



**iiNet Limited**  
ACN 068 628 937

**iiNet Limited**  
502 Hay Street  
Subiaco, WA 6008

**Support:** 13 22 58  
**Sales:** 13 19 17  
**Fax:** 1300 785 632  
**Web:** [iinet.net.au](http://iinet.net.au)

## **Telecommunications Final Access Determination inquiries**

**— non-price terms and conditions**

**Submission by iiNet in response to ACCC consultation of 8 December 2014**

## 1. INTRODUCTION

The Australian Competition and Consumer Commission (**ACCC**) is currently undertaking public inquiries into making new final access determinations (**FADs**) for:

- the six fixed line services<sup>1</sup>;
- the Wholesale ADSL service (**WDSL**);
- the Domestic Transmission Capacity Service (**DTCS**); and
- the mobile terminating access service (**MTAS**),  
  
(**the Declared Services**).

The current FADs for the Declared Services specify certain price and non-price terms and conditions. The ACCC has divided the price terms into two categories:

- **Primary prices** - these are charges for direct use of the services, that is:
  - the monthly access prices for the ULLS, LSS, WLR and wholesale ADSL port service;
  - the usage charges for the LCS, MTAS, FOAS and FTAS and wholesale ADSL AGVC service; and
  - the annual charges for the DTCS.
- **Supplementary prices** - these refer to additional charges incurred in using the services, for example, connection and disconnection charges.

Due to the complexity and number of issues involved in determining the primary prices for the Declared Services, the ACCC decided to consult separately on:

- the primary prices for the Declared Services; and
- the non-price terms and supplementary prices for the Declared Services.

In May 2014 the ACCC issued a position paper entitled: *Telecommunications Final Access Determination inquiries – non price terms and conditions and supplementary prices Position Paper (the Position Paper)*. iiNet provided a response to the Position Paper which set out iiNet's views in response to the issues raised in the Position Paper (**the Position Paper Submission**).<sup>2</sup>

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<sup>1</sup> These are: the Local Call Service (**LCS**), Line Sharing Service (**LSS**), Fixed Originating Access Service (**FOAS**), the Fixed Terminating Access Service (**FTAS**), the Unconditioned Local Loop Service (**ULLS**) and the Wholesale Line Rental Service (**WLR**).

<sup>2</sup> This submission was provided by Thomson Geer lawyers on behalf of iiNet.

On 30 October 2014 the ACCC issued a Discussion Paper which sought input from stakeholders on issues relating to non price terms and conditions (**the Discussion Paper**). iiNet provided a response to the Discussion Paper which set out iiNet's views in response to the issues raised in the Discussion Paper (**the Discussion Paper Submission**).

On 8 December 2014 the ACCC sent an email to a number of industry participants, including iiNet, that requested comments on the drafting of certain non price terms and conditions. iiNet welcomes the opportunity of responding to the ACCC's request for drafting comments. iiNet's comments are set out in this submission.

## 2. STRUCTURE OF THIS SUBMISSION

The ACCC's email of 8 December 2014 included an attachment which contained a number of terms and conditions of access which the ACCC may include in the FADs (for convenience referred to as **the Draft NPTs**). The ACCC is seeking comments on the Draft NPTs. The ACCC is also seeking views and drafting suggestions on the following issues:

- recourse to regulated terms;
- disclosure of information to the ACCC or other regulators/government bodies;
- ensuring that Telstra provides equivalent services as between Telstra Retail and access seekers; and
- the ACCC's role in disputes relating to terms and conditions of access.

This submission provides iiNet's views on the Draft NPTs and each of the issues listed above in turn.

## 3. THE DRAFT NPTS

As stated in the Discussion Paper Submission, iiNet believes that terms and conditions of access that reasonably balance the interests of the access provider and access seekers will be most likely to promote the long term interests of end users (**LTIE**). iiNet believes that the Draft NPTs represent balanced and reasonable terms of access that will promote the LTIE. Subject to the comments in section 7 below regarding the ACCC's role in disputes about variations to the terms of access, iiNet supports the inclusion of the Draft NPTS in the FADs.

#### 4. RECOURSE TO REGULATED TERMS

iiNet does not agree that there are 'practical commercial opportunities' that would alleviate the need for the FAD to provide reasonable recourse to regulated terms. Furthermore, as explained in the Discussion Paper Submission, regulated terms should be the starting point for negotiations and not an end point that access seekers must spend time and resources to get to.<sup>3</sup> iiNet believes that any of the following three options will ensure that access seekers have reasonable recourse to regulated terms:

- the FAD is comprehensive;
- the access provider is under an obligation to offer a 'reference offer' to access seekers which incorporates regulated terms; or
- a party can choose to adopt or 'pass through' regulated terms.

