



PUBLIC INQUIRY TO MAKE A FINAL ACCESS DETERMINATION FOR THE WHOLESALE ADSL SERVICE

DISCUSSION PAPER

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List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	Asymmetric DSL
AD	access determination
AGVC	Aggregating Virtual Circuit
ATM	Asynchronous Transfer Mode
CBD	Central Business District
CCA	<i>Competition and Consumer Act 2010</i>
CMUX	Customer Multiplexer
DSL	Digital Subscriber Line
ESA	Exchange Service Area
FAD	final access determination
GST	Goods and services tax
IAD	interim access determination
LSS	Line sharing service
LTIE	Long term interests of end users
Model Terms	<i>Model Non-Price Terms & Conditions Determination 2008</i>
NBN	National Broadband Network
RAF	Regulatory Accounting Framework

RIM	Remote Integrated Multiplexer (exchange for remote country areas)
RMRC	Retail price minus retail cost
SAOs	standard access obligations
Service	the declared wholesale ADSL service
SIO	service in operation
Tribunal	Australian Competition Tribunal
TWE	Telstra Wholesale Ethernet
ULLS	Unconditioned local loop service
VLAN	Virtual LAN
VOIP	Voice over internet protocol

1 Introduction

The wholesale ADSL service (the Service) was declared on 14 February 2012.

Consequently, the ACCC is required to issue a final access determination (FAD) for the Service under Part XIC of the *Competition and Consumer Act 2010* (CCA).

This initial discussion paper commences the public inquiry into the making of an FAD for the Service. This discussion paper sets out the issues that, in the ACCC's opinion are relevant to inquiry and background material about those issues, and seeks the views of interested parties on the matters that are relevant to the making of an FAD, as follows:

- the interpretation of the mandatory criteria, and any other matters that should be considered when making the FAD
- the terms and conditions of access that should be addressed in the FAD, and the general nature of the terms and conditions that the FAD should provide in respect of them, or the method that should be used to develop those terms and conditions
- whether the ACCC should consider limiting or restricting the Standard Access Obligations (SAOs) that are owed by access providers of the Service, including in relation to operators of non-dominant DSL networks or in certain geographic areas

The ACCC will consider submissions in reaching views on the overall approach to making the FAD and in preparing a further discussion paper.

2 Overview of legislative provisions

As a consequence of the Service being declared, the ACCC is required to conduct a public inquiry under Part 25 of the Telco Act about a proposal to make an access determination relating to access to the Service. The inquiry must be commenced within 30 days after the declaration is made¹ and concluded within six months of commencement, unless the ACCC publishes a written notice on its website to extend the decision making period by a further six months and explaining the reasons for the extension, pursuant to section 152BCK(3) of the CCA.

An access determination, including an FAD, provides a base set of terms and conditions that access seekers can rely on if they are unable to come to an agreement with an access provider on the terms and conditions of access to a declared service. If parties come to an agreement on terms and conditions of access, their access agreement will prevail over the FAD to the extent of any inconsistency.² Hence, an access agreement creates a benchmark that access seekers are able to fall back upon whilst still allowing parties to negotiate different terms.

An access determination may be an interim (IAD) or final (FAD). Where access determinations specify terms and conditions of access, they must include terms and

¹ Section 152BCI(1).

² Section 152BCC of the CCA.

conditions relating to price (or a method of ascertaining a price) and may also contain non-price terms, although this is not required.³

Compliance with an access determination is both a carrier licence condition and a service provider rule.⁴ A breach of either a carrier licence condition or a service provider rule may lead to a pecuniary penalty of up to \$10 million for each contravention.⁵ Private action to enforce an access determination may also be taken in the Federal Court.⁶

An access determination may, among other things, provide that any or all of the Special Access Obligations (SAOs) are not applicable to a carrier or carriage service provider (either unconditionally or subject to specified conditions or limitations). An access determination may also restrict or limit the application to a carrier or carriage service provider of any or all of the SAOs.⁷

3 Consultation process for final access determination

3.1 Overview of consultation process

The ACCC is required to hold a public inquiry before making a final access determination (FAD).⁸ The publication of this discussion paper marks the commencement of the public inquiry into the making of the FAD for the Service.

This discussion paper seeks submissions on a range of matters. The ACCC will consider submissions in reaching views on the overall approach to making the FAD and in preparing a further discussion paper.

Although a further discussion paper will be issued, interested parties are encouraged to submit their views on those questions raised in this discussion paper at this stage to ensure that those views can be taken into account in the further conduct of the public inquiry.

The ACCC may also issue information requests to assist it in making the FAD.

The ACCC also intends to publish a draft FAD for public comment before making a final decision.

