



Submission by AAPT Limited

5 April 2012

to

ACCC Discussion Paper

**Public Inquiry to Make a Final Access Determination for the
Wholesale ADSL Service, dated February 2012**



Introduction

1. AAPT Limited (**AAPT**) welcomes the opportunity to make a submission in response to the Australia Competition and Consumer Commission (**ACCC**) discussion paper entitled: *Public Inquiry to Make a Final Access Determination for the Wholesale ADSL Service*, dated February 2012 (**the Discussion Paper**). The purpose of this submission is to identify what AAPT considers to be the essential requirements for a final access determination (**FAD**) for the Wholesale ADSL Service (**W-ADSL**).

Executive summary

2. In summary, AAPT submits that the FAD should deliver the following outcomes:
 - where possible, prices for W-ADSL should be based on the efficient costs of providing W-ADSL, and the approach for setting W-ADSL prices should be consistent with the approach that the ACCC has used in setting prices for other fixed line declared services;
 - Access Seekers should be given flexibility as to whether or not to bundle a PSTN service with W-ADSL and whether or how the various components of W-ADSL are to be bundled;
 - the W-ADSL FAD should only apply to Telstra;
 - there should be no geographic exemptions in respect of W-ADSL;
 - there should be a complete set of reasonable non price terms and conditions;



- there should be no restriction on reselling W-ADSL to wholesale customers; and
 - the term of the W-ADSL FAD should run until the ‘designated day’ as determined by section 577A(10) of the *Telecommunications Act 1997* (**Telco Act**).
3. AAPT submits that these outcomes are essential requirements for a FAD for W-ADSL in order for that FAD to promote the long term interests of end users (**LTIE**).

Applying the statutory criteria

4. Section 152BCA of the *Competition and Consumer Act 2010* (**CCA**) does not contain any objectives but rather only contains considerations. Consistent with the objective of Part XIC of the CCA, the sole objective of a FAD is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services¹. Therefore, the considerations in section 152BCA need to be seen in light of that sole objective to be achieved. The Australian Competition Tribunal had the following to say about the outcomes that best promote the LTIE:²

...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.

5. AAPT submits that in setting terms for the W-ADSL FAD, the ACCC should seek to achieve this outcome. AAPT submits that this outcome is best

¹ See section 152AB(1) of the CCA.

² *Re Seven Network Limited (No 4)* [2004] ACompT 11, at [120].



achieved by ensuring that the W-ADSL FAD meets the essential requirements discussed below.

Cost based pricing

6. AAPT notes that the Interim Access Determination (**IAD**) in respect of W-ADSL contains price terms which are set on the basis of retail minus retail cost (**RMRC**) methodology. AAPT acknowledges that the adoption of an RMRC methodology for the IAD in respect of W-ADSL was an appropriately pragmatic approach for the ACCC to take in order to fulfil the limited objective of providing interim safeguards against the ongoing competition concerns relating to W-ADSL that the ACCC had identified³. However, AAPT submits that pricing based on the RMRC methodology is not sufficient to achieve the broader objective of pricing W-ADSL in a manner that best promotes the LTIE. AAPT submits that cost based pricing is required to achieve this broader objective.

7. As regards the pricing of fixed line telecommunications, the ACCC stated⁴:

A building block model (BBM) pricing methodology estimates prices that reflect efficient costs. The ACCC considers that adopting a BBM approach to setting prices for the declared fixed line services meets the objectives of promoting the LTIE because setting prices that reflect efficient costs will promote competition in the markets for carriage services and encourage efficient use of and investment in infrastructure.

³ ACCC Interim access determination for the Wholesale ADSL service – Statement of Reasons, February 2012 at p.6.

⁴ ACCC Inquiry to make final access determinations for the declared fixed line services, Final Report, July 2011, at p.133.



Access prices that reflect efficient costs, and do not include any monopoly profits, will facilitate access to the infrastructure services required by access seekers to provide a range of communications services to end-users.

