



Public inquiry to make a final access determination for the wholesale ADSL service

Issues Paper (a Second Discussion Paper)

JULY 2012



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List of abbreviations and acronyms

2008 Model Terms *Model Non-Price Terms & Conditions Determination 2008*

ACCC Australian Competition and Consumer Commission

ADSL Asymmetric DSL

AD access determination

AGVC Aggregating Virtual Circuit

CBD Central Business District

CCA *Competition and Consumer Act 2010*

CSP Carriage Service Provider

DSL Digital Subscriber Line

ESA Exchange Service Area

FAD final access determination

IAD interim access determination

LPGS Large pair gain system

LSS Line sharing service

LTIE Long term interests of end users

NBN National Broadband Network

RIM Remote Integrated Multiplexer

RMRC	Retail price minus retail cost
SAOs	standard access obligations
SIO	service in operation
ULLS	Unconditioned local loop service
VOIP	Voice over internet protocol

1 Introduction

This issues paper is a second discussion paper on the final access determination (FAD) for the wholesale ADSL service. The ACCC declared the wholesale ADSL service on 14 February 2012 and published a first discussion paper (the February FAD Discussion Paper) that same day.

The ACCC foreshadowed in the February FAD Discussion Paper that it would publish a further discussion paper before making a draft FAD. A wide range of issues have been raised in the course of the FAD inquiry so far, including issues of fundamental approach to pricing the declared wholesale ADSL service, the scope of access obligations to apply, and the scope and content of non-price terms. This issues paper sets out the ACCC's preliminary views on certain fundamental matters and seeks further submissions on a range of matters to inform the ACCC in making the FAD.

This paper is structured as followed:

- **Chapter 2** provides relevant background on the wholesale ADSL service. The service description for the wholesale ADSL service is reproduced at **Appendix A**.
- **Chapter 3** explains the consultation process of this public inquiry and how to make a submission.
- **Chapter 4** outlines the legislative framework and the basis on which the ACCC can make an access determination. A detailed outline of the framework is at **Appendix B**.
- **Chapter 5** discusses price terms and conditions.
- **Chapter 6** discusses the scope of the application of the standard access obligations for the wholesale ADSL service.
- **Chapter 7** addresses terms and conditions regarding bundling of the declared wholesale ADSL service with PSTN services.
- **Chapter 8** addresses the points of interconnection for the wholesale ADSL service.
- **Chapter 9** discusses general non-price terms and conditions.
- **Chapter 10** discusses other issues.

2 Background

2.1 ADSL services

In Australia, Telstra operates a near-ubiquitous customer access network (CAN) from the exchange building to the premises. Despite the introduction of competition in telecommunications services in Australia in 1991, the CAN has remained a bottleneck facility in relation to the provision of various wholesale services. Telstra and other service providers use the CAN to supply a range of fixed line services – including digital subscriber line (DSL) services and voices services – to end-user premises.

At a retail level, DSL technology enables the supply of high bandwidth services such as broadband internet access to consumers. It is currently the dominant technology for fixed line internet connections in Australia,¹ although other fixed line broadband technologies such as optical fibre and HFC are also in use. ADSL (asymmetric) services are a type of DSL technology with a high downstream data rate coupled with a lower rate upstream and are typically used by residential or small business consumers.

At a wholesale level, wholesale ADSL is used as an input into the supply of retail ADSL services to end-users. It is one of several methods of providing ADSL services over Telstra's CAN. The ULLS and LSS are also declared services that enable the use of Telstra's CAN and are inputs into retail ADSL services.

2.2 The declaration of the wholesale ADSL service

The ACCC declared the wholesale ADSL service on 14 February 2012. The declaration will expire on 13 February 2017. The relevant service description is reproduced at **Appendix A** to this issues paper.

The service description outlines the scope of the service to which the wholesale ADSL FAD will apply and to which the SAOs apply. The service description covers 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 a CBD exchange in the relevant state. In acquiring a wholesale ADSL service an access seeker must pay both a 'port charge' for the local access component and a variable AGVC charge for the backhaul component.

2.3 Providers of the wholesale ADSL service

Telstra is the dominant access provider of wholesale ADSL and currently supplies the "wholesale ADSL service" at some 2800 ADSL-enabled exchanges nationally. Each exchange serves an exchange service area (ESA). Other access providers acquire the ULLS and LSS service from Telstra and combine the service with additional infrastructure to either self-supply or to supply third parties with a "wholesale ADSL" service.

¹ By December 2011, ADSL technology accounted for 82 per cent of fixed internet connections in Australia: ABS, *Internet Activity, Australia*, December 2011.

3 The consultation process for the wholesale ADSL FAD

3.1 The Consultation Process

The February FAD Discussion Paper sought submissions by 10 April 2012, following an extension to the due date granted by the ACCC. The ACCC received six submissions in response to that discussion paper: from Telstra, Optus, Herbert Geer Lawyers (on behalf of iiNet, Internode, TransACT, Primus and Adam Internet), Macquarie Telecom, AAPT, and Vocus. Public versions of all submissions are available on the ACCC's website.

This issues paper seeks further submissions from interested parties. To assist with this process, the ACCC identifies in this issues paper discussion questions and preliminary ACCC views on which submissions are sought. The ACCC does not expect that all submissions will address all issues on which submissions are sought. For example, some questions in this issues paper are about information likely to be available to access providers but not access seekers. The ACCC has, on occasion, identified particular parties who may wish to make submissions on certain questions. In addition to this issues paper, the ACCC may also issue specific information requests to assist it in making the FAD.

The ACCC intends to publish a draft FAD for public comment before making a final determination. To assist the ACCC in making the draft FAD all interested parties are encouraged to make relevant submissions in response to this issues paper by the due date.

3.2 How to make a submission in response to this issues paper

To make a submission in response to this issues paper please provide submissions to the following email address: **accessdeterminations@acc.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. Submissions will be accepted until **5:00 pm on 3 August 2012**. Any submissions received after this time may not be considered.

Interested parties who require an accessible version of the submissions should contact the ACCC at the contact details provided below.

All submissions will be considered public and posted on the ACCC's website. To submit commercial-in-confidence material interested parties should provide the ACCC with 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.

Please contact Kathryn Wood with any questions you have concerning this consultation process on (02) 9230 3895 or Kathryn.Wood@acc.gov.au.

4 The legislative framework

4.1 Overview of the legislative framework

An access determination 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 an FAD to the extent of any inconsistency.² Hence, an access determination creates a benchmark that access seekers are able to fall back upon whilst still allowing parties to negotiate different terms.

The ACCC *must* take the following matters into account in making an access determination:³

- a) whether the determination will promote the long term interests of end-users (LTIE) of carriage services or services supplied by means of carriage services
- 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.

Subsection 152BCA(2) sets out other matters that the ACCC may take into account in making an FAD if a carrier or CSP who supplies, or is capable of supplying, the declared service supplies one or more other eligible services. The ACCC may also take into account any other matters that it thinks are relevant when making an FAD.⁴

An FAD may include a wide range of terms and conditions about the supply of a service. An FAD may:

- specify any or all of the terms and conditions on which a carrier or carriage service provider is to comply with any or all of the SAOs applicable to the carrier or provider; or

² Section 152BCC of the CCA.

³ Section 152BCA(1) of the CCA.

⁴ Section 152BCA(3) of the CCA.

- specify any other terms and conditions of an access seeker's access to the declared service; or
- require a carrier or carriage service provider to comply with any or all of the SAOs applicable to the carrier or provider in a manner specified in the determination; or
- require a carrier or carriage service provider to extend or enhance the capability of a facility by means of which the declared service is supplied; or
- impose other requirements on a carrier or carriage service provider in relation to access to the declared service; or
- specify the terms and conditions on which a carrier or carriage service provider is to comply with any or all of those other requirements; or
- require access seekers to accept, and pay for, access to the declared service; or
- provide that any or all of the obligations referred to in section 152AR (the SAOs) are not applicable to a carrier or carriage service provider, either unconditionally or subject to such conditions or limitations as are specified in the determination; or
- restrict or limit the application to a carrier or carriage service provider of any or all of the obligations referred to in section 152AR; or
- deal with any other matter relating to access to the declared service.

Where access determinations specify terms and conditions of access, they must include terms and conditions relating to price (or a method of ascertaining a price) and may also contain non-price terms, although this is not required.⁵

Compliance with an access determination is both a carrier licence condition and a service provider rule.⁶ 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.⁷ Private action to enforce an access determination may also be taken in the Federal Court.⁸

4.2 The ACCC's approach to the statutory criteria

As summarised above, the ACCC “must” take into account certain matters in making an access determination and “may” take into account other matters it considers relevant. To assist interested parties the ACCC has outlined at **Appendix B** its intended approach to each of these matters. In the February FAD Discussion Paper the ACCC sought submissions on how the statutory matters should be interpreted, what markets should be considered, and what “other matters” should be taken into account. The ACCC has considered each of the submissions made in this regard but, in general, does not intend to depart from its general approach to applying the statutory matters. The submissions have raised particular issues

⁵ Section 152BC(8) of the CCA.

⁶ Sections 152BCO and 152BCP of the CCA.

⁷ Section 570 of the *Telecommunications Act 1997*.

⁸ Section 152BCQ of the CCA.

about how certain matters could be considered in relation to certain facts. Those submissions will be addressed in this issues paper as relevant.

The CCA directs the ACCC's attention to the markets in which competition may be promoted. The ACCC may consider both the market in which wholesale ADSL is or would be supplied, and downstream markets in which competition may be promoted. For the purpose of making a FAD for the wholesale ADSL service the ACCC proposes to adopt the same markets it used deciding to declare the wholesale ADSL service in February 2012. These are national retail and wholesale markets for fixed line broadband internet services. The ACCC believes this approach is supported by market evidence and does not consider that there is any reason to depart from the approach.

These matters are further discussed in **Appendix B**.

4.3 This FAD and other regulatory processes

In making an FAD for the wholesale ADSL service the ACCC will have regard to the statutory criteria set out in subsection 152BCA(1).

Telstra has submitted that the ACCC should consider the impact of Telstra's equivalence obligations under the Structural Separation Undertaking (SSU). Telstra submits that on the basis of those obligations, the ACCC should either refrain from setting terms in the FAD in respect of matters already covered by the SSU or ensure that any terms set are consistent with the SSU.⁹

The ACCC accepted Telstra's SSU on 28 February 2012. As required by the *Telecommunications Act 1997* (Telco Act), that SSU sets out various commitments to apply in relation to the wholesale ADSL service during the transition to the NBN.

There are some potential areas of overlap between the SSU and an FAD as set out in **Appendix C**. The ACCC is legislatively restricted from performing a function or exercising a power under Part XIC so as to prevent Telstra from complying with the SSU.¹⁰ The ACCC therefore accepts Telstra's submission that the FAD should set terms that are consistent with the SSU. However, this does not preclude the FAD setting additional obligations should such terms be consistent with the legislative framework.

⁹ Telstra submission in response to the February FAD Discussion Paper, Pub. p.35.

¹⁰ Section 152ER(3) of the CCA.

5 Price terms and conditions

Where access determinations specify terms and conditions of access, they must include terms and conditions relating to price (or a method of ascertaining a price).¹¹ There are a range of methodologies that could be applied in order to develop price-related terms and conditions. The February FAD Discussion Paper sought submissions on what methodology would be appropriate for the wholesale ADSL service, and on what charges should be specified in the FAD.

Responses to the February FAD Discussion Paper included detailed arguments about the preferred pricing methodology for wholesale ADSL. Telstra has advocated for a retail minus retail cost (RMRC) approach. However, other submissions have generally advocated for a cost-based methodology.

The ACCC considers that submissions on pricing methodology in response to the February FAD Discussion Paper are sufficient for present purposes. In order to progress its consideration of the appropriate price terms for the FAD, the ACCC will—during the period for submissions in response to this issues paper—seek information regarding costs, demand forecasts and other relevant parameters directly from Telstra as the dominant provider of wholesale ADSL services. The ACCC may also seek relevant information from other providers of wholesale ADSL.

The ACCC will then develop draft price terms which will be published in the draft FAD, and interested parties will be invited to make submissions in response to those draft terms in due course.

Backdating

An FAD can be ‘backdated’ to apply in relation to the period covered by a preceding IAD, overriding the provisions of the IAD.¹² Under the previous access dispute arbitration regime, one rationale for backdating was to limit regulatory gaming by an access provider by reducing incentives to delay the finalisation of the arbitral determination.¹³

In the context of access determination inquiries, concerns around regulatory gaming may be less likely to arise. There are fewer procedural steps than in an arbitration, and the ACCC has greater control over the timing of the process. The ACCC is therefore currently not minded to backdate the wholesale ADSL FAD. However, the ACCC may depart from this position if there is any evidence to suggest that regulatory gaming has occurred while the IAD is in effect.

Questions on which the ACCC seeks views:

1. Do you agree with the approach to considering the need for backdating of a FAD that is reflected above?

¹¹ Section 152BC(8) of the CCA.

¹² Section 152BCF(2), sections 152BCF(4) and (4A) of the CCA.

¹³ ACCC, Resolution of telecommunications access disputes—a guide, March 2004, p.62.

6 Scope of the application of the standard access obligations

6.1 Overview of issue

Before considering specific terms and conditions that could be included in an FAD, it is useful to consider how broadly those terms and conditions could apply. This is because although the ACCC has declared the wholesale ADSL service nationally as supplied by all access providers, it is not necessarily the case that the SAOs and regulated terms and conditions should apply nationally and to all access providers. An access determination “may” include terms and conditions providing that the SAOs are not applicable to a carrier or CSP either unconditionally or subject to conditions and limitations as are specified in the determination.¹⁴ The ACCC generally refers to the inclusion of such terms in an access determination as “exemptions”, although these differ to “exemption orders” that could be made under the previous legislative regime.

In the February FAD Discussion Paper the ACCC sought submissions on two ways that the access obligations for the wholesale ADSL service could be limited:

- Firstly, the ACCC sought submissions on “geographic exemptions” to the SAOs. This issue had been raised by Telstra during the declaration inquiry. The ACCC declared the service nationally but stated that it would consider any geographic exemptions through the FAD inquiry. In the February FAD Discussion Paper the ACCC noted that while a number of access seekers had deployed DSLAM infrastructure in a large proportion of CBD/metropolitan ESAs there was a question about the extent to which the presence of those operators provided a sufficient constraint to warrant exempting particular ESAs from regulation, particularly in light of “RIM/pair gain” issues.
- Secondly, the ACCC sought submissions on whether the SAOs should apply to access providers other than Telstra. In the IAD the ACCC specified that the SAOs were not applicable to operators of “non-dominant networks”. In the February FAD Discussion Paper the ACCC expressed the preliminary view that it was unclear that the SAOs should apply to network operators other than Telstra because Telstra is the dominant access provider for the service with a network that significantly exceeds the reach of all other suppliers of wholesale ADSL services, and only Telstra’s access terms have given rise to competition concerns in regard to the wholesale ADSL service.

In this issues paper, the ACCC will refer to network operators and wholesale ADSL access providers other than Telstra as non-dominant network operators. The ACCC will refer to the types of terms and conditions that could apply to non-dominant network operators as “carrier-specific exemptions”.

This chapter canvasses issues relevant to the scope of the application of the SAOs that should apply having regard to the statutory criteria in s. 152BCA. It includes a consideration of both “geographic exemptions” and “carrier-specific exemptions.” The purpose of this discussion is to respond to relevant submissions and outline the ACCC’s analytical approach in order to assist interested parties in making further relevant submissions.

¹⁴ Sections 152BC(3)(h) and (i) of the CCA.

Parties are encouraged to cast their submissions in terms of the matters to which the ACCC must have regard in making an access determination (see **Appendix B**).

6.2 Submissions on scope of the application of the SAOs

The ACCC has received a number of detailed submissions on the preferred scope of the application of the SAOs.

Telstra proposes exempting from the SAOs at least 289 ESAs on the basis of an “effective competition test” adapted from that previously used for resale fixed line voice services.

Telstra argues for geographic exemptions on four bases:¹⁵

- Firstly, that there is “deep, effective competition” for the supply of broadband services based on infrastructure based competition.
- Secondly, that infrastructure-based competition continues to bring real benefits to all end-users.
- Thirdly, the benefits of infrastructure-based competition cannot be replicated by “resale” competition in the ADSL context.
- Finally, there is significant risk to the LTIE if the ACCC intervenes in “effectively competitive markets”. In short, that intervention could reduce investment incentives.

Telstra submits that to the extent that the SAOs apply to the wholesale ADSL service in particular geographic areas they should apply to all access providers.¹⁶ Telstra submits that the ACCC must assess any exemptions for non-dominant network operators against the legislative criteria. Telstra considers that carrier-specific exemptions:¹⁷

- create a “clear opportunity for distortions in the market for wholesale ADSL”
- are inconsistent with the approach taken by the ACCC to resale fixed line voice services, and
- would deny access seekers who acquire wholesale ADSL from providers other than Telstra access to those regulated terms.

Herbert Geer (on behalf of Adam Internet, iiNet, Internode, Primus and TransACT) submit that the ACCC should have regard to the experience of the WLR/LCS and PSTN OA exemptions in assessing any proposed wholesale ADSL exemptions.¹⁸ Herbert Geer submits that geographic exemptions will impede the ability of access seekers to compete, allow Telstra to leverage between regulated and non-regulated areas, increase negotiation costs, and not promote the efficient use of infrastructure.

Herbert Geer submits that the SAOs should be limited to Telstra because:

¹⁵ Telstra submission in response to the February FAD Discussion Paper, Pub. pp.9-16.

¹⁶ Ibid, p.17.

¹⁷ Ibid, p.7.

¹⁸ Herbert Geer submission in response to the February FAD Discussion Paper, pp.28-29.

- Telstra is the dominant service provider
- Telstra's DSL network is large in comparison with the limited coverage of other service providers
- competition concerns relating to DSL relate to Telstra's conduct
- other service providers with limited market share must at least match Telstra's price in order to compete
- other WDSL providers operate on a different cost basis that would create difficulties in making appropriate FAD price terms.¹⁹

Optus submits that geographic exemptions are not in the LTIE as Telstra has market power for three reasons: RIM and LPGS copper lines cannot be DSL-enabled by ULLS based access providers, switching costs act as a barrier, and some wholesale customers require a "whole of business" or national product offering.²⁰ Optus submits that non-dominant network operators should be exempted as non-dominant carriers do not have market power. Optus submits that overregulation can result in inefficiencies and impose unnecessary regulatory burden. Optus submits that Telstra has, and will retain, a dominant position in relation to the supply of wholesale broadband services.²¹

Macquarie Telecom submits that Telstra is the dominant supplier of wholesale ADSL services and exemptions could damage competition through Telstra's ability to increase prices and deny supply in exempt areas.²² Macquarie Telecom submits that the ACCC's regulatory intervention should focus on the dominant network operator as the competition concerns that have arisen relate to Telstra's supply of the service. Macquarie Telecom also submits that the application of the SAOs to non-dominant networks "would impose obligations and requirements which would be unlikely to be exercised".²³

AAPT submits that competition should not be assessed on an ESA basis as an ESA does not have the requisite economies of scale to offer a retail or wholesale offering. AAPT submits exemptions could reduce competition through bundling of regulated and non-regulated products and risk of cross-subsidy.²⁴ AAPT considers that the FAD should only apply to Telstra.²⁵ AAPT submits that the competition concerns which led to declaration relate to Telstra and as the vertically integrated incumbent Telstra has the incentive and ability to create barriers to entry and discriminate against wholesale customers in favour of its own retail business units. AAPT also submits that other providers of the wholesale ADSL service operate on a different cost basis.

¹⁹ Ibid, pp.27-28.

²⁰ Optus submission in response to the February FAD Discussion Paper, Pub. pp.23-24.

²¹ Ibid, pp.21-22.

²² Macquarie Telecom submission in response to the February FAD Discussion Paper, p.8.

²³ Ibid, p.7.

²⁴ AAPT submission in response to the February FAD Discussion Paper, pp.9-10.

²⁵ Ibid, p.8.

Vocus submits that the FAD should not include geographic exemptions and that the ACCC should have close regard to the experience in resale fixed line voice.²⁶

6.3 Long term interests of end-users

In making an access determination the ACCC must take into account whether the determination will promote the long term interests of end-users of carriage services or services supplied by means of carriage services. The ACCC's approach to the long term interests of end-users in making the wholesale ADSL access determination is outlined in **Appendix B**.

As outlined above, the ACCC is considering both "geographic exemptions" and "carrier-specific exemptions". There are approximately 2200 ESAs at which Telstra is the sole supplier of wholesale ADSL services. The ACCC does not consider it appropriate to make any exemptions where Telstra is the sole supplier of wholesale ADSL services.

6.4 Promotion of competition – Geographic Exemptions

As outlined in **Appendix B**, the ACCC considers that the relevant markets for considering this FAD are the national wholesale and retail markets for fixed line broadband services. However, in considering the scope of the application of the SAOs that could apply the ACCC considers that competition can be accurately assessed by examining a geographic region narrower than a national market. The ACCC's view is that the ESA, or groupings of ESAs, are an appropriate basis on which to perform this analysis.

Some access seekers have submitted that the ESA is not an appropriate basis to undertake a competition assessment. The Australian Competition Tribunal has previously noted that *'if it is possible to reach conclusions about the long-term interests of end-users by an analysis of an appropriate geographic component of a relevant market, there is no reason to refrain from doing so'*.²⁷ The ACCC considers that, although the relevant markets are national, the ESA is an appropriate geographic unit of analysis in considering exemptions because:

- Competition has emerged unevenly in the national fixed line broadband market between different ESAs.
- The ACCC has access to ESA disaggregated information which allows meaningful conclusions about the level of competition to be drawn at an ESA level.