The ACCC expects that a wide range of issues will be raised in the course of the FAD inquiry, including issues of fundamental approach to pricing the declared wholesale ADSL service and the scope and content of non-price terms that should also be included.

Based upon the range and type of access arrangements that could be raised in this inquiry, the ACCC is of the view that it is unlikely that it will be in a position to make an FAD within six months after the commencement of the public inquiry. The CCA makes provision for interim access determinations that may apply during the interim period until an FAD is made.

³ Section 152BC(8) of the CCA.

⁴ Sections 152BCO and 152BCP of the CCA.

⁵ Section 570 of the *Telecommunications Act 1997*.

⁶ Section 152BCQ of the CCA.

⁷ Subsections 152BC(3)(h) and (i) of the CCA

⁸ Section 152BCH of the CCA.

Should the ACCC not complete this inquiry within six months, the ACCC may extend the inquiry by a further six months by publishing a notice including an explanation of the reasons for the extension under section 152BCK(3) of the CCA.

3.2 Making a submission

Submissions in response to this discussion paper will be accepted until **5:00 pm** on **30 March 2012**. Any submissions received after this time may not be considered.

All submissions will be considered public and posted on the ACCC's website. If stakeholders wish to submit commercial-in-confidence material to the ACCC they should submit a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or '[c-i-c]'.

The *ACCC-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC website at www.accc.gov.au.

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format which allows the submission text to be searched.

Please contact Alex Elith regarding any questions you have concerning this consultation process on alex.elith@accc.gov.au or 03 9290 1837.

Please provide submissions to the following email address:
accessdeterminations@accc.gov.au

4 The declared service – wholesale ADSL

The wholesale ADSL Service was declared on 14 February 2012. The declaration will expire on 13 February 2017. The relevant service description is reproduced at **Appendix 1** to this discussion paper.

Digital subscriber line (DSL) technology, in broad terms, enables the supply of high bandwidth services (such as broadband internet access).

ADSL (asymmetric) services have a downstream data rate that is higher than the upstream data rate, and is the dominant fixed-line broadband technology in Australia, accounting for around 83 percent of fixed-line broadband services in operation as at June 2011.⁹ ADSL services are typically used by residential or small business customers.

Wholesale ADSL services allow service providers to enter ESAs and supply end-user ADSL services without the need to deploy their own DSL network infrastructure. Access seekers must still invest in other input services such as international and domestic inter-capital transmission, internet connectivity and other downstream applications and content support, and customer support and retailing facilities.

Wholesale ADSL services comprise both a local access component from the network termination point at the customer premise to the local exchange, and a backhaul transmission component between the local exchange and the point of interconnection with the access seeker's network, which is typically located in the CBD of the relevant state.

This backhaul transmission is supplied in an aggregate form, whereby data from the service provider's end-users, including from end-user services physically connected to different DSLAMs, is aggregated into a "stream" for delivery to the access seeker.

The backhaul interface can be either an AGVC or VLAN (using either ATM or Gigabit Ethernet as the communication protocol respectively). The access seeker acquires backhaul transmission capacity over that interface to a specified throughput that it chooses.

Notwithstanding this aggregation in the backhaul component, the declared wholesale ADSL service is from the perspective of the access seeker a layer 2 service, which is used by service providers to access end-users of ADSL services.

Access seekers are able to differentiate their end-user services in a variety of ways, including through the level of contention that they use in provisioning backhaul transmission services, the usage quotas they offer, and the customer support, applications or content that they provide.

5 Relevant considerations

The ACCC must have regard to the criteria specified in subsection 152BCA(1) of the CCA when making an FAD. These are:

⁹ Australian Bureau of Statistics (ABS), Internet Activity, Australia, June 2011.

- (a) whether the determination will promote the long term interests of end-users of carriage services or services supplied by means of carriage services (LTIE)
- (b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- (c) the interests of all persons who have rights to use the declared service
- (d) the direct costs of providing access to the declared service
- (e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- (f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- (g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

The ACCC's approach to these criteria is described in **Appendix 2**.

Subsection 152BCA(2) sets out other matters that the ACCC may take into account in making FADs.

The ACCC may also take into account any other matters that it thinks are relevant when making an access determination.¹⁰

The ACCC is not required to precisely define the scope of the relevant markets when applying these criteria to the making of an FAD. The ACCC considers that it is sufficient to broadly identify the scope of the relevant markets likely to be affected by the ACCC's regulatory decisions. In general terms, the relevant markets could include those for the supply of the declared services, or for the supply of services (retail and/or wholesale) which use the declared services as an input.

