

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
ACCC Discussion Paper

**Wholesale ADSL Service
Declaration Inquiry**

Public Version

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Section 1. EXECUTIVE SUMMARY

- 1.1 Optus welcomes the opportunity to provide comments in response to the Wholesale ADSL (WADSL) service declaration inquiry discussion paper.
- 1.2 Optus supports continuing the declaration of the WADSL service. The WADSL service is an important wholesale service required to compete in the market for fixed broadband during the transition to the NBN. The availability of WADSL on terms that promote competition will continue to promote the LTIE as:
 - (a) Telstra's actions prior to the declaration of the WADSL service, and during the recent fixed-line services FAD Inquiry, demonstrate its continuing intent to use its monopoly power over wholesale access services to substantially lessen competition during the transition to NBN;
 - (b) The delay of the roll-out of NBN means that access seekers are likely to rely on legacy wholesale service for a longer period; and
 - (c) Competition for end-users prior to NBN roll-out is becoming more important, especially since Telstra's auto-migration of its customer base from ADSL to NBN undermines the 'customer-choice' that is central to NBN competition and structural separation of Telstra.
- 1.3 Optus is of the view that Telstra retains the ability to frustrate the development of competition for fixed broadband services through its vertical ownership of the legacy PSTN. Telstra also has the ability to prevent further development of competition during the transition to NBN. This ability is magnified through Telstra's effective control of the migration process to NBN. Importantly, Telstra has the strong incentive to leverage its ability to limit competition for the purpose of frustrating customer choice as NBN rolls-out, thereby limiting competition post-NBN deployment.
- 1.4 Optus submits that there can be little doubt that the declaration of the WADSL service will promote the LTIE.
- 1.5 While re-declaring the current WADSL service would promote the LTIE, Optus believes that competition could be further enhanced by amending the service description to make it clear that no additional services are required in order to acquire the WADSL service. That is, the only charges applicable to the WADSL service are the port and VLAN charges.
- 1.6 Finally, the declaration of the WADSL service was, and remains, a key component of Telstra's Structural Separation Undertaking (SSU). The ACCC made clear that the SSU was accepted on the basis of the declaration of the WADSL service and the commitment by Telstra not to challenge the declaration.
- 1.7 Optus submits that it would be inconsistent with the NBN policy and structural separation of Telstra – including relevant protections for interim equivalence – to not re-declare the WADSL service.
- 1.8 Optus would expect that Telstra honour its pledge not to challenge the declaration of the WADSL service – a pledge that formed one reason why the ACCC accepted the SSU.

Section 2. WADSL KEY PILLAR OF THE SSU

- 2.1 The WADSL service was, and remains, a key component of Telstra's Structural Separation Undertaking (SSU). The SSU was accepted on the basis of the declaration of the WADSL service. Optus submits failure to re-declare the WADSL service would undermine the SSU, and put in jeopardy the market structure required for NBN to succeed.
- 2.2 A fundamental issue during the SSU inquiry was the appropriateness of the interim price equivalence rules, especially with regards the WADSL service. The WADSL service was required to be included in the SSU prior to its declaration through a Ministerial Direction.¹
- 2.3 Concerns were raised during the SSU process regarding equivalence and the WADSL service. It became clear that the terms proposed by Telstra in the SSU dealing with the pricing of the WADSL service were not adequate and would not be acceptable to the ACCC.² The ACCC observed that the provisions in the SSU that apply when the WADSL service is declared appeared reasonable – therefore, declaration of the WADSL service removed many of the ACCC's concerns.³
- 2.4 The interaction between the declaration of the WADSL service and the reasonableness of the SSU is shown in the following statements by the Commissioner in charge, Ed Willett, who stated in 2012:

We needed this declaration in place to ensure that the pricing equivalence measures in the SSU were effective ...

If Telstra now presents us with a revised [undertaking] and makes a commitment that they are not going to challenge the ADSL declaration, then we will be able to move to consider that [undertaking] promptly.⁴

- 2.5 The final decision to accept the SSU also made clear that the ACCC's decision to accept it was influenced by the declaration of the WADSL service – and the relevant pull-through provisions in the SSU:

Further, and importantly, the ACCC has since made access determinations for the wholesale ADSL service and the WLR service that covers metropolitan areas. These, combined with the 'pull-through' mechanism for future access determinations, provide assurance that price equivalence is likely to be achieved over time.

The ACCC considers that the 'pull-through' mechanism also resolves the concern that was expressed around the lack of clear consequences for a material divergence that Telstra reports in external wholesale prices and internal unit costs. This is because the ACCC will be able to recalibrate external wholesale prices should this be appropriate by varying an access determination⁵

¹ Telecommunications (Regulated Services) Determination No 1 2011

² ACCC, 2011, December Discussion Paper Assessment of Telstra's Revised SSU, p.10

³ ACCC, 2011, December Discussion Paper Assessment of Telstra's Revised SSU, p.11

⁴ <http://www.smh.com.au/business/telstras-nbn-deal-in-peril-after-watchdog-bites-on-broadband-prices-20120214-1t43z.html>

⁵ ACCC, 2012, Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan Final decision, February, p.143

- 2.6 Optus submits that the historical context for the declaration of the WADSL service must be kept in mind. It is clear that the ACCC assessed as reasonable Telstra's interim equivalence obligations in the SSU on the basis that the WADSL service was declared – the ACCC could set terms through an FAD and that these terms were automatically pulled-through to the wholesale rate card.
- 2.7 The ACCC made clear statements that without declaration, the WADSL price equivalence terms in the SSU were not reasonable and the ACCC would not accept the SSU.
- 2.8 Optus submits that it would be inconsistent with the NBN policy and structural separation of Telstra – including protections for interim equivalence – to not re-declare the WADSL service.
- 2.9 Finally, Optus would expect that Telstra honour its pledge not to challenge the declaration of the WADSL service – a pledge that formed one reason why the ACCC accepted the SSU.

