

TELSTRA CORPORATION LIMITED

FAD inquiry on non-price terms and conditions
Response to the Commission's Position Paper

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Executive Summary

Telstra welcomes the opportunity to provide feedback to the Commission's Position Paper on "Telecommunications Final Access Determination Inquiries —non-price terms and conditions supplementary prices" (**Position Paper**). This is Telstra's submission on non-price terms and conditions (**NPTCs**).

Consumers and the telecommunications industry are experiencing a period of significant change and a number of challenges brought about by the transition from the traditional copper network to the National Broadband Network (**NBN**). As such, a regulatory framework that provides certainty and stability in regulated price and non-price terms must be a key objective for the various Final Access Determination (**FAD**) inquiries. Instability and substantial changes to the key regulatory settings for legacy declared services will lead to greater uncertainty, disruption and potential investment risk at this critical point in the industry's longer term transformation.

It is important that the efforts of all industry participants remain focused on ensuring a smooth and effective transition to the NBN, including by investing in and developing the innovative new products, services and platforms needed to support the future requirements and expectations of our customers, both wholesale and retail.

Regulatory stability allows the industry to successfully transition to the NBN while operating under a well understood and longstanding set of key terms and conditions with respect to legacy declared services. It also minimises unnecessary regulatory intervention and supports the effective commercial negotiations that have occurred in the wholesale market over a long period for both regulated and non-regulated services.

Telstra considers that these objectives will be best achieved by the Commission maintaining its current approach of addressing only a limited number of issues in the FAD NPTCs. This approach provides the significant benefit of providing industry certainty in relation to the well-established (and well-understood) terms of supply for declared services and minimises unnecessary regulatory intervention. Conversely, taking steps to implement a full set of regulated terms and conditions of access (commonly referred to as a **Reference Offer**) would add potentially significant time, cost and unnecessary disruption at a time when continuity and operational certainty for legacy services should be optimised in the transition to the NBN.

This is particularly the case given that the current NPTCs operating in the market have evolved over the last 17 years and are well understood and accepted by industry participants. In short, the industry has reached a mature or steady state in relation to the key terms and conditions underpinning the supply of legacy declared services. This has led the industry to a significant level of certainty with current commercial arrangements being highly successful and sufficiently flexible to adapt to bilateral needs.

To the extent that the FAD inquiry uncovers any new issues with existing NPTCs, the Commission should address these specific issues and continue to leave other settled NPTCs to commercial agreement.

Further, the development of a Reference Offer would require drafting of all the terms and conditions necessary to acquire a service including, for example, the head terms of the agreement, all price and NPTCs (including all operational terms underpinning the supply and acquisition of a service).

In addition, the development of a Reference Offer would likely raise a number of complex issues (for example, its relationship to terms of supply for ancillary or related non-declared services or features) that are unlikely to be resolved within the Commission's intended timeframe for finalising the FAD inquiry (which Telstra understands to be by mid-2015).

The resource intensive task of implementing Reference Offers would also be of very limited benefit (especially compared to the potentially significant costs of implementing substantial changes to current processes) given that commercial agreements and the existing NPTCs are working effectively and legacy networks are progressively being replaced by the NBN.

Telstra also considers that to the extent the existing NPTCs included in the current FADs for declared services are included in the new FAD non-price terms, then certain changes should be made to those terms to better reflect current commercial or operational practices. In addition, for NPTCs that are intended to apply as a boiler plate or a common term across all declared services, consistent drafting should be used when applied across all FADs.

Telstra's detailed submissions on the existing FAD NPTCs are set out below.

1. Introduction

Telstra welcomes the opportunity to provide feedback to the Commission's Position Paper. The Position Paper called for submissions on NPTCs, supplementary pricing and facilities access in the FADs for the fixed line services, mobile terminating access service (**MTAS**) and the domestic transmission capacity service (**DTCS**).

For the sake of clarity, Telstra has provided separate submissions on (1) NPTCs and (2) supplementary pricing and facilities access. This is Telstra's submission on the NPTCs issues in the Position Paper.

Telstra considers that there is benefit in the Commission considering NPTCs across the declared services in one, combined process. Telstra has previously suggested that this holistic approach would be beneficial given that many of the NPTCs apply across the declared services.¹

While there is a clear relationship between determining price and non-price terms, Telstra is also amenable to the Commission separating its consideration of the FAD price terms and NPTCs. However, Telstra considers that all price terms (including supplementary pricing and facilities access pricing) should be considered together in the relevant FAD pricing process for the reasons set out in our separate submission on supplementary prices.

