access seekers are not declared, Telstra must and does offer NPTCs for such services in a competitive environment.

In Telstra's experience, this has meant that access agreements are a proven efficient and expeditious means of determining NPTCs. They reflect the competitive process and have contributed to competitive outcomes by allowing the parties to agree mutually beneficial terms of access, even if the negotiation of those terms is not contentious. This experience is shared by Basslink which stated: "*Experience shows that Basslink and access seekers readily reach agreement – i.e. negotiations are not 'hard fought', they are relatively expeditious and to Basslink's knowledge access seekers consider the outcome commercially reasonable.*"⁵

Parties negotiate in order to achieve an *overall* commercial value in relation to the supply of declared and contestable services and, in practice, Telstra's wholesale customers have shown an overwhelming preference for a single supply agreement covering price terms and NPTCs for both declared and non-declared services. These negotiated, single sets of terms, avoid inefficient duplication and make contracts easier to administer. They also cover all issues of concern to wholesale customers and can be tailored to deal with their specific requirements, making them the most efficient means of capturing the parties' needs and concerns. This is in contrast to a "minimalist" and "one-size-fits-all" FAD (or some sort of hybrid agreement) whose regulated FAD terms may not always be appropriate because they are not tailored to address an access seeker's specific requirements and priorities. Further, wholesale customers benefit from this approach through the ability to negotiate, for example, 'whole of deal' or 'whole of business' discounts that apply to the range of services (declared and non-declared) being acquired.

Finally, in Telstra's experience, wholesale customers who request changes to Telstra's access agreements do not generally request FAD terms specifically. Rather FAD terms may form the background for negotiations and inform some of the requested changes from access seekers. These outcomes justify retaining the status quo of the current targeted set of NPTCs and also demonstrate the adequate and effective bargaining power that is exercised by access seekers and access providers.

In light of the above, Telstra considers that there is no compelling case to warrant further regulatory intervention in respect of NPTCs, either in the form of additional or a comprehensive set of NPTCs in the FADs.

3.2. "Pull through" of FAD terms into existing agreements is inconsistent with the statutory regime

The statutory hierarchy in Part XIC does not provide for the automatic "pull through" of regulated NPTCs during the term of an existing access agreement. To the contrary, it provides for the primacy of commercially negotiated agreements. If pull through was provided for in the statutory hierarchy, the ACCC could effectively reverse the statutory hierarchy (and legislative intent) and undermine the fundamental principles associated with primacy of the commercially negotiated agreement.

As noted in Telstra's supplementary response to the Position Paper, the pull through of regulated NPTCs into access agreements on foot would:

- create uncertainty as to the applicable terms of supply between parties;

⁵ Basslink at page 2.



- allow for “cherry picking” of terms between regulated terms and commercial alternatives; and
- create inefficient duplication as different NPTCs would need to be developed for declared services and for non-declared services, which would not align with Telstra’s wholesale customers’ preference for an efficient single supply agreement covering both declared and non-declared services.

In practice, the FADs may be used as a reference point for the parties to raise key items of concern during commercial negotiations, which is consistent with the statutory hierarchy. However, commercial negotiations allow flexible, bundled and whole of business contracts, involving a range of services (both declared and non-declared), to be developed without risk of “cherry picking” through changes in regulated non-price terms during the term of an existing agreement. Without this, the commercial negotiation process would inevitably gravitate back to a “lowest common denominator” approach for declared services, thereby not allowing access seekers the flexibility of negotiating specific items of concern to them. It is also likely to result in a less efficient commercial outcome for other non-declared services, as regulated products would no longer be able to be factored into bundled or whole of business arrangements because of this risk of “cherry picking”.

3.3. Targeted and limited set of NPTCs adequately addresses any perceived inequality of bargaining power

The ACCC has noted, as part of its consideration of how to regulate NPTCs, that it is seeking to take into account incentives for access providers to leverage their position to set unreasonable NPTCs.

In Telstra’s view, the ACCC should not speculate on possible incentives unless there is clear evidence before it that access providers have sought to do this in practice. Given the lack of access seeker responses to the Position Paper, and the general consensus of those access seekers that did respond that the NPTCs currently operating in the market are well understood and accepted, no such evidence exists.