Section 3. ASSESSMENT CRITERIA

- 3.1 The legacy copper network is being replaced by the NBN during the timeframe of this declaration. Consequently, the assessment of the LTIE should increasingly be viewed in the context of the transition to the NBN. Unique to this situation is that the legacy copper network (over-which WADSL is supplied) will be shut down and replaced with a government-owned statutory monopoly – thus removing the requirement for further commercial investment in the PSTN.
- 3.2 This section discusses the trade-offs in relation to promoting competition and infrastructure investments, and discusses how previous views should be refreshed to take into account the shutdown of the PSTN across Australia.
- 3.3 Finally, it will show that the LTIE will be best promoted if greater weight is placed upon increasing static efficiency through a regime that focuses on competition rather than incentives to invest.

Impact on the assessment of the long term interest of end-users

- 3.4 The legislative criteria requires that when making an access determination, the ACCC must take the following matters into account:⁶
 - (a) Whether it will promote the long term interest of end-users;
 - (b) The legitimate business interest of access providers and the access provider's investment in facilities used to supply the service;
 - (c) Interests of all persons who have a right to use the declared service;
 - (d) The economically efficient operation of a service, network or facility;
 - (e) Value of extensions and the operational and technical requirements necessary for the same of reliable operation of a service, network or facility.
- 3.5 When considering whether something promotes the LTIE, regard must be had to the following objectives:⁷
 - (a) Promoting competition in relevant markets;
 - (b) Achieving any-to-any connectivity;
 - (c) Encouraging the efficient use of, and the economically efficient investment in, infrastructure by which services are supplied, including;
 - (i) the legitimate commercial interests of the access provider
 - (ii) incentives for investment
- 3.6 While the Act contains a long list of considerations that the ACCC must have regard to, there are some key factors which impact across several matters.
- 3.7 The primary objective of access regulation is to promote competition. This is concerned with enabling efficient suppliers to operate in dependent markets, to gain

⁶ Section 152BCA

⁷ Section 152AB

the benefits of the process of competition such as lower prices for consumers and displacement of inefficient suppliers by efficient suppliers.⁸ One reason for the primacy of the promotion of competition is that it enhances economic efficient outcomes and consumer welfare — in simple terms competition is the force that leads to efficiency and monopoly is condemned for distorting it.⁹

- 3.8 Another key element is the efficient use of, and investment in, infrastructure used in the provision of declared services. Access providers will have an incentive to make efficient investments so long as it receives a normal return on the investment.¹⁰ This requires that a carrier can recover the costs of its infrastructure, its operating costs and obtain a normal return on its capital.¹¹
- 3.9 It has been recognised that one purpose of access pricing is to provide the incentives for access providers to find the least cost way of providing the services (now and into the future) by promoting competitive forces. Failure to do so would lead to reductions in productive and dynamic efficiency in a way that would not promote the economically efficient operation of telecommunications networks and infrastructure now and in the future.¹²
- 3.10 The common elements across the main matters to be considered are the promotion of economically efficient outcomes — both usage and investment. One could argue that if declaration promoted economically efficient outcomes then it promotes the LTIE and other matters. Much discussion has occurred on what is efficiency in the context of Part XIC.
- 3.11 A declaration decision will need to balance the short term interest of end-users (promote competition, lower prices, increased usage) and the longer-term interests (ongoing access to services, reinvestment, new products and services, new networks). Short term interests, such as lower prices, are bounded by the requirement to cover direct costs of providing access and the legitimate commercial interests of access providers. Longer term interests, such as adequate return to encourage investment, are bounded by concepts of efficient investment and long term competition by access seekers.
- 3.12 The remainder of this section examines:
- (a) elements of economic efficiency;
 - (b) maximising efficient in absence of need for reinvestment; and
 - (c) Its application to the current inquiry.

Elements of economic efficiency

- 3.13 Textbook economics define economic efficiency into three main types: allocative (i.e. Pareto), productive (i.e. technical) and dynamic efficiency. The Australian Competition Tribunal has expressed this as:

There is productive efficiency, allocative efficiency and dynamic efficiency. Productive efficiency is production at least cost. Allocative efficiency occurs when

⁸ Re Telstra Corporation Ltd (No 3) [2007] ACompT 3 (17 May 2007), [98-9]

⁹ Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2 (27 May 2009), [1]

¹⁰ Re Telstra Corp Ltd [2006] ACompT 4 (June 2006), [103]

¹¹ Re Telstra Corp Ltd [2006] ACompT 4 (June 2006), [104]

¹² Re Telstra Corp Ltd [2006] ACompT 4 (June 2006), [95]

*services are provided to those who value them most highly. Dynamic efficiency involves preserving incentives for innovation and investment.*¹³