2. The Commission's approach to NPTCs

2.1. A Reference Offer is unnecessary

Telstra considers that there is no compelling case or recent driver to introduce Reference Offers or even a more limited number of NPTCs in the new FADs, given that existing NPTCs are well understood and accepted by industry participants, they are readily agreed through commercial negotiations, and there have been no formal disputes notified in respect of any NPTCs since 2009.

However, if the Commission is minded to continue to include NPTCs in the FADs, Telstra considers that there is no need for the Commission to determine all NPTCs relating to the supply of the declared services. Rather, Telstra considers that the alternative approach proposed by the Commission, in which the scope of NPTCs in the FADs is limited, is more appropriate and more likely to promote the long term interests of end users (**LTIE**).

The current NPTCs operating in the market have evolved over the last 17 years and are well understood and accepted by industry participants. In short, the industry has reached a mature or steady state in relation to the terms and conditions underpinning the supply of legacy declared services. This is a far different state, as we begin the transition to NBN, from a new regulatory regime for new products and services where terms and supply are in the early stages of industry negotiation or development.

A limited number of NPTCs which were previously the subject of disputes or extended commercial negotiations have long been settled. Further, in 2008 the Commission determined Model Non-Price Terms for the fixed line services² (**2008 Model Terms**), to which regard has been had in commercial negotiations. These Model Terms, which are familiar to the industry, were the basis of the NPTCs included in the 2011 Fixed Services FADs.

To implement a Reference Offer at this stage would risk introducing unnecessary regulatory and compliance burdens into a well-functioning commercial environment which would not be in the LTIE. This is because a Reference Offer would need to comprehensively cover all of

¹ Telstra, *Response to the Commission's Draft Report in the Public inquiry to make a final access determination for the Wholesale ADSL service*, April 2013, p.37.

² <http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/model-non-price-terms-and-conditions/final-determination-2008>.

the NPTCs that are necessary for an access seeker to acquire services from an access provider. A Reference Offer would also need to be capable of application to all access providers in the industry where the FADs apply. The exercise of developing such a set of terms would be time consuming, resource intensive and costly and would apply only in the short term, given that the industry is in the process of moving towards an NBN-based service model.

2.2. NPTCs on a limited number of issues will promote the LTIE

Accordingly, Telstra considers that the alternative approach to determining NPTCs proposed by the Commission in the Position Paper (i.e. a set of terms and conditions which deals only with a limited number of issues) is more likely to promote the LTIE, if the Commission decides to include NPTCs in the FADs. In this regard, given the consultation and amendments which have already been made to the current set of FAD NPTCs, they should form the starting point for the current FAD inquiry.

This approach is in the LTIE, because it will promote stability and certainty for access providers, access seekers and end users. Telstra considers that in the next five years, the primary focus of the industry, the Commission 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, 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, MTAS and DTCS.

2.3. Scope of Commission's review of current FAD NPTCs

In taking the current set of FAD NPTCs as the starting point, Telstra considers that the Commission's review should be limited to:

- whether the FAD NPTCs should continue to apply to **all of** the declared services to which they currently apply;
- whether the FAD NPTCs should apply **consistently** across the declared services (noting that, at this time, there are drafting inconsistencies between the FADs, which has the potential to cause uncertainty); and
- whether any of the FAD NPTCs should be **removed**.

Telstra's submissions on each of these matters are set out in section 3 below.

This submission does not include detailed drafting of the FAD NPTCs, given the absence of proposed drafting in the Position Paper. Telstra assumes that the industry will have the opportunity to comment on the Commission's proposed draft FAD NPTCs later in the inquiry process and prior to any draft decision being made. In addition, the drafting of the NPTCs has previously been complex and would benefit from simplification, which should be undertaken in this inquiry.

3. NPTCs to be covered in FADs

The Commission should, in general, maintain the status quo for each of the declared services in terms of the scope of the NPTCs currently included in the FADs. As discussed above, subject to drafting clarifications (including for consistency) and the exclusion of certain provisions which are unnecessary, the current set of NPTCS in the current FADs are working well and do not need to be expanded.

3.1. NPTCs which currently apply to the declared services

Table 1 below sets out the NPTCs that are currently included in the various declared services FADs.