AAPT submits that this reasoning is applicable to the pricing of W-ADSL, and, therefore, the ACCC should price W-ADSL on the basis of prices that reflect efficient costs of providing W-ADSL.

8. AAPT submits that the ACCC has already done a great deal of work that is relevant to the pricing of W-ADSL. AAPT considers that the FAD prices for the Unconditioned Local Loop Service (**ULLS**), Line Sharing Service (**LSS**) and Wholesale Line Rental Service (**WLR**)⁵ are all highly relevant to determining prices for W-ADSL. As submitted below, AAPT believes that Access Seekers should not be forced to obtain an underlying PSTN service with W-ADSL. This leads to two possibilities as follows:
 - the Access Seeker obtains W-ADSL and an underlying PSTN service (**Bundled Service**); and
 - the Access Seeker obtains W-ADSL without an underlying PSTN service (**Standalone Service**).

9. In AAPT's view, Telstra's underlying customer access network costs can be recovered as follows:
 - in the case of a Bundled Service, through the charge for WLR; and
 - in the case of a Standalone Service, through an equivalent charge to the charge for ULLS.

⁵ See *Final Access Determinations Nos. 1 to 6 of 2011 for Fixed Line Services*.



10. In light of this, the only additional work that would be required to set W-ADSL prices would be to determine the additional W-ADSL specific costs. AAPT considers that:
- cost of access could be determined using the same approach for determining LSS specific costs; and
 - transmission prices should ideally be cost based.
11. However, AAPT acknowledges that the ACCC has adopted a benchmarking approach in relation to the Domestic Transmission Capacity Service (DTCS)⁶. If the ACCC decides that a similar approach should be adopted for determining transmission prices for W-ADSL, AAPT submits that a highly relevant consideration would be NBN Co's CVC pricing.

Flexibility for Access Seekers and End Users

12. AAPT submits that the W-ADSL FAD should allow Access Seekers to:
- obtain a Standalone Service from Telstra which could be subsequently retailed on the basis that end users need not also buy a PSTN service; and
 - make the AGVC component of the service optional.
13. **W-ADSL as a Standalone Service** - AAPT does not believe that there is any technical impediment to Telstra supplying a W-ADSL service without an underlying PSTN service. AAPT understands that the technology that Telstra uses to deliver W-ADSL is broadly similar to the technology that access

⁶ See ACCC, *Draft final access determination for the domestic transmission capacity service (DTCS)*, Explanatory Statement, December 2011, at p.8.



seekers use to provide DSL services via the ULLS. AAPT can see no advantages, other than to Telstra, in maintaining the forced PSTN bundling requirement. On the other hand, AAPT believes that mandating the provision of a Standalone Service would enhance competition and innovation and would allow Access Seekers to deliver the services that retail customers ask for rather than imposing PSTN services on retail customers in circumstances where those customers may either not want or need a PSTN service.

14. AAPT considers that a W-ADSL access service is an important foundation for AAPT to introduce new and novel value-added services. Accordingly, the ability to purchase a Standalone Service would provide AAPT with more opportunity and functionality to add its own value-added services over the top of the W-ADSL access service. This is in line with the trend set by current service providers (e.g. those that provide naked DSL) and the NBN roll out which is geared to increasing competition in the market for value-added retail services. A Layer 2 wholesale product (which does not require a phone line) allows for greater control of service functionality for the access seeker than a Layer 3 wholesale product for example.
15. In relation to the AGVC component, AAPT believes that competition in markets for wholesale transmission could be stimulated by allowing an Access Seeker the option of obtaining alternative transmission. This would require Telstra to permit interconnection deeper within the network than it currently allows. The availability of competitive transmission services that can be used as an alternative to the AGVC would be likely to drive lower prices in the relevant retail markets which would ultimately be beneficial for consumers.