- 3.14 Allocative and productive efficiency demands that efficiency be promoted within the current period, maximising usage of the current assets and access prices set at marginal cost without regard to sunk investments. The Australian Competition Tribunal has commented that productive and allocative efficiency related to “*the most efficient use of the resources and technology currently available to a firm, in **any given time period.***”¹⁴ [emphasis added]
- 3.15 Further, allocative efficiency will be “*best promoted where the price of a service reflects the underlying marginal cost of providing the service.*”¹⁵
- 3.16 Dynamic efficiency is a concept that involves consideration of adaptation by firms to the evolving supply and demand forces in the market.¹⁶ It involves two elements:
- (a) preserving incentives for innovation and investment;¹⁷ and
 - (b) ensuring ongoing competition which forces firms to seek to improve their goods or develop new goods as part of the battle¹⁸
- 3.17 This view is also adopted by Ofcom, where it identified two elements to dynamic efficiency: the first relates to investment and innovation by the *regulated firm*; and the second relates to competitive entry of *alternative providers* and the additional competitive pressure to reduce costs over time.¹⁹
- 3.18 Dynamic efficiency takes into account investment decisions by the access provider, now and in the future. This requires that regulated prices be set at levels allowing recovery of efficient investments (irrespective of whether they are sunk). Specifically, dynamic efficiency takes into account the trade-off between short term and middle (or long) term dimensions in order to guarantee adequate returns to an investment.
- 3.19 Dynamic efficiency also looks at competitive entry and the additional competitive pressure to reduce costs over time. This takes into account the chilling effect on competitive investment as a result of high access prices leading to less-than-optimal levels of independent infrastructure investment.²⁰ Higher access prices would promote further investment by access providers, but may also discourage competitive investment by access seekers.

Maximising efficiency in absence of reinvestment

- 3.20 Setting regulated prices that maximise efficiency depends on whether one looks at efficiency within one investment period (static efficiency) or across multiple investment periods (dynamic efficiency). For example, ignoring sunk costs is efficient

¹³ Re Duke Eastern Pipeline Pty Ltd [2001] ACompT 2 (4 May 2001), [63]

¹⁴ Re Qantas Airways Ltd [2004] ACompT 9 (12 Oct 2004), [160]

¹⁵ Re Telstra Corp Ltd [2006] ACompT 4 (June 2006), [94]

¹⁶ Re Qantas Airways Ltd [2004] ACompT 9 (12 Oct 2004), [159]

¹⁷ Re Duke Eastern Pipeline Pty Ltd [2001] ACompT 2 (4 May 2001), [63]

¹⁸ Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2 (27 May 2009), [33]

¹⁹ Ofcom, 2011, Charge control review for LLU and WLR services, Annex 5. Available at:

<http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/annexes/wlr-cc-annexes.pdf>

²⁰ Application by Telstra Corp Ltd [2009] ACompT 1 (22 May 2009), [156]

in a static sense, but it would not promote dynamic efficiency and incentives to invest.²¹

- 3.21 A classic example of the relationship between static and dynamic efficiency is access regulation based on a simple cost recovery rule, which encourages efficient utilisation of infrastructure through close to marginal cost pricing, but risks discouraging future investment. Marginal cost pricing is efficient when there is no need to reinvest in the network asset. For example, in relation to ducts this is because of the enduring nature of the investment (where marginal cost covers ongoing maintenance charges)²² and in relation to the copper local loop, it is the impending migration to fibre access.²³
- 3.22 Under both static and dynamic criteria, the main purpose for regulating the telecommunication markets is to promote efficiency – that is, enhancing competition should remain the core focus.
- 3.23 In the static sense, competition reduces the market power of producers (or a sole ‘producer’ of access infrastructure such as Telstra), which leads to lower prices and higher consumer surplus. Competition also disciplines producers in their use of resources thereby promoting efficient use of inputs and minimising waste. As noted above, a price which reflects marginal cost maximises allocative and productive efficiency. It will also be that access pricing that reflects marginal cost best promotes competition in a dynamic sense – that is, it both access seekers and access provider will face the same cost of access to legacy copper networks during transition to NBN. Both access seekers and access provider will be able to attract end-users on the same cost basis – and win or lose customers on the basis of the efficiency of their own operations. This will not only promote competition during transition to NBN, but better reflect the nature of competition post-migration, where all providers will have access to the same open access fibre network.

Relevance to the current Declaration Inquiry

- 3.24 The key element is assessing whether declaration is likely to promote the LTIE is an assessment of both static and dynamic efficiency. Promoting the LTIE has traditionally been a balancing act of these often conflicting objectives. In the current context of access to the WADSL service over the PSTN during migration to NBN, the trade-off between static and dynamic efficiency is different from previous inquiries due to the imminent closure of the PSTN.
- 3.25 Where considerations relating to continual investment in copper infrastructure in the long term are no longer relevant, the focus of the LTIE assessment should be to promote competition and the resultant economic efficiency in both a static and dynamic sense. Optus submits that due to the migration of end-user off legacy PSTN onto the NBN, less weight should be given to the need to promote investment (or re-investment).
- 3.26 In conclusion, the LTIE assessment should ensure that the decision to declare the WADSL service – and the associated service description – promote competitive entry and use over the regulated period.