Table 1: NPTCs in each of the declared services FADs

NPTCs	Fixed line	MTAS	DTCS	WDSL
Billing and notifications	✓	✓	✓	✓
Creditworthiness and security	✓	✓	✓	✓
General dispute resolution	✓	✓	✓	✓
Confidentiality provisions	✓	✓	✓	✓
Suspension and termination	✓	✓	✓	✓
Communications with end users	✓	x	x	✓
Liability and indemnity	x	x	✓	✓
Network modernisation and upgrade	✓	x	✓	✓
Changes to operating manuals	ULLS	x	x	✓
Ordering and provisioning	ULLS and LSS	x	x	x
Resale services	x	x	x	✓

Telstra considers that if NPTCs are included in the FADs, then it is appropriate that some NPTCs continue to apply to all of the declared services, and that others only apply to certain services. However, Telstra also considers that some FAD NPTCs are unnecessary and should not apply to any services.

Table 2 below sets out Telstra's views on how the FAD NPTCs should apply to each of the declared services.

Table2: Proposed application of NPTCs to each of the declared services

NPTCs	Fixed line	MTAS	DTCS	WDSL
Billing and notifications	✓	✓	✓	✓
Creditworthiness and security	✓	✓	✓	✓
General dispute resolution	✓	✓	✓	✓
Confidentiality provisions	✓	✓	✓	✓
Suspension and termination	✓	✓	✓	✓
Communications with end users	✓	x	x	✓
Liability and indemnity	x	x	x	x
Network modernisation and upgrade	✓	x	x	✓
Changes to operating manuals	x	x	x	x
Ordering and provisioning	ULLS and LSS	x	x	x
Resale services	x	x	x	x

Where FAD NPTCs relate to multiple declared services (as shown in Table 2), Telstra considers that they should be consistent across those services in order to promote certainty and decrease costs of compliance (see **section 3.2** for further detail). However, it is not always necessary nor in the LTIE to apply some FAD NPTCs to each of the declared services (see **section 3.3** for further detail).

As indicated in Table 2, Telstra also considers that some of the NPTCs which were included in the 2011 FADs (changes to operating manuals; liability and indemnity; and resale services) are not necessary and it is not in the LTIE for these NPTCs to apply to any of the declared services (see **section 3.4** for further detail).

Finally, Telstra notes that access seekers raised some NPTCs for discussion in previous FAD inquiries, although these were not incorporated into the current FADs. In **section 3.5**, we set out the reasons why it remains unnecessary to include these NPTCs in the FADs.

3.2. Some common NPTCs should be consistently applied to each of the declared services

As set out in Table 1 above, a number of the current FAD NPTCs are common across all of the declared services FADs, including:

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

Telstra reiterates the position that it has taken in previous FAD inquiries that it is unnecessary to include these NPTCs in the FADs. This is because these NPTCs are well understood and accepted by industry and have not been the subject of disputes since at least 2009.

However, if the Commission is minded to retain these NPTCs in the FADs, 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.

3.3. NPTCs which should only apply to particular services

As set out in Table 1, a number of the current FADs NPTCs only apply to certain declared services:

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

Telstra considers that the latter three of these sets of NPTCs (changes to operating manuals; liability and indemnity; and resale services) should not apply to any of the declared services. Reasons for this are set out in section 3.4 below.

Telstra considers that the NPTCs relating to communications with end users, and network modernisation and upgrades should only apply to the fixed services (including WDSL).

Telstra considers that the NPTCs relating to ordering and provision should only apply to ULLS and LSS.

The reasons for Telstra's views in relation to each of these NPTCs are set out below.

3.3.1 Communications with end users

Provisions relating to communications with end users are currently included in the fixed services and WDSL FADs. The rationale for these provisions is to “*place limits on service providers from engaging in aggressive marketing strategies, which provide assurance to the access provider and all service providers that marketing to end-users will be done appropriately.*”³ The Commission 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 MTAS or DTCS.⁴

Provisions relating to communications with end users NPTCs are unnecessary for MTAS because the circumstances where an access provider would contact an end user when provisioning MTAS are rare and relate to fault detection and repair. Contact with an end user would only occur following consultation with the end user's access seeker and after obtaining their consent. This reflects the nature of the MTAS as a network-to-network interconnection service. Given that communications with end users are rare and only occur with access seekers' consent, it is unnecessary to include such provisions in any MTAS FAD. Historically this has not been an issue and including these provisions in the MTAS FAD would only expose the parties to unnecessary regulatory and compliance burdens with no additional benefit.