This approach is also consistent with that recently adopted (for the same reasons) in relation to other fixed line services.²⁸

Some submissions have noted that the ACCC has declared the wholesale ADSL service nationally. The ACCC considers that declaring a broad service and then considering the scope of the application of the SAOs to apply is consistent with the legislative framework. The legislative framework allows the ACCC to include in an FAD terms and conditions that

²⁶ Vocus submission in response to the February FAD Discussion Paper, p.5.

²⁷ Chime Communications Pty Ltd (No 2) [2009] ACompT 4 (27 May 2009) at [109].

²⁸ ACCC, Final decision on the variation inquiry into the fixed line services FADs (exemptions), September 2011, Pub. p.40.

limit the application of the SAOs. The ACCC reached the view that it was in the LTIE to declare the service on a national basis. However, in its declaration decision the ACCC noted that the access determination inquiry would “*provide a further opportunity to consider whether different terms and conditions of access should be determined for various ESAs, or whether certain ESAs should be excluded.*”

Based on the above, the ACCC will use the ESA, or groupings of ESAs, as a basis for considering both “geographic exemptions” and “carrier-specific exemptions”. However, assessing the level of competition on this basis does not mean it is only relevant to consider the impact of terms and conditions on those ESAs being considered for exemption. It is also relevant to consider the impact that a particular term or condition would have on the national market as a whole and/or in non-exempt ESAs.

6.4.1 Effectiveness of competition

One basis for limiting the scope of the application of SAOs owed by access providers in particular ESAs is if that access provider is already subject to competitive constraint.

Where competition is already effective (and is likely to remain effective), then the application of the SAOs to access providers may not promote competition. This is because the price and other terms and conditions of supply available in the market can already be considered to be competitive.

On the other hand, if competition is ineffective, then the application of the SAOs and the availability of regulated terms and conditions could lead to changes in the quantity, price and other terms and conditions of the supply of the eligible service. This in turn could lead to increased competition in markets for downstream services. For instance, if absent regulation the service were not to be supplied or were to be supplied only at a high price, the SAOs could lead to improved access to wholesale ADSL and enable more efficient competitors to enter downstream markets.

The ACCC has provided an overview of the meaning of “effective competition” in its recent decision to vary the FADs for resale fixed line voice services. This is reproduced at **Appendix D**. In considering whether competition is effective, or likely to become effective, the ACCC may consider factors such as the structure of the market, the availability of substitutes, supply-side constraints, and the conduct of market participants.

This approach is consistent with the approach taken by the ACCC in its recent decision to vary the FADs for resale fixed line voice services. However, the ACCC notes that while the ACCC made particular factual findings in relation to resale fixed line voice services, this FAD inquiry involves the *wholesale ADSL* service and the fixed line broadband markets. The ACCC therefore does not accept submissions that its recent decision on resale fixed line voice services demonstrates that exemptions are not appropriate for the wholesale ADSL service or are never appropriate for any declared service. For example, there may be different evidence on the availability of competitive alternatives or on the effectiveness of competition.

6.4.2 Availability of competitive alternatives

At a theoretical level, the presence of supply-side alternatives suggests that access providers are subject to competitive restraint. This is because both access seekers and end-users can

switch to a range of alternative providers if the supply terms are not competitive. A wide range of competitive alternatives indicates that there are fewer obstacles to end-users of listed services gaining access to those services.

Telstra submits that the scale of competitive entry and investment across CBD and metropolitan ESAs is significant.²⁹ Telstra submits that the SAOs should not apply in areas where infrastructure investment has been greatest as that investment has resulted in effective competition in both wholesale and retail markets. Telstra includes DSLAMs, mobile wireless, and HFC as relevant types of infrastructure investment. Telstra submits that, at a minimum, the SAOs should not apply to those 289 ESAs where the three largest DSLAM network operators have a presence.

The ACCC considers that both ULLS and LSS, used in conjunction with DSLAMs and transmission services, are substitutable for wholesale ADSL. The ACCC's factual findings in relation to resale fixed line voice services – that ULLS was not an effective substitute for those services – do not appear to be applicable to the wholesale ADSL service.³⁰ Rather, it appears that access seekers *“have invested in infrastructure largely to meet growing retail demand for data (broadband) services”* because wholesale ADSL and ULLS/LSS can be used interchangeably to supply retail ADSL products to end-users.³¹ As discussed in section 6.4.3, one important limitation on this substitutability is large pair gain systems.

In addition to ULLS and LSS, other substitutable competitive alternatives in the fixed line broadband market include HFC and optic fibre. In those ESAs where these services are available the availability of these substitutes may act as a competitive constraint.³² The ACCC does not consider mobile wireless to be in the relevant market, but mobile wireless may also be a substitute for some end-users for some purposes.

There are various measures of market concentration and the availability of competitive alternatives that can be used to identify those ESAs where competitive alternatives are readily available. The competitiveness of a market cannot be measured simply by the number of firms in the market, their market shares and the market concentration. However, that can be a useful starting point for analysis.

Telstra's submission points to a range of retail market outcomes associated with infrastructure-based competition. In considering whether the FAD for the declared wholesale ADSL service should include geographic exemptions the ACCC is not assessing a situation of infrastructure based competition against a situation of competition based on wholesale ADSL-inputs. This is because, as outlined in section 6.7 regarding incentives to use and invest in infrastructure, a degree of infrastructure-based competition is likely to be maintained. By providing efficient terms of access for the wholesale ADSL service regulated

²⁹ Telstra submission in response to the February FAD Discussion paper, Pub. p.10.

³⁰ The ACCC found that “...supply-side constraints on the substitutability of the ULLS for the WLR service mean that, for supplying a significant share of the retail voice-only market, there is no effective alternative to purchasing WLR, LCS and PSTN OA services from Telstra.” (ACCC, *Final Report: Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services*, December 2011, p.8).

³¹ ACCC, *Final Report: Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services*, December 2011, p.8.

³² ACCC, *Final Decision: Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*, p.11.

access between firms should increase the services offered by firms and broaden end-users' choices. Similarly, the Australian Competition Tribunal has recognised that consumers benefit where they have a choice between a range of products and services.³³

Questions on which the ACCC seeks views:

2. Telstra has proposed one way a term or condition exempting certain geographic areas could be delineated. The ACCC seeks submissions on Telstra's proposed test and submissions on alternative measures of where competition is effective.

6.4.3 Large pair gain systems and limits on substitutability

One important limitation on the substitutability of ULLS and LSS for the wholesale ADSL service is that large pair gain systems and other technology blockers may make a significant portion of lines in some ESAs unserviceable by ULLS or LSS. Large pair gain systems (LPGS) generally connect a number of copper pairs to roadside cabinets connected back to the exchange by optical fibre. End-users connected to LPGS can get ADSL services over Telstra's network, provided the LPGS cabinet is ADSL-enabled and a port is available.

However, services provided over ULLS/LSS are not available. This is because the economics do not support competitive entry at roadside cabinets – there are relatively few services that can be supplied from where the copper pairs terminate and relatively high cost to install a competitor DSLAM. Telstra's cabinets do not support competitor equipment and hence a competitor would have to build a separate cabinet and power source adjacent to the Telstra cabinet.

Telstra is increasing the capacity of existing LPGS cabinets as part of its "Project Top Hat." Over time, this will increase the number of ADSL services that could only be supplied by the Telstra ADSL network.

In the ACCC's decision to declare the wholesale ADSL service the ACCC found that³⁴:

Lines with RIMs [LPGS] are widely distributed throughout the CAN, as practically all ESAs are subject to some RIM technologies including those proposed by Telstra to not be subject to service declaration.³⁵ Closer analysis reveals that some of Telstra's proposed ESAs have high levels of lines affected by pair gains. For example the [c-i-c] [c-i-c] ESAs are proposed for exemption by Telstra in its submission,³⁶ although data reported by Telstra shows that [c-i-c] [c-i-c] in those ESAs are non-MDF lines (pair gains) and essentially only contestable by Telstra.³⁷ Telstra's submission does not make any allowance for considering lines affected by pair gains.

End-users on lines affected by LPGS are likely to face high obstacles to gaining access to alternative services. As those lines are not contestable by other providers, Telstra has a dominant market position in relation to those lines. Further, it is possible that, unregulated,

³³ Chime Communications Pty Ltd (No 2) [2009] ACompT 4 (27 May 2009) at [161].

³⁴ ACCC, *Final Decision: Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*, p.56.

³⁵ Telstra submission to the wholesale ADSL declaration inquiry, Pub. p.17.

³⁶ Ibid, Conf. Annexure B, pp.41-50.

³⁷ ACCC Infrastructure RKR.

the existence of a high proportion of lines affected by pair gains could be diluting the competitive constraint posed by infrastructure based competitors overall. Monopoly services provided over the pair gain lines can be used to cross-subsidise competitive services or to achieve greater economies of scale. A high number of pair gain lines may also lessen the business case for continuing infrastructure-based investment by competitors, as there are fewer addressable customers within that ESA.

One option would be to consider how the ACCC could take into account LPGS in making terms and conditions for the wholesale ADSL service. The ACCC notes that Telstra has previously submitted that an obligation to supply a regulated service only on lines affected by pair gains would be enormously complex, costly, and impracticable.³⁸

Questions on which the ACCC seeks views:

3. Are there any limits, other than large pair gain systems, on the substitutability of ULLS and LSS-based services for wholesale ADSL?
4. To what extent does the use of LPGS in the CAN limit the competitive constraint posed by infrastructure based alternatives?
5. How should the ACCC take into account the existence of LPGS in making terms and conditions for the wholesale ADSL service?
6. *Telstra*: What forward-looking plans does Telstra have regarding the use of pair gain systems on the CAN?

6.4.4 The conduct of market participants

The conduct of market participants may also indicate the effectiveness of competition. This is because in effectively competitive markets the wholesale supplier should seek to maximise demand and it can be expected that, over the long run, prices are determined by underlying costs rather than the existence of market power. Further, evidence of market power posing a threat to present or future competition would tend to contraindicate the existence of “effective competition”.

In declaring the service on a national basis the ACCC noted a number of concerns in relation to Telstra’s conduct as the dominant access provider. These were:

- the level and structure of wholesale ADSL pricing
- inefficient price discrimination
- leveraging conduct, and particular terms and conditions of supply of the wholesale ADSL service.

The ACCC found that declaration of the wholesale ADSL service was likely to result in the achievement of the objective of promoting competition in markets for fixed line broadband services as declaration would:

³⁸ Chime Communications Pty Ltd (No 3) [2009] ACompT 4 (24 August 2009) at [24].

- enable the ACCC to regulate the terms of access to wholesale ADSL services including the level and structure of pricing such that wholesale ADSL inputs are available to access seekers on efficient terms and conditions
- address contractual restrictions likely to impede competition in both retail and wholesale fixed line broadband markets
- create conditions in which efficient access seekers are able to effectively compete for customers during the lead-up to the NBN.³⁹

It is relevant to consider whether concerns about wholesale ADSL still arise in those ESAs that have attracted a degree of infrastructure-based competition. In the declaration decision, the ACCC noted that its concern about the level of pricing “*extends to the level of pricing in TW [Telstra Wholesale] Zone 1 exchanges, even if Telstra’s pricing is higher in areas where it is not subject to infrastructure based competition.*”

The ACCC has also noted:

*While the level of competition varies between ESAs, concerns about the commercial terms on which Telstra provides access to the wholesale ADSL services continue to arise on a national basis. This suggests that there is not effective competition as, notwithstanding the availability of substitutes in certain areas, Telstra has been able to impose terms and conditions that differ from those that would be expected to apply in a competitive market.*⁴⁰

As the promotion of competition is a forward-looking analysis it is also relevant to consider market developments that might affect conduct in the future markets such as the deployment of the NBN. The ACCC has previously noted that – absent regulation - until the NBN has been fully deployed the competition concerns identified in relation to the supply of wholesale ADSL are unlikely to be alleviated.⁴¹ Telstra has strong incentives to engage in entry and expansion deterring conduct during the transition to the NBN.

In considering the scope of application of the SAOs it is relevant to consider the impact on both potentially exempt and potentially non-exempt areas. Some access seekers have made submissions about the potential for geographic exemptions to influence market outcomes in other geographic areas. For example, there is a concern that Telstra may leverage from non-regulated ESAs into regulated ESAs or bundle regulated and non-regulated products. The ACCC considers that these submissions highlight the importance of accurately assessing the effectiveness of competition. If certain geographic areas are effectively competitive, then Telstra is constrained in its ability to behave anti-competitively.

³⁹ ACCC, *Final Decision: Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*. p.46.

⁴⁰ ACCC, *Final Decision: Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*. p.55.

⁴¹ ACCC, *Final Decision: Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*. p.25.

Questions on which the ACCC seeks views:

7. What market evidence is there that the availability of substitutes has acted as a competitive constraint on Telstra's terms and conditions in relation to the wholesale ADSL service in particular ESAs?
8. If the FAD was to provide a geographic exemption in ESAs that have attracted a higher degree of infrastructure-based investment, do you consider that Telstra would be likely to:
 - (a) charge prices for wholesale ADSL that are above competitive levels in all ESAs?
 - (b) engage in inefficient price discrimination?
 - (c) impose anti-competitive terms and conditions of supply? If so, what terms?

Please provide evidence in support of your response.

9. Some submissions consider that geographic exemptions could affect market outcomes in other geographic areas. How so?

6.5 Promotion of competition – carrier-specific exemptions

Once a service is declared, an access provider supplying the declared service to itself or another person must also supply the service, upon request, to service providers in accordance with the SAOs set out in section 152AR. Service declaration therefore imposes access obligations on *all* network operators that supply the declared service to themselves regardless of whether they currently supply wholesale access services to third parties.

Given the breadth of the service description (see **Appendix A**) supply obligations could apply to all DSLAM owners.⁴² However, the ACCC has included in the IAD a term providing that carriers or CSPs other than Telstra are not required to comply with the SAOs in respect of the wholesale ADSL service. This particular term has the effect of exempting all non-dominant carrier access providers. If non-dominant network operators are strongly constrained by Telstra then the application of access obligations is unlikely to promote competition. This is because these access providers already face a competitive constraint and do not have market power to influence prices. In this regard, Herbert Geer has submitted that *“other service providers with limited market share have no option except to at least match Telstra's price if they want to compete in the market for WADSL.”*⁴³

The ACCC considers it can assess the degree of competitive constraint faced by particular carriers by adopting a similar approach to that used to consider geographic exemptions. The subset of ESAs under consideration here is the competitive footprint, excluding any ESAs subject to a “geographic exemption” applicable to all access providers.⁴⁴

⁴² The ACCC is able to ascertain the identity of these network operators through data collected under the CAN RKR.

⁴³ Herbert Geer submission in response to the February FAD Discussion Paper, p.28.

⁴⁴ The ESA is used here as a unit for competitive analysis. It is not necessarily the case that any carrier-specific terms would need to be expressed in terms of particular ESAs. In practice though, “a non-dominant network

6.5.1 Competitive constraint from Telstra

Non-dominant network providers appear to each be competitively constrained by Telstra. Telstra is the only access provider who owns the CAN and is the dominant access provider for the wholesale ADSL service. Telstra has an overwhelming market share for the supply of wholesale ADSL to third parties (resale). In its decision to declare the wholesale ADSL service the ACCC had regard to confidential market share information, and noted publicly that:

*Telstra has service in operation market shares that significantly exceed those of any other providers that have a presence in the relevant bands...while there is some variance in competitive conditions between geographic areas Telstra still maintains its dominance even when considered on a less aggregated basis.*⁴⁵

In the sub-set of ESAs where non-dominant network operators operate, these access providers have much smaller market shares to Telstra. This is particularly the case if the ACCC does decide to make geographic exemptions and removes from the analysis those ESAs that are “effectively competitive”.

In its decision to declare the wholesale ADSL service the ACCC noted that:

In observing the level of competition in this segment of the wholesale market, the ACCC considers that a strong competitive resale market has not developed. While some suppliers – such as Optus and AAPT - do offer ULLS-based wholesale ADSL to other ISPs in their respective footprints, the ACCC does not consider that these amount to a material competitive constraint on Telstra in the national market for the supply of fixed line broadband.

Only Telstra’s access terms have given rise to competitive concerns in regard to the service. Telstra submits this is not a relevant consideration.⁴⁶ While the existence of complaints is not necessarily demonstrative of an underlying competition issue,⁴⁷ the information available to the ACCC to date suggests that there are no competition concerns regarding non-dominant network operators supply of the wholesale ADSL service. A number of submissions note this is the case. By contrast, Telstra as the dominant access provider has been the subject of repeated competition concerns as documented in the ACCC’s final decision to declare the wholesale ADSL service. The structure of the market, and the conduct of market participants, suggests that non-dominant network providers are strongly constrained by the presence in the market of Telstra.

Considering the above factors, the ACCC’s preliminary view is that non-dominant network operators are subject to a competitive constraint by Telstra and that they do not have substantial market power. In these circumstances, applying the SAOs to non-dominant network providers is unlikely to promote competition in the relevant markets.

operator” exemption as in the IAD applies only in the sub-set of ESAs where non-dominant network operators operate.

⁴⁵ ACCC, *Final Decision: Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*. p.19.

⁴⁶ Telstra submission in response to the February FAD Discussion Paper, Pub. p.18.

⁴⁷ ACCC, *Final Decision: Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*. p.33.

Questions on which the ACCC seeks views:

10. What does market shares and the market conduct of non-dominant network providers indicate about the degree of competitive constraint non-dominant network providers face?
11. Would applying the SAOs to non-dominant network providers promote competition?
How would a term exempting non-dominant network providers from the SAOs promote competition?

6.6 Practical considerations

The ACCC is not currently proposing particular forms of terms and conditions to be included in an FAD but, should the ACCC decide to exempt certain geographic areas it will propose particular terms as part of its draft decision. In considering the objective of promoting competition it may be relevant to consider the transactional costs associated with particular terms and conditions and the ease with which various terms and conditions can be implemented.

6.7 Efficient use of, and investment in, infrastructure

In considering the LTIE the ACCC must have regard to the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied and any other infrastructure by which listed services are, or are likely to become, capable of being supplied.

This includes, among other things, a consideration of the incentives for investment in the infrastructure by which services are supplied and any other infrastructure by which services are, or are likely to become, capable of being supplied.

6.7.1 Efficient use of infrastructure

The ACCC's preliminary view is that access seekers who have *already invested* in infrastructure in particular ESAs are likely to continue to efficiently use that infrastructure. Access seekers are unlikely to decommission DSLAMs or migrate customers to wholesale ADSL inputs as a result of Telstra and/or other access providers having to provide wholesale ADSL on regulated terms.

This is because the investments required to service customers on existing infrastructure are largely sunk. Access providers therefore face a low marginal cost associated in supplying a customer over existing infrastructure compared to purchasing the wholesale ADSL service from Telstra. The ACCC has received no submissions to date from DSLAM operators that they would reduce the use of their existing DSLAM infrastructure as a result of the application of the SAOs. The ACCC's preliminary view is that Telstra is also likely to continue to efficiently use existing copper infrastructure with, or without, the application of SAOs.

Questions on which the ACCC seeks views:

12. How would terms and conditions providing geographic exemptions or carrier-specific exemptions affect the efficient use of existing infrastructure by access seekers and access providers?

6.7.2 Efficient investment in infrastructure

The ACCC must consider ongoing incentives to invest in infrastructure by which services are supplied, and any other infrastructure by which services are, or are likely to become, capable of being supplied.

Access seekers may invest in copper network infrastructure to:

- deploy DSLAMs in new ESAs ('broadening' investment)
- increase capacity at exchanges in order to increase the number of addressable customers they can provide ULLS/LSS based services ('deepening' investment)
- replace or upgrade existing infrastructure

In the current context, it is relevant to consider deepening investment rather than broadening investment as the ACCC is only considering exempting ESAs that have already attracted infrastructure based investment. The ACCC has concluded in its decision to declare the wholesale ADSL service that access seekers are likely to continue to invest in DSLAM infrastructure with, and without, declaration.⁴⁸ The ACCC's preliminary view is that using a narrower geographic region as a unit of analysis does not alter that conclusion in regards to the application of the SAOs.

There are a range of benefits associated with having customers "on-net" which access seekers are likely to wish to preserve. This includes an enhanced ability to differentiate products and increased functionality or service quality options. Telstra explains that:

Infrastructure-based competition (specifically DSLAM-based competition) allows access seekers to directly control the technical specifications (and input costs) of their backhaul, core and broadband access networks. Greater control enables access seekers to provide more competitive, customised offerings and has enabled access seekers to innovate in the ADSL market (with ADSL2+ and Annex-M offerings all being delivered first to market by providers using unbundled services) at the retail and wholesale layer.⁴⁹

Any ESAs which are ultimately considered effectively competitive are likely to be relatively mature markets that have already attracted a high level of infrastructure investment. For example, Telstra proposes for exemption some 289 ESAs with three infrastructure-based competitors. In this sub-set of the competitive footprint, the high level of investment to date

⁴⁸ ACCC, *Final Decision: Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*. p.53.

⁴⁹ Telstra submission in response to the February FAD Discussion Paper, Pub. p.15.

makes it probable that access seekers have already installed sufficient capacity to service their current and future customers.