The ACCC's current view is that the FAD will most likely affect retail and wholesale markets for the supply of fixed-line broadband services, either as standalone services or bundled with voice services (excluding Voice over Internet Protocol (VoIP) and mobile originated calls).

Questions on which the ACCC seeks views:

How do you consider that the mandatory criteria should be interpreted for the purpose of making this FAD?

What markets should be considered in applying the mandatory criteria to this FAD?

What "other matters" should be considered when making this FAD?

¹⁰ Subsection 152BCA(3) of the CCA.

6. Price related terms and conditions

An FAD must contain terms and conditions relating to price or a method for ascertaining a price for the declared service.

A range of price terms might be levied in respect of a declared service. For instance, a number of discrete charges could be levied on each occasion a service is supplied by way of a multi-part tariff, or there could be a range of miscellaneous charges that are levied from time to time in connection with the supply of a service. In some cases, standard charges might be specified, with alternate charges or 'price on application' charges being specified for 'non-standard' services.

The ACCC's general approach is to focus an FAD on those price terms that have a material bearing on the supply of a service. This could be because the relevant charge comprises a material proportion of the cost base of supplying downstream services, or otherwise the price term has a material impact on the supply of relevant services.

Telstra – which is the dominant DSL network operator – levies the following charges by way of a multi part tariff when supplying the Service:

- *A monthly charge for each end user access*

In general, a "zone" structure applies to these charges, under which the charge paid by access seekers is dependent upon where the end-user is located.

The ACCC understands that the first of these zones (zone 1) comprises ESAs in which competing DSL networks have been built, or in which there was potential for competing DSL networks to be built. These ESAs are predominantly located in metropolitan areas.

Telstra also maintains Zones 2 and 3, comprising other ESAs, although it does not appear to currently differentiate wholesale access charges between these latter two zones.

- *Backhaul transmission (AGVC or VLAN) charges*

The monthly charge depends upon the 'size' of the AGVC or VLAN that is acquired, i.e., the data throughput capacity that the access seeker acquires

These charges are levied per AGVC or per VLAN, with at least one AGVC or VLAN required per state in which wholesale ADSL is acquired.

These charges are in addition to separate charges for ATM or TWE access.

- *A connection charge*

This is a one off charge for the connection of an ADSL service and can be referred to as an installation charge or a transfer charge.

Different charges can apply depending upon whether or not the service is being transferred and if so the type of transfer involved: where the end-user service is

being migrated from another wholesale ADSL service (Type A Transfer) or from a line sharing service (Type B Transfer)

- *An early termination charge*

This is a one off charge that is imposed on cancellation of a service.

It is only in applied where the service is terminated within a prescribed period, and is waived in some circumstances, e.g., where the service is migrated to another Telstra access product supplied to the customer.

Telstra also levies a range of miscellaneous fees and charges in connection with its supply of the Service.

Questions on which the ACCC seeks views:

What charges do you consider should be addressed in this FAD? Please consider the type of charges outlined above as well as any other material charges.

There are a range of methodologies that could be applied in order to develop price-related terms and conditions for inclusion in the FAD.

For instance, the ACCC has applied the following general methodologies in specifying the level of access prices for fixed line services:

- A cost based methodology – see, the Final report for the inquiry to make final access determinations for the fixed line declared services, July 2011
- A ‘retail-minus’ methodology – see Final pricing principles and indicative prices for 2008-2009 for Local carriage service and wholesale line rental, August 2008.
- A benchmarking – see the ACCC's position paper on pricing the domestic transmission capacity service (DTCS) issued November 2010, and applied in the Statement of Reasons for the DTCS IAD, April 2011.

The ACCC does not have a presumption as to which methodology would be most appropriate for developing this FAD.

Questions on which the ACCC seeks views:

What methodology(s) should be used to develop price terms for this FAD?

As well as specifying a level of prices (or method to ascertain their level), an FAD can deal with other price-related terms. Illustrative examples of other price related terms and conditions that might be relevant to the making of this FAD are:

- The overall structure of prices – such as the balance between upfront charges and recurrent charges in multi-part tariffs, and/or between charges for end user access and backhaul to the point of interconnection

It could be important to achieve an appropriate balance between charges for access (i.e. per end user access charges) and usage-based charges (i.e. AGVC/VLAN charges). Weighting the tariff too heavily towards access charges may make it difficult for access seekers to supply end-users with entry-level services. On the other hand, weighting the tariff too heavily towards usage-based charges may preclude access seekers from offering high-end services and data-intensive applications such as IPTV.