Each option will be considered in turn.

##### 4.1 Comprehensive FAD

If the terms of the FAD are comprehensive, then it will not be necessary for an access seeker to enter into an access agreement where the access seeker and access provider cannot agree on the terms of access. The access seeker could ensure that access is provided in accordance with regulated terms by requesting access under the terms of the FAD. If the FAD is updated or amended, any such updates or amendments will apply automatically. It should be noted that under this model, the access provider and access seeker will still have the freedom to negotiate an access agreement on different terms. The utility that will be provided by a comprehensive FAD is that it will ensure that the default terms of access are regulated terms that are specifically designed to promote the LTIE rather than terms that are specifically designed to promote the interests of the access provider.

##### 4.2 Reference offer

This model was discussed in detail in the Discussion Paper Submission. This is the model that Telstra currently uses for price terms for regulated services.<sup>4</sup> The utility that this model has as compared to a comprehensive FAD is that it is not necessary for the ACCC to turn its mind to every minute aspect of access. As regards implementation of this model, the FAD would need to include an obligation on the access provider to offer a reference offer that incorporates regulated terms as they are made from time to time. Suggested drafting for this obligation is set out below:

1. *If an access provider is required to comply with any or all of the standard access obligations as defined in the Competition and Consumer Act 2010 in respect of [name of declared service] the access provider must offer [name of declared service] under the terms of a standard reference offer.*

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<sup>3</sup> See section 7 of the Discussion Paper Submission.

<sup>4</sup> See clause 1.2 of Schedule 8 of Telstra's Structural Separation Undertaking.

2. *The access provider must publish the terms of the standard reference offer on the access provider's website.*

3. *The access provider's standard reference offer must include the following term:*

*"The terms of access for [name of declared service] are to be determined in accordance with the following order of precedence (with (a) having the highest precedence and (c) having the lowest precedence):*

*(a) the terms and conditions of access specified in any in force binding rule of conduct made by the ACCC under section 152BD of the Competition and Consumer Act 2010 as applicable to [name of declared service];*

*(b) the terms and conditions of access specified in any in force final access determination made by the ACCC under section 152BC of the Competition and Consumer Act 2010 as applicable to [name of declared service];*

*(c) any additional terms set out in the standard reference offer."*

Inclusion of this term in a reference offer would ensure that any updated or amended regulated terms would apply automatically. Once again, it would be open to the access provider and access seeker to agree to enter into an access agreement that excludes or limits the application of regulated terms. However, the default position would be that regulated terms apply automatically.

#### **4.3 Either party can adopt or 'pass through' regulated terms**

This is similar to the reference offer model. However, regulated terms do not apply automatically. Regulated terms only apply if one of the parties nominates that some or all regulated terms should apply. Suggested drafting for a regulated terms pass through clause is set out below.

*If an access provider is required to comply with any or all of the standard access obligations as defined in the Competition and Consumer Act 2010 in respect of [name of declared service] the access provider must on request offer to supply [name of declared service] under terms and conditions of access that include the following term:*

*"1. Subject to clauses 2 and 3:*

*a. A party (**the first party**) may give a written notice to the other party (**the second party**) that specifies that the first party wishes one or more Regulated Terms that are applicable to the Service to apply to the supply of that service under this agreement (**Regulated Terms Notice**);*

*b. the parties agree that 10 Business Days after the Regulated Terms Notice has been given to the second party, the Regulated Terms referred to in the Regulated Terms Notice will be incorporated into this agreement and any terms of this agreement which are inconsistent with the Regulated Terms*

*referred to in the Regulated Terms Notice will be treated as not being part of this agreement for so long as the Regulated Terms Notice is in effect, so that, for the purposes of Part XIC of the Competition and Consumer Act 2010, there will be no inconsistency between the Regulated Terms specified in the Regulated Terms Notice and the terms of this agreement.*

2. *A Regulated Terms Notice in respect of one or more Regulated Terms has no effect unless it is given to the second party within one month of the coming into force of the instrument in which the Regulated Terms to which the Regulated Notice relates are contained. For the avoidance of doubt, a Regulated Terms Notice can relate to Regulated Terms contained in an instrument that varies Regulated Terms already in existence.*
3. *A Regulated Terms Notice ceases to have effect on the expiry or revocation of the instrument in which the Regulated Terms referred to in the Regulated Terms Notice are contained.*
4. *For the avoidance of doubt more than one Regulated Terms Notice may be given.*
5. **Regulated Terms** means terms and conditions of access contained in an access determination or binding rules of conduct made by the ACCC under Part XIC of the Competition and Consumer Act 2010 which are applicable to [name of declared service]."

