

Selena Liu
A/g Assistant Director - Water and Wireline Markets
Australian Competition & Consumer Commission

By email: Selena.Liu@acc.gov.au

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Dear Ms Liu

ACCC FAD inquiry: draft non-price terms and conditions

We refer to the ACCC's email of 8 December 2014 seeking comments on the drafting of non-price terms in the ACCC's final access determinations (**FADs**). Vocus thanks the ACCC for the opportunity to comment. This submission does not contain confidential information and may be published on the ACCC's website.

1. Proposed non-price terms

Vocus has reviewed the ACCC's proposed non-price terms (**the proposed NPTs**). We consider that the proposed NPTs are suitable for inclusion in the FADs and appropriately reflect the mandatory criteria set out in section 152BCA of the *Competition and Consumer Act 2010* (Cth) (**the CCA's mandatory criteria**), which the ACCC is required to have regard to when making FADs. The proposed NPTs are fairly balanced. They protect Telstra's legitimate business interests and investments by ensuring that it is not exposed to unreasonable risk as a result of access seekers using its network but also have regard to the access seekers' right to access declared services, which must be adequately protected in order to provide an environment in which competition can survive in markets for telecommunications services.

Telstra's incentive and ability to impede competition in the markets that it operates in remains extremely strong. Instances of Telstra's willingness to act in a manner that is contrary to competition are numerous and for example have been publicly demonstrated in the Federal Court's decision in the exchange capping case¹ and in the dozens of ACCC access determinations that determined Telstra was charging excessive access prices. Ignoring Telstra's competitive dominance would be detrimental to the long term interests of end-users of carriage services (the LTIE) by failing to promote competition in telecommunications markets.

We consider that the proposed NPTs:

- Are commercially relevant and practicable;

¹ ACCC v Telstra [2010] FCA 790



- Appropriately balance the interests of the access provider and access seeker;
- Are clear and unambiguous.

2. Terms about recourse to regulated terms

We strongly agree with the position that FAD terms must provide for recourse to regulated terms. If an access seeker wants to operate in telecommunications markets and supply services over Telstra's network then realistically it has no option but to enter into access agreements with Telstra.

We are not aware of any access seekers that have indefinitely delayed execution of an access agreement on the basis that it could afford to wait until it gained access to the service via regulated terms. Such delay is commercially and competitively untenable. As such, access seekers are placed in the position of having to take the offer that Telstra places on the table.

Regulated terms set by the ACCC in FADs and binding rules of conduct (BROCs) are only made after considerable public scrutiny and with close regard to the CCA's mandatory criteria. Accordingly, the terms are very likely to be balanced, fair and promote the LTIE. If access seekers and access providers are unable to have recourse to the regulated terms then the object of promoting the LTIE is probably not being achieved.

Though facilities access is not yet a declared service, Vocus' experience in being held to the terms of what we considered an unreasonable access agreement is relevant to the question of whether or not FADs should include terms that provide for recourse to regulated terms.

As the ACCC is aware, Vocus disputed the terms of its duct access agreement with Telstra and sought arbitration of the dispute before the ACCC pursuant to the ACCC's jurisdiction in Schedule 1 of the Telecommunications Act 1997 (Cth). The full bench of the Federal Court accepted Telstra's argument that the existence of an access agreement meant that there was no 'failure to agree' and therefore the ACCC's jurisdictional threshold was not achieved.²

Though facilities access is regulated, it is not declared and there is no applicable FAD. In considering our options to achieve reasonable access terms it was very clear that the options are very limited both commercially and via regulatory recourse. We could not simply terminate the agreement and be left in commercial limbo where our cables could be removed from Telstra's underground ducts whilst we sought a regulated outcome. We consider that a similar situation applies for access seekers acquiring declared services even though FADs apply to the services. This is because of the hierarchy in Part XIC of the CCA under which access agreements prevail over regulated terms and the fact that there are no comprehensive FADs that operate as default agreements that an access seeker can fall back into upon termination of an access agreement and failure to agree with the access provider on replacement terms.