- Whether different charges should be specified to apply depending upon:

The location of the end user access (geographically zoned or nationally consistent wholesale pricing)

A zoned pricing construct could be appropriate if there is a significant disparity in the unit costs of supplying different regions, allowing access prices to align more closely with prevailing costs. That said, there can be complexities in maintaining zone charging and hence it is generally not appropriate where underlying unit costs are broadly similar.

On the other hand, a zoning regime that did not group areas based upon broad similarities in the underlying costs of operating the DSL and/or backhaul networks, but was rather being applied to gain a competitive advantage, would not be appropriate.

If a zoned pricing structure is to be adopted, then this will raise an issue around how the zones should be constructed.

The wholesale service profile of the access seeker (e.g., whether the access seeker is a ‘builder’ or ‘reseller’)

A range of price terms could potentially be used to discriminate against access seekers on the basis of the business model they were pursuing, including bespoke pricing for each access seeker, tiered pricing, volume discounts, or different price terms for ‘handback’ of wholesale services.

Whether the access seeker acts efficiently in acquiring the service

A charge structure that shared genuine cost efficiencies with access seekers that help to generate them might be supported on efficiency grounds. An example of this might be to waive a charge where the access seeker reports faults or submits orders using an online interface rather than manually providing them to a help desk operator, thereby reducing costs of providing access.

On the other hand, a charge structure that discriminated on the basis of the access seeker per se, or its wholesale service profile or the business model that it was pursuing, would risk impeding competition. This is because such pricing can discourage efficiencies, as those access seekers that seek out efficiencies in downstream or related markets are at risk of the access provider capturing the benefits through a targeted higher access charge.

Whether the same service provider is supplying a fixed voice service on the ADSL line

End users are generally offered a lower price for a broadband service where they also acquire a PSTN service, and/or another service, from the broadband service provider.

In these circumstances – depending upon the price methodology chosen – there could be some benefit in developing separate ‘bundled’ and ‘standalone’ charges at the wholesale level.

On the other hand, it might not be necessary or appropriate to develop separate charges, and a ‘blended’ wholesale price might be more appropriate.

Questions on which the ACCC seeks views:

What overall charge structure should be considered, e.g., between access fees and usage fees?

Should any of the charges be levied on a zone basis, or should they be levied on a nationally consistent basis? On what basis should areas be grouped into zones, if this construct is to be used?

On what bases (if any) should price discrimination between access seekers be encouraged or discouraged?

What other price-related terms should be addressed in this FAD? In general terms, what do you consider an appropriate outcome for these terms and conditions?

7 Non price terms and conditions

There are various types of non-price terms and conditions that could be included in an FAD. These include:

- standard commercial terms, such as billing, creditworthiness and dispute resolution
- limitations or restrictions on the supply of the service, including limitations or restrictions on use of the Service for resale or other specified purposes
- operational or technical aspects of the service, such as the points of interconnection

The ACCC's general approach to making an FAD has been to address the key commercial terms of access that would facilitate the commercial supply of the service to occur, and to base these upon the ACCC's *Model Non-Price Terms and Conditions Determination 2008* (2008 Model Terms).

That said it is possible that not all of the 2008 Model Terms are applicable to the Service.

The 2008 Model Terms covering the following areas appear on their face to be relevant to the Service:

- (a) billing and notification
- (b) creditworthiness and security
- (c) general dispute resolution procedures
- (d) confidentiality provisions
- (e) communication with end-users
- (f) suspension and termination

On the other hand, the 2008 Model Terms covering the following areas appear less relevant to the Service:

- (g) the liability (risk allocation) provisions
- (h) the changes to operating manual provisions
- (i) the ordering and provisioning terms
- (j) network modernisation and upgrade provisions
- (k) facilities access

Questions on which the ACCC seeks views:

What do you consider are the key commercial terms needed for commercial supply of the Service to occur? Do you consider the 2008 Model Terms should be applied (where relevant) in developing an FAD that addresses those terms? If not, on what other basis should these terms and conditions be developed?

Similarly, the ACCC will also consider including in an FAD other non-price terms where it would be appropriate to do so.

The ACCC would be concerned if the non-price terms of access sought to unreasonably restrict or inhibit an access seeker from using the Service in order to compete in supplying retail and/or wholesale services. One such competition concern that was raised in submissions to the declaration inquiry was that commercial offers of access to the Service have sought to restrict or impede use of the Service for the purpose of supplying services to a reseller. The ACCC's current view is that such terms may impede the development of competition in relevant wholesale markets, and hence should be discouraged.

From submissions received during the declaration inquiry, the ACCC anticipates that a number of further particular terms and conditions of a more operational or technical nature might be raised in the course of this consultation, including:

- Points of interconnection of the Service

This issue concerns whether or not default points of interconnection should be specified, and if so what points of interconnect should be nominated. In this regard, an FAD could potentially nominate that points of interconnect are to be associated with a specific class of Telstra exchange, such as an exchange in the relevant central business district – which is the point of interconnect that Telstra currently offers – and/or associated with the exchange closest to the end-user or an intermediate exchange.