Telstra is subject to competitive pressures when negotiating our wholesale agreements. In particular, Telstra is operating in a growing market for contestable wholesale services, with almost 90% of services on offer to access seekers being non-declared services.

Given that all wholesale services are supplied to an access seeker under the same agreement, the declared services (comprising approximately 10% of the service suite) benefit from the strong commercial leverage/competitive incentives for Telstra to flexibly negotiate all terms or risk being uncompetitive in the market place. [c-i-c begins]

[REDACTED]

[REDACTED]

[REDACTED]

[c-i-c ends]



3.4. A comprehensive set of NPTCs (in any form) is not a commercially viable alternative

In its Discussion Paper at section 6.3.1, the ACCC appears to propose three options for providing a comprehensive set of NPTCs:

- a) full, comprehensive set of NPTCs – however, the ACCC noted parties' concerns about both the ACCC's capacity, and the length of time it would take, to develop a FAD that specified terms and conditions for *all* aspects of access (in effect, a "**Reference Offer**");
- b) making a FAD requiring a standard offer to be developed which includes specified clauses on issues that are likely to be contentious or of particular competition concern. The standard offer would be available to all access seekers on request and its terms incorporated into the FAD through reference to the standard offer (the "**iiNet proposal**" or a "**Standard Offer**");
- c) making a FAD that specifies clauses on issues that are likely to be contentious or of particular competition concern, and stating that all other terms and conditions of access are those set out in another document previously agreed to (e.g. an access agreement between two companies) (a "**Bespoke Offer**").

The ACCC's indicative approach is that option (a) may be too resource and time costly. Telstra agrees and considers that similar issues arise with options (b) and (c).

Reference Offer

In Telstra's view, there is no compelling case to warrant the introduction of comprehensive NPTCs in any of the above forms given that, as set out above, current NPTCs are well understood and accepted as they are the product of a competitive environment and commercial negotiations. Access seekers' responses to the Position Paper show that there is no general industry appetite or need for any form of comprehensive NPTCs in the FADs.

In this regard:

- Basslink submitted that a comprehensive suite of NPTCs (in this case for the DTCS FAD) is unnecessary, impractical and adverse to the statutory criteria in s152BCA⁶;
- iiNet submitted that it is neither feasible nor desirable for the ACCC to consider every minute detail of access and make a determination that is a complete set of NPTCs⁷;
- Optus similarly submitted that it is neither feasible nor practical for the ACCC to set out every possible NPTC⁸;
- Macquarie Telecom and NBN Co submitted that any NPTC's should be focussed only on those where parties are unlikely to reach commercial agreement⁹;
- NextGen submitted that the NPTCs should only deal with a limited number of issues, to expedite the process and provide increased certainty to parties¹⁰; and
- TPG submitted that it would be unrealistic for the ACCC to maintain a comprehensive set of NPTCs in a manner that would be useful on an ongoing basis¹¹.

Telstra agrees with these views and believes they support the need to ensure (and protect) the primacy of commercially negotiated bilateral outcomes. The above submissions clearly support an industry view that developing a full, comprehensive set of NPTCs is not feasible, practical or desirable, and would be an inefficient, time consuming exercise if the ACCC were to attempt it.

In any event, before developing a full, comprehensive set of NPTCs, the ACCC must be satisfied that it is in the LTIE to do so. In assessing the LTIE criteria, the ACCC must consider firstly, whether it would be in the LTIE to include a particular NPTC and then secondly, how the NPTC should be drafted in order to meet the LTIE. Since NPTCs for services are negotiated in a competitive environment and apply to both declared and non-declared services, it would not be in the LTIE to regulate NPTCs in a FAD.

⁶ Basslink at page 2.

⁷ iiNet submission at page 8.

⁸ Optus at page 10.

⁹ Macquarie at pages 3-4; NBN Co at page 2.

¹⁰ NextGen submission, pages 4-5.

¹¹ TPG at page 3.