Access seekers may also incur capital expenditure to replace or upgrade existing equipment. Telstra has previously argued that the technical life of a DSLAM is up to ten years, although the economic life may be less than this and closer to five years. The ACCC has little information on how often access seekers actually upgrade existing DSLAMs. Looking forward, the transition to the NBN may alter access seekers incentives to incur capex on DSLAMs. As the NBN will ultimately render DSLAM infrastructure redundant any upgrades will have a shorter economic life.

Telstra submits that applying the SAOs in areas with several access seekers is “likely to reduce investment incentives”. Telstra has pointed to TPG’s submissions in relation to the removal of exemptions for resale fixed line voices services lessening the business case for increasing investment in voice infrastructure.⁵⁰

The ACCC notes that any investments in copper-based infrastructure, such as DSLAMs, that were prompted by prices exceeding cost-based access prices may represent inefficient investments. This is not to suggest that the ACCC is of the view that DSLAM investments are generally inefficient. As noted above, there are a range of non-price benefits associated with DSLAM investments that are also relevant to access seeker investment decisions. However, given the wholesale ADSL service was until recently unregulated past levels of investment may not, of themselves, be good indicators of efficient levels of investment. In this regard the Australian Competition Tribunal has noted:

...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.⁵¹

The prices set in the FAD could affect access seekers’ ‘build or buy’ decisions by altering the relative attractiveness of using wholesale ADSL compared to using LSS or ULLS and their own infrastructure to provide a broadband service to an end-user. However, as per the Australian Competition Tribunal reasoning, efficient investment can be expected if access charges are set to ensure efficient recovery of costs. Consistent with this, the ACCC has previously concluded that where it is efficient to continue to invest in DSLAM infrastructure access seekers are likely to continue to do so both with and without declaration.⁵² Accordingly, provided prices are set appropriately it does not appear that a term or condition exempting Telstra from the SAOs will further achieve the objective of the LTIE.

The ACCC must also have regard to incentives to invest in other infrastructure by which services are, or are likely to become, capable of being supplied. In this regard, it is relevant to note that inefficient wholesale ADSL pricing could divert investment from more efficient investments in NBN infrastructure.

⁵⁰ Ibid, pp.15-16.

⁵¹ Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [159].

⁵² ACCC, *Final Decision: Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*. p.53.

An additional consideration is Telstra's incentives to invest in infrastructure. The application of SAOs to Telstra could lessen Telstra's incentives to invest in DSLAMs and other copper infrastructure during the transition to the NBN. This may be either through the loss of monopoly profits or because of the perceived risk that the ACCC sets a regulated price of access that does not allow an adequate return.

The ACCC would generally not accept that the loss of monopoly profits would result in lower levels of *efficient* investment in, and use of, infrastructure. As noted above, the Australian Competition Tribunal has noted that access provider investment would be expected to be encouraged where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment). The ACCC would also consider the access provider's legitimate business interests, including compensation for ongoing economic costs of providing the service, in setting price terms and conditions.

13. The ACCC considers that the application of the SAOs would not have a material negative effect on the deployment of competing DSLAMs and that where it is efficient to do access seekers will continue to invest in DSLAMs. The ACCC seeks any relevant submissions on this view.
14. *Access seekers*: Do you intend to still use existing DSLAMs? Will you decommission any DSLAMs if the SAOs apply to Telstra in particular ESAs? In those ESAs where you have existing infrastructure, will you supply retail ADSL based on your own DSLAM infrastructure or based on wholesale ADSL inputs?
15. *Access seekers*: What are your current plans to invest in DSLAM and other infrastructure? In the context of considering geographic exemptions, submitters should consider their likely investment within the existing competitive footprint and/or at ESAs that have a number of access-seekers present rather than expansion of the competitive footprint.
16. Is the *application of the SAOs* to Telstra in particular ESAs likely to reduce Telstra's incentives to efficiently invest in infrastructure?

6.7.3 Other considerations

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 other considerations. These relate to technical feasibility, the legitimate commercial interests of the supplier, and the risks involved in making the investment (see **Appendix B** for a detailed overview).

The ACCC notes there is some overlap between these considerations and the stand-alone matters to which the ACCC must have regard to in making an access determination. For the purpose of this issues paper, these issues are discussed in sections 6.8 and 6.9 below. The ACCC will consider relevant submissions as part of both its LTIE analysis and in considering those stand alone matters.

6.8 Legitimate business interests

The ACCC must take into account “the legitimate business interests of a carrier or carriage service provider 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.” As part of its LTIE analysis, the ACCC must also have regard to the “legitimate commercial interest of the supplier or suppliers of the service, including the ability of the supplier or suppliers to exploit economies of scale and scope”.

The ACCC considers that access providers’ legitimate business interests will be met if in making the access determination and setting price and non-price terms of access are appropriate and that access provider is compensated for its ongoing economic costs of providing these services.

The ACCC notes that it is technically feasible for Telstra to supply and charge for the wholesale ADSL service, as Telstra already supplies such services. As discussed in section 6.9, the extent to which other access providers currently supply wholesale ADSL services to third parties as opposed to self-supplying such services is less clear. This may raise issues of technical feasibility in addition to direct costs of providing access.

17. How would exemptions (geographic or carrier-specific) affect the legitimate business interests of access providers (including potential access providers) and the access providers’ investments in facilities?

6.9 The direct costs of providing access to the declared service;

In the context of exemptions, the ACCC considers that the relevant direct costs are those incurred in establishing the supply of the wholesale ADSL service together with the costs associated with the ongoing supply of the wholesale ADSL service.

As noted above, Telstra currently supplies the wholesale ADSL service in all ESAs where it supplies itself. The costs involved in supplying and charging for the services for Telstra are likely to be reasonable given that the service is already supplied by it on a commercial basis.

However, other access providers may face different costs. For those access providers that currently already supply wholesale ADSL services on a commercial scale similar considerations to Telstra apply. That is, supply is technically feasible and the costs involved in supplying and charging for the service are likely to be reasonable given these providers have already invested in the necessary billing and provisioning systems to supply the service.

For access providers that offer wholesale ADSL services on only a limited scale there is a question as to what costs would be incurred in supplying and charging the service to any party upon request. For example, an access provider who currently only supplies wholesale ADSL to related companies acquired through acquisition may incur new costs should they be required to charge for the service more generally.

For those providers that do not supply wholesale ADSL services to third parties at all a range of establishment costs may be incurred. For example, these access providers may be required to establish new billing and provisioning systems to supply services to third parties. As other

access providers currently supply the service using ULLS/LSS, it is likely that other purchasers of ULLS/LSS are able to use that technology to supply a service.

As a factual matter, the ACCC has received differing submissions on the extent to which non-dominant network operators currently supply the wholesale ADSL service to third parties. Telstra submits that Optus, iiNet, and TPG offer supply of wholesale ADSL services to third parties.⁵³ However, only Optus and AAPT have clearly identified themselves as offering wholesale ADSL services as a general commercial offering. Telstra submits that iiNet supplies services “in partnership with AAPT”. However, while iiNet has acquired AAPT’s consumer arm it is not clear what relationship exists and a wholesale level. As set out below, the ACCC seeks submissions from access providers on the extent to which they currently offer wholesale ADSL services to third parties as well as the direct costs of doing so.

There is some uncertainty as to whether access seekers are likely to request wholesale ADSL services, or access on regulated terms, from suppliers who do not currently offer resale wholesale ADSL services. It is possible that no such requests are made. However, given that if an exemption is not made all access providers would have a legal obligation to comply with the SAOs the ACCC considers they would need to incur the direct costs required to comply with those obligations.

18. *Access providers (DSLAM network operators)*: Do you currently supply wholesale ADSL services to third parties?
19. *Access providers (DSLAM network operators)*: What would be the direct costs associated with providing access to the declared service to others upon reasonable request? For example, costs associated in provisioning and billing the service to access seekers. To what extent do you currently incur these costs?
20. The ACCC seeks information on:
 - (a) Whether the costs involved in supplying and charging for the services are reasonable or likely to become reasonable; and
 - (b) the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks

6.10 The interests of all persons who have rights to use the declared service.

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.

In the case of geographic exemptions, this may not occur if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process. In this regard, the ACCC has noted that inefficient price discrimination was a concern in

⁵³ Telstra notes the following sources “*Optus* (see <http://www.optus.com.au/portal/site/wholesale>), *TPG* (which offers resale services through its Soul brand) (see <http://soulaustralia.com.au/wholesale/internet.html>) and *iiNet* (which provides wholesale ADSL and other services in partnership with AAPT) (see <http://www.aapt.com.au/wholesale>).”

relation to the wholesale ADSL service and that Telstra engaged in this behaviour in all ESAs.

In terms of carrier-specific exemptions, Telstra has expressed concerns about the potential disadvantage these may cause customers of non-dominant network operators.

...access-seekers who acquire wholesale ADSL services from access providers other than Telstra would be unlikely to be able to access the terms and conditions of the FAD. That is because those access providers would only be incented to offer the terms and conditions of the FAD if faced with a real risk of migration of their access seekers to Telstra. However, the costs associated with migration (such as changes to billing systems so that they are compatible with Telstra's, as well as any 'downtime' for those access seekers' end-users during the migration) may exceed the price advantage of the FAD. In such circumstances, those access providers are not faced with a real risk of migration. There is no reason why the terms and conditions of the FAD should not be available to those access seekers, if they are in their interests.⁵⁴

Telstra concludes that “access providers other than Telstra would be unlikely to be able to access the terms and conditions of the FAD.”

The ACCC notes that the terms offered by non-dominant network operators may depend on the level of competitive constraint they face. If non-dominant network operators are constrained by Telstra, then the regulated terms offered by Telstra may have some flow-on influence on other network-providers even if they are exempt. Non-dominant access providers will be incented to at least match Telstra's terms or risk losing market share.

Telstra draws attention to the switching costs associated with migration to Telstra. The ACCC accepts that there may be costs associated with switching between providers and those costs may act as a disincentive to end-users substituting between competing providers in the event of price differences. As outlined in **Appendix B**, the ACCC considers that the relevant markets are the retail and wholesale markets for fixed line broadband. In reaching this view, the ACCC has considered whether users of fixed line broadband services are likely to switch between alternative sources of supply. The ACCC considers that in the event of a small but significant non-transitory increase in price users can be expected to substitute between alternative sources of supply, despite any switching costs.

21. What are the costs of switching between wholesale ADSL providers?
22. If you currently acquire wholesale ADSL services from a provider other than Telstra, are you concerned about the application of the SAOs to that carrier provided in areas where those obligations apply to Telstra?

6.11 The value to a person of extensions, or enhancement of capability, whose cost is borne by someone else;

The ACCC's preliminary view is that any exemptions would not require extensions or enhancement of capability to be borne by someone else.

⁵⁴ Telstra submission in response to the February FAD Discussion Paper, Pub. p.18.

6.12 The operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;

The ACCC's preliminary view is that any exemptions are unlikely to affect the safe and reliable operation of a carriage service, a telecommunications network, or a facility.

6.13 The economically efficient operations of a carriage service, a telecommunications network or a facility

As outlined in **Appendix B**, this criteria raises similar issues of economic efficiency to those considered under the LTIE. The ACCC considers that the discussion of these matters at section 6.7 will elicit submissions that can be used to consider this stand alone criteria.

7 Bundling with PSTN services

7.1 Overview of issue

Telstra currently requires a PSTN service to be supplied on a customer's line before it will supply retail or wholesale ADSL services. This precludes the use of the wholesale ADSL service by access seekers to provision 'naked' ADSL services to retail consumers. Naked ADSL services allow end-users to acquire retail ADSL services without acquiring a fixed line voice service. Access seekers currently provide naked ADSL services by purchasing ULLS and using their own DSLAM equipment.

During the ACCC's wholesale ADSL declaration inquiry, Telstra submitted that the service description should include the requirement that wholesale ADSL must be purchased with an underlying PSTN service. On the other hand, access seekers submitted that the service description should state that access seekers are allowed to purchase wholesale ADSL as an unbundled service without the need for a PSTN service. The service description for the wholesale ADSL service does not specify that a PSTN service must be provided over the line (see **Appendix A**). The ACCC considered these issues to be more appropriately dealt with through the access determination, noting:

...it was not appropriate to specify whether a PSTN service must be provided over the line on which a wholesale ADSL service is provisioned. This would appear to be a term or condition of access which – consistent with the general principles outlined above – is more appropriately considered in any access determination.

This chapter considers what terms and conditions could be included in an FAD regarding the supply of the wholesale ADSL service bundled with a PSTN service. Under s 152BC(3), an access determination may, among other things:

- specify any other terms and conditions of an access seeker's access to the declared service; or
- require a carrier or carriage service provider to extend or enhance the capability of a facility⁵⁵ by means of which the declared service is supplied; or
- impose other requirements on a carrier or carriage service provider in relation to access to the declared service.

The ACCC considers that the above provisions are broad enough to allow a term to be included in an FAD requiring, or not requiring, a PSTN service to be provided over the line on which a wholesale ADSL service is provisioned.

⁵⁵ According to s 151AB, the word "facility" has the same meaning as in the *Telecommunications Act 1997* (s 7). "Facility" means: (a) any part of the infrastructure of a telecommunications network; or (b) any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.

7.1.1 PSTN unbundling options

Although the wholesale ADSL declaration applies to all access providers, the following discussion regarding PSTN unbundling options focuses on the dominant access provider Telstra. This is because most other prospective suppliers of wholesale ADSL already offer naked ADSL services at the retail and/or wholesale level.

There are a range of possible terms and conditions regarding the bundling of PSTN with the wholesale ADSL service that could be included in an FAD, and each could raise different considerations against the statutory criteria. The ACCC has set out three broad options below for consideration.

The first option would be to explicitly maintain the current market position whereby an active PSTN service is required on a line before Telstra supplies wholesale ADSL services. As mentioned above, this would preclude access seekers from providing a naked ADSL service based on Telstra wholesale inputs. Telstra has strongly advocated for this option in its submission.

The second option would be to include a term providing that an access provider cannot require that the wholesale ADSL service must be provisioned with a PSTN line, or include a term requiring that a wholesale ADSL service is supplied without an associated PSTN line on request by an access seeker. The ACCC refers to this option as ‘full unbundling’ of the PSTN service from the wholesale ADSL service. Such a term would require Telstra to offer a wholesale ADSL service on a stand-alone basis, however it would not preclude Telstra also offering a bundle of wholesale ADSL and WLR.

In the event the ACCC chose to implement full unbundling, it would need to ensure that Telstra recovered all relevant costs associated with the supply of the wholesale ADSL service. Given that copper line costs are currently recovered through WLR services, the unbundled wholesale ADSL service would need to be priced to cover this aspect of service provision.

As Telstra does not currently provide wholesale ADSL as a standalone service, there may be systems development costs associated with unbundling. These costs are relevant to the ACCC’s consideration as discussed below. Telstra’s submission⁵⁶ also makes an argument about whether a term requiring Telstra to offer an unbundled wholesale ADSL service would be inconsistent with the SAOs.⁵⁷ The ACCC’s preliminary view is that it is possible that an FAD could provide for unbundling in a manner that is not inconsistent with the SAOs.

A third ‘hybrid’ option could be to include a term permitting Telstra to implement unbundling by making available a limited telephone line rental service in conjunction with the wholesale ADSL service. Providing a ‘stripped back’ line rental product could achieve some of the benefits of unbundling while potentially being cheaper and easier to implement than ‘full’ unbundling.

⁵⁶ Telstra submission in response to the February FAD Discussion Paper, Pub. p.23.

⁵⁷ Pursuant to s.152BCB(3) the ACCC must not make a an Access Determination which is inconsistent with the SAOs.

The ACCC understands that Telstra previously trialled such a product configuration, which it named ‘Pure DSL’, whereby a line rental service was provided in conjunction with ADSL but was barred from outbound calls. Users could call emergency services and receive calls.⁵⁸

The telephone service component of ‘Pure DSL’ appears similar to Telstra’s “InContact” service. This does not include a charge for telephone line costs but allows incoming and emergency calls. This service is currently only available to eligible concession card holders, home customers with outstanding debts, and homeless refugees. The service is only offered where available and technically feasible.

As with ‘full’ unbundling, if it chose to permit a ‘hybrid’ unbundling implementation the ACCC would need to ensure that Telstra recovered all relevant costs associated with providing a ‘stripped back’ line rental product.

7.2 Submissions on bundling

Telstra submits that the FAD should include a requirement for an underlying PSTN service before ADSL services are supplied, thus clarifying that Telstra is not required to offer wholesale naked ADSL.⁵⁹ Telstra provides the following reasons in support of its submission:⁶⁰

- the FAD should not require Telstra to offer a service at a wholesale level which it does not offer at the retail level
- offering wholesale naked ADSL will require network and systems changes
- Telstra would need to recover its line costs in the charge for the wholesale naked ADSL service
- end-users benefit from the PSTN bundling requirement as Telstra is able to provide better quality of service.

Optus submits that the ACCC should ensure Telstra will offer access seekers unbundled wholesale ADSL and WLR services.⁶¹ Optus further submits that providing customers with the option of selecting a naked ADSL service is particularly important in the lead up to the NBN as an unbundled wholesale ADSL service will provide access seekers with the option to bundle wholesale ADSL with other services, such as mobile services, which promotes innovation and customer choice.⁶²

Herbert Geer (on behalf of Adam Internet, iiNet, Internode, Primus and TransACT) submits that there should not be a requirement that wholesale ADSL can only be provided on lines with an underlying PSTN service.⁶³ Herbert Geer further submits that there is no technical impediment that requires the two services on the line and that the LTIE will be better

⁵⁸ <http://bit.ly/9f5ZsZ>, <http://bit.ly/a2iMy5>, <http://bit.ly/bAwtptz>.

⁵⁹ Telstra submission in response to the February FAD Discussion Paper, Pub. p.23.

⁶⁰ Ibid.

⁶¹ Optus submission in response to the February FAD Discussion Paper, Pub. p.13.

⁶² Ibid, pp.14-15.

⁶³ Herbert Geer submission in response to the February FAD Discussion Paper, p.7.

achieved through unbundling as forced bundling places an unreasonable limitation on the types of services that can be provided to consumers.⁶⁴

AAPT submits that mandating the provision of a standalone wholesale ADSL service would enhance competition and innovation and would allow access seekers to deliver the services that retail customers ask for.⁶⁵ AAPT further submits that unbundling would provide more opportunity and functionality to add its own value-added services over the top of the wholesale ADSL service.⁶⁶

7.3 Long term interests of end-users

The ACCC's approach to the long term interests of end-users in making access determinations is outlined in **Appendix B**. Following is a brief consideration of how the LTIE may be affected by the unbundling of wholesale ADSL from PSTN services.

7.3.1 Promotion of competition

Telstra's current supply terms mean that access seekers supply naked ADSL where they, or a non-Telstra wholesale provider, acquire an unbundled service. As such, end-users in many rural and regional areas, where access seekers have not deployed DSLAM infrastructure, must purchase a fixed line voice service in order to acquire ADSL.

As noted in **Appendix B**, 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 goods and services at lower prices, of a higher quality, and/or a greater diversity of goods and services.

In terms of diversity of goods and services, requiring Telstra to supply an unbundled wholesale ADSL service could promote competition by expanding the scope of services that access seekers can offer to end-users. Submissions from access seekers suggest that such a service would promote competition and innovation as access seekers would be able to offer a greater range of products, which will ultimately benefit end-users with added consumer choice and competitive prices.

There is some market evidence indicating that naked ADSL products are popular with end-users and access seekers. For example, after launching the naked ADSL product in late 2007 iiNet experienced a 123 per cent growth in its naked ADSL subscriber numbers in FY08/09 and a 59 per cent growth in naked ADSL subscriber numbers in FY09/10.⁶⁷ Approximately 106,000 subscribers were taking the iiNet naked ADSL product by FY09/10.⁶⁸ Over a similar time period, a number of other ISPs also launched naked ADSL products as shown in Figure 1. It is clear that naked ADSL has become increasingly recognised by ISPs and end-users as an important product in the broadband market. However, ISPs can currently only offer naked ADSL where they, or a non-Telstra wholesale provider, acquire ULLS.

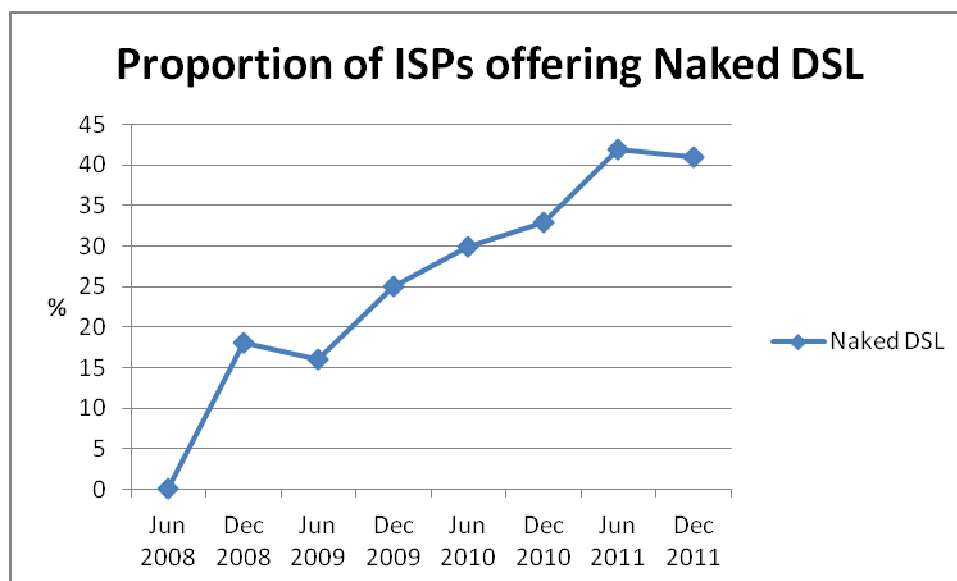
⁶⁴ Ibid, pp.7-8.