Similarly, provisions relating to communications with end users are not relevant to DTCS because the only circumstances in which an access provider would contact an access seeker's end user in connection with DTCS are already expressly provided for in the DTCS FAD, namely (1) in relation to an emergency or in order to carry out works necessary to activate the DTCS; and (2) for fault detection and repair. In these circumstances, the end user's details are provided to Telstra by the access seeker in order for Telstra to communicate with the end user. Telstra considers that it is highly unlikely that an access seeker's end user would contact Telstra directly (as opposed to via their access seeker service provider) in relation to the DTCS.

3.3.2 Network modernisation and upgrade

Major network modernisation and upgrade (MNMU) provisions currently apply to fixed line services, DTCS and WDSL FADs. However, these provisions are only relevant to the fixed line services (including WDSL) and are not relevant to MTAS or DTCS for the reasons set out below. They should therefore be removed from the DTCS FAD, and should not be included in the MTAS FAD.

First, the majority of the 2008 Model Terms in respect of MNMUs apply specifically to the ULLS.⁵ In drafting the 2008 Model Terms, the Commission was concerned to ensure that changes in the network would not result in access seekers' equipment – such as DSLAMS or

³ Telstra's response to the Commission's DTCS discussion paper 29 August 2011, p26.

⁴ MTAS FAD Explanatory statement and instrument, 7 December 2011 p21; DTCS FAD Explanatory statement, 22 June 2012 p48.

⁵ See paragraphs (a) and (b) of the definition of MNMU in clause G of the 2008 Model Terms which are specifically applicable to ULLS.

voice switches – no longer being supported. In light of this, the only possible application of the MNMU model terms to non-ULL services was if it could be shown that an MNMU:

- resulted in a service no longer being supplied; or
- adversely affected the quality of a service or any services supplied by access seekers to their end-users using the service.⁶

It is therefore necessary to consider whether these scenarios are likely to arise with respect to MTAS or DTCS. If these scenarios are unlikely, then the inclusion of MNMU provisions in the MTAS and DTCS FADs would create unnecessary and unduly onerous obligations for access providers contrary to the LTIE.

In respect of the MTAS, an MNMU would not produce either of these outcomes because the MTAS would continue to be supplied and its quality would not be adversely affected by an MNMU. This is because the MTAS is not a customer access network (**CAN**) based service, but rather a network interconnection service, where changes to the core network will not affect the interconnecting service provider's requirement to route and deliver the call in accordance with the agreed technical specifications for network-to-network connectivity for voice services.

In respect of the DTCS, an MNMU would also not produce either of the outcomes set out above. Given that the DTCS is technology neutral, an MNMU would not affect the provision of DTCS because, unlike an acquirer of ULLS (whose ability to continue to provide comparable services may be affected if Telstra was to, for example, replace copper with fibre), an acquirer of DTCS purchases an end-to-end service irrespective of the infrastructure over which Telstra delivers it.

It is therefore evident that the MNMU provisions are only relevant to the CAN-based fixed line services and should not be included in the FADs for MTAS or DTCS. To do so would not promote the LTIE but rather undermine it. It would create unnecessary and unduly onerous obligations for access providers contrary to their legitimate business interests, and would increase the direct costs of providing services by requiring the compilation of unnecessary reports in relation to MNMUs.

3.3.3 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 agrees the application of these provisions should be limited to ULLS and LSS 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. Additionally, ordering and provisioning processes for all declared services have been in place for many years and are well understood and accepted within the industry. As such, there is no need for the Commission to expand the application of these provisions.

3.4. NPTCs which should not be included in FADs

As noted above, Telstra considers that the NPTCs relating to changes to operating manuals, ordering and provisioning, liability and indemnity and resale service should not apply to any declared services. These reasons are set out below.

3.4.1 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. This is because they have never been the subject of a formal dispute between parties and it is

⁶ See paragraph (c) of the definition of MNMU in clause G of the 2008 Model Terms.

therefore unnecessary for the Commission to intervene. While some parties have argued that these provisions are biased in favour of the access provider, they have not provided any evidence of this and the lack of formal disputes between parties on this issue suggests strongly that in practice, this is not the case.

However, if the Commission decides that liability and indemnity terms should be included in the FADs, Telstra considers that they should be limited to the 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 these FADs have been working well and there is no indication that they need to be changed to include liability and indemnity provisions. This would simply increase uncertainty and compliance costs for businesses.

3.4.2 Changes to operating manuals

Provisions regarding changes to operating manuals currently apply to WDSL and ULLS. Telstra considers that these provisions which were included in the 2008 Model Terms and flowed through to the fixed services FAD as a result of particular issues access seekers considered they were facing at the time in relation to changes to ULLS operating manuals. Telstra further considers that these provisions were included in the WDSL FAD to give access seekers comfort and certainty regarding the NPTCs that would apply in relation to WDSL, rather than because there was an actual need for these terms to be included (such as in order to address any disputes which had arisen in relation to these provisions).