²¹ Ofcom, 2011, Charge control review for LLU and WLR services, Annex 5. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/annexes/wlr-cc-annexes.pdf>

²² Analysys Mason, 2010, Alternative methodologies for the valuation of BT’s duct assets, p.23

²³ Neumann, K.-H., Vogelsang, I., 2013, ‘How to price the unbundled local loop in the transition from copper to fiber access networks?’, Telecommunications Policy, Vol. 37/10 (2013), pp.893-909. Neumann & Vogelsang discuss issues around efficient copper access pricing while ensuring sufficient investment incentives for incumbent operators to reinvest in fibre networks. There is not the same issues in Australia where the Government is funding the deployment of NBN. Hence, access pricing of copper does not need to consider signals for reinvestment in next generation networks by the incumbent copper provider.

Section 4. DECLARATION PROMOTES LTIE

- 4.1 Optus submits that the declaration of the WADSL service will promote competition and the LTIE in the relevant markets.
- 4.2 This section sets out Optus' position on:
- (a) The relevant markets;
 - (b) State of competition in the relevant markets;
 - (c) Assessment of the LTIE criteria, focusing on:
 - (i) Promotion of competition;
 - (ii) Efficient use of, and investment in, infrastructure;
 - (iii) Interests of access seekers.
- 4.3 Finally, Optus will outline its views on the importance of the WADSL service for the development of competition during the transition to, and post-deployment of, the NBN.

The Relevant Markets

- 4.4 The ACCC has sought comments on the relevant market for the purpose of this discussion paper and the application of the LTIE test. Optus agrees with the statements in the discussion paper that:
- (a) Relevant markets include wholesale and retail broadband market; and
 - (b) Geographic scope of the market is national.
- 4.5 With regards to the level of substitution with superfast broadband and wireless broadband, Optus is of the view that there is limited direct substitution due to the geographic constraint of superfast broadband and the product characteristics of wireless broadband.
- 4.6 These issues are discussed in more detail below.

Wholesale and retail markets

- 4.7 The discussion paper asks whether it is appropriate to consider both the wholesale and retail markets for the purpose of this declaration inquiry. Optus believes it is appropriate.
- 4.8 The market for the acquisition of wholesale high speed broadband services is a market in its own right. Providers in this market utilise their own network to offer wholesale services to RSPs to deliver retail broadband services. The main wholesale highspeed broadband provider is vertically integrated. The provision of wholesale highspeed broadband services results in competition against its own retail services.
- 4.9 Telstra, the provider of the WADSL service, operates in both the wholesale and retail markets. It is vertically integrated and therefore has the ability and incentive to limit competition in the wholesale market for highspeed broadband services; and to

leverage its position in the wholesale market to limit competition in the retail broadband market.

Defining the size of the market

- 4.10 The discussion paper queries the level of substitution between the WADSL service and:
- (a) Superfast broadband services; and
 - (b) Wireless broadband services.
- 4.11 The ACCC observes that it is of the view that ADSL-based broadband services are included within the relevant highspeed broadband market. This is consistent with the observations made in the SBAS declaration inquiry which observed that ADSL-based services cannot supply the technical requirement of superfast broadband, and are unlikely to support applications that require large data downloads. Therefore they are not part of the same market.
- 4.12 Optus agrees with the observation by the ACCC that end-users are substituting away from ADSL-based broadband and onto superfast networks (FTTx or HFC) where it is available. However, the level of substitution is restricted by network availability. Only where end-users have access to multiple networks are they able to choose between the networks.
- 4.13 Optus supports the separation of the superfast broadband and highspeed broadband services using ADSL-based technology markets for market definition purposes. Although market power and competition issues are easily transferred across these related markets. This is discussed more below.
- 4.14 The discussion paper also states that it is unlikely that wireless broadband are within either of the highspeed or superfast broadband markets. The ACCC observes the high number of wireless broadband users; and that it appears they are using wireless as a complement to fixed broadband and not as a substitute. There are also different usage characteristics, namely significantly different levels of data downloaded.
- 4.15 Optus acknowledges that there is a growing, but still small, number of households that see wireless broadband as a substitute for ADSL-based services. However, this group of end-users are likely to have specific usage requirements that make wireless attractive – such as, low demand for data downloads, and increased need for mobility. As noted above, this product requirement differs from the functional elements available for ADSL-based services in the highspeed broadband market. Optus therefore agrees with the ACCC’s conclusion that wireless broadband services are not within the ADSL-based highspeed broadband market.

Geographic element of the market

- 4.16 The discussion paper asks whether it is appropriate to consider the ADSL-based highspeed broadband market as a national market or should it focus on an ESA-by-ESA basis.
- 4.17 Optus submits that the geographic element of the market should be national; but there needs to also be acknowledgment of the availability of different broadband-networks in different locations.
- 4.18 For instance, all RSPs offer retail and wholesale broadband plans on a national basis. However, retail plans do need to differ depending on the network over which they are supplied; due to the underlying network economics. Optus, for example, offers

nationally consistent retail broadband offers across all of its networks (ULL and HFC) and NBN-based offering. However, due to the high access costs associated with the WADSL service, Optus can only offer broadband services using the WADSL service at a higher price point.