The W-ADSL FAD should only apply to Telstra

16. It is clear that the competition concerns which led to the declaration of W-ADSL are all related to Telstra's conduct⁷. As the vertically integrated incumbent service provider, Telstra is the only service provider with a strong incentive and the ability to:
- create additional barriers to entry for new entrants; and
 - discriminate against wholesale customers in favour of its own retail business unit.
17. Furthermore, other providers of W-ADSL would each operate on a differing cost basis that would make their incorporation into the W-ADSL FAD price terms problematic. Therefore, including such providers within the scope of the FAD is likely to inhibit competition rather than promote it.

No geographic exemptions in respect of W-ADSL

18. AAPT notes that Telstra called for 361 exchange service areas (**ESAs**) to be excluded from the scope of the W-ADSL declaration⁸. AAPT believes that the ACCC should approach this issue in line with the approach that it has taken when it recently varied the FAD for fixed line services to remove the

⁷ ACCC *Interim access determination for the Wholesale ADSL service – Statement of Reasons*, February 2012 at p.6.

⁸ Telstra Corporation Limited Response to the Commission's Discussion Paper into whether wholesale ADSL services should be declared under Part XIC of the Competition and Consumer Act 2010 Public version 19 January 2012, at section 4.1.



geographic exemptions in relation to the WLR, LCS and PSTN OA services. The ACCC found clear evidence that⁹:

the exemptions have not promoted competition in the exempt areas and are unlikely to do so in the future. In addition, the ACCC has concluded that the exemptions have the potential to undermine efficiency in the use of, and investment in, infrastructure.

19. Furthermore, AAPT considers that the ESA does not represent the appropriate geographic dimension for assessing the state of competition in relation to W-ADSL services because:

- A consideration at the ESA level would artificially dilute Telstra's market power by ignoring the commercial reality that a single ESA fails to provide the requisite economies of scale to justify the roll-out of a competitive wholesale offering, let alone the high operational and marketing costs of taking a competitive retail offering to market, nor the rollout of a competitive wholesale offering.
- Regulation on a geographically segmented basis (based on the reasoning that some areas are more competitive than others) may in fact have the perverse effect of reducing competition in the competitive areas. For example, geographically segmented regulation can result in the following:
 - unfair bundling of regulated and non-regulated products/markets;
 - and

⁹ ACCC, *Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services*, Final Version, December 2011, Pub, p. 6.



- increased risk of cross-subsidies by Telstra between competitive (unregulated) and non-competitive (regulated) areas,

both of which would reduce competition in the “competitive areas” (because there is no ex ante regulation preventing discriminatory practices and cross-subsidies).

Reasonable non price terms and conditions

20. In accordance with the legislative hierarchy that applies by virtue of section 152AY of the CCA, a FAD provides a base set of terms and conditions that access seekers can rely on if they are unable to come to an agreement with an access provider on the terms and conditions of access to a declared service. In light of this, AAPT believes that the W-ADSL FAD should include reasonable terms relating to standard non price commercial matters. Although AAPT acknowledges the paramount importance of setting price terms¹⁰, AAPT believes that non price terms should not be overlooked given the obvious inequality in bargaining power between Telstra and an Access Seeker.
21. Subject to the comments made below, AAPT agrees that the ACCC’s *Model Non-Price Terms and Conditions Determination 2008 (the Model Terms)* should be used as the basis for the standard commercial terms in the W-ADSL FAD.

Billing and Notifications

22. Clause A.5(b) of the Model Terms (which allows the Access Provider to backbill the Access Seeker for up to six months after a charge was incurred by

¹⁰ By virtue of 152BC(8) of the CCA the ACCC cannot make a FAD that specifies terms and conditions of access without setting price terms or a method for ascertaining price.



the Access Seeker's customer) needs to be amended in order to be consistent with clause 6.5.4(d) of Communications Alliance's *Telecommunications Consumer Protections Code (C628:2007¹¹)* (**the TCP Code**) (which does not permit service providers to bill for charges older than 190 days from the date the charges were incurred). The TCP Code does not provide any exceptions to this rule that are relevant to clause A.5(b) of the Model Terms. The result is that the Access Provider can backbill the Access Seeker six months late, and the Access Seeker must pay the Access Provider. However, the Access Seeker cannot actually attempt to recover the late billed charges from its customers without being in breach of the TCP Code.