- Mandatory bundling of a PSTN voice service

This issue arises as Telstra requires an underlying PSTN service on the line before it will supply retail or wholesale ADSL services, which precludes the use of wholesale ADSL to provision 'naked' ADSL services.

Consideration of this issue is likely to involve a range of competing factors. On the one hand, discontinuing this mandatory bundling requirement could promote competition by expanding the scope of services that access seekers can offer to end-users, and have benefits for those end-users that require only a fixed broadband service.

On the other hand, removing this requirement would likely have broader implications, such as for the manner in which Telstra recovers its line costs from its overall charges. Hence, it might be appropriate for a higher access charge to apply to any services that are supplied without a PSTN service.

Further, offering a naked ADSL wholesale product might also require network or systems development, although there could potentially be ways to minimise these costs by using existing product offerings and systems and processes as far as practicable.

- Business grade service schedule

This issue potentially raises a range of non-price terms and conditions of access which could be incorporated into this FAD regarding the supply of business grade services.

Such terms and conditions might include business grade service assurance, after hours provisioning or other operational support that could be required to provide downstream services to business end-users.

Questions on which the ACCC seeks views:

What other non-price terms and conditions of access do you consider should be included in this FAD? Please consider those access terms outlined above as well as any other access terms that you consider to be of material significance.

What general approach do you consider would be appropriate in developing an FAD that addresses those terms?

In general terms, what do you consider to be an appropriate outcome for each of these terms and conditions?

8 Application of SAOs

8.1 Operators of ‘non-dominant networks’

At this stage it is not clear that the SAOs should apply to access providers other than Telstra. This is because Telstra is the dominant access provider for the Service with a DSL network that significantly exceeds the reach of all other suppliers of wholesale ADSL services.

Further, it appears that it is only Telstra’s access terms that have given rise to competition concerns in regard to the Service.

Consequently, it is the ACCC’s current view that the SAOs should not apply to access providers other than Telstra.

Questions on which the ACCC seeks views:

Should the SAOs apply to operators of non-dominant networks?

8.2 Application of SAOs in particular geographic areas

In its submission to the declaration inquiry, Telstra argues that any declaration of wholesale ADSL should not include ESAs which satisfy particular competition thresholds.

The ACCC has previously given effect to exemptions with respect to Wholesale Line Rental (WLR), Local Carriage Service (LCS) and PSTN Originating Access (PSTN OA) through the Interim and Final Access Determinations for these services. However, the ACCC decided to remove these exemption provisions from the FADs in December 2011 due to concerns that, among other things, Telstra’s continuing dominance in retail markets, as well as a number of supply-side constraints, limited the effectiveness of retail competition in restraining Telstra’s exercise of its wholesale market power.

In relation to wholesale ADSL, while a number of access seekers have deployed DSLAM infrastructure in a large proportion of CBD/metro ESAs, there are questions about the extent to which the presence of these operators may provide sufficient constraint on Telstra to warrant exempting particular ESAs from regulation (particularly in light of RIM/LPGS issues).

Questions on which the ACCC seeks views:

Should the ACCC consider exempting particular geographic areas from the SAOs and/or terms and conditions included in the access determination? Why/why not?

9 Commencement and expiry

The ACCC proposes that when the FAD has been developed, it would commence upon its publication in final form.

An FAD must have an expiry date, and in specifying an expiry date, the Commission must have regard to the principle that the expiry date should be the same as the expiry of the declaration for that service (as that declaration stood at the time when the access determination was made), unless, in the Commission's opinion, there are circumstances that warrant a different expiry date.¹¹ The ACCC may also have regard to such other matters (if any) as the ACCC considers relevant. The declaration for the Service expires on 14 February 2017.

Specifying an expiry date for an FAD can potentially raise questions around what period would on the one hand be long enough to provide sufficient stability and certainty to support industry investment planning. On the other hand, a long expiry date might provide less assurance that the FAD terms would not be reviewed should industry circumstances change.

Questions on which the ACCC seeks views:

What is an appropriate time period for the FAD?

Are there any circumstances that warrant a difference in the expiry dates of the access determination and the wADSL declaration?

¹¹ Section 152BCF(6).