⁶⁵ AAPT submission in response to the February FAD Discussion Paper, p.7.

⁶⁶ Ibid.

⁶⁷ iiNet, http://www.iinet.net.au/press/releases/170809_full_year_results.pdf.

⁶⁸ iiNet, http://www.iinet.net.au/press/releases/170809_full_year_results.pdf.

Figure 1: Proportion of ISPs offering Naked DSL, June 2008 to December 2011

Source: Australian Bureau of Statistics, December 2011, Internet Activity Australia (8153.0)

One of the key benefits of unbundling would be that end-users are provided with the option of lower communications prices. However, if a ‘hybrid’ term was adopted, as discussed in section 7.1.1, there may still be an additional cost associated with the limited telephone service. That is, end-users may still need to contribute to line costs in any case.

The effect (if any) on service quality may also be relevant to whether unbundling would promote the LTIE. Telstra has raised various service quality issues that would arise if the requirement for an underlying PSTN service is removed.⁶⁹ Whilst the ACCC generally considers that a lower quality service is less likely to promote the LTIE, these quality issues do not appear to have acted as a barrier to end-user take up of naked ADSL services. In this respect, it is not the ACCC’s role to make a choice between competing goods and services based on their quality; those choices are made by consumers.

The ACCC’s preliminary view is that unbundling is likely to promote competition in the form of lower prices and greater diversity of services for end-users.

Questions on which the ACCC seeks views:

23. Do you agree with the ACCC’s preliminary assessment of the benefits of unbundling the PSTN service from the wholesale ADSL service?
24. Do you consider that a ‘hybrid’ option would have the same potential to promote competition as ‘full’ unbundling?
25. What proportion of your total ADSL SIOs are attributable to a naked ADSL product?

⁶⁹ Telstra submission in response to the February FAD Discussion Paper, Pub. p.23.

7.3.2 Any to any connectivity

The ACCC considers that the objective of achieving any-to-any connectivity is not relevant to determining whether a term requiring PSTN unbundling should be included in the FAD.

7.3.3 Efficient use of, and investment in, infrastructure

The ACCC considers that unbundling could meet the objective of encouraging the economically efficient use of, and economically efficient investment in, relevant infrastructure.

Currently, end-users on Telstra wholesale ADSL-based services are required to purchase a PSTN service regardless of whether they want a fixed line telephone service. This is unlikely to represent an efficient use of infrastructure as the infrastructure is being utilised for a low value use.

A ‘hybrid’ bundling approach may not result in the same efficiency gains as unbundling. This is because if Telstra was required to supply a ‘stripped back’ PSTN service in conjunction with the wholesale ADSL service this would still require the use of infrastructure to provision a limited PSTN service in circumstances where end-users do not wish to acquire a telephone functionality.

In considering the efficient use of, and investment in, infrastructure, regard must also be had to whether it is, or is likely to become technically feasible for the services to be supplied and charged for, having regard to, among other things, whether the costs that would be involved and supplying, and charging for, the services are reasonable or likely to become reasonable, the legitimate commercial interests of the supplier, and the incentives for investment in the infrastructure by which the services are supplied and any other infrastructure by which the services are, or are likely to become, capable of being supplied. As these also arise under the other mandatory criteria in s. 152BCA(1), they are considered below. However, the ACCC will consider relevant submissions as part of both its LTIE analysis and in considering the stand alone matters below.

Questions on which the ACCC seeks views:

26. Would ‘full’ unbundling result in any economic efficiency gains?

27. Would a ‘hybrid’ unbundling approach result in any economic efficiency gains?

7.4 Other criteria

In addition to a consideration of the LTIE, the ACCC must also take into account other matters (see **Appendix B**). These are:

- the legitimate business interests of a carrier or carriage service provider 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
- the interests of all persons who have rights to use the declared service

- the direct costs of providing access to the declared service
- the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- the economically efficient operation of a carriage service, a telecommunications network or a facility

The Commission may take into account any other matters that it thinks are relevant.

The legitimate business interests of the access provider and direct costs of providing access are likely to be particularly relevant given that Telstra does not currently provide an unbundled service.

Telstra has raised issues about the technical feasibility of providing an unbundled wholesale ADSL service. In a submission to the wholesale ADSL declaration inquiry, Telstra submitted that:

...because of Telstra's core systems and platform design, ADSL services can only be provisioned where a telephone line has been provisioned at the end-user's premises. That core systems/platform limitation applies to both wholesale and retail services.⁷⁰

Understanding these limitations is important to the ACCC's consideration of a term requiring PSTN unbundling against the above criteria, particularly matters such as the legitimate business interests of the access provider and direct costs of providing access. The ACCC requires further information from Telstra regarding its systems limitations.

Questions on which the ACCC seeks views:

28. *Telstra*: What specific core systems/platform limitations prevent Telstra from offering a naked ADSL service?

The technical feasibility of providing the service also raises issues relating to the direct costs of providing access. As Telstra submits its systems cannot support unbundling, there could be substantial costs involved in systems development needed to supply an unbundled service. The ACCC understands, however, that Telstra currently offers symmetric DSL services unbundled from a PSTN service.⁷¹

The ease and costs of implementation are a relevant consideration in determining whether to include a term requiring PSTN unbundling. On the one hand, even though unbundling may be more complex to implement, the benefits arising from unbundling may exceed the costs of implementation. However, if the unbundled service cannot be implemented in a timely manner, the benefits of unbundling may not be recognised and the extent to which a term

⁷⁰ Letter from Telstra re whether wholesale ADSL services should be declared - Public version 8 February 2012, p3 [<http://bit.ly/KIfa7U>].

⁷¹ Telstra CAN RKR.

requiring unbundling will promote competition is lessened. However, a ‘hybrid’ approach may capture many of the competition benefits associated with unbundling but potentially be able to be implemented more quickly.

The ‘hybrid’ approach to unbundling could also minimise the direct costs associated with the provision of a naked ADSL service. The ACCC considers that such an approach may be technically feasible given that Telstra previously trialled a ‘Pure DSL’ service on a similar basis. The ACCC seeks submissions to ascertain whether this option achieves the benefits of unbundling whilst limiting the costs of implementation incurred by Telstra.

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.

The ACCC may seek information directly from Telstra regarding the nature and magnitude of system development costs of allowing a naked ADSL service to be provided.

The ACCC must also consider the value to access seekers of extensions, or enhancement of capability, whose cost is borne by Telstra. By requiring Telstra to provide an unbundled service, Telstra would be required to make changes to its systems. However, it would allow access seekers to provide a greater range of products which would enhance competition and innovation.

The ACCC must also have regard to the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility. Telstra submits that having a PSTN service on the line enables a better quality of service to be delivered through better fault detection and reduction in corrosion as a result of the wetting current.⁷² Whilst this may be the case, the ACCC seeks submissions on the extent to which access seekers have experienced deterioration in the quality of service without a PSTN service.

Questions on which the ACCC seeks views:

29. To what extent do you consider that ‘full’ unbundling or the ‘hybrid’ option takes into account the considerations under s. 152BCA?
30. What are your experiences with regards to the effect on the quality of service without a PSTN service on the line?
31. *Access seekers:* What system modifications were undertaken to enable a naked ADSL service to be provided? What costs were involved in the systems development process?

⁷² Telstra submission in response to the February FAD Discussion Paper, Pub. p.23.

8 Points of interconnection for the wholesale ADSL service

8.1 Overview of issue

The wholesale ADSL service is a point-to-point service between a point of interconnection and an end-user network boundary (**Appendix A**).

A point of interconnection means⁷³ 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.

The IAD does not specify the points of interconnection, leaving these as a matter of agreement between the access provider and access seeker. Telstra currently provides points of interconnection at a CBD exchange in each relevant state.⁷⁴ A list of the relevant AGVC interconnection site for each ADSL-enabled ESA is available on the Telstra wholesale website.⁷⁵

The FAD for the wholesale ADSL service could nominate points of interconnection or it could leave these to be the subject of agreement. If the FAD did nominate points of interconnection, these could match the existing points of interconnection offered by Telstra or specify additional points of interconnection.

8.2 Submissions

Telstra submits that the FAD should not specify points of interconnection different to those that are already defined in the service description for the wholesale ADSL service (as outlined above).⁷⁶ Telstra submits that providing additional points of interconnection would require a technical solution be developed and that the service would need to be aggregated to the existing CBD point of interconnection and then sent back out to the new point of interconnect. Telstra submits this would be inefficient, expensive, and degrade service quality.

Vocus submits that while AGVC should be subject to regulated charges, it “should not be mandatory for an access seeker to acquire AGVC from Telstra when acquiring WDSL.”⁷⁷ Vocus submits that providing access seekers with the choice to use competitive backhaul would substantially promote competition.

⁷³ As defined in the service description for the wholesale ADSL service – see Appendix A.

⁷⁴ Telstra submission in response to the February FAD Discussion Paper, Pub. p.24.

⁷⁵ Telstra, AGVC location for ADSL sites, <http://www.telstrawholesale.com.au/download/document/access-broadband-telstrae.xls> (accessed 19 June 2012).

⁷⁶ Telstra submission in response to the February FAD Discussion Paper, Pub. pp.24-25.

⁷⁷ Vocus submission in response to the February FAD Discussion Paper, p.4.

Herbert Geer submits that allowing access seekers to utilise their own transmission services would promote competition in transmission markets and provide lower cost ADSL services to retail end users.⁷⁸ However, Herbert Geer notes that AGVC should be subject to regulated charges as in many areas Telstra is the sole transmission provider.

AAPT submits that competition in markets for wholesale transmission could be stimulated by allowing access seekers to obtain alternative transmission by providing additional points of interconnection.⁷⁹ AAPT considers this would likely drive lower prices in the relevant retail markets.

8.3 Discussion

The AGVC component of the wholesale ADSL service involves the use of a static layer 2 tunnelling protocol over a transport layer to aggregate communications to the point of interconnection. Put simply, it involves both:

- aggregation of end-user traffic, and
- transportation of end-user traffic to the point of interconnection.

The ACCC understands that routers aggregate the end-user traffic onto Telstra's networks which is then transported over the "backhaul" component to the point of interconnection where the end-user traffic is disaggregated. The service description for the wholesale ADSL service does not specify the underlying technology used – which may be either Gigabit Ethernet or Asynchronous Transfer Mode (ATM).

Telstra has submitted that to provide additional points of interconnection it would first need to transport the aggregated traffic to the existing CBD points of interconnection, and then deliver that data to the new points of interconnect. However, the ACCC is not considering requiring the 'tromboning' of traffic to a state-centralised POI and then to a regional POI. Rather, the ACCC is considering whether the FAD should provide for distributed points of interconnection allowing traffic to be handed over at a deeper point in the network.

Providing additional points of interconnection could promote competition in retail markets where competitive transmission services are available to service providers. This is because competitive transmission services could offer a cheaper means of transporting end-user traffic compared with Telstra's AGVC services. If this is the case, then providing additional points of interconnection and which data can be handed over may promote competition by facilitating lower prices for end-users.

Further, where access seekers have already invested in transmission infrastructure providing additional points of interconnection may facilitate the efficient use of that existing infrastructure and incentivise future investment in that infrastructure. Providing additional points of interconnection could also promote competition in transmission markets by allowing alternative transmission providers to compete to supply a service.

⁷⁸ Herbert Geer submission in response to the February FAD Discussion Paper, p.8.

⁷⁹ AAPT submission in response to the February FAD Discussion Paper, p.7.

Providing additional points of interconnection for the wholesale ADSL service could also encourage investment in transmission infrastructure which can also be used to interconnect with the NBN (provided such points of interconnection are not additional to those 120 points of interconnection provided for the NBN network).

Further information is required to assess whether providing additional points of interconnection would be more efficient and result in lower costs. Firstly, the cost of providing an AGVC service to a regional point of interconnection may not be significantly lower than the cost of providing AGVC to existing capital city points of interconnect. This is because while the traffic may be carried a shorter distance (from the exchange to the regional point of interconnect) Telstra will still incur costs in aggregating the end-user traffic. Secondly, providing additional points of interconnection is likely to incur some direct costs and may require a facility to be extended or enhanced. The ACCC cannot require Telstra to bear an unreasonable amount of the costs of extending/enhancing the capability of a facility or maintaining extensions or enhancements of the capability of a facility. Therefore, the costs associated with implementing further points of interconnection may be recovered in the charge for the wholesale ADSL service.

The ACCC intends to seek further information from Telstra, as the dominant access provider, on the technical feasibility of and costs associated with providing additional points of interconnect. The ACCC will then consult on its proposed approach in the draft determination.

Questions on which the ACCC seeks views:

32. What are the likely costs and benefits associated with establishing additional points of interconnection?
33. *Transmission network operators:* Would you use your transmission networks to transport wholesale ADSL data should additional points of interconnection be specified for the wholesale ADSL service? Would you invest further in transmission networks if the wholesale ADSL FAD provided for additional points of interconnection for the wholesale ADSL service?

9 General non-price terms and conditions

9.1 Scope of non-price terms and conditions

9.1.1 Issue

This chapter discusses the scope and content of general non-price terms and conditions that could be included in the wholesale ADSL FAD. An FAD does not have to set out all the terms and conditions that apply to a declared service. The ACCC's general approach to making FADs 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* (the 2008 Model Terms). In the February 2012 FAD Discussion Paper, the ACCC noted this general approach and proposed to include base non-price terms and conditions in the wholesale ADSL FAD.

9.1.2 Submissions

In response to the February FAD Discussion Paper, Telstra submits that it is unnecessary to include any generic commercial terms in the FAD as, historically, these terms have not been a matter for dispute between Telstra and access seekers.⁸⁰

On the other hand, submissions from access seekers all support the inclusion of the relevant 2008 Model Terms listed in the February FAD Discussion Paper, subject to various proposed amendments, as the basis for the standard commercial terms in the FAD.

Optus submits that including non-price terms promotes certainty and provides parties with better guidance on what constitutes fair and reasonable conditions of access.⁸¹

AAPT and Herbert Geer (on behalf of Adam Internet, iiNet, Internode, Primus and TransACT) submit that the FAD should include reasonable terms relating to standard non-price commercial matters to provide a set of terms and conditions that access seekers can rely on.⁸² In addition, AAPT submits that non-price terms should not be overlooked given the inequality in bargaining power between Telstra and an access seeker.⁸³

Macquarie Telecom submits that the key commercial terms that are needed for the commercial supply of the wholesale ADSL service can be based on the 2008 Model Terms.⁸⁴

9.1.3 ACCC's preliminary view on including non-price terms and conditions

The ACCC intends to include non-price terms and conditions in the wholesale ADSL FAD as it is important to have a set of base terms in the event that commercial agreement cannot be reached. This is consistent with the approach taken by the ACCC for other declared services.

⁸⁰ Telstra submission in response to the February FAD Discussion Paper, Pub. p.26.

⁸¹ Optus submission in response to the February FAD Discussion Paper, Pub. p.16.

⁸² Herbert Geer submission in response to the February FAD Discussion Paper, p.11; AAPT submission in response to the February FAD Discussion Paper, p.10.

⁸³ AAPT submission in response to the February FAD Discussion Paper, p.10.

⁸⁴ Macquarie Telecom submission in response to the February FAD Discussion Paper, p.6.

While Telstra submits that it is unnecessary to include non-price terms in the FAD as access seekers have not historically raised concerns, it is evident from access seekers' submissions that they are strongly supportive of having the relevant non-price terms included in the FAD.

In circumstances where parties are unable to reach terms through commercial negotiations, the FAD non-price terms will provide a basic framework for interaction, billing and disputes resolution. This creates certainty for the parties and is likely to promote competition by encouraging access seekers to invest in the relevant markets. This in turn will promote the LTIE, provided such terms are reasonable taking into account the legislative framework (see **Appendix B**).

As a general proposition, terms and conditions of access will promote the LTIE where they facilitate access seekers obtaining the wholesale ADSL service on terms that are equivalent to those on which the access provider supplies to itself, in terms of technical and operational quality of services and the manner and timing of access.

Particular terms and conditions should also take into account the legitimate business interests of the access provider, the direct costs of providing access, and other matters set out in s. 152BCA. In this regard, Telstra submits that non-price terms should appropriately balance facilitating competition and placing undue, onerous or unnecessary costs and burdens on market participants.⁸⁵

9.2 The 2008 Model Terms

The 2008 Model Terms were developed by the ACCC to set out fair and reasonable terms and conditions of access. While made under the previous legislative regime, the ACCC had regard to the same matters it is required to have regard to in making an access determination under s. 152BCA. In making the 2008 Model Terms, the ACCC focused on those terms and conditions of access that could be expected to have a material bearing on a service provider's business and hence the range, quality and price of services offered to end-users.

The ACCC has further developed the 2008 Model Terms in the FAD process for DTCS, MTAS and fixed line services. The non-price terms in those FADs are based on the 2008 Model Terms, with changes and refinements to some terms.

The ACCC considers that the most appropriate starting point for developing non-price terms for the wholesale ADSL service is the 2008 Model Terms as adapted in the DTCS FAD. This approach is consistent with Telstra's submission that the non-price terms in the wholesale ADSL FAD should be consistent with similar terms included in the DTCS FAD.⁸⁶ The non-price terms in the DTCS FAD have recently been the subject of detailed consideration by interested parties and reflect the ACCC's most recent consideration.

However, it may be appropriate for the non-price terms in the wholesale ADSL FAD to differ from the DTCS FAD and the 2008 Model Terms for reasons specific to the wholesale ADSL service. It will be necessary to strike a balance between promoting consistency among the various FADs while recognising the differences between the declared services.

⁸⁵ Telstra submission in response to the February FAD Discussion Paper, Pub. p.27.

⁸⁶ Ibid, p.26.

A copy of the non-price terms included in the DTCS FAD is attached at **Appendix E**. Interested parties are encouraged to refer to these terms in making submissions to this issues paper.

9.3 Non-price terms and conditions in the wholesale ADSL FAD

This section examines the specific non-price terms and conditions that may be included in the wholesale ADSL FAD. The ACCC's preliminary view is that the following areas should be covered by the FAD:

- billing and notification
- creditworthiness and security
- general dispute resolution procedures
- confidentiality provisions
- communications with end-users
- suspension and termination.

The ACCC is also considering submissions that terms and conditions should be included in the FAD on liability and indemnity, ordering and provisioning, changes to operating manuals, and network modernisation and upgrade provisions. Terms on these areas were not included in the IAD. However, given submissions received to date, including terms on these areas in the FAD may be important to providing a base set of terms and conditions, creating certainty and promoting competition.

The ACCC has received detailed submissions regarding each of the above areas. These are considered below. Where relevant, the ACCC has referred to relevant changes to the 2008 Model Terms in the DTCS FAD (**Appendix E**).

9.3.1 Billing and notification

Overview

The billing and notification terms and conditions set out the access provider's responsibilities to provide accurate bills within certain timeframes. The terms also define the manner in which the access provider is paid for services it supplies, and sets out procedures for dealing with billing disputes.

The ACCC proposes to include billing and notification terms and conditions as they provide a clear, practical billing and notification framework for both the access provider and access seekers. Access seekers may be adversely affected if bills for services are materially inaccurate or unduly delayed, or if workable processes do not exist to resolve billing disputes in an appropriate and timely manner. The ACCC considers that the billing and notification terms are fundamental commercial terms of access.

Issues raised in submissions

The ACCC has received a number of specific, detailed, comments on the billing and notification terms and conditions.

AAPT, Herbert Geer and Optus submit that timeframes for invoicing for uninvoiced charges should be amended in order to be consistent with the *Telecommunications Consumer Protections Code (C628:2007)* (TCP Code).⁸⁷ The TCP Code is a registered code under the *Telecommunications Act 1997* and is the industry-developed, self-regulatory instrument that sets standards of conduct for telecommunications service providers. The existing TCP Code is currently under review but the new proposed code (C728:2012) has not yet been registered by the ACMA. The ACCC has made some amendments to the 2008 Model Terms timeframes in the DTCS FAD.⁸⁸

Questions on which the ACCC seeks views:

34. For the purpose of the wholesale ADSL FAD, are amendments required to the timeframe in clause 2.4 of **Appendix E**? If so, should the timeframes in clause 2.4 of **Appendix E** be consistent with the TCP Code? What if a new code is registered that provides a different timeframe?

AAPT and Herbert Geer submit that, with regards to billing disputes involving investigation by the TIO, the timeframe for raising a billing dispute should be extended to take into account that the TIO can investigate complaints that have arisen up to 24 months prior.⁸⁹

Questions on which the ACCC seeks views:

35. For the purpose of the wholesale ADSL FAD, should the timeframe for raising billing disputes be made consistent with the TIO timeframe?

36. For the purpose of the wholesale ADSL FAD, are amendments required to the timeframe in clause 2.14 of **Appendix E**?

Optus and Herbert Geer submit that:

- the billing provisions regarding “new services” are unclear (2008 Model Terms, clause A.5(b)(ii))⁹⁰; and

⁸⁷ AAPT submission in response to the February FAD Discussion Paper, p.11; Herbert Geer submission in response to the February FAD Discussion Paper, p.12; Optus submission in response to the February FAD Discussion Paper, Pub. p.16.