Further, in Telstra's view, there have been no submissions and there is no evidence to suggest that the option of a comprehensive set of NPTCs provides a direct, positive benefit to end users and is therefore in the LTIE. This may be distinguished, for example, from more potentially contentious issues which may be more suitable to a targeted and limited set of NPTCs, if any.

For these reasons, Telstra considers that it would not be in the LTIE to attempt to develop a full, comprehensive set of NPTCs, particularly given their short-term application as the industry moves to the NBN. Telstra considers that the primary focus of industry, the ACCC and the Government must be the effective rollout and transition to the NBN. The stability of NPTCs (relative to current pricing) will ensure that this transition is supported in the most efficient, least disruptive manner possible. [c-i-c begins]

[c-i-c ends] This demonstrates not only that there are practical and regular opportunities for access seekers to negotiate, but also that those negotiations have been successful, given that Telstra has contracts with all access seekers, and without significant ongoing areas of general industry concern being identified.

Standard Offer

The option of Standard Offer Terms was only raised by one access seeker; iiNet. It is not therefore widely accepted by industry as a necessary or feasible alternative to a targeted set of NPTCs.

In Telstra's view, there is very limited practical utility in the iiNet proposal and it is not consistent with the current regulatory regime.

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

The lack of any equivalent statutory obligation on legacy access providers is evidence that the legislature did not intend for those legacy access providers to 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 that context, the SFAA serves as a useful form of standardisation.

Further, Telstra notes the ACCC's position with respect to the NBN Co SAU was less prescriptive than that now being considered as a possible option for the declared copper-based legacy services. The NPTCs in the NBN Co SAU were confined to a subset of high-level principles relating to dispute resolution and POI related commitments. The absence of detailed NPTCs in the NBN Co SAU enabled commercial negotiations on appropriate NPTCs between NBN Co and access seekers. It would therefore be inconsistent with this position for the ACCC to now seek to adopt a *more* prescriptive approach in relation to NPTCs for copper-based declared services given that they are well understood by industry, operating effectively in a competitive environment and there no significant industry issues of contention have been raised.

Where NPTCs have long been established and apply across numerous services (which are, in the main, non-declared), there is no need to create a non-discriminatory standardised approach to contractual NPTCs. 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 non-declared and declared services. NPTCs are, and have been, amended to suit the commercial context (in the standard TWA) and may be further tailored to specific requirements of access seekers. Should a standard form of access agreement with NPTCs be put in place, it would be unlikely to suit the circumstances or specific requirements of all access seekers, and so would not provide the regulatory recourse which the ACCC seeks.

Access agreements are a proven efficient means of settling NPTCs 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

¹² As predicted in the Explanatory Memorandum



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.

Bespoke Offer

Like the option of a Standard Reference offer, the creation of bespoke terms by reference to another existing agreement is not an option that was requested or desired by industry.

Tying specific clauses on issues by reference to another document is likely to create uncertainty and confusion between the parties as to which access agreement or other documents form the entirety of the access arrangement, how the provisions would operate together in practice, and which clauses should prevail to the extent of any inconsistency. There are also likely to be issues when the other document is renegotiated and how that relates, if at all, to the timing for renegotiating any specified clauses.

Further, the ACCC's proposal to utilise terms and conditions from standard reference offers in other jurisdictions, such as those developed by the New Zealand Commerce Commission (**NZCC**), also fails to take into account the significant differences in circumstances under which those offers were (and are) developed and the bespoke nature of the agreements currently in place in Australia, as noted above. The NZCC – unlike the ACCC – is required to make a determination comprising both price and non-price terms that best meet the requirements of New Zealand's *Telecommunications Act 2001*.

The NZCC undertakes a thorough process for the development of standard reference offers for each regulated service in New Zealand, including significant amounts of consultation in response to standard terms initially proposed by access providers. The standard terms determinations developed in New Zealand take full account of the specific market context to the extent that Telstra considers it unlikely that adjustments for the Australian context could be made efficiently or appropriately. For example, the standard terms determination for MTAS is based on significantly different market conditions including on-net/off-net pricing differentials, low cross-net traffic and low mobile voice usage. Telstra considers that any NPTCs should be based on the Australian context and reflect where specific contentious industry issues have arisen and require the imposition of regulated terms. It is also significant that the NZCC approach in setting comprehensive standard terms determinations was unique at the time that it was introduced (in 2006) and remains unique internationally. Telstra does not consider that it is appropriate for the ACCC to implement a prescriptive approach where it is not required by legislation, particularly in the absence of evidence to suggest that the current approach is not working and where the significant majority of stakeholders have not requested such change.