Consolidated list of questions for comment

1. How do you consider that the mandatory criteria should be interpreted for the purpose of making this FAD?
2. What markets should be considered in applying the mandatory criteria to this FAD?
3. What “other matters” should be considered when making this FAD?
4. What charges do you consider should be addressed in this FAD? Please consider the type of charges outlined above as well as any other material charges.
5. What methodology or methodologies should be used to develop price terms for this FAD?
6. What overall charge structure should be considered, eg. between access fees and usage fees?
7. Should any of the charges be levied on a zone basis, or should they be levied on a nationally consistent basis? On what basis should areas be grouped into zones, if this construct is to be used?
8. On what basis (if any) should price discrimination between access seekers be encouraged or discouraged?
9. What other price-related terms should be addressed in this FAD? In general terms, what do you consider an appropriate outcome for these terms and conditions?
10. What do you consider are the key commercial terms needed for commercial supply of the Service to occur? Do you consider the 2008 Model Terms should be applied (where relevant) in developing an FAD that addresses those terms? If not, on what basis should these terms and conditions be developed?
11. What other non-price terms and conditions of access do you consider should be included in this FAD? Please consider those access terms outlined above as well as any other access terms that you consider to be of material significance.
12. What general approach do you consider would be appropriate in developing an FAD that addresses those terms?
13. In general terms, what do you consider to be an appropriate outcome for each of these terms and conditions?
14. Should SAOs apply to operators of non-dominant networks

15. Should the ACCC consider exempting particular geographic areas from the SAOs and/or terms and conditions included in the access determination? Why/why not?
16. What is an appropriate time period for the FAD?
17. Are there any circumstances that warrant a difference in the expiry dates of the access determination and the wADSL declaration?

Appendix 1 – Wholesale ADSL service description

The wholesale asymmetric digital subscriber line service (wholesale ADSL service) is an internet-grade, best efforts point to point service for the carriage of communications in digital form between a point of interconnection and an end-user network boundary that:

- (a) is supplied by means of Asymmetric Digital Subscriber Line (ADSL) technology over a twisted metallic pair that runs from the end-user network boundary to the nearest upstream exchange or RIM or CMUX; and
- (b) uses a static layer 2 tunnelling protocol (L2TP) over a transport layer to aggregate communications to the point of interconnection.

Definitions

Where words or phrases used in this declaration are defined in the *Competition and Consumer Act 2010* or the *Telecommunications Act 1997*, they have the meaning given in the relevant Act.

In this Appendix:

Asymmetric Digital Subscriber Line technology or **ADSL** means the protocols, recommendations and standards set out in the ITU-TG.992 Recommendations.

Layer 2 has the same meaning as in the Open System Interconnection (OSI) Reference Model for data exchange.

a **point of interconnection** means an interface that is:

- (a) a physical point of interconnection which allows the interconnection of facilities in accordance with subsection 152AR(5) of the *Competition and Consumer Act 2010*; and
- (b) located in the same state/territory that the access provider associates with the exchange service area in which the **end-user network boundary** is located.

an **end-user network boundary** means the boundary point of the telecommunications network that is:

- (i) associated with the end-user premise; and
- (ii) ascertained in accordance with section 22 of the *Telecommunications Act*.

Appendix 2 – Legislative framework for final access determinations

This section sets out the relevant legislative framework in relation to FADs and the approach the ACCC will take in applying the legislative provisions.

Content of an FAD

Section 152BC of the CCA specifies what an FAD may contain. It includes, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the standard access obligations provided for in the CCA and terms and conditions of access to a declared service.

An FAD may make different provisions with respect to different access providers or access seekers.¹²

Fixed principles provisions

An FAD may contain a fixed principles provision, which allows a provision in an FAD to have an expiry date after the expiry date of the FAD.¹³ Such a provision would allow the ACCC to ‘lock-in’ a term so that it would be consistent across multiple FADs.

Varying an FAD

Section 152BCN allows the ACCC to vary or revoke an FAD, provided that certain procedures are followed.

A fixed principles provision cannot be varied or removed unless the FAD sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.¹⁴

Commencement and expiry provisions

Section 152BCF of the CCA sets out the commencement and expiry rules for FADs.

An FAD must have an expiry date, which should align with the expiry of the declaration for that service unless there are circumstances that warrant a different expiry date.¹⁵

An FAD may be ‘backdated’ such that it comes into force on a date prior to the making of the determination.¹⁶ There are, however, limitations on the extent of backdating that is permitted.¹⁷

Criteria to consider when making an FAD

¹² Subsection 152BC(5) of the CCA.

¹³ Section 152BCD of the CCA.

¹⁴ Subsection 152BCN(4) of the CCA.

¹⁵ Subsection 152BCF(6) of the CCA.

¹⁶ Subsection 152BCF(2) of the CCA.