Once again, this term is a default term and the access provider and access seeker are free to agree not to include this term in an access agreement.

## 5. **DISCLOSURE OF INFORMATION TO THE ACCC OR OTHER REGULATORS/GOVERNMENT BODIES**

iiNet notes that the specific issue under consideration is a request from Telstra that the terms of the current WDSL FAD be varied to allow Telstra to disclose access seeker confidential information to the ACCC in order to meet a reporting obligation or request made by the ACCC under Telstra's structural separation undertaking. iiNet has no objections to the FAD terms permitting such disclosure, subject to Telstra being under an obligation to notify the access seeker that the access seeker's confidential information has been disclosed to the ACCC. However, there are circumstances, for example when making submissions to the ACCC, where access seekers should also be permitted to disclose Telstra's confidential information to the ACCC. Therefore, iiNet submits that any additional rights of disclosure to regulatory bodies should apply to both parties. As regards drafting, iiNet suggests that clause 5.1(g) of Schedule 5 of the NPTs be replaced with the following:

*(g) as directed or requested by any regulatory authority or for the purpose of making a submission to a regulatory authority provided that the Disclosing Party:*

*(i) informs the other party as soon as possible that it will disclose the Confidential Information to the regulatory authority; and*

*(ii) informs the regulatory authority that the information is Confidential Information;*

## **6. ENSURING THAT TELSTRA PROVIDES EQUIVALENT SERVICES AS BETWEEN TELSTRA RETAIL AND ACCESS SEEKERS**

iiNet believes that an obligation in the FAD for Telstra to provide equivalence as between Telstra Retail and access seekers would provide a means of allowing access seekers to directly enforce Telstra's commitments under its Structural Separation Undertaking (SSU). This would clearly add benefit as compared to the status quo because it provides an additional incentive to Telstra to comply with its obligations under the SSU.

However, iiNet acknowledges that the overarching commitment to equivalence in Telstra's SSU is a complex provision and there are aspects of it, such as the commitment in relation to price equivalence, that would not be appropriate to include in a FAD. iiNet suggests that a modified overarching equivalence term be included in the FAD. As regards the scope of this term, suggested drafting is as follows:

- 1. Subject to [clauses 2 and 3 - number as appropriate] Telstra will ensure equivalence in respect of the ordering, provisioning and fault rectification systems, procedures and processes it provides to the access seeker.*
- 2. Whether Telstra has provided equivalence in accordance with clause 1 will be determined in accordance with the Structural Separation Undertaking.*
- 3. To avoid doubt, a failure by Telstra to provide equivalence will not be a breach of clause 1 unless the failure is also a breach of the Structural Separation Undertaking.*

*[New definition]: Structural Separation Undertaking means the Structural Separation Undertaking given by Telstra Corporation Limited to the Australian Competition and Consumer Commission under section 577A of the Telecommunications Act 1997 dated 23 February 2012*

## **7. THE ACCC'S ROLE IN DISPUTES RELATING TO TERMS AND CONDITIONS OF ACCESS**

As stated in the Discussion Paper Submission, iiNet submits that there is an important distinction between:

- a dispute about a breach of terms and conditions of access; and
- a dispute about what the terms and conditions of access should be.

iiNet submits that a dispute about whether or not it is reasonable to make a variation to existing terms is akin to a dispute about what the terms of access should be because it effectively amounts to the access provider saying to the access seeker:

*The terms of access are currently X but I am going to change them to Y.*

Given that it is clearly part of the ACCC's role to make default terms of access (i.e. decide what the terms of access should be), iiNet believes that the ACCC is best placed to deal with a dispute about whether or not an access provider should be permitted to vary the terms of access.

iiNet notes that Schedule 10 of the Draft NPTs deals with the variation of 'operational documents'. Schedule 10 provides as follows:

*10.1 Operational documents concerning the Service may be amended:*

*(a) by the Access Provider from time to time to implement or reflect a change to its standard processes, subject to:*

*(i) giving 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and a marked-up copy of the proposed new operational document that clearly identifies all amendments; and*

*(ii) allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and giving reasonable consideration to any comments which the Access Seeker has made on the proposed amendments; and*