23. Clause A.15 of the Model Terms provides that a billing dispute cannot be raised after six months from the due date of an invoice. This should be extended as regards Billing Disputes that involve investigation by the Telecommunications Industry Ombudsman (**TIO**). The TIO has jurisdiction to investigate complaints that have arisen up to 24 months prior. A large percentage of the complaints investigated by the TIO relate to billing. If Access Seekers are not able to instigate a Billing Dispute because of the Model Terms' set time frames, they will not be able to comply with their obligation to provide the TIO with all information that is relevant to a complaint.

Liability (Risk Allocation) Provisions

24. AAPT believes that it is appropriate for liability (risk allocation) provisions to be included in the FAD. This is because AAPT's experience is that the liability provisions included in the commercial terms offered by Telstra are invariably one-sided in Telstra's favour. Due to Telstra's superior bargaining

¹¹ Available from: http://www.commsalliance.com.au/__data/page/21676/C628_2007.pdf.



position, AAPT believes that it would be appropriate if Access Seekers can avail themselves of even handed liability provisions. Subject to the comments below, AAPT believes that the appropriate liability provisions that should be incorporated into the FAD are those contained in section C of the Model Terms.

25. AAPT notes that the overriding principle behind section C of the Model Terms is to place the risk of a loss with the party that has the ability to control that risk and/or the amount of loss¹². AAPT accepts that clauses C.1 to C.15(a), C.21 and C.22 are consistent with this principle and that the effect of these clauses is to attribute risk in an even handed manner. Therefore, AAPT encourages the ACCC to adopt those provisions into the FAD, subject to the following suggestions:

- AAPT suggests that the amount of the cap in clause C.3(e) should be specified at a level that reflects insurance cover. Therefore, AAPT suggests that clause C.3(e) be amended to:

'\$10 million or other amount agreed in writing between the parties.'

- The effect of clause C.6 as currently worded is that there is a potentially unlimited liability for consequential loss arising from a negligent act or omission or an act or omission intended to cause loss. AAPT is aware that such unlimited liability provisions are often the subject of amendment during contractual negotiations. In light of this, it may be more appropriate for the ACCC to limit liability for such consequential loss to the amount of the liability cap under clause C.3.

¹² *Final Determination – Model Non-price Terms and Conditions November 2008*, at page 20.



26. As regards clauses C.15(b) to C.20 of the Model Terms, AAPT submits that these clauses do not give effect to the principle that the party that has the ability to control the risk should be liable for the risk. Telstra has control over the delays, failures and errors referred to in clause C.15(b). These problems have the potential to cause Access Seekers to suffer loss. AAPT believes that merely precluding Telstra from recovering charges for a service that it is not providing does not give Telstra sufficient incentive to do everything reasonably practical to rectify such problems in a timely manner. Therefore, AAPT submits that clauses C.15(b) to C.20 should not be included in the FAD.

Network Modernisation and Upgrade Provisions

27. Section G of the Model Terms deals with network modernisations and upgrades. AAPT notes the view expressed in the Discussion Paper¹³ that section G of the Model Terms may not be relevant to the supply of W-ADSL. Although the definition of 'Major Network Modernisation and Upgrade' is drafted with specific reference to ULLS, AAPT believes that the provisions in section G of the Model Terms should, with appropriate modifications to make the provisions applicable to W-ADSL, be included in the W-ADSL FAD. AAPT believes that there is no reason in principle why Telstra should not be required to comply with the requirements of section G of the Model Terms in circumstances where Telstra undertakes network changes that will result in either:

- Telstra no longer supplying W-ADSL; or
- the supply or quality of W-ADSL services being adversely affected.