⁸⁸ See Appendix E, clause 2.4; compare with 2008 Model Terms, clause A.5.

⁸⁹ AAPT submission in response to the February FAD Discussion Paper, p.11; Herbert Geer submission in response to the February FAD Discussion Paper, p.14.

These submissions relate to Appendix E, clause 2.14 and the equivalent term in 2008 Model Terms, clause A.15.

⁹⁰ Optus submission in response to the February FAD Discussion Paper, Pub. p.17; Herbert Geer submission in response to the February FAD Discussion Paper, p.13.

- the terms should specify a maximum period within which each party has to provide the other party with information relevant to a dispute (2008 Model Terms, clause A.17).⁹¹

The ACCC made some refinements to these terms in the DTCS FAD (**Appendix E**, clauses 2.4 and 2.16 respectively).

Questions on which the ACCC seeks views:

37. For the purpose of the wholesale ADSL FAD, are further refinements required to clauses 2.4 and 2.16 in **Appendix E**?

Finally, Herbert Geer submits that there is a drafting inconsistency regarding the right to withhold payment of disputed amounts that requires clarification in order to avoid disputes between the access provider and access seekers.⁹² In particular, Herbert Geer submits that redrafting is necessary to clarify the ACCC's intention to allow disputed charges to be withheld until a matter is resolved, where the dispute is promptly notified, and not withheld only if the access provider agrees.⁹³

Questions on which the ACCC seeks views:

38. Is there a drafting inconsistency between clauses 2.6 and 2.12 in **Appendix E**? If so, what amendments are required to ensure consistency between these two clauses in the wholesale ADSL FAD?

39. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to billing and notification?

40. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

9.3.2 Creditworthiness and security

Overview

The creditworthiness and security terms and conditions set out the access provider's rights to make enquiries of the access seeker's ability to pay, and to require that security be provided in certain circumstances.

The ACCC proposes to include creditworthiness and security terms and conditions as these terms protect the access provider's interests by enabling it to make appropriate enquiries as to the creditworthiness of an access seeker or seek security where it is necessary to protect its

⁹¹ Optus submission in response to the February FAD Discussion Paper, Pub. p.17; Herbert Geer submission in response to the February FAD Discussion Paper, p.15.

⁹² Herbert Geer submission in response to the February FAD Discussion Paper, p.14.

This submission relates to Appendix E, clauses 2.6 and 2.12 and the equivalent terms in the 2008 Model Terms, clauses A.7 and A.13.

⁹³ Ibid.

legitimate business interests. This reduces an access provider's exposure to risk of default on payment by an access seeker. The ACCC considers that the creditworthiness and security terms are fundamental commercial terms of access.

Issues raised in submissions

Access seekers have made submissions regarding the security to be provided to the access provider.⁹⁴ Optus submits that security should only be requested when it is reasonably necessary to protect the legitimate business interests of the access provider.⁹⁵ Herbert Geer submits that credit checks and security should only be required when an access seeker first acquires services from the access provider or when events give rise to a genuine concern about the access seeker's ability or willingness to pay its debts.⁹⁶

The DTCS FAD provides that security must be provided where reasonably required (**Appendix E**, clause 3.1), which is consistent with the other FADs. The ACCC's view has been that this formulation balances the legitimate business interests of the access provider by protecting its commercial return on investments whilst striking a balance with the interests of access seekers who have the right to use the declared service.

Questions on which the ACCC seeks views:

41. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to creditworthiness and security?
42. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

9.3.3 General dispute resolution procedures

Overview

The general dispute resolution procedures terms and conditions establish how disputes should be managed, including applicable timeframes. General dispute resolution procedures facilitate the resolution of disputes in an expeditious manner without the need to resort to legal proceedings or commercial arbitrations, although the parties can commence legal proceedings in certain circumstances. These terms also give parties a mechanism for enforcing other non-price terms and conditions of access.

The ACCC proposes to include general dispute resolution procedures terms and conditions as dispute resolution procedures promote the interests of both the access provider and access seekers. The ACCC considers that the general dispute resolution procedures terms are fundamental commercial terms of access.

⁹⁴ See Appendix E, clause 3.1 and equivalent term in the 2008 Model Terms, clause B.1.

⁹⁵ Optus submission in response to the February FAD Discussion Paper, Pub. p.17.

⁹⁶ Herbert Geer submission in response to the February FAD Discussion Paper, p.15.

This submission relates to Appendix E, clause 3.1 and the identical term in the 2008 Model Terms, clause B.1.

Issues raised in submissions

Herbert Geer submits that, to ensure disputes are expedited, a timeframe should be included for which each party is required to provide relevant materials to the other party after the notification of a non-billing dispute.⁹⁷ The ACCC considers this could provide additional clarity for parties. Telstra also submits that, in light of the severe consequences of breaching the FAD, the non-price terms should be clear.⁹⁸

Questions on which the ACCC seeks views:

43. For the purpose of the wholesale ADSL FAD, should a timeframe be included in **Appendix E**, clause 4.9? If so, what should the timeframe be?
44. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to general dispute resolution procedures?
45. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

9.3.4 Confidentiality provisions

Overview

The ACCC proposes to include confidentiality terms and conditions as these terms seek to ensure that confidential information used or obtained in the course of providing access is not used to the other party's detriment. It will often be the case that one party will need to disclose confidential information to the other. Thus the ACCC considers that the confidentiality terms are fundamental commercial terms of access.

Issues raised in submissions

Optus questions the inclusion of a clause that provides access seekers with the right to invoke an audit process if it has prima facie evidence to suggest that an access provider has used the confidential information for non-legitimate reasons (2008 Model Terms, clause E.11), as it does not appear to be a standard contract term.⁹⁹ The ACCC notes that a similar submission was made during the MTAS FAD process and this clause has been removed in the DTCS FAD. The ACCC proposes adopting the same approach for the wholesale ADSL service.

Herbert Geer submits that it is not practical to destroy confidential information stored in back-up systems.¹⁰⁰ The extent to which such an issue arises is not currently clear to the ACCC.

⁹⁷ Herbert Geer submission in response to the February FAD Discussion Paper, p.17.

This submission relates to Appendix E, clause 4.9 and the equivalent term in the 2008 Model Terms, clause D.9.

⁹⁸ Telstra submission in response to the February FAD Discussion Paper, Pub. p.27.

⁹⁹ Optus submission in response to the February FAD Discussion Paper, Pub. p.18.

¹⁰⁰ Herbert Geer submission in response to the February FAD Discussion Paper, p.17.

Questions on which the ACCC seeks views:

46. Do you consider it impractical to destroy confidential information stored in back-up systems? If so, for the purpose of the wholesale ADSL FAD, what amendments are required to clause 7 of Annexure 1 of Schedule 5 in **Appendix E**?
47. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to confidentiality?
48. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

9.3.5 Communications with end-users***Overview***

The ACCC proposes to include communications with end-users terms and conditions as these terms provide an assurance to access seekers that any marketing to end-users will be done appropriately, and that an access provider will not use its control over the network to ‘win back’ end-user customers. While such terms were not included in the DTCS FAD, the ACCC considers that such terms may be important for the wholesale ADSL service given the dominant access provider is vertically integrated.

Issues raised in submissions

Herbert Geer submits that the 2008 Model Terms contain an unintended ambiguity allowing the access provider to contact and market to an access seeker’s end-user in relation to goods and services that the access provider previously supplied to the end-user (2008 Model Terms, clause F.2(a)).¹⁰¹ The ACCC notes that the 2008 Model Terms clause F.3(a) prohibits the access provider from marketing to the access seeker’s end-user.

Optus submits that a clause to make and maintain a record of each communication had with another party’s end-user would be impractical and onerous (2008 Model Terms, clause F.4).¹⁰² The ACCC considers that appropriate record-keeping can help ensure compliance but seeks submissions on whether clause F.4 imposes a cost burden upon parties.

Questions on which the ACCC seeks views:

49. Is there any ambiguity under clause F.2(a) regarding marketing by the access provider to the access seeker’s end-user? If so, does clause F.3(a) resolve this ambiguity?
50. Does the record keeping requirement under clause F.4 impose a cost burden upon parties? If so, what amendments are required to clause F.4 to alleviate this cost burden?

This submission relates to Appendix E, clause 7 of Annexure 1 of Schedule 5 and the identical term in the 2008 Model Terms, clause 7 of the Confidential Undertaking.

¹⁰¹ Ibid, p.18.

¹⁰² Optus submission in response to the February FAD Discussion Paper, Pub. p.18.

51. Should the ACCC include terms and conditions relating to communications with end-users in the FAD?
52. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as they currently stand in the 2008 Model Terms with regards to communications with end-users?
53. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

9.3.6 Suspension and termination

Overview

The suspension and termination terms and conditions establish the circumstances in which an access provider may suspend or terminate a service of an access seeker, including timeframes for an access seeker to rectify their conduct.

The ACCC proposes to include suspension and termination terms and conditions as these terms provide an assurance to access seekers that their service will not be indiscriminately suspended or terminated inappropriately. The ACCC considers that the suspension and termination terms are fundamental commercial terms of access.

Issues raised in submissions

Optus is concerned that remedial actions requested by an access provider might take longer than 20 business days. Optus notes the proposed termination provisions give the access provider the right to terminate in the event of a billing dispute on hand and the provisions do not address an access seeker's entitlement to terminate as a result of contractual breaches of the access provider.¹⁰³

To address these concerns, Optus submits that amendments should be made to deal with suspension and termination by access seekers, to ensure the service does not terminate when there is a billing dispute on hand, and to allow the 20 business days period to be extended when reasonably required.¹⁰⁴

Herbert Geer submits that the 2008 Model Terms are too broad to reasonably protect the interests of the access provider as the access provider has the right to suspend an access seeker's services if the access seeker's use of facilities is in contravention of any law.¹⁰⁵

Herbert Geer proposes amendments to make clear that the access provider cannot suspend a service where the contravention of a law is unrelated to the access provider's provision of a

¹⁰³ Optus submission in response to the February FAD Discussion Paper, Pub. p.18.

This submission relates to Appendix E, clause 6.2 and the equivalent term in the 2008 Model Terms, clause H.2.

¹⁰⁴ Ibid.

¹⁰⁵ Herbert Geer submission in response to the February FAD Discussion Paper, pp.19-20.

This submission relates to Appendix E, clause 6.2(b) and the equivalent term in the 2008 Model Terms, clause H.2(b).

facility, and where the access provider unilaterally decides the access seeker's use of facilities is in contravention of a law without this view being supported by a court.¹⁰⁶

The ACCC considers that these submissions raise important issues regarding Telstra's ability to unilaterally terminate the service in particular circumstances. However, the ACCC also considers that the suspension and termination clauses are important for the access provider as it is a means by which the access provider can protect its legitimate business interests in achieving a normal return on its investment, having regard to relevant risks.

Questions on which the ACCC seeks views:

54. For the purpose of the wholesale ADSL FAD, are amendments required to clause 6.2 of **Appendix E** to ensure the interests of access seekers are balanced with the legitimate business interests of the access provider?
55. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to suspension and termination?
56. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

9.3.7 Liability (risk allocation) provisions

Overview

The liability and indemnity terms and conditions set out who should be responsible for damage to property or personal injury (i.e. to make repairs and/or compensate parties that have suffered loss). These terms can also set caps on liability and require parties to limit their losses to the extent they are able.

The ACCC notes that the liability and indemnity terms and conditions were not included in the wholesale ADSL IAD but are included in the DTCS FAD. Whilst the ACCC previously considered that these terms appeared to be less relevant to the wholesale ADSL service, it notes that the relative bargaining positions of access seekers and the access provider may warrant the inclusion of liability provisions in the wholesale ADSL FAD.

Issues raised in submissions

Submissions from Herbert Geer and AAPT propose amendments to various liability and indemnity terms (2008 Model Terms, Section C). These parties submit that they consider that liability provisions included in the commercial terms offered by Telstra are invariably one-sided in Telstra's favour, and therefore it would be appropriate if access seekers can avail themselves of even handed liability provisions.¹⁰⁷ The ACCC notes that the liability and indemnity terms and conditions included in the DTCS FAD (**Appendix E**, Schedule 7) have made many modifications to the 2008 Model Terms.

¹⁰⁶ Ibid.

¹⁰⁷ Herbert Geer submission in response to the February FAD Discussion Paper, pp.16-17; AAPT submission in response to the February FAD Discussion Paper, pp.11-13.

Questions on which the ACCC seeks views:

57. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to liability and indemnity?
58. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

9.3.8 Ordering and provisioning and changes to operational manuals***Overview***

The wholesale ADSL IAD does not contain terms on ordering and provisioning or on changes to operational manuals.

The ordering and provisioning terms and conditions in the 2008 Model Terms set out how service orders are to be placed and how those orders are to be fulfilled. The 2008 Model terms and conditions regarding changes to operational manuals deal with the ability of an access provider to vary operational manuals setting out certain processes, including ordering and provisioning. The 2008 Model Terms allowed the access provider to amend its standard processes subject to notice and consultation requirements, and provided a means of dispute resolution.

As the 2008 Model Terms are drafted with specific reference to the ULLS service, these terms were not included in the wholesale ADSL IAD and are also not included in the DTCS FAD.

Issues raised in submissions

Herbert Geer and AAPT submit that whilst the 2008 Model Terms are drafted with specific reference to the ULLS and are not relevant to the wholesale ADSL service, this does not mean that the wholesale ADSL FAD should not contain terms and conditions that relate to service delivery and fault rectification.¹⁰⁸

Herbert Geer and AAPT further submit that, in light of the ACCC's acceptance of the SSU, it would be appropriate for the wholesale ADSL FAD to incorporate the following commitments made by Telstra in the SSU that relate to service delivery and fault rectification as relevant to wholesale ADSL:¹⁰⁹

- Overarching equivalence commitment (Clause 9 SSU) (i.e. Telstra will provide wholesale ADSL on an equivalence of outputs basis as compared to the Layer 2 component of Telstra's Retail ADSL service)

¹⁰⁸ Herbert Geer submission in response to the February FAD Discussion Paper, p.21; AAPT submission in response to the February FAD Discussion Paper, p.15.

¹⁰⁹ Herbert Geer submission in response to the February FAD Discussion Paper, p.21; AAPT submission in response to the February FAD Discussion Paper, p.15.

- DSL upgrades (Clause 15 SSU) (i.e. if Telstra develops a naked DSL product it will offer the wholesale naked DSL product to wholesale customers)
- Equivalence and transparency metrics (Schedule 3 SSU) (i.e. the service levels that relate to the wholesale ADSL service)

In addition, Herbert Geer and AAPT submit that the FAD should acknowledge that access seekers may have statutory entitlements under the *Telecommunications (Consumer Protection and Service Standards) Act 1999* in respect of provisioning and fault rectification.¹¹⁰

Optus submits that provisions on changes to operating manuals should be included in the FAD to ensure Telstra is not entitled to amend an operational manual on a unilateral basis.¹¹¹ Herbert Geer and AAPT submit that the FAD should include modified provisions of the 2008 Model Terms that prevent Telstra from making changes to operational documents without sufficient notice to, and consultation with, access seekers (2008 Model Terms, Section I).¹¹²

Discussion

The ACCC considers that the ordering and provisioning terms and conditions are important to the terms of access and the submissions received to date suggest there is the potential for disputation around these terms. Providing reasonable terms and conditions regarding ordering and provisioning may therefore help provide a basic framework of key non-price terms.

There are a range of ways the FAD could set out terms for ordering and provisioning.

One way would be to incorporate Telstra's existing SSU commitments. As noted in section 4.3, the ACCC must not perform a function, or exercise a power, under Part XIC that would prevent Telstra from complying with the SSU. Replicating the existing commitments could provide greater clarity to parties and allow these obligations to be directly enforced by access seekers.

However, some of Telstra's commitments – such as the overarching equivalence commitment – detail a process of rectification to be administered by the ACCC. In these circumstances, incorporating a provision of the SSU into the wholesale ADSL FAD may change the nature of the commitment and be impractical to administer. Terms and conditions regarding DSL upgrades would appear to relate to technical equivalence, and not the terms and conditions on which access seekers order or provision a service. The equivalence and transparency metrics could provide a baseline for the development of timeframes for ordering and provisioning, but as provided for in the SSU are primarily designed to measure and incentivise operational equivalence.

The FAD could make reference to existing operational manuals. A number of submissions suggested it would be necessary to place limits on the circumstances in which an access-

¹¹⁰ Herbert Geer submission in response to the February FAD Discussion Paper, p.21; AAPT submission in response to the February FAD Discussion Paper, p.15.

¹¹¹ Optus submission in response to the February FAD Discussion Paper, Pub. p.20.

¹¹² Herbert Geer submission in response to the February FAD Discussion Paper, pp.20-21; AAPT submission in response to the February FAD Discussion Paper, p.14.

provider can amend these operational manuals. One model for such limitations could be Section I of the 2008 Model Non-Price Terms.

Questions on which the ACCC seeks views:

59. Should the ACCC include terms and conditions relating to ordering and provisioning in the FAD? How should these terms be included?
60. Should the ACCC include terms and conditions relating to changes to operating manuals in the FAD? How should these terms be included?
61. For the purpose of the wholesale ADSL FAD, should the ACCC replicate the relevant terms in the SSU with regards to ordering and provisioning?

9.3.9 Network modernisation and upgrade provisions

Overview

The network modernisation and upgrade terms and conditions deal with managing service disruptions and any adverse consequences of network disruptions which may impact on the availability or quality of services. The ACCC considers that these terms may be relevant to the wholesale ADSL service given the dominant access provider is vertically integrated. These terms were not included in the wholesale ADSL IAD.

Issues raised in submissions

Submissions from Herbert Geer, AAPT and Optus propose including network modernisation and upgrade provisions and particular amendments to the 2008 Model Terms (2008 Model Terms, Section G).¹¹³

The ACCC notes that the network notifications clauses¹¹⁴ in the SSU already include terms relating to network modernisation and upgrade that are applicable to the wholesale ADSL service. As noted above, as Telstra is required to comply with the SSU including these terms may not change Telstra's substantive obligations but including these terms in an FAD may provide greater clarity to parties as to all of Telstra's obligations.

However, the ACCC could specify further network modernisation and upgrade provisions through the FAD based on a consideration of the matters set out in s. 152BCA.

Questions on which the ACCC seeks views:

62. Should the ACCC include terms and conditions relating to network modernisation and upgrade provisions in the FAD? Please take into account any overlap with similar terms in the SSU in your response.

¹¹³ Herbert Geer submission in response to the February FAD Discussion Paper, pp.18-19; AAPT submission in response to the February FAD Discussion Paper, p.13; Optus submission in response to the February FAD Discussion Paper, Pub. pp.19-20.

¹¹⁴ Clause 14.3 and Schedule 4 of the SSU.

63. If you consider terms and conditions relating to network modernisation and upgrade provisions should be included in the FAD, how do you consider specific clauses should be drafted?

10 Other issues for consideration in this inquiry

There are some other issues under consideration in this FAD inquiry on which the ACCC has sought submissions. The ACCC will consider submissions received in making its draft determination but does not require further submissions on these matters at this stage. The ACCC intends to further consult on its position after making a draft determination. These other issues, and the relevant submissions, are outlined below.

10.1 Restrictions on resale

10.1.1 Overview of issue

The IAD currently provides that the wholesale ADSL service can be acquired on the terms specified in the IAD for the purpose of resale, and that an access seeker is not required to notify Telstra when it acquires or seeks to acquire wholesale ADSL for supply to a reseller nor seek Telstra's consent to that resale arrangement.

The ACCC included this term in the IAD in order to respond to concerns that commercial offers of access to the wholesale ADSL service have sought to restrict or impede use of the wholesale ADSL service for the purpose of supplying services to a reseller. Such terms and conditions would appear to have the potential to limit competition in the wholesale fixed line broadband market.

The FAD discussion paper sought submissions on whether such a term should be included in the FAD.

10.1.2 Submissions

Telstra submits that the terms in the IAD, allowing the wholesale ADSL service to be acquired for resale, should not be included in the FAD as reseller clauses, which subject resellers to Telstra's terms and conditions of access, are important in ensuring Telstra's network and the supply of its wholesale ADSL service are not compromised in any way and, if they are compromised, that remedial action is promptly taken.¹¹⁵ Telstra further submits that, in commercial negotiations with access seekers, Telstra is not preventing access seekers from reselling its wholesale ADSL service but, rather, has negotiated to ensure the access seeker will procure compliance by the reseller with Telstra's terms and conditions.¹¹⁶

AAPT and Herbert Geer (on behalf of Adam Internet, iiNet, Internode, Primus and TransACT) submit that the terms in the IAD allowing the wholesale ADSL service to be

¹¹⁵ Telstra submission in response to the February FAD Discussion Paper, Pub. p.24.