In summary, Telstra considers that the ACCC should not develop a comprehensive FAD.

As a consequence of its position, Telstra has not provided a set of NPTCs which the ACCC should use as a basis for consideration in the event that the ACCC adopts one of the options it has suggested.

In the event that any parties nominate a set of terms and conditions for a comprehensive set of NPTCs in a FAD, Telstra reserves its right to make further submissions to the ACCC with its views on the appropriateness, or otherwise, of the nominated NPTCs.

4. Currently regulated non-price terms and conditions

As explained above, Telstra maintains its view as set out in its response to the Position Paper, that the ACCC should continue its current approach of addressing only a targeted set of NPTCs. Thus, Telstra supports adopting the suite of NPTCs currently in the FADs, subject to ensuring that common clauses are consistent across the various FADs and drafting updates are undertaken where required.

Telstra reserves its right to make further submissions in response to any proposed drafting of specific NPTCs.

4.1 Common and consistent terms and conditions

Common terms

As previously submitted, Telstra considers (subject to any drafting amendments that it may propose at a later time in the FAD inquiry) that the following sets of NPTCs (if required at all), should be 'common' across all the declared services:

- billing and notifications;
- creditworthiness and security;
- general dispute resolution;
- confidentiality provisions; and
- suspension and termination.

In Telstra's view and for the reasons set out previously in its submissions, there is no need for any additional and new common NPTCs in the FADs.

Consistent terms

Assuming the ACCC intends to retain NPTCs in the FADs, as previously submitted, Telstra's position is that where FAD NPTCs relate to multiple declared services, they should be consistently drafted across the FADs in order to promote certainty and decrease costs of compliance. This is the case for even minor discrepancies in drafting.

However, it is not always necessary nor in the LTIE to apply some FAD NPTCs to each of the declared services and Telstra recognises that some NPTCs should be limited to particular services - see section 4.2 below for further details.

4.2 Service specific terms and conditions

As noted in Telstra's response to the Position Paper, a number of the current FADs NPTCs only apply to certain declared services:

- communications with end users – apply to fixed services and WDSL;
- network modernisation and upgrade – apply to fixed services, DTCS and WDSL;
- ordering and provisioning – apply to ULLS and LSS;
- changes to operating manuals – apply to ULLS and WDSL;
- liability and indemnity – apply to DTCS and WDSL; and
- resale services – apply to WDSL.¹³

As previously submitted, Telstra considers that:

- a) the NPTCs relating to communications with end users and network modernisation and upgrades should only apply to the fixed services, including WDSL. This is because the ACCC did not include these provisions in the MTAS or DTCS FADs and Telstra agrees that it is not necessary for such provisions to apply to those services. To the extent that any proposed NPTCs are already addressed in the SSU, there is no need to include them in the FADs because this would be duplicative or, to the extent that there were (even minor) differences between the FADs and the SSU, would risk creating uncertainty; and
- b) the NPTCs relating to ordering and provision should be limited to ULLS and LSS, as is currently the case, due to the necessary technical complexity involved in delivery of, and migration between these network access services, as opposed to simpler resale services such as WLR or DTCS.

Telstra confirms its views set out in its 15 July response to the Position Paper that there is no need for any NPTCs relating to changes to operating manuals, liability and indemnity or resale services for *any* of the declared services and it is not clear how it would be in the LTIE for such NPTCs to apply to any of the declared services.

¹³ See Table 2 of page 7, and page 8 of Telstra's submission of 15 July 2014.



Liability and indemnity

Liability and indemnity provisions are currently included in the DTCS and WDSL FADs. However, Telstra believes that it is unnecessary to include such provisions in any of the FADs. While some parties have argued that these provisions are biased in favour of the access provider, the ACCC has not been presented with any evidence of this issue which suggests strongly that in practice, this is not the case.