- 4.19 In conclusion, the ADSL-based highspeed broadband market is a national market comprising access through the use of ULLS and DSLAMs, and the use of the WADSL service. However, it must also be recognised that the use of the WADSL service is more prominent in areas without ULLS access; and results in higher retail prices than other broadband networks. This is discussed in the competition assessment below.

The State of Competition in the relevant markets

- 4.20 Optus supports the ACCC's view that Telstra has retained a dominant position in the supply of retail and wholesale ADSL services. The state of competition for wholesale ADSL has changed little since the service was last declared in 2012.
- 4.21 During the original WADSL declaration inquiry in 2011, it was acknowledged that Telstra had a 45% market share in the retail broadband market.²⁴ As the ACCC then stated, Telstra's ADSL network covers over 90% of Australian homes and businesses.²⁵ Telstra's DSL network currently supplies around 63% of all retail and wholesale ADSL SIOs.²⁶ In metropolitan areas, Telstra's DSL network supplies around 50% of these SIOs, and in regional areas, it supplies around 96% of such SIOs.²⁷ The three largest competing DSL networks on the other hand supply only 8 to 13% of retail and wholesale SIOs.²⁸
- 4.22 Updated market information shows that little has changed. As at June 2015, Telstra had a 41% market share in the retail fixed broadband market.²⁹ Competition from alternative providers of wholesale DSL, has not developed to a significant extent. Telstra has retained the majority market share in both the retail and wholesale broadband market, and a steady increase in SIOs. Telstra has 1.691 million wholesale SIOs in the year ending 2015,³⁰ compared to 1.38 million wholesale SIOs in 2009-2010.
- 4.23 Even with the continued roll-out of NBN, it is still expected that there will be an increase in the number of ADSL services that could be supplied by Telstra's DSL.
- 4.24 Telstra's dominance in both the wholesale and retail broadband market is largely due to the lack of substitutes available, and Telstra's level of integration. Current alternative networks, such as the Optus HFC network, do not provide national coverage and is not available for resale. Other alternatives such as wireless broadband and optical fibre are not fully effective substitutes for ADSL. The alternatives for access seekers therefore are to either build their own DSLAMs or to purchase the WADSL service from Telstra or from another ULLS provider.
- 4.25 As the ACCC found in the fixed line services exemption inquiry, the uncertainty around the timing and location of the roll-out of the NBN has increased the risks

²⁴ ACCC, 2011, Discussion Paper into whether Wholesale ADSL services should be declared under Part XIC of the Competition and Consumer Act 2010, December, p.16

²⁵ Ibid p.14

²⁶ Ibid p.15

²⁷ Ibid p.15

²⁸ Ibid p.15

²⁹ ACCC, 2016, ACCC telecommunications reports 2014-15: Competition in the Australian telecommunications sector, February, p.23

³⁰ Data based on half year result 2016. <https://www.telstra.com.au/content/dam/tcom/about-us/investors/pdf%20D/Analyst-briefing-presentation-and-materials-2016.pdf>

associated with investing in DSLAMs that will be redundant once the NBN has been deployed. It is unlikely that access seekers will make further large scale investments in DSLAMs.³¹ Access seekers therefore are left with the option to either purchase a WADSL service from Telstra or from a ULLS provider.

- 4.26 One of the reasons for this imbalance is the coverage difference. Telstra has approximately 2800 DSL-enabled ESAs nationwide.³² While access seekers' DSLAM footprints are generally limited to metropolitan areas. In addition, the ACCC found that the combined footprint of all competing DSL networks represents around 20% of the footprint of Telstra's DSL network.³³
- 4.27 The presence of RIMs or large pair gain systems means that many copper lines cannot be DSL-enabled by ULLS-based access seekers. In 2012, it was estimated that approximately 11% of CAN lines are supplied using RIM/LPGS technologies.³⁴ This constrains the ability for access seekers to expand their network footprints, and typically results in WADSL being the only input available to service providers wishing to supply end-users in RIM affected areas.
- 4.28 For these reasons, ULLS-based DSL providers do not provide effective competition to Telstra at the wholesale level.
- 4.29 Another reason for the lack of effective competition results from Telstra's level of integration. It is the only ubiquitous operator of fixed-line services in Australia, with services available across the range of alternative access technologies that provide the underlying input for the supply of ADSL services. As a vertically integrated operator Telstra has the ability and incentive to favour its retail arm over its wholesale customers when providing key upstream services.
- 4.30 Put simply, access seekers just cannot compete against this geographic reach without accessing Telstra's WADSL service.

Declaration promotes the LTIE

- 4.31 The ACCC in 2012 concluded that *"denying service providers access to necessary wholesale services on reasonable terms is a significant obstacle to end-users gaining access to services."*³⁵ This is an important observation as little has changed in respect of Telstra's dominance in both the retail and wholesale broadband markets since the initial declaration of WADSL services.
- 4.32 As a result, the ACCC accepted that Telstra has, and will continue to retain, a dominant position in the supply of fixed-line broadband services. Furthermore, in the majority of ESAs, Telstra remains the *only* wholesale provider of wholesale fixed-line broadband access and backhaul services in those ESAs (approximately 2,800 exchanges).
- 4.33 A number of other significant observations were also outlined in the 2012 decision:

³¹ ACCC, 2011, Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services, Final Report, December, p.9