Further, Telstra has clear processes in place to update its operating manuals and there have not been any disputes for a number of years in relation to changes to operating manuals. On this basis, Telstra believes it is unnecessary for these provisions to apply to any of the FADs and would simply increase costs of compliance for the parties.

If, however, the Commission decides to retain these provisions, Telstra believes that their application should remain limited to ULLS and WDSL. There is no indication that any issues exist in relation to processes for making changes to the operating manuals of any other declared services, and to extend these provisions would simply add an unnecessary administrative burden.

3.4.3 Resale services

The WDSL FAD contains a NPTC that specifically allows access seekers to resell the Telstra WDSL service. Telstra considers that this NPTC is unnecessary and recommends that it be removed. As Telstra explained in the WDSL FAD inquiry,⁷ the purpose of the reseller clause in Telstra's agreements with its wholesale customers was not to prevent access seekers from reselling the WDSL service, but rather that access seekers ensured that their resale customers' actions did not impact the Telstra network. Given this, Telstra believes that the NPTC regarding resale of WDSL is unnecessary and should be removed.

3.5. NPTCs raised in previous FAD inquiries

The Commission has invited nomination of issues that have been raised in previous inquiries (although those issues were not included in the current FADs).⁸

In determining whether additional NPTCs are required, Telstra believes that proposals for such NPTCs should be evaluated against the following criteria:

- Are the proposed NPTCs specifically covered by the standard access obligations (**SAOs**) (e.g. equivalence or ordering and provisioning SAOs) in Part XIC? If so, then it is simply unnecessary to include such NPTCs in the FADs;

⁷ Telstra response to the Commission's Draft Report in the Public inquiry to make a final access determination for the Wholesale ADSL service, April 2013, p48.

⁸ Commission's Position Paper "Telecommunications FAD inquiries – non-price terms and conditions & supplementary prices", May 2014, p11.

- Are the proposed NPTCs already addressed in Telstra's SSU? Telstra recognises that the SSU had not been finalised and accepted prior to most of the current FADs being made (the FAD for WDSL being the exception). However, the SSU was accepted in February 2012 and has now been in place for over two years. 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
- What are the costs of including the NPTCs for access providers? The Commission needs to balance the interests of access providers and access seekers in making the FADs and if a new NPTC would be costly to implement, then those costs would need to be recovered from access seekers and, ultimately, end users. Further, the Commission should bear in mind that the industry is transitioning to the NBN, so imposing costly NPTCs on access providers would likely mean that there would only be a relatively short period of time within which the cost of any necessary investments could be recovered.

Telstra has addressed some of the previous proposals for additional NPTCs below.

3.5.1 Overarching equivalence

In the WDSL FAD process, some access seekers submitted that a NPTC requiring Telstra to provide equivalence as between Telstra Retail and the access seeker in relation to ordering and provisioning would be in the LTIE and would provide a means of allowing access seekers to directly enforce Telstra's commitment under the SSU.⁹

The Commission did not, at the time, include an overarching equivalence obligation in any of the FADs. In its Final Report on the WDSL FAD, the Commission stated that:

Telstra is required to engage in conduct in order to comply with the SSU [and] ... given the nature of the specific Commission enforcement mechanism prescribed in the SSU for possible breaches of the overarching equivalence commitment, inclusion of an overarching equivalence commitment in the FAD, particularly in a redacted or modified form, would likely give rise to inconsistency between the SSU and the FAD.¹⁰

Telstra considers that an overarching equivalence obligation should not be included in the FADs as to do so would likely give rise to inconsistency between the SSU and the FAD, as recognised by the Commission.

3.5.2 Equivalence and transparency metrics

In the WDSL FAD process, some access seekers submitted that metrics 8 to 11 in Schedule 3 of the SSU as well as service level rebates in schedule 7 of the SSU should be included in the FAD on the basis that it may provide an additional incentive for Telstra to provide equivalence, as this would enable access seekers to directly enforce Telstra's commitment under the SSU.

The Commission decided not to include equivalency and transparency metrics in the FAD because Schedule 3 of the SSU would continue to apply even if the FAD contained these terms and it was not necessary to replicate these provisions in the FAD.¹¹

Telstra agrees with the Commission and does not believe that the FADs should include terms and conditions covered by the SSU which are duplicative or which would likely give rise to inconsistency (to the extent that there were (even minor) differences between the SSU and the FADs).