¹¹⁶ Ibid.

acquired for resale are appropriate, are required to promote competition and should be included in the FAD.¹¹⁷

Optus submits that the terms in the IAD allowing the wholesale ADSL service to be acquired for resale should be included in the FAD as it ensures that competition in the wholesale and retail broadband market will be promoted.¹¹⁸ Optus further submits that these terms will ensure that Telstra is restricted from discriminating between different access seekers by placing restrictions on resale.¹¹⁹

Vocus submits that the terms in the IAD allowing the wholesale ADSL service to be acquired for resale should be included in the FAD as this will promote competition in wholesale markets and have flow on effects in the downstream retail markets.¹²⁰ Vocus further submits that stimulating competition in this way will obviously better promote the LTIE than stifling competition by allowing restrictions on reselling.¹²¹

10.1.3 ACCC's preliminary view on including resale services terms and conditions in the FAD

The ACCC's current view is that contractual terms restricting resale may impede the development of competition in relevant wholesale markets. Accordingly, the ACCC considers that the terms allowing the wholesale ADSL service to be acquired for resale may be consistent with the statutory criteria. The ACCC's primary concern is that restrictions on resale are not relied upon to restrict competition. In that context, it may be appropriate to provide terms and conditions that allow the wholesale ADSL service to be acquired for resale whilst ensuring the access provider's network and supply of its wholesale ADSL service are not compromised.

The ACCC intends to further consult on this issue after issuing a draft FAD.

10.2 Business grade services

In the February FAD Discussion Paper the ACCC flagged the potential to include non-price terms and conditions 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 ADSL services to business end-users. The ACCC notes that such terms would need to relate to the wholesale ADSL service as declared, which is an asymmetrical "internet grade, best efforts...service." As the ACCC has not received submissions that such terms should be specifically included, the ACCC's preliminary view is to not include such terms. If these terms should be the subject to dispute in the future, the ACCC could vary the FAD or have recourse to its BROCC powers (if there was an urgent need to do so) to set additional terms for the wholesale ADSL service.

¹¹⁷ AAPT submission in response to the February FAD Discussion Paper, p.16; Herbert Geer submission in response to the February FAD Discussion Paper, p.23.

¹¹⁸ Optus submission in response to the February FAD Discussion Paper, Pub. p.19.

¹¹⁹ Ibid.

¹²⁰ Vocus submission in response to the February FAD Discussion Paper, p.5.

¹²¹ Ibid.

10.3 Commencement and expiry of the FAD

10.3.1 Issue

A FAD comes into force on the day specified in the FAD. The ACCC notes that the commencement date may be backdated to before the day on which the FAD was made, up to 1 January 2011.¹²² However, as the FAD is to replace the IAD, and the wholesale ADSL service is covered by a declaration under s 152AL, the commencement date of the FAD must not be earlier than the date of declaration.¹²³

An FAD must have an expiry date. In specifying an expiry date, the ACCC 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 ACCC's opinion, there are circumstances that warrant a different expiry date.¹²⁴ The ACCC may also have regard to such other matters (if any) as the ACCC considers relevant. The declaration for the wholesale ADSL 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.

10.3.2 Submissions

Commencement

Telstra submits that it would not be appropriate for the FAD to apply on and from the date of publication of the FAD because Telstra will need sufficient time to implement the various price and non-price terms.¹²⁵ Accordingly, Telstra submits that the FAD should commence 21 days after the date on which it is published by the ACCC.¹²⁶

Herbert Geer (on behalf of Adam Internet, iiNet, Internode, Primus and TransACT) submits that the interpretation of the mandatory criteria that the ACCC will have regard to in making the FAD in, for example, September 2012 are unlikely to be any different to the circumstances in February 2012 and it is very likely the same result will be reached.¹²⁷ Accordingly, Herbert Geer submits that the FAD should commence on the date of declaration of the wholesale ADSL service as the application of the mandatory criteria requires that the FAD is backdated to the date of declaration.¹²⁸

Expiry

Telstra submits that an earlier expiry date of 31 July 2014 is warranted in the circumstances as this would provide an opportunity for the ACCC and industry to assess whether or not the

¹²² Sections 152BCF(2) and (2A) of the CCA.

¹²³ Section 152BCF(4A) of the CCA.

¹²⁴ Section 152BCF(6) of the CCA.

¹²⁵ Telstra submission in response to the February FAD Discussion Paper, Pub. p.28.

¹²⁶ Ibid.

¹²⁷ Herbert Geer submission in response to the February FAD Discussion Paper, p.31.

¹²⁸ Ibid.

terms of the FAD continue to be appropriate given the continued roll out of the NBN.¹²⁹ Telstra further submits that an expiry date of 31 July 2014 aligns with the expiry date of the FADs for the fixed line services, and balances the need for sufficient certainty for the industry as well as flexibility to reassess the terms of the FAD in light of the continued roll out of the NBN.¹³⁰

Macquarie Telecom submits that a two year time period would provide an appropriate balance between providing access seekers with regulatory certainty against the need to ensure that regulatory settings are relevant to contemporary market conditions.¹³¹ Macquarie Telecom further submits that, as price terms must be reasonably contemporary, price terms of the FAD should be reviewed no later than two years after they have been set.¹³²

Optus submits that a shorter expiry date should be set for the FAD and proposes a three year period for the FAD.¹³³ Optus further submits that a shorter regulatory period will allow for changes to be incorporated into prices closer to the date when they are known; as such, costs are more accurately forecast which reduces risks to both AS and access provider.¹³⁴

Herbert Geer submits that the FAD should expire on 1 July 2018, the designated day by which Telstra should not be in control of a fixed line network providing services to retail customers.¹³⁵

AAPT submits that it would substantially increase regulatory certainty if the term of the FAD was consistent with the term of the transparency and equivalence obligations under the SSU.¹³⁶ Accordingly, AAPT submits that given the transparency and equivalence obligations under the SSU run until the designated day, the FAD should also run until then.¹³⁷

10.3.3 Discussion

The ACCC will consider the above submissions and consult on a proposed commencement and expiry date when it makes a draft determination. The ACCC considers that this will allow the ACCC to commence consultation on duration at the same time as it consults on the proposed substantive terms of the FAD.

One option could be to set a five year term for the FAD but review the price terms at an earlier stage. The ACCC can commence a variation inquiry at any time during the life of the FAD.

¹²⁹ Telstra submission in response to the February FAD Discussion Paper, Pub. p.28.

¹³⁰ Ibid.

¹³¹ Macquarie Telecom submission in response to the February FAD Discussion Paper, p.8.

¹³² Ibid.

¹³³ Optus submission in response to the February FAD Discussion Paper, Pub. p.24.

¹³⁴ Ibid, p.25.

¹³⁵ Herbert Geer submission in response to the February FAD Discussion Paper, p.32.

¹³⁶ AAPT submission in response to the February FAD Discussion Paper, p.16.

¹³⁷ Ibid, pp.16-17.

Consolidated list of questions for comment

Chapter 6: Scope of the application of the standard access obligations

1. Do you agree with the approach to considering the need for backdating of a FAD that is reflected above?
2. Telstra has proposed one way a term or condition exempting certain geographic areas could be delineated. The ACCC seeks submissions on Telstra's proposed test and submissions on alternative measures of where competition is effective.
3. Are there any limits, other than large pair gain systems, on the substitutability of ULLS and LSS-based services for wholesale ADSL?
4. To what extent does the use of LPGS in the CAN limit the competitive constraint posed by infrastructure based alternatives?
5. How should the ACCC take into account the existence of LPGS in making terms and conditions for the wholesale ADSL service?
6. *Telstra*: What forward-looking plans does Telstra have regarding the use of pair gain systems on the CAN?
7. What market evidence is there that the availability of substitutes has acted as a competitive constraint on Telstra's terms and conditions in relation to the wholesale ADSL service in particular ESAs?
8. If the FAD was to provide a geographic exemption in ESAs that have attracted a higher degree of infrastructure-based investment, do you consider that Telstra would be likely to:
 - (a) charge prices for wholesale ADSL that are above competitive levels in all ESAs?
 - (b) engage in inefficient price discrimination?
 - (c) impose anti-competitive terms and conditions of supply? If so, what terms?Please provide evidence in support of your response.
9. Some submissions consider that geographic exemptions could affect market outcomes in other geographic areas. How so?
10. What does market shares and the market conduct of non-dominant network providers indicate about the degree of competitive constraint non-dominant network providers face?
11. Would applying the SAOs to non-dominant network providers promote competition? How would a term exempting non-dominant network providers from the SAOs promote competition?

12. How would terms and conditions providing geographic exemptions or carrier-specific exemptions affect the efficient use of existing infrastructure by access seekers and access providers?
13. The ACCC considers that the application of the SAOs would not have a material negative effect on the deployment of competing DSLAMs and that where it is efficient to do access seekers will continue to invest in DSLAMs. The ACCC seeks any relevant submissions on this view.
14. *Access seekers*: Do you intend to still use existing DSLAMs? Will you decommission any DSLAMs if the SAOs apply to Telstra in particular ESAs? In those ESAs where you have existing infrastructure, will you supply retail ADSL based on your own DSLAM infrastructure or based on wholesale ADSL inputs?
15. *Access seekers*: What are your current plans to invest in DSLAM and other infrastructure? In the context of considering geographic exemptions, submitters should consider their likely investment within the existing competitive footprint and/or at ESAs that have a number of access-seekers present rather than expansion of the competitive footprint.
16. Is the *application of the SAOs* to Telstra in particular ESAs likely to reduce Telstra's incentives to efficiently invest in infrastructure?
17. How would exemptions (geographic or carrier-specific) affect the legitimate business interests of access providers (including potential access providers) and the access providers' investments in facilities?
18. *Access providers (DSLAM network operators)*: Do you currently supply wholesale ADSL services to third parties?
19. *Access providers (DSLAM network operators)*: What would be the direct costs associated with providing access to the declared service to others upon reasonable request? For example, costs associated in provisioning and billing the service to access seekers. To what extent do you currently incur these costs?
20. The ACCC seeks information on:
 - (a) Whether the costs involved in supplying and charging for the services are reasonable or likely to become reasonable; and
 - (b) the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks
21. What are the costs of switching between wholesale ADSL providers?
22. If you currently acquire wholesale ADSL services from a provider other than Telstra, are you concerned about the application of the SAOs to that carrier provided in areas where those obligations apply to Telstra?

Chapter 7: Bundling with PSTN services

23. Do you agree with the ACCC's preliminary assessment of the benefits of unbundling the PSTN service from the wholesale ADSL service?
24. Do you consider that a 'hybrid' option would have the same potential to promote competition as 'full' unbundling?
25. What proportion of your total ADSL SIOs are attributable to a naked ADSL product?
26. Would 'full' unbundling result in any economic efficiency gains?
27. Would a 'hybrid' unbundling approach result in any economic efficiency gains?
28. *Telstra*: What specific core systems/platform limitations prevent Telstra from offering a naked ADSL service?
29. To what extent do you consider that 'full' unbundling or the 'hybrid' option takes into account the considerations under s. 152BCA?
30. What are your experiences with regards to the effect on the quality of service without a PSTN service on the line?
31. *Access seekers*: What system modifications were undertaken to enable a naked ADSL service to be provided? What costs were involved in the systems development process?

Chapter 8: Points of interconnection for the wholesale ADSL service

32. What are the likely costs and benefits associated with establishing additional points of interconnection?
33. *Transmission network operators*: Would you use your transmission networks to transport wholesale ADSL data should additional points of interconnection be specified for the wholesale ADSL service? Would you invest further in transmission networks if the wholesale ADSL FAD provided for additional points of interconnection for the wholesale ADSL service?

Chapter 9: General non-price terms and conditions

34. For the purpose of the wholesale ADSL FAD, are amendments required to the timeframe in clause 2.4 of **Appendix E**? If so, should the timeframes in clause 2.4 of **Appendix E** be consistent with the TCP Code? What if a new code is registered that provides a different timeframe?
35. For the purpose of the wholesale ADSL FAD, should the timeframe for raising billing disputes be made consistent with the TIO timeframe?
36. For the purpose of the wholesale ADSL FAD, are amendments required to the timeframe in clause 2.14 of **Appendix E**?

37. For the purpose of the wholesale ADSL FAD, are further refinements required to clauses 2.4 and 2.16 in **Appendix E**?
38. Is there a drafting inconsistency between clauses 2.6 and 2.12 in **Appendix E**? If so, what amendments are required to ensure consistency between these two clauses in the wholesale ADSL FAD?
39. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to billing and notification?
40. If you consider amendments should be made, how do you consider specific clauses should be redrafted?
41. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to creditworthiness and security?
42. If you consider amendments should be made, how do you consider specific clauses should be redrafted?
43. For the purpose of the wholesale ADSL FAD, should a timeframe be included in **Appendix E**, clause 4.9? If so, what should the timeframe be?
44. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to general dispute resolution procedures?
45. If you consider amendments should be made, how do you consider specific clauses should be redrafted?
46. Do you consider it impractical to destroy confidential information stored in back-up systems? If so, for the purpose of the wholesale ADSL FAD, what amendments are required to clause 7 of Annexure 1 of Schedule 5 in **Appendix E**?
47. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to confidentiality?
48. If you consider amendments should be made, how do you consider specific clauses should be redrafted?
49. Is there any ambiguity under clause F.2(a) regarding marketing by the access provider to the access seeker's end-user? If so, does clause F.3(a) resolve this ambiguity?
50. Does the record keeping requirement under clause F.4 impose a cost burden upon parties? If so, what amendments are required to clause F.4 to alleviate this cost burden?
51. Should the ACCC include terms and conditions relating to communications with end-users in the FAD?

52. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as they currently stand in the 2008 Model Terms with regards to communications with end-users?
53. If you consider amendments should be made, how do you consider specific clauses should be redrafted?
54. For the purpose of the wholesale ADSL FAD, are amendments required to clause 6.2 of **Appendix E** to ensure the interests of access seekers are balanced with the legitimate business interests of the access provider?
55. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to suspension and termination?
56. If you consider amendments should be made, how do you consider specific clauses should be redrafted?
57. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to liability and indemnity?
58. If you consider amendments should be made, how do you consider specific clauses should be redrafted?
59. Should the ACCC include terms and conditions relating to ordering and provisioning in the FAD? How should these terms be included?
60. Should the ACCC include terms and conditions relating to changes to operating manuals in the FAD? How should these terms be included?
61. For the purpose of the wholesale ADSL FAD, should the ACCC replicate the relevant terms in the SSU with regards to ordering and provisioning?
62. Should the ACCC include terms and conditions relating to network modernisation and upgrade provisions in the FAD? Please take into account any overlap with similar terms in the SSU in your response.
63. If you consider terms and conditions relating to network modernisation and upgrade provisions should be included in the FAD, how do you consider specific clauses should be drafted?

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Appendix A	Service description for the wholesale ADSL service
Appendix B	The legislative framework for making this final access determination.
Appendix C	Telstra's Structural Separation Undertaking
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Appendix E	Non-price terms and conditions from the DTCS FAD

Appendix A: Service description for the Wholesale ADSL service

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 B: The ACCC's approach to applying the statutory framework

Overview of legislative provisions

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 any or all of the SAOs applicable to the carrier or provider and any other terms and conditions of access to a declared service. An FAD may make different provision with respect to different access providers or access seekers.¹³⁸

The ACCC must take into account the following matters when making an FAD:

- (a) whether the determination will promote the LTIE of carriage services or services supplied by means of carriage services
- (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.

These matters mirror the repealed criteria that the ACCC was required to take into account in making a final determination (FD) in an access dispute.¹³⁹ In making FADs, the ACCC has interpreted the matters above in a similar manner to how these matters were interpreted under the repealed legislative regime. In this summary of the ACCC's approach, the ACCC has referred to relevant Australian Competition Tribunal authority and past ACCC decisions where relevant.

In addition to the above matters, the CCA sets out other matters the ACCC "may" take into account.¹⁴⁰ The ACCC may also take into account any other matters that it thinks are relevant.¹⁴¹

Summary of submissions

The February FAD Discussion Paper sought submissions on:

¹³⁸ Section 152BC(5) of the CCA.

¹³⁹ Section 152CR(1) repealed by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*

¹⁴⁰ Section 152BCA(2) of the CCA.

¹⁴¹ Section 152BCA(3) of the CCA.

- how the mandatory criteria should be interpreted for the purposes of making the wholesale ADSL FAD;
- what other matters should be considered, and
- what markets should be considered in applying the mandatory criteria to this FAD

The ACCC received a number of submissions in response to these questions. These are summarised below.

Telstra submits that in weighing up the mandatory relevant considerations set out in section 152BCA, the ACCC cannot “jettison or ignore” any mandatory consideration, or “give it cursory consideration only in order to put it to one side”.¹⁴² With regards to the LTIE, Telstra submits that, given that one of the ACCC’s objectives is to promote investment, regard has to be directed to the impact of the FAD on investment decisions by access providers and access seekers.¹⁴³ Telstra also submits that the ACCC must give fundamental weight to the access provider’s direct costs of implementation and such a consideration militates against the ACCC imposing obligations where there are substantial implementation costs or increased risks and the obligations would not promote the LTIE to any significant extent.¹⁴⁴

Vocus submits that “the interests of 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”¹⁴⁵ is the outcome that promotes the LTIE.¹⁴⁶ Vocus further submits that, given the nature of the outcome that the LTIE test is intended to achieve, adopting an approach to setting access prices which is overly generous to Telstra cannot be in the LTIE because it will not achieve an outcome whereby end users can obtain the best possible services at the lowest possible prices.¹⁴⁷

Herbert Geer submits that, in giving consideration to the criteria in section 152BCA, the ACCC should ask itself, when setting wholesale ADSL prices, what is the lowest price that can be set which will allow Telstra to recover its reasonable costs in providing wholesale ADSL access (including capital costs).¹⁴⁸ Herbert Geer further submits that setting the lowest possible wholesale ADSL price will promote efficient competition, and if Telstra is permitted to recover its reasonable costs, its legitimate business interests will be fulfilled and it will have sufficient incentive to make the necessary investments in its infrastructure.¹⁴⁹

AAPT submits that the considerations in section 152BCA need to be seen in light of the sole objective of Part XIC, which is to promote the LTIE.¹⁵⁰ AAPT further submits that in setting terms for the FAD, the ACCC should seek to achieve the outcomes that best promote the LTIE as described by the Australian Competition Tribunal in *Re Seven Network Limited (No 4)*.¹⁵¹

¹⁴² Telstra submission in response to the February FAD Discussion Paper, Pub. p.33.

¹⁴³ Ibid, p.34.

¹⁴⁴ Ibid.

¹⁴⁵ *Re Seven Network Limited (No 4)* [2004] ACompT 11, at [120].

¹⁴⁶ Vocus submission in response to the February FAD Discussion Paper, p.2.

¹⁴⁷ Ibid.

¹⁴⁸ Herbert Geer submission in response to the February FAD Discussion Paper, p.4.

¹⁴⁹ Ibid, pp.4-5.

¹⁵⁰ AAPT submission in response to the February FAD Discussion Paper, p.3.

¹⁵¹ Ibid.

Macquarie Telecom submits its views on how each of the criteria in section 152BCA should apply to the wholesale ADSL FAD.¹⁵²

Optus submits that it supports the ACCC's proposed approach described in Appendix 2 of the February 2012 FAD Discussion Paper.¹⁵³

In relation to the markets that should be considered in applying the mandatory criteria, Optus submits that the FAD will most likely affect the retail and wholesale markets for the supply of fixed line broadband services.¹⁵⁴ Herbert Geer submits that the relevant retail and wholesale markets include high speed broadband services, including copper, HFC and optic fibre services.¹⁵⁵ Macquarie Telecom submits that the relevant market is a national market for downstream (retail) fixed network broadband services that includes both ADSL and substitutable services, which include HFC and optic fibre networks.¹⁵⁶

Long Term Interests of End Users

The first matter the ACCC must take into account in making an access determination is whether the determination will promote the LTIE of carriage services or services supplied by means of carriage services.

This matter is also the object of Part XIC.¹⁵⁷ 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.¹⁵⁸ The ACCC considers that the same interpretation is appropriate for making access determinations

In determining whether a particular thing promotes the LTIE the CCA requires the ACCC to have regard to the extent to which the thing is likely to result in the achievement of the following objectives:

- 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.¹⁵⁹

¹⁵² Macquarie Telecom submission in response to the February FAD Discussion Paper, p.2-3.

¹⁵³ Optus submission in response to the February FAD Discussion Paper, Pub. p.4.

¹⁵⁴ Ibid.

¹⁵⁵ Herbert Geer submission in response to the February FAD Discussion Paper, p.5.

¹⁵⁶ Macquarie Telecom submission in response to the February FAD Discussion Paper, p.4.

¹⁵⁷ Section 152AB of the CCA.

¹⁵⁸ 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.

¹⁵⁹ Section 152AB(2) of the CCA.

Promotion of competition

In taking into account whether something is likely to achieve the objective of promoting competition in listed markets the ACCC first identifies markets likely to be affected by the service declaration, then assesses the current state of competition in those markets, then considers the likely future state of competition in the relevant market/s with and without the proposed regulatory intervention.

Market definition

The CCA directs the ACCC's attention to the markets in which competition may be promoted. The ACCC may consider both the market in which wholesale ADSL is or would be supplied, and downstream markets in which competition may be promoted.

A market includes any goods or services that are substitutable for, or otherwise competitive with, the goods and services under analysis.¹⁶⁰ Typically, the ACCC considers the product, geographic, functional and temporal dimensions of a market.

The ACCC is not required to precisely define the scope of the relevant markets when taking into account whether the access determination will promote the LTIE. 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.

For the purpose of making an FAD for the wholesale ADSL service the ACCC proposes to adopt the same markets it used in the declaration inquiry. These are national wholesale and retail markets for fixed line broadband internet services.

The ACCC gave detailed consideration to the relevant markets in the declaration inquiry and considered that these markets were supported by market evidence.