³² As at 11 July 2016, Telstra has 2,830 ADSL enabled exchanges. Of these, approx. 2,493 are ADSL2+ enabled. https://www.telstrawholesale.com.au/content/dam/tw/products/broadband/ADSL/Documents/TW_Report_ADSL_Enabled_ESAs.xls

³³ ACCC, 2011, Discussion Paper into whether Wholesale ADSL services should be declared under Part XIC of the Competition and Consumer Act 2010, December, p.15

³⁴ ACCC, 2012, Declaration of the Wholesale ADSL services under Part XIC of the Competition and Consumer Act 2010, Final Decision, February, p.24

³⁵ Ibid, p.65

- (a) Due to its dominant position and vertical integration, Telstra has the incentive to set terms and conditions in its supply of WADSL which would allow it to retain its significant market share.³⁶
- (b) A strong competitive resale market has not developed, particularly at the wholesale level. This may be attributed to the smaller footprints of competing networks resulting from high barriers to entry and potentially restrictive conditions of access imposed by Telstra, thereby limiting access seekers' ability to effectively compete in the national market for the supply of fixed-line broadband.³⁷
- (c) Barriers to entry into backhaul markets, particularly in regional and rural areas, continue to inhibit DSLAM deployment in those areas given the size of the addressable market and the cost to build the route.³⁸
- (d) Given the impending rollout of NBN, it has been considered unlikely that there will be any "*substantial threat of further expansion or deepening of the competitive footprint from potential competitors.*"³⁹ Competition concerns in relation to the supply of WADSL are also unlikely to be alleviated until the completion of the NBN rollout.⁴⁰

4.34 Many of the above observations continue to exist today. Optus therefore submits there is little doubt that the continued declaration of the WADSL service promotes the LTIE.

Extent to which declaration would promote competition

- 4.35 Continued declaration of WADSL services will promote competition in the retail and wholesale markets for highspeed broadband. Further, it will promote competition in a number of related markets, including market for superfast broadband, including competition over NBN-supplied connections. As discussed above, there continue to be long-standing competition concerns constraining the ability for access seekers to effectively compete in the national broadband market.
- 4.36 First, there remain concerns in relation to access to the underlying technologies that may be used to provide downstream DSL services. Given that the retail broadband product market requires RSPs to compete on a national basis, this means that RSPs need access to alternative wholesale services as inputs for the provision of their downstream ADSL services, particular where they do not have existing network reach.
- 4.37 The ACCC previously acknowledged that "*the lack of competition in the resale market may be attributed to the smaller footprints of competing networks resulting from high barriers to entry and Telstra's ability to set terms and conditions for the provision of wholesale ADSL which make it difficult for alternative suppliers to compete on a national basis.*"⁴¹
- 4.38 It continues to be the case that Telstra's conduct, also clearly affects the ability of access seekers to compete with entry-level plans. In addition to port and AGVC charges, access seekers incur network and overhead costs, an installation charge,

³⁶ Ibid, p.18

³⁷ Ibid, p.21

³⁸ Ibid, p.22

³⁹ Ibid, p.23

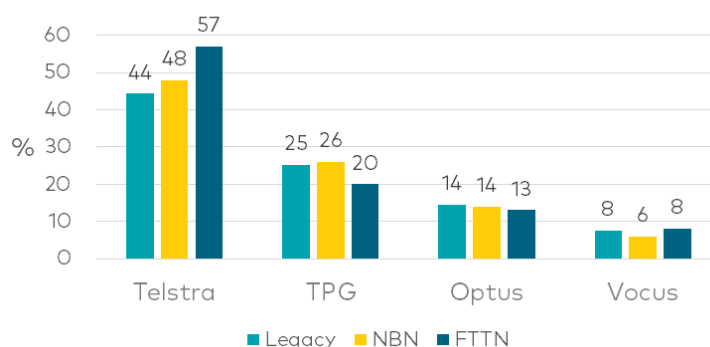
⁴⁰ Ibid, p.25

⁴¹ Ibid, p.21

and – to provide a bundle of services – WLR charges.⁴² Many of which are not regulated and subject to Telstra’s monopoly commercial rates.

- 4.39 Evidence shows that even with declaration, Telstra is able to maintain its market dominance in the retail market for ADSL services. Given that competition is difficult at the prevailing regulated rates, Optus argues that competition would be likely to be restricted absent re-declaration of the WADSL service. Moreover, Telstra’s comments during the recently completed fixed line services FAD, and its willingness to appeal the decision, demonstrates that absent the declared rates it would set rates significantly higher.
- 4.40 Further, failure to re-declare the WADSL service will adversely impact competition in related markets, including the market for superfast broadband services. Current market shares for NBN connections show that Telstra is successfully transferring its PSTN-dominance over to the NBN. This provides a challenge to the competition policy setting underpinning the NBN – including the reasonableness of the interim equivalence obligations under Telstra’s SSU.
- 4.41 ACCC data shows that at June 2015, Telstra had a market share in the retail fixed broadband market of 41%. However, Telstra’s market share of fixed broadband connections over the NBN has grown to 48% in total – and FTTN connections have grown to 57%.