⁹ Herbert Geer's Response to the Commission's Draft Report in the public enquiry to make a final access determination for the wholesale ADSL Service, April 2012 p15-16.

¹⁰ Commission's Public Inquiry to make a FAD for the wholesale ADSL service, Final Report, 4 June 2013, p95.

¹¹ Public Inquiry to make a FAD for the wholesale ADSL service, Final Report, 4 June 2013, p96.

3.5.3 Service levels

In the 2011 fixed services FAD inquiry, some access seekers submitted that the FAD should include service levels that the access provider is required to adhere to in regards to ordering, provisioning and fault rectification. Access seekers argued that these activities tended to be carried out on a best efforts basis without service levels. They argued that at a minimum the service levels should include the following conditions:

- the access provider should be obliged to provide levels of service on a non-discriminatory basis and equivalent to that which they provide to themselves; and
- if the access provider fails to achieve service levels, it is required to pay the access seeker an appropriate credit.¹²

However, this is an issue that is already adequately addressed in the SSU and, as noted above, Telstra does not believe that FADs should include terms and conditions covered by the SSU which are duplicative or which would likely give rise to inconsistency.

3.5.4 Service assurance

Some access seekers have previously argued for NPTCs relating to enhanced service assurance for ULLS.¹³

Telstra considers that it would be inappropriate for the Commission to include NPTCs addressing this issue for the following reasons:

- access seekers can already choose to take up enhanced service assurance levels for at least some of the declared services;
- such enhanced service levels are typically available for a commercial charge, reflecting the fact that there are costs associated with providing enhanced service levels; and
- any concerns that access seekers may have with respect to equivalence are adequately addressed by Telstra's SSU.

3.5.5 DSL Upgrades

In the context of the WDSL FAD, access seekers argued that a NPTC should be included in the FAD which would require that, if Telstra developed a DSL upgrade or a mass market naked DSL product, Telstra must make available a relevant comparable wholesale upgrade or naked DSL product to its wholesale customers (this would be equivalent to clause 15 of the SSU, which has no effect on Telstra, while WDSL is an active declared service).

The Commission found it was not necessary to replicate the SSU provisions in the FAD because if Telstra develops a naked DSL product or upgraded DSL product, the Part XIC standard access obligations would require Telstra to take all reasonable steps to ensure the technical and operational quality of the declared service supplied to its wholesale customers is equivalent to that which it provides to itself.

Telstra agrees with the Commission's decision and does not believe the FADs should contain provisions relating to DSL upgrades for these reasons.

¹² Herbert Geer's Submission in response to the Public inquiry to make final access determinations for the declared fixed line services (on behalf of Adam internet Pty Ltd, Aussie Broadband Pty Ltd, iiNet Limited and Internode Pty Ltd, 3 June 2011, p18.

¹³ Optus' response to the Commission's discussion paper Public Inquiry to make Final Access Determinations for the Declared Fixed Line Services, June 2011, p68.

3.5.6 Quality of service (QoS)

In its response to the Commission's draft report in the fixed line services re-declaration inquiry, one access seeker stated that the Commission should consider imposing an obligation upon Telstra to supply QoS as part of its WDSL service.¹⁴

Telstra considers that the access seeker misunderstood the nature of the QoS solution that Telstra provides, which is not a long term, scalable solution. Telstra disagrees with the imposition of a QoS obligation in the FADs for the following reasons:

- the QoS solution that Telstra provides to one retail product (DOT™) is a Layer 3 solution, not a Layer 2 solution – [c-i-c];
- requiring Telstra to provide QoS to wholesale customers would entail significant investment in the network to increase capacity and upgrade hardware; and
- [c-i-c] (which, as the Commission is aware, is a shared network between retail and wholesale end users).

3.5.7 Application of WDSL FAD terms and conditions

Telstra continues to be disappointed that the WDSL FAD applies to Telstra only, such that non-Telstra providers of WDSL are not subject to the WDSL FAD NPTCs. To the extent that the Part XIC SAOs apply to WDSL, Telstra remains of the view that they (and any NPTCs) should apply to all access providers.

The basis of the Commission's 2013 decision to exempt other carriers from the SAOs for WDSL appears to have largely been that non-Telstra access providers are already sufficiently constrained by competition from Telstra and Telstra is the dominant provider of WDSL services nationally and is likely to retain that position for the foreseeable future. The Commission appeared concerned that imposing terms and conditions on non-Telstra providers would reduce their incentives to invest in infrastructure or innovations, which would have detrimental impacts upon competition in ADSL markets (both wholesale and retail) and on the efficient use of, and investment in, infrastructure.