We disagree with Telstra's submission that there are practical commercial opportunities for parties to negotiate changes to existing terms in access agreements and that this can include amendments that reflect new or varied regulated terms. Such an important issue should not be left unresolved or to the whims of a dominant service provider that has a

² Telstra v Vocus Fibre [2014] FCAFC 77

recurring history of using its market dominance to engage in conduct that damages competition.

We agree with the concerns that other submitters have expressed to the ACCC about the lack of recourse to regulated terms and support the need to include a review mechanism in the FADs. We consider that this can be achieved by the provision of a comprehensive FAD, an obligation on access providers to publish and offer a standard reference offer that incorporates all regulated terms, or a regulatory pass through clause that allows a party to elect to adopt any new regulated terms.

To date, the ACCC's FADs have not attempted to include all terms that are required to access a declared service. This has resulted in access seekers being unable to rely solely on FADs and instead having to enter into access agreements drafted by Telstra.

If a comprehensive FAD is made, then it will not be necessary for an access seeker to enter into an access agreement in the situation where it does not agree with the access provider's terms of access. Rather, the access seeker could ensure that access is provided in accordance with regulated terms by requesting access under the terms of the comprehensive FAD. The FAD could include a term that provides for automatic inclusion of any FAD variation or BROCC. The competitive benefit of a comprehensive FAD is that the fall back or default terms of access are regulated terms drafted by the ACCC with regard to the CCA's mandatory criteria with the primary focus of promoting competition and the LTIE, rather than terms that are specifically drafted to promote the interests of the access provider. Of course, it remains open to the access seeker and access provider to agree on access terms that differ from the comprehensive FAD.

An alternative to comprehensive FADs is for the FADs to include terms requiring access providers to publish and make available standard reference offers that include all regulated terms and which shall be automatically updated when a FAD is varied or a BROCC is made. This would negate the need for the ACCC to draft comprehensive FADs but still provide a means for access seekers to obtain access pursuant to important and fairly drafted regulated terms. Again, it remains open to the access seeker and access provider to agree on access terms that differ from the comprehensive FAD.

A regulatory pass through clause in FADs would allow a means for one of the parties to nominate and require that regulated terms are incorporated into and prevail over any inconsistent terms in an access agreement.

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

Vocus does not object to Telstra's request that FADs include a term allowing for disclosure of access seekers' confidential information to the ACCC or other regulators and government bodies. We do, however, consider that the term should have a mutual application and also allow for access seekers to provide the access provider's confidential information to the ACCC or other regulators and government bodies.

Access agreements include tightly drafted confidentiality agreements that prohibit disclosure of the access provider's confidential information. Though commercially sensitive information warrants protection, such disclosure prohibitions may go beyond the legitimate requirements of the access provider and inhibit the provision of relevant information to regulators, which prevents efficient operation of their roles. We consider that such a term should provide that the disclosing party must inform the other party of the disclosure and the regulator must be informed that the information is confidential and

should not be published without approval of the party that owns the confidential information.

4. The ACCC's dispute resolution role

The proposed NPTs include at Schedule 4 fairly standard commercial dispute resolution provisions that we consider are reasonable and appropriate for most disputes that are likely to arise regarding access to declared services. We are concerned that the proposed NPTs do not provide for the ACCC to have a resolution role where the dispute concerns a variation to the terms of access. For example, Schedule 10 of the proposed NPTs provides that the Access Provider may vary operational terms, which in effect is a variation to the access terms. We consider that a dispute about the variation of access terms should be regarded differently to a dispute about a breach of existing access terms.

The latter should be resolved under the dispute provisions in Schedule 4 whereas the former is more appropriately dealt with by the ACCC if the parties cannot themselves resolve the dispute. This is because making default terms of access to declared services and deciding whether it is appropriate for an access provider to vary access terms is clearly within the ACCC's role of regulating access to declared services.

Yours faithfully



Mark Simpson
General Counsel
Vocus Communications Limited