However, if the ACCC decides that liability and indemnity terms should be included in the FADs, then:

- a) Telstra considers that they should be limited to those FADs to which they currently apply (i.e. DTCS and WDSL) and should not be expanded to the fixed line services and MTAS FADs. This is because the fixed line services and MTAS FADs have, to date, been working well and there is no evidence that they need to be changed to include liability and indemnity provisions. To do so would arguably increase uncertainty and compliance costs for businesses, and would not be in the LTIE; and
- b) if the ACCC decides to include them across all declared services, they should be drafted consistently to help ensure regulatory certainty and consistency in interpretation.

Ordering and provisioning

With the exception of the ULLS and LSS, the FADs currently do not include NPTCs in relation to ordering and provisioning. Telstra accepts that if ordering and provisioning NPTCs are to be continued, then they should be limited to ULLS and LSS due to the greater technical complexity involved in the delivery of and migration between these network access services, as opposed to simpler resale services such as WLR or DTCS. Specifically, prior to the introduction of the existing integrated process for LSS to ULLS migration and transfers, the process required separate connection and disconnection processes with associated multiple charges. Further, no specific issues or concerns have been raised with respect to ordering and provisioning for WLR or DTCS.

Additionally, ordering and provisioning processes for simpler resale services such as WLR or DTCS have been in place for many years and are well understood and accepted within the industry. As such, there is no need for the ACCC to expand the application of these provisions, nor would it be in the LTIE to do so.

iVULLS

Telstra notes that the ACCC previously considered whether to include iVULLS NPTCs in 2011 (in the fixed services FAD inquiry) and decided not to do so.

Telstra maintains that there is no need to include iVULLS NPTCs as they are commercially settled and well understood, and have not been the subject of formal disputes. It would be inappropriate and unnecessary for the ACCC to open up this issue in the absence of competition concerns or issues raised by access seekers and Telstra does not consider that it would be in the LTIE to do so.

In February 2011, Telstra launched the Enhanced Vacant Unconditioned Local Loop (eVULL) process. Since then Telstra has made the eVULL process available to all access seekers. [c-i-c begins] [redacted] [c-i-c ends]. To date, the eVULL process has been working well and so mandating an iVULLS process in the FADs is unnecessary.

In Telstra's view there is no need for any other service-specific NPTCs.

4.3 Drafting of terms and conditions

As noted above, if NPTCs are to be regulated, Telstra considers that some drafting changes should be made to ensure consistency and where appropriate, common application of terms.

In Telstra's view, it would be premature to propose specific drafting amendments at this stage of the inquiry. Telstra intends to propose specific drafting amendments once the ACCC has released its draft FADs and once Telstra has had an opportunity to consider any specific drafting which has been proposed by other parties.

4.4 Other issues

Disclosure of confidential information to regulatory bodies



As noted in the Discussion Paper, in response to the wholesale ADSL FAD inquiry in 2013, Telstra submitted that a new sub-clause should be included 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. The ACCC did not adopt the proposed clause on the basis that the protection of confidential information prevents it from being used inappropriately.

Telstra maintains its view that the protection of confidential information does not negate Telstra's concerns around the practicality and efficiency of disclosing information that is required to be disclosed, for example, in order to comply with regulatory obligations.

Disclosure of confidential information should not be confined to disclosure for the purposes of the FAD, as this is not the only purpose for which disclosure to a regulatory authority or government body may be required. To confine disclosure to the purposes of the FAD may be unduly restrictive (e.g. the access provider may be required to disclose confidential information to comply with other laws or regulations).

Telstra's proposed amendments promote certainty for the parties and the efficient use and disclosure of information, in particular by saving time in having to obtain consent on each occasion that disclosure is required. Further, they do not enable Telstra to use an access seeker's confidential information in a way that could be considered inappropriate or damaging as the proposal is limited to disclosure pursuant to a reporting obligation or a request from a regulatory authority or government body in connection with the SSU. Such outcomes are essential in ensuring that services are provided in the most efficient manner, minimising direct costs and promoting the legitimate business interests of the access provider.