While recognising that Telstra's ADSL network exceeds that of other providers on a national level, it is important to also realize that in metropolitan areas several providers operate networks of a comparable size to Telstra. In areas in which access seekers have installed DSLAM-based infrastructure, the market for ADSL services exhibits quite different characteristics and outcomes, compared to areas in which access seekers have chosen to not install competitive infrastructure. In these areas, Telstra's market share is sometimes low and yet it is still subject to the Part XIC SAOs by virtue of the current WDSL FAD. Given that the SAOs apply to ESAs where Telstra's WDSL market share is low, then Telstra believes that the SAOs should also apply to other WDSL providers.

As to the Commission's view that imposing FAD terms and conditions on other WDSL access providers may reduce their incentives to invest in infrastructure or innovations, Telstra does not understand why this is not equally applicable to Telstra. Imposing the NPTCs of the WDSL FAD upon Telstra could similarly harm its flexibility and ability to innovate. The statutory criteria do not allow the Commission to give a "leg-up" to Telstra's competitors over Telstra.

3.5.8 Network conditioning

In the context of the MTAS FAD, Optus argued that the Commission should include a NPTC on network conditioning for mobile numbers in the FAD. It argued that the maximum time allowed for network conditioning should be specified in the FAD to promote industry certainty

¹⁴ AAPT's response to the Commission's Draft Report in the Public Inquiry into the fixed line services declaration, February 2014, p2.

and ensure MNOs are competing on a level playing field.¹⁵ The Commission disagreed with Optus' submission that such provisions should be included in the FAD because the provision of MTAS is not dependent on provisions for network conditioning for mobile numbers.¹⁶ Telstra agrees with the Commission that network conditioning for mobile numbers is simply not relevant to the provision of MTAS and NPTCs in relation to this should and therefore, not be included in the MTAS FAD.

3.5.9 Additional NPTCs

Telstra does not consider that there is a need for any additional NPTCs to be included in the FADs. There have been no changes in circumstances that would warrant such additions to the FADs and the Commission should carefully consider the costs and benefits of any proposals to include additional NPTCs.

4. Terms and conditions requiring urgent attention

Telstra is not aware of any specific NPTCs the application of which would need to be given priority due to urgency.

The absence of any Binding Rules of Conduct (**BRoC**) to date is evidence of the lack of any urgent requirement for changes to the current set of FAD NPTCs or any requirement for additional NPTCs. Telstra is of the view that this is because the NPTCs are well understood and accepted by industry and are working well.

5. Frequency of review of NPTCs

Telstra considers that regular reviews of NPTCs are unnecessary. As outlined above, the NPTCs have worked well to date, were developed over many years and are well understood and accepted in the industry. At this time, it is unclear how long the term of the FADs will be (although Telstra notes the principle set out in section 152BCF(6)(a) of the *Competition and Consumer Act 2010* (Cth) that the expiry date of the FAD should be the same as the expiry date of the service declaration) and Telstra will comment upon this at the appropriate time in the FAD inquiry).

Given the maturity of the existing NPTCs there would be little benefit in reviewing the NPTCs more frequently.

6. Industry engagement

6.1. Commercial negotiations

In section 3 of the Position Paper, the Commission has asked that parties provide reasons for any preferred approach they put forward for addressing NPTCs in the FADs, including description of "*any relevant experiences you have had in negotiating commercial agreements, and how those experiences explain your preferred approach*".¹⁷

Telstra supports the Commission's call for any positions put forward in submissions on this issue to be accompanied by relevant supporting information. Telstra also appreciates that parties' experiences in negotiating commercial agreements with Telstra may inform their views on the preferable approach, and may be instructive for the Commission.

¹⁵ Optus submission in response to MTAS ACCC Discussion Paper, July 2011 at section 10.1 and Optus submission in response to the Commission's Draft Access Determination Explanatory Statement, October 2011 at section 5.6.

¹⁶ Commission, Access Determination Explanatory Statement, 7 December 2011 at p21.

¹⁷ Commission, Position Paper "Telecommunications FAD inquiries – non-price terms and conditions & supplementary prices", May 2014, p10.

However, Telstra is also mindful of the fact that specifics of the negotiation process relating to commercial agreements for access to the declared services may, in many cases, be confidential information of each of the parties to the relevant negotiation.