¹⁷ See e.g. subsections 152BCF(2A), 152BCF(3), 152BCF(3A), 152BCF(4) and 152BCF(4A).

The ACCC must have regard to the criteria specified in subsection 152BCA(1) of the CCA when making an FAD. These criteria are:

- (h) whether the determination will promote the LTIE of carriage services or services supplied by means of carriage services
- (i) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- (j) the interests of all persons who have rights to use the declared service
- (k) the direct costs of providing access to the declared service
- (l) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- (m) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- (n) the economically efficient operation of a carriage service, a telecommunications network or a facility.

The subsection 152BCA(1) criteria mirror the repealed subsection 152CR(1) criteria that the ACCC was required to take into account in making a final determination (FD) in an access dispute. The ACCC intends to interpret the subsection 152BCA(1) criteria in a similar manner to that used in access disputes.

Subsection 152BCA(2) sets out other matters that the ACCC may take into account in making FADs.

Subsection 152BCA(3) allows the ACCC to take into account any other matters that it thinks are relevant.

The ACCC's initial views on how the legislative criteria in section 152BCA should be interpreted for the FAD process are set out below.

Paragraph 152BCA(1)(a) – long-term interests of end-users

The first criterion for the ACCC to consider when making an FAD is 'whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services'.

The ACCC has published a guideline explaining what it understands by the phrase 'long-term interests of end-users' in the context of its declaration responsibilities.¹⁸ This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for making FADs for the declared fixed line services.

In the ACCC's view, particular terms and conditions promote the interests of end-users if they are likely to contribute towards the provision of:

¹⁸ ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act*, July 1999, in particular pp. 31-38.

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.¹⁹

The ACCC also notes that the Australian Competition Tribunal (Tribunal) has offered guidance in its interpretation of the phrase ‘long-term interests of end-users’ (in the context of access to subscription television services):

Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary to take the following matters into account when applying the touchstone – the long-term interests of end-users:

*End-users: “end-users” include actual and potential [users of the service]...

*Interests: the interests of the end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings. ...[T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case ...

*Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.²⁰

To consider the likely impact of particular terms and conditions on the LTIE, the CCA requires the ACCC to have regard to whether the terms and conditions are likely to result in:

- promoting competition in markets for carriage services and services supplied by means of carriage services
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in:
 - the infrastructure by which listed carriage services are supplied, and
 - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.²¹

Promoting competition

In assessing whether particular terms and conditions will promote competition, the ACCC will analyse the relevant markets in which the declared services are supplied (retail and wholesale) and consider whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.²²

¹⁹ *ibid.*, p. 33.

²⁰ *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

²¹ Subsection 152AB(2) of the CCA.

²² Subsection 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] A CompT 3 at [92]; *Telstra Corporation Limited* [2006] A CompT at [97], [149].

Obstacles to accessing these services include the price, quality and availability of the services and the ability of competing providers to provide telephony and broadband services.

The ACCC is not required to precisely define the scope of the relevant markets in which the declared services are supplied. The ACCC considers that it is sufficient to broadly identify the scope of the relevant markets likely to be affected by the ACCC's regulatory decision.

Any-to-any connectivity

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service. This must be the case whether or not the end-users are connected to the same telecommunications network.²³

The ACCC considers that this criterion is relevant to ensuring that the terms and conditions contained in FADs do not create obstacles for the achievement of any-to-any connectivity.

Efficient use of and investment in infrastructure

In determining the extent to which terms and conditions are likely to encourage the economically efficient use of and investment in infrastructure, the ACCC must have regard to:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
 - the technology that is in use, available or likely to become available
 - whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and
 - the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the NBN) by which services are, or are likely to become, capable of being supplied, and
- the risks involved in making the investment.²⁴

The objective of encouraging the 'economically efficient use of, and economically efficient investment in ... infrastructure' requires an understanding of the concept of economic efficiency. Economic efficiency consists of three components:

²³ Subsection 152AB(8) of the CCA.

²⁴ Subsections 152AB(6) and (7A) of the CCA.

- productive efficiency – this is achieved where individual firms produce the goods and services that they offer at least cost
- allocative efficiency – this is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs)
- dynamic efficiency – this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

On the issue of efficient investment, the Tribunal has stated that:

...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.²⁵

...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.²⁶

...access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.²⁷

Paragraph 152BCA(1)(b) – legitimate business interests

The second criterion requires the ACCC to consider ‘the legitimate business interests’ of the carrier or CSP when making an FAD.

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment.²⁸ The ACCC is of the view that the concept of ‘legitimate business interests’ in relation to FADs should be interpreted in a similar manner, consistent with the phrase ‘legitimate commercial interests’ used elsewhere in Part XIC of the CCA.