There are no additional NPTC matters which Telstra considers the ACCC should address in the FADs, except as explained in this section 4.4.

5 Consultation, commencement, expiry and review of NPTCs

5.1 Commencement, expiry and review

Telstra is of the view that the FAD NPTCs should not have a different term or review process to the price terms in the relevant FAD. Different periods and review processes for price and NPTCs would give rise to unnecessary uncertainty and complexity, contrary to the LTIE.

5.2 Consultation process

For the reasons set out in section 3.2 above, Telstra does not consider that it would be in the LTIE for the ACCC to develop a comprehensive set of NPTCs, and so in Telstra's view there would be no need to consult on comprehensive NPTCs.

To the extent that consultation on targeted NPTCs is required because the ACCC is satisfied that the inclusion of such terms and conditions is in the LTIE, Telstra's view is that consultation on paper would be more practical, efficient and productive than through an industry forum. Telstra confirms that it reserves its rights to make submissions on the drafting of specific NPTCs to be included in the FADs.

Appendix 1 – Summary of Telstra’s responses to the ACCC’s questions

	ACCC’s Question	Telstra’s view
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.	<p>Please refer to sections 2.1 and 2.2 of Telstra’s response.</p> <p>In Telstra’s view, the ACCC should give attention to the primacy that the statutory hierarchy in Part XIC gives to negotiated commercial arrangements and that while Part XIC requires the FADs to contain price terms, <i>it does not require NPTCs</i>.</p> <p>In considering the LTIE mandatory criteria, in Telstra’s view the ACCC should ensure that it assesses <i>each</i> NPTC by reference to the direct impact on the actual or potential end user, and not rely on an assumption that, for example, promoting competition or encouraging investment is automatically in the LTIE, when there may not be any flow on impact.</p>
2	Are there any ‘other matters’ that should be considered when making NPTCs in FADs?	No. The very limited number of access seekers who responded to the Position Paper do not ask for any other matters to be included in the current FADS and in Telstra’s view there is no need to change or expand the current NPTCs included in the FADS.
3	Are non-comprehensive or targeted FADs a commercially viable alternative to supply of declared services pursuant to access agreements?	Please refer to sections 3.1 and 3.2 of Telstra’s response.
4	Have commercial negotiations on NPTCs in access agreements been effective in obtaining competitive outcomes in relevant markets. Please explain why or why not.	<p>Please refer to sections 3.1 and 3.3 of Telstra’s response.</p> <p>Given that almost 90% of services which are on offer to access seekers are not declared, Telstra must and does offer NPTCs for such services in a competitive environment. In Telstra’s experience, this has meant that access agreements are a proven efficient means of determining NPTCs. They reflect the competitive process and have contributed to competitive outcomes by allowing the parties to agree mutually beneficial terms of access, even if the negotiation of those terms is not contentious.</p>
5	<p>How have parties used previous regulated terms and conditions in negotiating access agreements?</p> <p>How have these regulated terms and conditions affected the bargaining power of parties?</p>	<p>Please refer to sections 3.1, 3.2 and 3.3 of Telstra’s response.</p> <p>In Telstra’s experience, wholesale customers who request changes to Telstra’s access agreements do not generally request FAD terms specifically. Rather FAD terms may form the background for negotiations and inform some of the requested changes from access seekers. These outcomes justify retaining the status quo of the current targeted set of NPTCs and also demonstrate the adequate and effective bargaining power that is exercised by access seekers and access providers.</p>