Promotes Competition

In assessing whether terms and conditions of an access determination will promote competition, the ACCC will consider whether the terms set for the wholesale ADSL service remove obstacles to end-users gaining access to listed services.¹⁶¹ The ACCC considers that obstacles to accessing relevant services include the price, quality and availability of the services and the ability of competing providers those services.

For example, in the context of this inquiry it is relevant to consider how terms could result in increased fixed line broadband offerings to retail consumers.

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

¹⁶⁰ Section 4E of the CCA.

¹⁶¹ Section 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Australian Competition Tribunal in *Telstra Corporations Limited (No 3)* [2007] A CompT 3 at [92]; *Telstra Corporation Limited* [2006] A CompT at [97], [149].

the case whether or not the end-users are connected to the same telecommunications network.¹⁶²

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 for the purposes of determining the incentives for investment, regard must be had to the risks involved in making the investment.¹⁶³

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:

- 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 Australian Competition Tribunal has stated that:

¹⁶² Section 152AB(8) of the CCA.

¹⁶³ Sections 152AB(6) and (7A) of the CCA.

...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.¹⁶⁴

...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.¹⁶⁵

...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.¹⁶⁶

Legitimate business interests (s. 152BCA(1)(b))

The ACCC must take into account ‘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.¹⁶⁷ 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.¹⁶⁸

The Australian Competition Tribunal has taken a similar view of the expression ‘legitimate business interests’.¹⁶⁹

Persons who have a right to use (s. 152BCA(1)(c))

The ACCC must have regard to ‘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 Australian Competition Tribunal has also taken this approach.¹⁷⁰ 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.¹⁷¹

¹⁶⁴ *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

¹⁶⁵ *Ibid.* at [164].

¹⁶⁶ *Ibid.*

¹⁶⁷ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

¹⁶⁸ ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

¹⁶⁹ *Telstra Corporation Limited* [2006] ACompT 4 at [89].

¹⁷⁰ *Telstra Corporation Limited* [2006] ACompT 4 at [91].

¹⁷¹ *Ibid.*

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.¹⁷²

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.

Direct costs of providing access (s. 152BCA(1)(d))

The ACCC must have regard to ‘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 matter, 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 Australian Competition Tribunal’s approach.¹⁷³ 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.¹⁷⁴

The ACCC also notes that the Australian Competition Tribunal has considered the direct costs criterion ‘is concerned with ensuring that the costs of providing the service are recovered.’¹⁷⁵ The Australian Competition Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.¹⁷⁶

Extensions or enhancements of capability (s. 152BCA(1)(e))

The ACCC must 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.

¹⁷² Ibid.

¹⁷³ *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

¹⁷⁴ 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.

¹⁷⁵ *Telstra Corporation Limited* [2006] ACompT 4 at [92].

¹⁷⁶ Ibid. at [139].

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.¹⁷⁷

Safe and reliable operation (s. 152BCA(1)(f))

The ACCC must 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 matter involves consideration of whether terms of access 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.¹⁷⁸

Economically efficient operation (s.152BCA(1)(g))

The ACCC must consider ‘the economically efficient operation of a carriage service, a telecommunications network facility or a facility’ when making an FAD.

The ACCC has 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 ACCC has also noted – in the context of resolving access disputes - that the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.¹⁷⁹

Consistent with the approach taken by the Australian Competition Tribunal, the ACCC considers that in having regard to this matter, 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.¹⁸⁰

Other eligible services (s. 152BCA(2))

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,¹⁸¹ take into account:

- the characteristics of those other eligible services

¹⁷⁷ 1997 Access Pricing Principles, p. 11.

¹⁷⁸ ACCC, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

¹⁷⁹ Access Dispute Guidelines, p. 57.

¹⁸⁰ *Telstra Corporation Limited* [2006] ACompT at [94]-[95].

¹⁸¹ ‘Eligible service’ has the same meaning as in section 152AL of the CCA.

- 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 to the Bill that introduced this provision 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.¹⁸² 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.¹⁸³

Any other relevant matters (Subsection 152BCA(2))

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

For the wholesale ADSL FAD, the ACCC considers that the relevant considerations will likely be captured under the range of matters to which the ACCC must have regard.

¹⁸² Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

¹⁸³ Ibid.

Appendix C: Telstra's Structural Separation Undertaking

The ACCC is legislatively restricted from performing a function, or exercising a power, under Part XIC so as to prevent Telstra from complying with the SSU.¹⁸⁴

The ACCC accepted Telstra's SSU on 28 February 2012. As required by the *Telecommunications Act 1997* (Telco Act), that SSU sets out various commitments to apply in relation to the wholesale ADSL service during the transition to the NBN.

These are:

- Overarching equivalence commitment: A broad commitment to equivalence that supports the more specific interim equivalence and transparency commitments in the SSU.
- Price equivalence: Telstra will publish a rate card with reference prices for the wholesale ADSL service available to all access seekers.
- Non-price equivalence, including:
 - Service quality and operational quality: Telstra commits to use equivalent order management to process all ADSL service activations received from a retail business unit and wholesale customers and to rectify faults equivalently.¹⁸⁵
 - Technical quality: Telstra undertakes that if it develops a DSL upgrade it will make an equivalent upgrade to the relevant comparable wholesale ADSL service. Telstra specifically commits that if it develops a naked ADSL product it will offer the comparable product to wholesale customers.¹⁸⁶
 - Information equivalence: Commitments include how Telstra will provide information on matters likely to affect the delivery or operational quality of Wholesale ADSL.

Price terms (see chapter 5)

The SSU sets out that, if the wholesale ADSL service is declared, then the applicable "rate card price" is that set out in an ACCC access determination or binding rule of conduct. In considering Telstra's SSU, the ACCC noted that this arrangement provides assurances that access prices will promote competition and encourage economic efficiency.

Geographic Exemptions (see chapter 6)

The SSU applies to the Wholesale ADSL service as described by the service description at **Appendix A** and the *Telecommunications (Regulated Services) Determination (No .1) 2011*.

¹⁸⁴ Section 152ER(3) of the CCA.

¹⁸⁵ Clause 11.3 of the SSU.

¹⁸⁶ Clause 15 of the SSU.

Accordingly, if the ACCC exempts certain geographic areas the SSU will continue to apply to wholesale ADSL as supplied nationally.

However, the application of the price equivalence measures will differ. Telstra will publish a rate card with reference prices for the wholesale ADSL service available to all access seekers. If the ACCC chooses to exempt certain ESAs in the FAD, in those areas the reference price will be as specified in Telstra's customer terms or price list.

PSTN Bundling (see chapter 7)

Telstra has committed in the SSU that if it develops a product that "allows end-users to acquire a retail DSL service without having to also acquire a PSTN voice service supplied by Telstra over the same line" it will offer a comparable wholesale ADSL service to wholesale customers. However, this commitment only has effect in a period where wholesale ADSL is not an active declared service.

The ACCC does not consider that, should the FAD require unbundling of the PSTN and wholesale ADSL services, this would prevent Telstra from complying with its SSU commitments.

General non-price terms and conditions (see chapter 9)

In relation to non-price terms, the ACCC considers there are some areas of potential overlap between non-price terms and the SSU. The ACCC has discussed these areas in chapter 9 as appropriate.

Appendix D: “Effective Competition”

ACCC, Final Report: Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services, December 2011, p.40-42

The concept of ‘effective competition’

At the theoretical level, the concept of ‘perfect competition’ describes a market structure in which no producer or consumer has the market power to influence prices. Economic theory suggests that perfectly competitive markets have a large number of buyers and sellers, goods/services are perfect substitutes, all firms and consumers have complete knowledge about the pricing/output decisions of others and all firms can freely enter or exit the relevant market.

In reality, these conditions are rarely found in any market or industry—even those in which competition between rival firms is relatively intense. It is certainly not a realistic threshold for fixed line telecommunications markets given that:

- many services are provided by a small number of providers, in a situation where the incumbent as owner of the only ubiquitous local loop remains the predominant provider of most (if not all) essential inputs.
- the industry is characterised by economies of scale, scope and density over large ranges of outputs.
- services are often differentiated from each other.
- there are constantly evolving service types and network technologies.

The concept of ‘effective competition’ recognises the practical limitations of the theory of perfect competition. Definitions of such standard are always difficult, but some characteristics can be highlighted.¹⁸⁷ Effective competition:

- is more than the mere threat of competition—it requires that competitors be active in the market, holding a reasonably sustainable market position
- requires, that, over the long run, prices are determined by underlying costs rather than the existence of market power (a party may hold a degree of market power from time to time)
- requires that barriers to entry are sufficiently low and that any degree of market power will be competed away in the long run, so that any degree of market power is only transitory
- requires that there be ‘independent rivalry in all dimensions of the price/product/service [package]’,¹⁸⁸ and
- does not preclude one party holding a degree of market power from time to time, but that power should ‘pose no significant risk to present and future competition’.¹⁸⁹

¹⁸⁷ This is not intended to be an exhaustive characterisation of effective competition.

¹⁸⁸ Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd (1976) 25 FLR 169.

¹⁸⁹ In general, however, market power must not be used in a way that would constitute a ‘misuse of market power’.

These five factors are indicators of the extent to which competition constrains the market participants to supply products and services of a given quality at prices that are based on efficient costs.

The OECD has referred to effective competition in telecommunications in the following way:

Effective competition is concerned not only with the ability to control prices and costs for products and/or services, but also with consumer benefits such as quality of service, a range of services available to consumers, efficient operation of firms in a market and innovative service provisions as well.¹⁹⁰

Factors which are relevant to a competition assessment

When assessing the effectiveness of competition in a particular market, the ACCC examines a range of structural and behavioural characteristics. This includes (but is not limited to) factors such as:

- structural factors, including the level of concentration in the market
- the potential for the development of competition in the market (including planned entry, the size of the addressable market and existence and height of barriers to entry, expansion or exit in the relevant markets)
- the dynamic characteristics of markets, including growth, innovation and product differentiation, as well as changes in costs and prices over time, and
- the nature and extent of vertical integration in the market.

¹⁹⁰ OECD, Indicators for the Assessment of Telecommunications Competition DSTI/ICCP/TISP, 2001, p. 6.

Appendix E: Non-price terms and conditions from the DTCS FAD

Schedule 2 – Billing and Notifications

- 2.1 The Access Seeker's liability to pay Charges for the Service to the Access Provider arises at the time the Service is supplied by the Access Provider to the Access Seeker, unless the parties agree otherwise.
- 2.2 The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 2.
- 2.3 The Access Provider must provide the Access Seeker with an invoice each month in respect of Charges payable for the Service unless the parties agree otherwise.
- 2.4 The Access Provider is entitled to invoice the Access Seeker for previously uninvoiced Charges or Charges which were understated in a previous invoice, provided that:
 - (a) the Charges to be retrospectively invoiced can be reasonably substantiated to the Access Seeker by the Access Provider; and
 - (b) subject to clause 2.5, no more than six Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld).
- 2.5 The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the Telecommunications Act 1997 (Cth) and the provisions of any applicable industry code registered pursuant to Part 6 of the Telecommunications Act 1997 (Cth) in relation to billing.
- 2.6 Subject to any Billing Dispute notified in accordance with this FAD, an invoice is payable in full 30 Calendar Days after the date the invoice was issued or such other date as agreed between the parties. The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider. All amounts owing and unpaid after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day authorised dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5 percent.
- 2.7 In addition to charging interest in accordance with clause 2.6 or exercising any other rights the Access Provider has at law or under this FAD, where an amount is outstanding and remains unpaid for more than 20 Business Days after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this FAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.

- 2.8 Unless the parties otherwise agree, there is no setting-off (i.e. netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise the administration and financial costs, the parties must consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.
- 2.9 The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice. Nothing in this clause 2.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
- 2.10 If the Access Seeker believes a Billing Dispute exists, it may invoke the Billing Dispute Procedures by providing written notice to the Access Provider (Billing Dispute Notice). A Billing Dispute must be initiated only in good faith.
- 2.11 Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal or regulatory proceedings in relation to any Billing Dispute.
- 2.12 If a Billing Dispute Notice is given to the Access Provider by the due date for payment of the invoice containing the Charge which is being disputed, the Access Seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved. Otherwise, the Access Seeker must pay the invoice in full in accordance with this FAD (but subject to the outcome of the Billing Dispute Procedures).
- 2.13 Except where payment is withheld in accordance with clause 2.12, the Access Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.
- 2.14 A Billing Dispute Notice must be given to the Access Provider in relation to a Charge within six Months of the invoice for the Charge being issued in accordance with 2.6.
- 2.15
- (a) The Access Provider must acknowledge receipt of a Billing Dispute Notice within two Business Days by providing the Access Seeker with a reference number.
 - (b) Within five Business Days of acknowledging a Billing Dispute Notice under clause 2.15(a), the Access Provider must, by written notice to the Access Seeker:
 - (i) accept the Billing Dispute Notice; or
 - (ii) reject the Billing Dispute Notice if the Access Provider reasonably considers that:
 - A. the subject matter of the Billing Dispute Notice is already being dealt with in another dispute;

- B. the Billing Dispute Notice was not submitted in good faith; or
 - C. the Billing Dispute Notice is incomplete or contains inaccurate information.
- (c) If the Access Provider fails to accept or reject the Billing Dispute Notice within five Business Days of acknowledging the Billing Dispute Notice under clause 2.15(a), the Access Provider is taken to have accepted the Billing Dispute Notice.
- 2.16 The Access Seeker must, as early as practicable and in any case within five Business Days after the Access Provider acknowledges a Billing Dispute Notice, provide to the other party any further relevant information or materials (which was not originally provided with the Billing Dispute Notice) on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

Without affecting the time within which the Access Provider must make the proposed resolution under clause 2.17, the Access Provider may request additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution pursuant to clause 2.17. This additional information may be requested up to 10 Business Days prior to the date on which the Access Provider must make the proposed resolution under clause 2.17. The Access Seeker must provide the requested information within five Business Days of receiving the request. If the Access Seeker fails to do so within five Business Days, the Access Provider may take the Access Seeker's failure to provide additional information into account when making its proposed resolution.

- 2.17 The Access Provider must try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of accepting a Billing Dispute Notice under clause 2.15 (or longer period if agreed by the parties), by notifying the Access Seeker in writing of its proposed resolution of a Billing Dispute. That notice must:
- (a) explain the Access Provider's proposed resolution (including providing copies where necessary of all information relied upon in coming to that proposed resolution); and
 - (b) set out any action to be taken by:
 - (i) the Access Provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or
 - (ii) the Access Seeker (e.g. payment of the disputed Charge).

If the Access Provider reasonably considers that it will take longer than 30 Business Days after accepting a Billing Dispute Notice to provide a proposed resolution, then the Access Provider may request the Access Seeker's consent to an extension of time to provide the proposed resolution under this clause 2.17 (such consent not to be unreasonably withheld).

2.18 If the Access Seeker does not agree with the Access Provider's decision to reject a Billing Dispute Notice under clause 2.15 or the Access Provider's proposed resolution under clause 2.17, it must object within 15 Business Days of being notified of such decisions (or such longer time agreed between the parties). Any objection lodged by the Access Seeker with the Access Provider must be in writing and state:

- (a) what part(s) of the proposed resolution it objects to;
- (b) the reasons for objection;
- (c) what amount it will continue to withhold payment of (if applicable); and
- (d) any additional information to support its objection.

If the Access Seeker lodges an objection to the proposed resolution under this clause, the Access Provider must, within 5 Business Days of receiving the objection, review the objection and

- (e) provide a revised proposed resolution (Revised Proposed Resolution in this Schedule 2); or
- (f) confirm its proposed resolution.

2.19 Any:

- (a) withdrawal, adjustment or refund of the disputed Charge by the Access Provider; or
- (b) payment of the disputed Charge by the Access Seeker (as the case may be),

must occur as soon as practicable and in any event within one Month of the Access Provider's notice of its proposed resolution under clause 2.17 or its Revised Proposed Resolution under clause 2.18 (as applicable), unless the Access Seeker escalates the Billing Dispute under clause 2.22. If the Access Provider is required to make a withdrawal, adjustment or refund of a disputed Charge under this clause but its next invoice (first invoice) is due to be issued within 48 hours of its proposed resolution under clause 2.17 or its Revised Proposed Resolution under clause 2.18 (as applicable), then the Access Provider may include that withdrawal, adjustment or refund in the invoice following the first invoice notwithstanding that this may occur more than one Month after the Access Provider's notice of its proposed resolution or Revised Proposed Resolution.

2.20 Where the Access Provider is to refund a disputed Charge, the Access Provider must pay interest (at the rate set out in clause 2.6) on any refund. Interest accrues daily from the date on which each relevant amount to be refunded was paid to the Access Provider, until the date the refund is paid.

2.21 Where the Access Seeker is to pay a disputed Charge, the Access Seeker must pay interest (at the rate set out in clause 2.6) on the amount to be paid. Interest accrues

daily from the date on which each relevant amount was originally due to be paid to the Access Provider, until the date the amount is paid.

2.22 If

- (a) the Access Provider has not proposed a resolution according to clause 2.17 or within the timeframe specified in clause 2.17, or
- (b) if the Access Seeker having first submitted an objection under clause 2.18 is not satisfied with the Access Provider's Revised Proposed Resolution, or the Access Provider's confirmed proposed resolution, within the timeframes specified in clause 2.18,

the Access Seeker may escalate the matter under clause 2.23. If the Access Seeker does not do so within 15 Business Days after the time period stated in clause 2.17 or after being notified of the Access Provider's Revised Proposed Resolution under clause 2.18(e) or confirmed proposed resolution under clause 2.18(f) (or a longer period if agreed by the parties), the Access Seeker is deemed to have accepted the Access Provider's proposed resolution made under clause 2.17 or Revised Proposed Resolution under clause 2.18(e) or confirmed proposed solution under clause 2.18(f) and clauses 2.20 and 2.21 apply.

2.23 If the Access Seeker wishes to escalate a Billing Dispute, the Access Seeker must give the Access Provider a written notice:

- (a) stating why it does not agree with the Access Provider's Revised Proposed Resolution or confirmed proposed resolution; and
- (b) seeking escalation of the Billing Dispute.

2.24 A notice under clause 2.23 must be submitted to the nominated billing manager for the Access Provider, who must discuss how best to resolve the Billing Dispute with the Access Seeker's nominated counterpart. If the parties are unable to resolve the Billing Dispute within five Business Days of notice being given under clause 2.23 (or such longer period as agreed between the parties) the Billing Dispute must be escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart who must meet in an effort to resolve the Billing Dispute.

2.25 If the Billing Dispute cannot be resolved within five Business Days of it being escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart under clause 2.24 (or such longer period as agreed between the parties):

- (a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation must be conducted in accordance with the mediation guidelines of the ACDC and concluded within three Months of the proposal (unless the parties agree to extend this timeframe); or

- (b) if the parties either do not agree to proceed to mediation within five Business Days of being able to propose the appointment of a mediator under clause 2.25(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal or regulatory proceedings to resolve the matter.
- 2.26 The parties must ensure that any person appointed or required to resolve a Billing Dispute takes into account the principle that the Access Seeker is entitled to be recompensed in circumstances where the Access Seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end-user an amount which is the subject of a Billing Dispute (a Backbilling Loss), provided that:
 - (a) such principle applies only to the extent to which the Billing Dispute is resolved against the Access Provider; and
 - (b) such principle applies only to the extent to which it is determined that the Backbilling Loss was due to the Access Provider unnecessarily delaying resolution of the Billing Dispute.
- 2.27 Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
- 2.28 All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause 2.24 (or their respective nominees).
- 2.29 There is a presumption that all communications between the parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.
- 2.30 If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that three or more out of any five consecutive invoices for a given Service are incorrect by 5 percent or more, then, for the purposes of clause 2.20, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 2.6, plus 2 percent. The remedy set out in this clause 2.30 is without prejudice to any other right or remedy available to the Access Seeker.

Schedule 3 – Creditworthiness and security

- 3.1 Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide to the Access Provider and maintain, on terms and conditions reasonably required by the Access Provider and subject to clause 3.2, the Security (as be determined having regard to clause 3.3 and as may be varied pursuant to clause 3.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.
- 3.2
- (a) The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the Security specified in clause 3.1 for a period of six Months following (but not including) the date on which the last of the following occurs:
 - (i) cessation of supply of the Service under this FAD, and
 - (ii) payment of all outstanding amounts under this FAD.
 - (b) Notwithstanding clause 3.2(a), the Access Provider has no obligation to release the Security if, at the date the Access Provider would otherwise be required to release the Security under clause 3.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.
- 3.3 The Security (including any varied Security) may only be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services, and be of an amount and in a form which is reasonable in all the circumstances. As a statement of general principle the amount of any Security is calculated by reference to:
- (a) the aggregate value of all Services likely to be provided to the Access Seeker under this FAD over a reasonable period; or
 - (b) the value of amounts invoiced in respect of the Service but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).

For the avoidance of doubt, any estimates, forecasts or other statements made or provided by the Access Seeker may be used by the Access Provider in determining the amount of a Security.

- 3.4 Examples of appropriate forms of Security, having regard to the factors referred to in clause 3.3, may include without limitation:
- (a) fixed and floating charges;

- (b) personal guarantees from directors;
- (c) Bank Guarantees;
- (d) letters of comfort;
- (e) mortgages;
- (f) a right of set-off;
- (g) a Security Deposit; or
- (h) a combination of the forms of security referred to in paragraphs (a) to (g) above.