For completeness, the ACCC notes that it would be in the access provider’s legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.²⁹

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.³⁰

²⁵ *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

²⁶ *ibid.* at [164].

²⁷ *ibid.*

²⁸ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

²⁹ ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

³⁰ *Telstra Corporation Limited* [2006] ACompT 4 at [89].

Paragraph 152BCA(1)(c) – persons who have a right to use

The third criterion requires the ACCC to consider ‘the interests of all persons who have the right to use the service’ when making an FAD.

The ACCC considers that this criterion requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.³¹ The access seekers' interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete with the access provider in the provision of retail services.³²

People who have rights to currently use a declared service will generally use that service as an input to supply carriage services, or a service supplied by means of carriage service, to end-users.

The ACCC considers that this class of persons has an interest in being able to compete for the custom of end-users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.³³

However, the ACCC does not consider that this criterion calls for consideration to be given to the interests of the users of these ‘downstream’ services. The interests of end-users will already be considered under other criteria.

Paragraph 152BCA(1)(d) – direct costs of providing access

The fourth criterion requires that the ACCC consider ‘the direct costs of providing access to the declared service’ when making an FAD.

The ACCC considers that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access, and includes the incremental costs of providing access.

The ACCC interprets this criterion, and the use of the term ‘direct costs’, as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal’s approach in an undertaking decision.³⁴ A contribution to indirect costs can also be supported by other criteria.

However, the criterion does not extend to compensation for loss of any ‘monopoly profit’ that occurs as a result of increased competition.³⁵

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs criterion ‘is concerned with ensuring that the costs of providing the service are recovered.’³⁶ The Tribunal has also noted that the direct costs could conceivably be

³¹ *Telstra Corporation Limited* [2006] ACompT 4 at [91].

³² *ibid.*

³³ *ibid.*

³⁴ *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

³⁵ See Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44: [T]he ‘direct’ costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

³⁶ *Telstra Corporation Limited* [2006] ACompT 4 at [92].

allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.³⁷

Paragraph 152BCA(1)(e) – extensions or enhancements of capability

The fifth criterion requires that the ACCC consider ‘the value to a party of extensions, or enhancements of capability, whose cost is borne by someone else’ when making an FAD.

In the 1997 Access Pricing Principles, the ACCC stated:

This criterion requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.³⁸

The ACCC considers that this application of paragraph 152BCA(1)(e) is relevant to making FADs.

Paragraph 152BCA(1)(f) – safe and reliable operation

The sixth criterion requires the ACCC to consider ‘the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility’ when making an FAD.

The ACCC considers that this criterion requires that terms of access should not compromise the safety or reliability of carriage services and associated networks or facilities, and that this has direct relevance when specifying technical requirements or standards to be followed.

The ACCC has previously stated in the context of model non-price terms and conditions, it is of the view that:

...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.³⁹

The ACCC considers that these views will apply in relation to the paragraph 152BCA(1)(f) criterion for the making of FADs.

Paragraph 152BCA(1)(g) – economically efficient operation

The final criterion of subsection 152BCA(1) requires the ACCC to consider ‘the economically efficient operation of a carriage service, a telecommunications network facility or a facility’ when making an FAD.

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the

³⁷ *ibid.* at [139].

³⁸ 1997 Access Pricing Principles, p. 11.

³⁹ ACCC, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.⁴⁰

Consistent with the approach taken by the Tribunal, the ACCC considers that in applying this criterion, it is relevant to consider the economically efficient operation of:

- retail services provided by access seekers using the access provider's services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.⁴¹

Subsection 152BCA(2) – other eligible services

Subsection 152BCA(2) provides that, in making an AD that applies to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,⁴² take into account:

- the characteristics of those other eligible services
- the costs associated with those other eligible services
- the revenues associated with those other eligible services, and
- the demand for those other eligible services.

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in making an AD, does not consider the declared service in isolation, but also considers other relevant services.⁴³ As an example, the Explanatory Memorandum states:

...when specifying the access price for a declared service which is supplied by an access provider over a particular network or facility, the ACCC can take into account not only the access provider's costs and revenues associated with the declared service, but also the costs and revenues associated with other services supplied over that network or facility.⁴⁴

Subsection 152BCA(3) – any other relevant matters

This subsection states the ACCC may take into account any other matters that it thinks are relevant when making an FAD.

⁴⁰ Access Dispute Guidelines, p. 57.

⁴¹ *Telstra Corporation Limited* [2006] ACompT at [94]-[95].

⁴² 'Eligible service' has the same meaning as in section 152AL of the CCA.

⁴³ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

⁴⁴ *ibid.*