Appendix 1 – Summary of Telstra’s responses to the ACCC’s questions

6	How should the ACCC take account of the relative bargaining power of parties in its assessment of the mandatory criteria in s.152BCA of the CCA, when considering the approach to take in regulating NPTCs?	<p>Please refer to section 3.3 of Telstra’s response.</p> <p>In Telstra’s view, the starting position should be that access providers and access seekers should be encouraged to negotiate their commercial arrangements in the normal course of business. Telstra considers it is in the legitimate interests of access providers and access seekers to be able to conduct their own negotiations without pre-emptive regulatory intervention and the lack of any identifiable issue of general industry concern is evidence of this. The benefit of a “fall-back” position is just that; it is a fall back if agreement cannot be reached, and a presumed level of inequality should not be the starting position.</p>
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.	<p>Please refer to section 3.3 of Telstra’s response.</p>
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.	<p>This question appears to be addressed primarily to access seekers. Telstra reserves its right to make further submissions to the ACCC once it has had an opportunity to require any submission’s from access seekers in response to this question.</p>
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?	<p>Please refer to section 3.1 of Telstra’s response.</p> <p>The currently regulated NPTCs are well understood and accepted by industry. The absence of any significant contentious industry issues being raised in the limited number of responses to the Position Paper, and the absence of any BRoCs to date, is evidence that there is no need to change or add to the current set of NPTCs. Accordingly, Telstra does not consider that there are any issues on which agreement is less likely to be reached which therefore warrant being the subject of NPTCs.</p>
10	Do you consider that the currently regulated NPTCs (discussed in Chapter 3) should be included in the new FADs?	<p>Please refer to section 3.1 of Telstra’s response.</p> <p>In general Telstra does not believe that it is necessary to include NPTCs in the FADs. This is because (the currently regulated) NPTCs are well understood and accepted by industry. The absence of any contentious issues</p>

Appendix 1 – Summary of Telstra’s responses to the ACCC’s questions

	Please provide reasons for your views, by reference to the statutory criteria outlined in Chapter 2.	raised in the limited number of responses to the Position Paper, and the absence of any BRoCs to date is evidence there is no need to change or add to the current set of NPTCs or the need for additional NPTCs.
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.	Please refer to section 4 of Telstra’s response. The ACCC should, in general, maintain the status quo for each of the declared services in terms of the scope of NPTCs currently included. With the exception of suggested, <i>limited</i> modifications (described above), the current set of NPTCs are working well and do not need to be expanded.
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.	No. Please refer to section 4.4 of Telstra’s response.
13	Do you consider that the current industry structure or environment justifies the need for a FAD that provides comprehensive NPTCs? Please provide reasons.	No. Please refer to section 3.4 of Telstra’s response. There is no reason to introduce comprehensive NPTCs in any form. Existing NPTCs are well understood and accepted by industry participants and readily agreed through commercial negotiations. Implementing comprehensive NPTCs at this stage would risk introducing unnecessary regulatory and compliance burdens into a well-functioning commercial environment which would not be in the LTIE.
14	What do you consider would be an appropriate mechanism for implementing a comprehensive FAD?	None. Please refer to section 3.4 of Telstra’s response. Telstra’s view is that there is no appropriate means to implement any form of comprehensive NPTCS in the FADs, as each of options identified is problematic, inefficient and would not be in the LTIE.
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 refer to section 3.2 of Telstra’s response. Telstra does not consider that the ACCC should give further consideration to developing comprehensive FAD NPTCs. As such, Telstra has not provided a set of NPTCs which the ACCC should use as a basis. To the extent that any parties nominate an appropriate set of terms and conditions for a comprehensive set of NPTCs in a FAD, Telstra reserves its right to make further submissions to the ACCC with its views on the appropriateness, or otherwise, of the nominated comprehensive set of NPTCs.
16	Please identify other issues (not listed at 7.3.1) which should be the subject of	Confidential Information - please refer to section 4.4 of Telstra’s response.

Appendix 1 – Summary of Telstra’s responses to the ACCC’s questions

	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.	Except in relation to Confidential Information, in Telstra’s view and given that the parties have commercial agreements in place, and the terms in these agreements have not been disputed, it is unnecessary to specify or include additional issues that should be the subject of common terms in the FADs.
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.	None. Please refer to section 4.2 of Telstra’s response.
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.	Please refer to section 5.1 of Telstra’s response.
19	How do you think the ACCC should consult on comprehensive NPTCs before the release of a draft decision?	Please refer to section 5.2 of Telstra’s response. Telstra does not consider that an industry forum was required to discuss NPTCs – if a forum was convened there is a risk that bilateral confidentiality obligations may be breached. This would need to be carefully managed by the ACCC and the parties.