For its part, Telstra notes that it does not anticipate having any particular concerns about other parties' disclosure to the Commission of accurate information relating to negotiation of commercial wholesale arrangements with Telstra, on a commercial-in-confidence basis (in terms of disclosure to other industry participants or broader public), provided that the commercial-in-confidence information is also provided to Telstra. Telstra considers that this will not only reflect its joint ownership of the relevant information, but will also ensure relevant parties get full visibility of information provided to the Commission and an opportunity to review and (where appropriate) respond to it.

6.2. Industry forum

Telstra does not consider that an industry forum is required to discuss NPTCs in the FADs. As noted, the NPTCs are well understood and accepted by industry and, to the extent that changes to the FAD terms and conditions are required, these can be done by way of written submissions.

If a forum was convened, Telstra would be concerned that there is a risk that bilateral confidentiality obligations may be breached at the forum and this would need to be carefully managed by the Commission and the parties.

Appendix 1 – Responses to the Commission’s questions

	Commission’s question	Telstra’s view
1	What approach to regulating NPTCs do you consider would best promote the LTIE?	Telstra considers that including NPTCs in the FADs is unnecessary, given that current contractual NPTCs are well understood and accepted by the industry. If, however, the Commission is minded to include NPTCs in the FADs, Telstra considers that, for the reasons set out in section 2, a Reference Offer is inappropriate and not in the LTIE. Rather, the current approach (i.e. NPTCs which address a limited number of issues) is in the LTIE and the current FAD NPTCs are an appropriate starting point for the Commission’s inquiry.
2	Do you consider the FADs should be made as: <ul style="list-style-type: none"> • A comprehensive set of terms and conditions which can act as a fall back or complete substitute for commercial agreement; or • A set of terms and conditions which deal only with a limited number of issues, which can be used when parties are unable to agree on a complete set of terms and conditions for access to a declared service or services; or • An alternative option (please describe). 	See Telstra’s response to Question 1 above.
3	What terms and conditions do you consider should be covered in the FAD?	See Telstra’s response to Question 1 above.
4	Are there any terms and conditions that the Commission should consider as a matter of urgency?	Telstra is not aware of any terms and conditions which need to be considered by the Commission as a matter of urgency. This is evidenced by the lack of any BRoCs to date. Please refer to section 4.

	Commission's question	Telstra's view
5	<p>What terms and conditions do you consider should be 'common' (that is, identical) across all the declared services?</p>	<p>Telstra considers (subject to any drafting amendments that it may propose at the appropriate time in the FAD inquiry) that the following sets of NPTCs should be 'common' across all the declared services:</p> <ul style="list-style-type: none"> • billing and notifications; • creditworthiness and security; • general dispute resolution; • confidentiality provisions; and • suspension and termination. <p>Reasons for Telstra's proposal are set out in section 3.2.</p> <p>Telstra considers that the following sets of NPTCs, which currently only apply to some of the declared services, should be removed from the FADs for those services and should not apply to any of the declared services:</p> <ul style="list-style-type: none"> • changes to operating manuals; • liability and indemnity; and • resale services. <p>Reasons for Telstra's proposal are set out in section 3.4.</p>
6	<p>Are there non-price issues for which a different approach should be adopted for individual regulated services?</p>	<p>Telstra considers that the following sets of NPTCs should only apply to certain declared services:</p> <ul style="list-style-type: none"> • communications with end users; • network modernisation and upgrade; and • ordering and provisioning. <p>The declared services and the reasons for Telstra's proposal are set out in section 3.3.</p>

	Commission's question	Telstra's view
7	How frequently should the Commission review the NPTCs included in the FADs?	For the reasons set out in section 5, Telstra considers that regular reviews of the NPTCs are unnecessary.
8	Please provide your views on what steps the Commission can take to facilitate active engagement and assistance from industry in the course of its consultant on NPTCs. For example, would there be benefit from holding an industry forum to discuss specific issues in relation to NPTCs (as proposed in Chapter 2 of this paper)?	<p>Telstra does not consider that an industry forum is required to discuss NPTCs in the FADs. As noted, the NPTCs are well understood and accepted by industry and, to the extent that changes to the FAD terms and conditions are required, these can be done by way of written submissions.</p> <p>Further, insofar as parties wish to refer to the specifics of negotiations of their commercial agreements with Telstra (either in any forum that the Commission holds or in their written submissions), those parties and the Commission must ensure that the confidentiality of those negotiations is maintained (to the extent that it applies). Please refer to section 6.</p>