*(b) otherwise, by agreement of the parties.*

*10.2 Upon completion of the process set out in clause 10.1, the Access Provider must notify the Access Seeker and make available to the Access Seeker a copy of the new operational document.*

*10.3 Where operational documents concerning the Service are amended in accordance with clause 10.1 and the Access Seeker believes that the amendments:*

*(a) are unreasonable; or*

*(b) deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;*

*the Access Seeker may seek to have the matter resolved in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD*

Subject to one concern, iiNet believes that the approach in Schedule 10 of NPTs to the variation of operational documents is reasonable because it appropriately balances the interests of the access provider and access seekers by:

- not requiring the access provider to obtain the consent of the access seeker for all variations to operational documents; and
- giving the access seeker recourse to independent third party intervention where the variation is unreasonable.

The concern iiNet has with Schedule 10 of the Draft NPTs is that the ACCC has no role in resolving a dispute about a variation to operational documents. As stated above, iiNet believes that the ACCC is best placed to resolve such a dispute. Furthermore, iiNet believes that an access seeker's entitlement to dispute a variation on the grounds set out in section 10.3 of the Draft NPTs should apply in all cases where the access provider is permitted to unilaterally vary terms and conditions of access and not just in respect of the variation of operational documents.

As regards drafting changes, iiNet suggests that the following drafting changes be made to Schedule 10 of the Draft NPTs:

10.1 *Operational documents, systems and processes and policies concerning the Service may be amended:*

(a) *by the Access Provider from time to time to implement or reflect a change to its standard processes, subject to:*

(i) *giving 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and where relevant a marked-up copy of the proposed new ~~operational~~ document that clearly identifies all amendments; and*

(ii) *allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and giving reasonable consideration to any comments which the Access Seeker has made on the proposed amendments; and*

(b) *otherwise, by agreement of the parties.*

10.2 *Upon completion of the process set out in clause 10.1, the Access Provider must notify the Access Seeker and where relevant make available to the Access Seeker a copy of the new ~~operational~~ document.*

10.3 *Where ~~operational documents concerning the Service are amended in accordance with clause 10.1 and~~ the Access Seeker believes that the amendments referred to in clause 10.1:*

(a) *are unreasonable; or*

(b) *deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;*

*the Access Seeker may ~~seek to have the matter resolved~~ raise a dispute in accordance with ~~the dispute resolution procedures set out in Schedule 4 of this FAD clause 10.4 (Variation Dispute)~~. If the Access Seeker does not raise a Variation Dispute, the variation will take effect subject only to the requirements of clauses 10.1 and 10.2.*

10.4 If the Access Seeker wishes to raise a Variation Dispute the Access Seeker must within 10 Business Days of being provided with the information

referred to in clause 10.1(a)(i), provide the Access Provider with a written notice that sets out the reasons for the Variation Dispute (Variation Dispute Notice).

10.5 The parties must use reasonable endeavours to resolve the Variation Dispute within 10 Business Days of the access provider being provided with the Variation Dispute Notice (the Negotiation Period).

10.6 If the Variation Dispute is not resolved in accordance with clause 10.5, the Access Seeker may within five Business Days of the expiry of the Negotiation Period refer the Variation Dispute by written notice to the ACCC (ACCC Notice). If the Access Seeker does not refer the Variation Dispute to the ACCC within five Business Days of the Expiry of the Negotiation Period, the variation will be deemed to take effect from the day after the expiry of the Negotiation Period. The ACCC Notice must be accompanied by a copy of the Variation Dispute Notice and any written response by the Access Provider to the Variation Dispute.

10.7 Unless the ACCC decides that the Variation Dispute is frivolous or vexatious, the ACCC must after receiving an ACCC Notice provided to the ACCC in accordance with clause 10.6:

(a) determine that the proposed variation should apply and the date that it should be deemed to apply from;

(b) determine that the proposed variation should not apply; or

(c) determine that an amended form of the proposed variation that is proposed by either of the parties or the ACCC should apply and the date that the amended variation should apply from.

10.8 Before making a determination under clause 10.7 the ACCC must provide each of the parties with a reasonable opportunity to present evidence and submissions on which the parties wish to rely.

10.9 The ACCC must give written reasons for any determinations made under clause 10.7.

10.10 Unless the ACCC forms the view that the Variation Dispute raises significantly complex issues, any determination made under clause 10.7 must be made by the ACCC within 60 Business Days of receiving the ACCC Notice.