¹³ ACCC – Public Inquiry to make a Final Access Determination for the Wholesale ADSL Service – Discussion Paper, at p.10



Changes to Operating Manuals

28. Section I of the Model Terms deals with changes to operating manuals. AAPT notes the view expressed in the Discussion Paper¹⁴ that section I of the Model Terms may not be relevant to the supply of W-ADSL. AAPT acknowledges that:

- section I of the Model Terms is drafted with specific reference to the ULLS; and
- section I makes reference to an Access Seeker's ability to seek arbitrated terms via an access dispute.

In light of this, AAPT accepts that section I of the Model Terms as drafted is not suitable for inclusion in the W-ADSL FAD. However, this does not mean that:

- Telstra's operational documents are not relevant to W-ADSL; and
- the FAD should not include suitable provisions that prevent Telstra from making changes to operational documents without sufficient notice to, and consultation with, Access Seekers.

29. In light of this, AAPT submits that a suitably amended version of section I of the Model Terms should be included in the FAD.

¹⁴ ACCC – Public Inquiry to make a Final Access Determination for the Wholesale ADSL Service – Discussion Paper, at p.10.



Ordering and Provisioning

30. Section J of the Model Terms deals with ordering and provisioning. AAPT notes the view expressed in the Discussion Paper¹⁵ that section J of the Model Terms may not be relevant to the supply of W-ADSL. AAPT acknowledges that section J of the Model Terms is drafted with specific reference to the ULLS and so it is not relevant to the supply of W-ADSL. However, this does not mean that the FAD should not contain terms and conditions that relate to service delivery and fault rectification. AAPT notes that the ACCC has recently accepted Telstra's Structural Separation Undertaking (SSU) which contains commitments relating to equivalence and transparency in relation to the supply of regulated services. In light of this, AAPT believes that it would be appropriate for the FAD to incorporate the following commitments made by Telstra in the SSU that relate to service delivery and fault rectification as relevant to W-ADSL:

- clause 9 – i.e. that Telstra will provide W-ADSL on an equivalence of outputs basis as compared to the Layer 2 component of Telstra's Retail ADSL service;
- clause 15 – DSL upgrades; and
- the service levels in Schedule 3 of the SSU that relate to W-ADSL.

31. In addition, the FAD should acknowledge that Access Seekers may have statutory entitlements under the *Telecommunications (Consumer Protection*

¹⁵ ACCC – Public Inquiry to make a Final Access Determination for the Wholesale ADSL Service – Discussion Paper, at p.10



and Service Standards) Act 1999 in respect of provisioning and fault rectification.

No restriction on reselling W-ADSL to wholesale customers

32. AAPT notes that the W-ADSL IAD expressly allows an Access Seeker to acquire the W-ADSL service for the purpose of supplying to a reseller without the need to obtain Telstra's consent to do so¹⁶. AAPT believes that this non price term is appropriate, is required to promote competition and should be included in the W-ADSL FAD.

The term of the W-ADSL FAD should run until the 'designated day' as determined by section 577A(10) of the Telco Act

33. W-ADSL is not only a declared service. It is also a regulated service by virtue of the *Telecommunications (Regulated Services) Determination (No. 1) 2011*. This means that even if W-ADSL ceases to be a declared service, Telstra will continue to have obligations to provide transparency and equivalence in respect of W-ADSL under the SSU for so long as those transparency and equivalence obligations remain in force. Given that the 'Reference Price' for W-ADSL under the SSU will be determined by reference to the W-ADSL FAD¹⁷, it would substantially increase regulatory certainty if the term of the W-ADSL FAD was consistent with the term of the transparency and equivalence obligations under Telstra's SSU. Given that the transparency and

¹⁶ Schedule 10 – Interim Access Determination No. 1 of 2012 (WDSL).

¹⁷ See clause 1.2 of Schedule 8 of Telstra's SSU



equivalence obligations under Telstra's SSU run until the 'designated day'¹⁸, the W-ADSL FAD should also run until then.

¹⁸ See clause 7.2 of the SSU.