Figure 1 Fixed Broadband SIO Market Shares



Source: ACCC, Telecommunications Report 2014-15; NBN Market Indicator Report June 2016

- 4.42 Optus submits that market power in the provision of ADSL-based broadband is easily transferrable across to services supplied over the NBN using FTTN/B technologies, due to the use of ADSL-VDSL modems that enable the automatic migration of end-users. This, combined with Telstra’s central role in setting the migration rules and processes, enables Telstra to gain and hold copper-based broadband connections across to the NBN. While the FTTN/B SIOs are relatively small at this stage, Telstra’s 58% share demonstrates that Optus’ concerns are legitimate.
- 4.43 Telstra’s use of automated migration and its control of the migration processes undermines the pro-competitive assumptions that underpin the NBN policy, and the view that structural separation of Telstra would result in greater competition.
- 4.44 Optus acknowledges that re-declaration of the WADSL service will do little to address these problems, but a counterfactual without declaration of WADSL will greatly magnify the problem. Absent declaration, Telstra would have the incentive and ability to limit ADSL-based competition in order to maximise its subscriber numbers to auto-migrate to NBN.

⁴² Ibid, p.34

- 4.45 Optus submits there is little doubt that declaration of the WADSL service will promote competition in the market for the provision of highspeed broadband services. It will also promote competition in related markets such as the market for superfast broadband, and for broadband services provided over NBN.

Any-to-any connectivity

- 4.46 Optus agrees with the ACCC's views that continued declaration of the WADSL service would unlikely impact on the objective of any-to-any connectivity.

Efficient use of, and investment in, infrastructure

- 4.47 The deployment of NBN continues to be the most significant infrastructure development in the fixed line market. As at 31 March 2016, NBN Co had passed or covered over 2 million premises and over 900,000 premises had an active NBN service.⁴³ Over the same period, Telstra supplied 8.7 million active connections on its copper access network,⁴⁴ compared to around 870,000 active NBN fixed line connections.⁴⁵ This highlights that Telstra still owns and operates the ubiquitous fixed line network.
- 4.48 Unique to this situation is the shut-down of the legacy copper network (over-which WADSL is supplied) and replacement with a government-owned statutory monopoly – thus removing the requirement for further commercial investment by the incumbent.
- 4.49 As outlined in section 2, the shut-down of the PSTN and its transfer to state-ownership means that less weight should be placed on whether declaration promotes efficient investment in fixed line infrastructure. The announced transfer to, and investment by, NBN Co will occur irrespective of the outcomes of this Inquiry.
- 4.50 While the decision to declare the WADSL service for a further period is likely to have little impact on the efficient investment in fixed line infrastructure, it would have significant impact of the efficient use of fixed line infrastructure. Absent declaration Telstra will likely increase the cost to access WADSL services, thereby limiting efficient use of existing ADSL-based broadband services.
- 4.51 The Discussion Paper acknowledges that since declaration, there has been continued although slowing growth in ULLS and DSLAM investments. This confirms the ACCC's view in the 2012 decision which considered that significant expansion of competitive footprint was unlikely, which would be further discouraged by the rollout of NBN. This decline increases the importance of efficient use of existing ADSL infrastructure – and especially the efficiency use of the WADSL service.

Duration of the WADSL Declaration should align with the other Fixed Line Services

- 4.52 Optus submits that the WADSL service should continue to be declared. The current declaration period should align with the current fixed line services declaration which expires on 30 June 2019. Although, the benefits of a 2022 end-date should not be discounted, as this would likely negate the need for a further declaration inquiry.
- 4.53 The current Fixed Line Services Declarations expire on 31 July 2019, and the Fixed Line Services FAD (including WADSL service) expires on 30 June 2019. The terms and conditions of access to the WADSL service are set out under the fixed line services FAD. Under the BBM approach adopted in the fixed line services FAD, it

⁴³ NBN Co, Third Quarter Results 2016 Presentation, 6 May 2016

⁴⁴ ACCC, Snapshot of Telstra's customer access network as at March 2016, Table 1

⁴⁵ NBN Co, Third Quarter Results 2016 Presentation, 6 May 2016

would be difficult to separate the pricing of WADSL and other services. It is therefore preferable to include the WADSL within the suite of services in the fixed line services declaration.

- 4.54 On the other hand, should the ACCC conclude, as was the case in the 2012 Declaration, that there are again no unique circumstances that warrant a departure from its general principle on declaration periods, the declaration period could be set within the usual three to five year duration. This means that the current WADSL Declaration should be extended to apply from 14 February 2017 to 13 February 2022. Optus sees benefits with a 2022 end date as this would likely remove the need for a further declaration inquiry, given the current expectation of the NBN completion date.