If any Security is or includes a Security Deposit, then:

- (i) the Access Provider is not obliged to invest the Security Deposit or hold the Security Deposit in an interest bearing account or otherwise; and
- (j) the Access Seeker is prohibited from dealing with the Security Deposit or its rights to that Security Deposit (including by way of assignment or granting of security).

If any security is or includes a Bank Guarantee and that Bank Guarantee (Original Bank Guarantee) has an expiry date which is the last day by which a call made be made under a Bank Guarantee, the Access Seeker must procure a replacement Bank Guarantee for the amount guaranteed by the Original Bank Guarantee no later than two months prior to the expiry date of the Original Bank Guarantee, such replacement Bank Guarantee to have an expiry date of no less than 14 months from the date of delivery of the replacement Bank Guarantee.

If the Access Seeker fails to procure a replacement Bank Guarantee, then in addition to any other of the Access Provider's rights under this FAD, the Access Provider may, at any time in the month prior to the expiry date of the Bank Guarantee, make a call under the Bank Guarantee for the full amount guaranteed. The amount paid to the Access Provider pursuant to a call on the Bank Guarantee will become a Security Deposit.

- 3.5 The Access Provider may from time to time where the circumstances reasonably require, request Ongoing Creditworthiness Information from the Access Seeker to determine the ongoing creditworthiness of the Access Seeker. The Access Seeker must supply Ongoing Creditworthiness Information to the Access Provider within 15 Business Days of receipt of a request from the Access Provider for such information. The Access Provider may, as a result of such Ongoing Creditworthiness Information, having regard to the factors referred to in clause 3.3 and subject to clause 3.7, reasonably require the Access Seeker to alter the amount, form or the terms of the Security (which may include a requirement to provide additional security), and the Access Seeker must provide that altered Security within 20 Business Days of being notified by the Access Provider in writing of that requirement.

- 3.6 The Access Seeker may from time to time request the Access Provider to consent (in writing) to a decrease in the required Security and/or alteration of the form of the Security. The Access Provider must, within 15 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors referred to in clause 3.3). The Access Provider may request, and the Access Seeker must promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 3.6.
- 3.7 If the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 3, the Access Seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the Access Provider and that there has been no material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider. If there has been a material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider, the Access Seeker must disclose the nature and effect of the change to the Access Provider at the time the information is provided.
- 3.8 For the purposes of this Schedule 3, **Ongoing Creditworthiness Information** means:
- (a) a copy of the Access Seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);
 - (b) a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker must co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the Access Seeker's creditworthiness. To that end, the Access Seeker agrees to procure written consents (as required under the *Privacy Act 1988* (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the Access Provider to:
 - (i) obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;
 - (ii) disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and
 - (iii) obtain and use a consumer credit report;
 - (c) a letter, signed by the company secretary or duly authorised officer of the Access Seeker, stating that the Access Seeker is not insolvent and not under any external administration (as defined in the *Corporations Act 2001* (Cth)) or under any similar form of administration under any laws applicable to it in any jurisdiction; and
 - (d) the Access Seeker's credit rating, if any has been assigned to it.

- 3.9 The Access Seeker may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.

Subject to this Schedule 3, the parties agree that a failure by the Access Seeker to provide the warranties set out in clause 3.7 or to provide Ongoing Creditworthiness Information constitutes:

- (a) an event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) of the Access Seeker and the Access Seeker must provide that altered Security within 15 Business Days after the end of the period set out clause 3.5; or
 - (b) breach of a material term or condition of this FAD.
- 3.10 Any disputes arising out of or in connection with Schedule 3 must be dealt with in accordance with the procedures in Schedule 4. Notwithstanding that a dispute arising out of or in connection with Schedule 3 has been referred to the procedures in Schedule 4 and has not yet been determined, nothing in this clause 3.10 or Schedule 4 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 6.

Schedule 4 – General dispute resolution procedures

- 4.1 If a dispute arises between the parties in connection with or arising from the terms and conditions set out in this FAD for the supply of the Service, the dispute must be managed as follows:
- (a) in the case of a Billing Dispute, the dispute must be managed in accordance with the Billing Dispute Procedures; or
 - (b) subject to clause 4.2, in the case of a Non-Billing Dispute, the dispute must be managed in accordance with the procedures set out in this Schedule 4.
- 4.2 To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless otherwise determined, that Non-Billing Dispute must be resolved in accordance with the Billing Dispute Procedures. The Access Provider may seek a determination from an independent third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent or third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access Provider. For the purposes of this clause 4.2, the independent third party may include an arbiter from the Australian Commercial Disputes Centre (ACDC).
- 4.3 If a Non-Billing Dispute arises, either party may, by written notice to the other, refer the Non-Billing Dispute for resolution under this Schedule 4. A Non-Billing Dispute must be initiated only in good faith.
- 4.4 Any Non-Billing Dispute notified under clause 4.3 must be referred:
- (a) initially to the nominated manager (or managers) for each party, who must endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 4.3 or such other time agreed by the parties; and
 - (b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within a further five Business Days to refer the Non-Billing Dispute to an Expert Committee under clause 4.11, or by written agreement submit it to mediation in accordance with clause 4.10.
- 4.5 If:
- (a) under clause 4.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation; or,
 - (b) under clause 4.10(f), the mediation is terminated; and
 - (c) after a period of five Business Days after the mediation is terminated as referred to in paragraph (b), the parties do not resolve the Non-Billing Dispute

or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise) either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.

- 4.6 A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:
- (a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 4.5; or
 - (b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable).
- 4.7 Each party must continue to fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 4 are pending.
- 4.8 All communications between the parties during the course of a Non-Billing Dispute are made on a without prejudice and confidential basis.
- 4.9 Each party must, as early as practicable after the notification of a Non-Billing Dispute pursuant to clause 4.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).
- 4.10 Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 4.4(b):
- (a) any agreement must include:
 - (i) a statement of the disputed matters in the Non-Billing Dispute; and
 - (ii) the procedure to be followed during the mediation,
 and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;
 - (b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the provisions of this clause 4.10. In the event of any inconsistency between them, the provisions of this clause 4.10 prevail;
 - (c) it must be conducted in private;
 - (d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator must:

- (i) have an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
 - (ii) have an appreciation of the competition law implications of his/her decisions; and
 - (iii) not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
- (e) the parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who will attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation;
- (f) it must terminate in accordance with the ACDC Guidelines;
- (g) the parties must bear their own costs of the mediation including the costs of any representatives and must each bear half the costs of the mediator; and
- (h) any agreement resulting from mediation binds the parties on its terms.

4.11 The parties may by written agreement in accordance with clause 4.4(b), submit a Non-Billing Dispute for resolution by an Expert Committee (**Initiating Notice**), in which case the provisions of this clause 4.11 apply as follows:

- (a) The terms of reference of the Expert Committee are as agreed by the parties. If the terms of reference are not agreed within five Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee is deemed to be terminated.
- (b) An Expert Committee acts as an expert and not as an arbitrator.
- (c) The parties are each represented on the Expert Committee by one appointee.
- (d) The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 4.10(d)(i), (ii) and (iii).
- (e) Each party must be given an equal opportunity to present its submissions and make representations to the Expert Committee.
- (f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.
- (g) Unless the parties agree otherwise the parties must ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the

final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.

- (h) If the dispute is not resolved within the timeframe referred to in clause 4.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
- (i) The Expert Committee has the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.
- (j) The Expert Committee must give written reasons for its decision.
- (k) A decision of the Expert Committee is final and binding on the parties except in the case of manifest error or a mistake of law.
- (l) Each party must bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties must each bear half the costs of the independent member of the Expert Committee.

4.12 Schedule 4 does not apply to a Non-Billing Dispute to the extent that:

- (a) there is a dispute resolution process established in connection with, or pursuant to, a legal or regulatory obligation (including any dispute resolution process set out in a Structural Separation Undertaking)
- (b) a party has initiated a dispute under the dispute resolution process referred to in clause 4.12(a), and
- (c) the issue the subject of that dispute is the same issue in dispute in the Non-Billing Dispute.

Schedule 5 – Confidentiality provisions

- 5.1 Subject to clause 5.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:
- (a) use or copy such Confidential Information except as set out in this FAD; or
 - (b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.
- 5.2 For the avoidance of doubt, information generated within the Access Provider's Network as a result of or in connection with the supply of the relevant Service to the Access Seeker or the interconnection of the Access Provider's Network with the Access Seeker's Network (other than information that falls within paragraph (d) of the definition of Confidential Information) is the Confidential Information of the Access Seeker.
- 5.3 The Access Provider must upon request from the Access Seeker, disclose to the Access Seeker quarterly aggregate traffic flow information generated within the Access Provider's Network in respect of a particular Service provided to the Access Seeker, if the Access Provider measures and provides this information to itself. The Access Seeker must pay the reasonable costs of the Access Provider providing that information.
- 5.4 Subject to clauses 5.5 and 5.10, Confidential Information of the Access Seeker may be:
- (a) used by the Access Provider:
 - (i) for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;
 - (ii) for the purposes of supplying Services to the Access Seeker;
 - (iii) for the purpose of billing; or
 - (iv) for another purpose agreed to by the Access Seeker; and
 - (b) disclosed only to personnel who, in the Access Provider's reasonable opinion require the information to carry out or otherwise give effect to the purposes referred to in paragraph (a) above.
- 5.5 A party (**Disclosing Party**) may to the extent necessary use and/or disclose (as the case may be) the Confidential Information of the other party:
- (a) to those of its directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential Information is reasonably required to be disclosed for the purposes of this FAD;

- (b) to any professional person for the purpose of obtaining advice in relation to matters arising out of or in connection with the supply of a Service under this FAD;
- (c) to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;
- (d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this FAD, provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party so that the other party has an opportunity to protect the confidentiality of its Confidential Information;
- (e) as required by law provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information, except that no notice is required in respect of disclosures made by the Access Provider to the ACCC under section 152BEA of the CCA;
- (f) with the written consent of the other party provided that, prior to disclosing the Confidential Information of the other party:
 - (i) the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party;
 - (ii) if required by the other party as a condition of giving its consent, the Disclosing Party must provide the other party with a confidentiality undertaking in the form set out in Annexure 1 of this Schedule 5 signed by the person or persons to whom disclosure is to be made; and
 - (iii) if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 5.6;
- (g) in accordance with a lawful and binding directive issued by a regulatory authority;
- (h) if reasonably required to protect the safety of personnel or property or in connection with an emergency;
- (i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted.

5.6 Each party must co-operate in any action taken by the other party to:

- (a) protect the confidentiality of the other party's Confidential Information; or
- (b) enforce its rights in relation to its Confidential Information.

- 5.7 Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction or disclosure.
- 5.8 Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the Disclosing Party that the Confidential Information is or will be correct.
- 5.9 Each party acknowledges that a breach of this Schedule 5 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this Schedule 5.
- 5.10 If:
- (a) the Access Provider has the right to suspend or cease the supply of the Service under:
 - (i) Schedule 6 due to a Payment Breach
 - (ii) under clause 6.7; or
 - (b) after suspension or cessation of supply of the Service under this FAD, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment
- then the Access Provider may do one or both of the following:
- (a) notify and exchange information about the Access Seeker (including the Access Seeker's Confidential Information) with any credit reporting agency or the Access Provider's collection agent; and
 - (b) without limiting clause 5.10, disclose to a credit reporting agency:
 - (i) the defaults made by the Access Seeker to the Access Provider; and
 - (ii) the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD

Annexure 1 of Schedule 5

Confidentiality undertaking form

[Amend where necessary]

CONFIDENTIALITY UNDERTAKING

I, _____ of [employer's company name] ([**undertaking company**]) undertake to [full name of party who owns or is providing the confidential information as the case requires] ([**Provider**]) that:

- 1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking (**Confidential Information**) that is in my possession, custody, power or control.
- 2 I acknowledge that:
 - (a) this Undertaking is given by me to [Provider] in consideration for [Provider] making the Confidential Information available to me for the Approved Purposes (as defined below);
 - (b) all intellectual property in or to any part of the Confidential Information is and will remain the property of [Provider]; and
 - (c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [undertaking company] in relation to the Confidential Information except as expressly provided in this Undertaking.
- 3 I will:
 - (a) only use the Confidential Information for:
 - (i) the purposes listed in Attachment 2 to this Undertaking; or
 - (ii) any other purpose approved by [Provider] in writing;(**the Approved Purposes**);
 - (b) comply with any reasonable request or direction from [provider] regarding the Confidential Information.
- 4 Subject to clause 5, I will not disclose any of the Confidential Information to any other person without the prior written consent of [Provider].
- 5 I acknowledge that I may disclose the Confidential Information to which I have access to:

- (a) any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:
 - (i) the person to whom disclosure is proposed to be made (**the person**) is notified in writing to [Provider] and [Provider] has approved the person as a person who may receive the Confidential Information, which approval shall not be unreasonably withheld;
 - (ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [Provider]; and
 - (iii) a signed undertaking of the person has already been served on [Provider];
 - (b) if required to do so by law; and
 - (c) any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(a) for the Approved Purpose.
- 6 I will establish and maintain security measures to safeguard the Confidential Information that is in my possession from unauthorised access, use, copying, reproduction or disclosure and use the same degree of care as a prudent person in my position would use to protect that person's confidential information.
- 7 Except as required by law and subject to paragraph 10 below, within a reasonable time after whichever of the following first occurs:
- (a) termination of this Undertaking;
 - (b) my ceasing to be employed or retained by [undertaking company] (provided that I continue to have access to the Confidential Information at that time); or
 - (c) my ceasing to be working for [undertaking company] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [undertaking company]);
- I will destroy or deliver to [Provider] the Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the Confidential Information in my possession, custody, power or control.
- 8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:
- (a) which is in the public domain; or
 - (b) which has been obtained by me otherwise than from [Provider] in relation to this Undertaking;

provided that the information is in the public domain and/or has been obtained by me by reason of, or in circumstances which do not involve any breach of a confidentiality

undertaking or a breach of any other obligation of confidence in favour of [Provider] or by any other unlawful means, of which I am aware.

- 9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that [Provider] may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to [Provider] at law or in equity.
- 10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to [Provider] of the Confidential Information pursuant to paragraph 7 above.

Signed: _____ Dated: _____

Print name: _____

ATTACHMENT 1

Any document, or information in any document provided by [provider] to [undertaking company] which [provider] claims is confidential information for the purposes of this Undertaking.

ATTACHMENT 2

[Approved purpose(s)]

Schedule 6 – Suspension and termination

- 6.1. The Access Provider may immediately suspend the supply of a Service or access to the Access Provider's Network, provided it notifies the Access Seeker where practicable and provides the Access Seeker with as much notice as is reasonably practicable:
- (a) during an Emergency; or
 - (b) where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider's Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency;
 - (c) where, in the reasonable opinion of the Access Provider, the Access Seeker's Network or equipment adversely affects or threatens to affect the normal operation of the Access Provider's Network or access to the Access Provider's Network or equipment (including for the avoidance of doubt, where the Access Seeker has delivered Prohibited Traffic onto the Access Provider's Network);
 - (d) where an event set out in clauses 6.7(a) to (i) occurs;
- and is entitled to continue such suspension until (as the case requires) the relevant event or circumstance giving rise to the suspension has been remedied.
- 6.2. If:
- (a) the Access Seeker has failed to pay monies payable under this FAD;
 - (b) the Access Seeker's use of:
 - (i) its Facilities;
 - (ii) the Access Provider's Facilities or Network; or
 - (iii) any Service supplied to it by the Access Providers,
 - (iv) is in contravention of any law; or
 - (c) the Access Seeker breaches a material obligation under this FAD
- (Suspension Event)** and:
- (d) as soon as reasonably practicable after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:
 - (i) citing this clause;
 - (ii) specifying the Suspension Event that has occurred;

(iii) requiring the Access Seeker to institute remedial action (if any) in respect of that event; and

(iv) specifying the action which may follow due to a failure to comply with the notice,

(Suspension Notice) and:

(e) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 6.1, the **Remedy Period**),

the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable after the expiry of the Remedy Period:

(f) refuse to provide the Access Seeker with the Service:

(i) of the kind in respect of which the Suspension Event has occurred; and

(ii) a request for which is made by the Access Seeker after the date of the breach,

until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist; and

(g) suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed.

6.3. For the avoidance of doubt, subclause 6.1(a) does not apply to a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.

6.4. In the case of a suspension pursuant to clause 6.1, the Access Provider must reconnect the Access Seeker to the Access Provider's Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider must do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.

6.5. If:

(a) an Access Seeker ceases to be a carrier or carriage service provider; or

(b) an Access Seeker ceases to carry on business for a period of more than 10 consecutive Business Days or

(c) in the case of an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or

(d) an Access Seeker breaches a material obligation under this FAD, and:

- (i) that breach materially impairs or is likely to materially impair the ability of the Access Provider to deliver Listed Carriage Services to its customers; and
 - (ii) the Access Provider has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and
 - (iii) the Access Seeker fails to institute remedial action as specified in the Breach Notice within 10 Business Days after receiving the Breach Notice (in this clause 6.4, the **Remedy Period**),
- (e) the supply of the Service(s) to the Access Seeker has been suspended pursuant to the terms and conditions of this FAD for a period of three months or more,

the Access Provider may cease supply of the Service under this FAD by written notice given to the first-mentioned party at any time after becoming aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be).

6.6. A party must not give the other party both a Suspension Notice under clause 6.1 and a Breach Notice under clause 6.4 in respect of:

- (a) the same breach; or
- (b) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events;

except:

- (c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 6.1 in respect of a Suspension Event and the Suspension Event has not been rectified by the Access Seeker within the relevant Remedy Period specified in clause 6.1; and
- (d) where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 6.4(d)(ii), the time period for the purposes of clause 6.4(d)(ii) will be 20 Business Days from the expiry of the time available to remedy the Suspension Event.

6.7. For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 6.1 in respect of a breach before giving a Breach Notice in respect of that breach under clause 6.4.

6.8. Notwithstanding any other provision of this FAD, either party may at any time immediately cease the supply of the Service under this FAD by giving written notice of termination to the other party if:

- (a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other party; or

- (b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other party; or
- (c) a holder of an encumbrance takes possession of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or
- (d) the other party is or is likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
- (e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or
- (f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of three Months; or
- (g) the other party breaches any of the terms of any of its loans, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to the supply of the Service under this FAD; or
- (h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
- (i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

6.9. The cessation of the operation of this FAD:

- (a) does not operate as a waiver of any breach by a party of any of the provisions of this FAD; and
- (b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.

6.10. Without prejudice to the parties' rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD.

Schedule 7 – Liability and indemnity

7.1. Subject to clause 7.2, each Party's liability in respect of:

- (a) the 12 month period commencing on the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in that initial 12 month period;
- (b) any subsequent 12 month period commencing on any anniversary of the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in the 12 month period immediately prior to that anniversary.

For the purposes of this clause 7.1, Liability arises when the act or omission giving rise to the Liability occurs, not when any claim is made by a party under this FAD in connection with that Liability.

7.2 The liability limitation in clause 7.1 does not apply to the Access Seeker's liability to pay the Charges for the Service provided under this FAD, or the Parties' indemnification obligations under clauses 7.3 and 7.4.

7.3 Each Party indemnifies the other Party against all Loss arising from the death of, or personal injury to, a Representative of the other Party, where the death or personal injury arises from:

- (a) an act or omission that is intended to cause death or personal injury; or
- (b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

7.4 Each Party indemnifies the other Party against all Loss arising from any loss of, or damage to, the property of the other party (or the property of a representative of the other Party), where the loss or damage arises from:

- (a) an act or omission that is intended to cause loss or damage to property; or
- (b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

7.5 Each Party indemnifies the other Party against all Loss arising from a claim by a third person against the Innocent Party to the extent that the claim relates to a negligent act or omission by the first Party or by a Representative of the first Party.

7.6 Subject to clauses 7.3 and 7.4, a Party has no Liability to the other Party for or in respect of any consequential, special or indirect Loss or any loss of profits or data.

- 7.7 A Party has no Liability to the other Party for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any end-user of a Party or any other third person who is not a Representative of a Party.
- 7.8 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 7 to the extent that the liability the subject of the indemnity claim is the direct result of:
- (a) a breach of this FAD;
 - (b) an act intended to cause death, personal injury, or loss or damage to property;
or
 - (c) a negligent act or omission;
- by the Innocent Party.
- 7.9 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 7 or for in respect of a claim brought against the Innocent Party by an end-user of the Innocent Party, or a third person with whom the Innocent Party has a contractual relationship, to the extent that the Loss under such claim could have been excluded or reduced (regardless of whether such a Liability actually was excluded or reduced) by the Innocent Party in its contract with the end-user or third person.
- 7.10 The Innocent Party must take all reasonable steps to minimise the Loss it has suffered or is likely to suffer as a result of an event giving rise to an indemnity under this Schedule 7. If the Innocent Party does not take reasonable steps to minimise such Loss then the damages payable by the Indemnifying Party must be reduced as is appropriate in each case.
- 7.11 A Party's liability to the other Party for Loss of any kind arising out of the supply of the Service under this FAD or in connection with the relationship established by it is reduced to the extent (if any) that the other Party causes or contributes to the Loss. This reduction applies whether the first Party's liability is in contract, tort (including negligence), under statute or otherwise.
- 7.12 The Indemnifying Party must be given full conduct of the defence of any claim by a third party that is the subject of an indemnity under clause 7.3 or 7.4, including, subject to the Indemnifying Party first obtaining the written consent (which must not be unreasonably withheld) of the Innocent Party to the terms thereof, the settlement of such a claim.