Section 5. AMENDMENTS TO THE SERVICE DESCRIPTION

- 5.1 Optus submits that amendments should be made to the service description to make it clear that the declared WADSL service – and the terms set out in the associated FAD – is sufficient to enable access seekers to acquire the service.
- 5.1 The ACCC set out principles for developing the WADSL service description in its 2012 decision, including that the service should be technically feasible to supply and charge for. And that the service should be one which potential access providers are supplying to themselves and others.⁴⁶
- 5.2 The WADSL service description states that the WADSL is an internet-grade, best efforts point to point service for the carriage of communications that is supplied by means of ADSL technology and uses a static Layer 2 tunnelling protocol over a transport layer to aggregate communications to the POI.⁴⁷
- 5.3 Importantly, it seems that the ACCC is of the view that this service description is technically feasible to supply the WADSL service, as described. Optus, however, submits that this is not the view of Telstra Wholesale. In fact, it is not possible to acquire just the WADSL service on the terms set out in the related FAD. Telstra Wholesale mandates that additional services be acquired in order to be supplied with the WADSL service. Telstra Wholesale further claims these additional services are unregulated and set prices at any level it sees fit. Moreover, these services fit the definition of bottleneck services; they cannot be avoided and there is no option of self-supply.
- 5.4 Optus has concerns over the mandatory Telstra Business Grade Ethernet (TWBGE) product, which is required in order to acquire WADSL services. The TWBGE provides access seekers with Ethernet access to Telstra's Internet Gateway Routers.
- 5.5 During the regulation of the WADSL service, little mention was made of the compulsory TWBGE charge. The WADSL service was described as:
- The backhaul interface can be either an AGVC or VLAN (using either ATM or Gigabit Ethernet as the transport protocol respectively). The access seeker acquires an interface and then acquires capacity over that interface to a specified throughput that it chooses.*
- 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.⁴⁸*
- 5.6 This description implies that an access seeker is required to purchase a port charge and AGVC/VLAN charges only to acquire a WADSL service. No mention appears to have been made either by the ACCC or Telstra of the additional TWBGE charge during the 2012 declaration inquiry process. The only mention of the requirement for an additional Ethernet access charge was in the Interim Access Determination which states that the AGVC charges are “*in addition to separate charges for ATM or TWE*

⁴⁶ ACCC, 2012, Final Report FAD for Wholesale ADSL, p.57

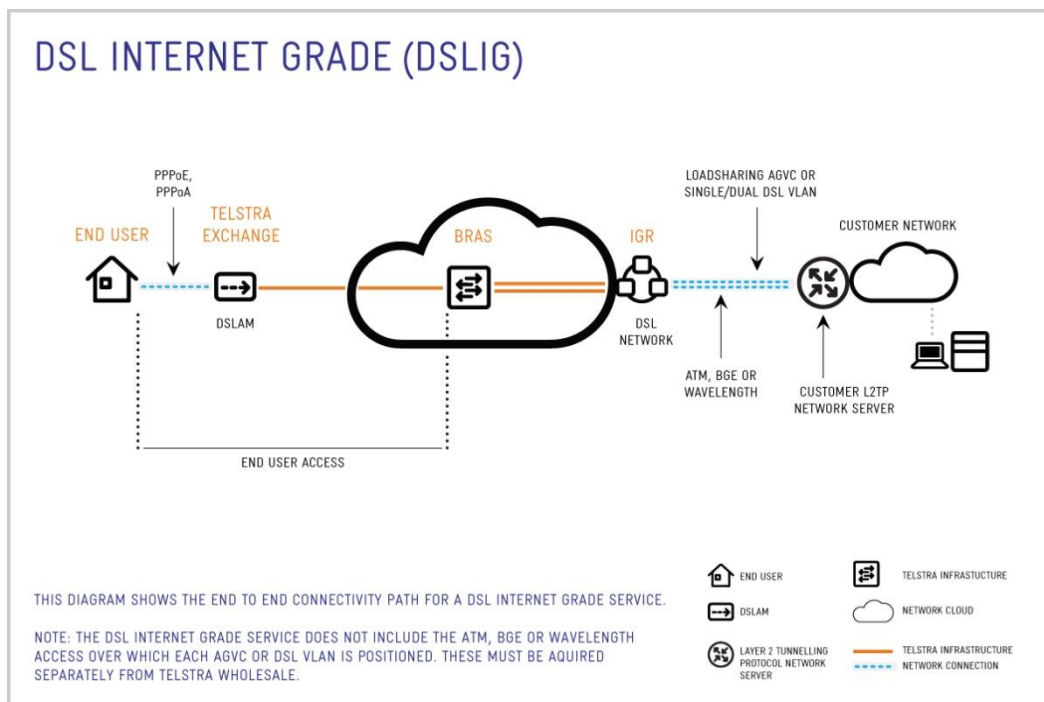
⁴⁷ WADSL Declaration, Annexure 1.

⁴⁸ ACCC, 2012, Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final Decision, February, section 2.3

access.”⁴⁹ No further mention was made in any other related document. It would appear, therefore, that the impact of the Ethernet access charge was not properly considered during the WADSL declaration or FAD inquiries.

- 5.7 A simple network schematic is shown in Figure 2, showing the compulsory nature of the BGE charge. To acquire a WADSL service, access seekers are required to purchase the underlying Ethernet port and link capacity, as well as the VLAN charge and the monthly charge per end-user port. In addition to the monthly recurring charge, there are additional set-up and connection charges.

Figure 2 WADSL service schematics



Source: Telstra Wholesale

- 5.8 In summary, on the information available it appears that the TWBGE was not fully considered during development of the WADSL FLSM. In other words, the declared service and the terms and conditions set out in the related FAD are not technically feasible to acquire WADSL. Without additional non-declared commercial services it is not possible to acquire WADSL.
- 5.9 Optus submits that the failure to fully declare all aspects of the WADSL service may limit the ability of the declaration to promote the LTIE.
- 5.10 Optus requests that the ACCC make clear that no additional services are required in order to acquire the WADSL service. That is, the only charges applicable to the WADSL service are the port and VLAN charges.

⁴⁹ ACCC, 2012 Interim access determination for the wholesale ADSL service: Statement of Reasons, February, p.4