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Consumer
Commission

Wholesale ADSL service declaration inquiry

Draft decision

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List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	asymmetric digital subscriber line
AGVC	aggregating virtual circuit
CAN	customer access network
CBD	central business district
CCA	<i>Competition and Consumer Act 2010</i>
DSL	digital subscriber line
DSLAM	digital subscriber line access multiplexer
DTCS	domestic transmission capacity service
ESA	exchange service area
FAD	final access determination
FTTB	fibre to the basement
FTTN	fibre to the node
FTTP	fibre to the premises
HFC	hybrid fibre-coaxial
LSS	line sharing service
LTIE	long-term interests of end-users
Mbps	megabits per second
NBN	National Broadband Network
PGS	pair gain systems
POI	point of interconnect
PoP	point of presence
PSTN	public switched telephone network
RIM	remote integrated multiplexer
SAOs	standard access obligations
SIO	services in operation
SSU	structural separation undertaking
TWBGE	Telstra's wholesale business grade ethernet
ULLS	unconditioned local loop service
VLAN	virtual local area network

Glossary

access agreement	A commercial contract between the access provider and an access seeker which sets out negotiated terms and conditions of supply for an agreed period of time.
access seeker	Telecommunications companies that seek access to the declared service (that is, the right to use the declared service).
access provider	Telecommunications companies that provide access to a declared service.
ADSL	<p>Asymmetric Digital Subscriber Line. A technology for transmitting digital information at high data rates on existing copper phone lines. It is called asymmetric because the download and upload data rates are not symmetrical (that is, download is faster than upload).</p> <p>ADSL2+ is a version of ADSL that gives a higher data rate.</p> <p>NB: All references to the wholesale ADSL service in this draft decision includes both ADSL and ADSL2+.</p>
declaration inquiry	The process by which the ACCC holds a public inquiry to determine whether a service should be declared.
declared service	A service that the ACCC regulates under Part XIC of the CCA. Once declared, a service provider must supply the service to other parties in accordance with the standard access obligations and the terms and conditions set in any final access determination.
DSLAM	Digital Subscriber Line Access Multiplexer. A device which makes use of the copper access lines to provide high data rate services, enabling broadband services to be provided over copper lines. It is generally located in a telephone exchange (or a node) that links many customer DSL connections (copper wires) to a core IP network via a backhaul system. It may also be located in a building to enable FTTB services.
end-user	Retail consumer of telecommunication services.
exchange	Place where various numbers and types of communication lines are switched so as to establish a connection between two telephones. The exchange also houses DSLAMs, enabling broadband services to be provided over copper lines to end-users.
FAD	Final Access Determination. The FAD is made by the ACCC and sets the terms and conditions (including prices) on which a service provider may be required to supply a declared service.
fixed-line services	Telecommunications services provided over fixed networks, such as Telstra's copper network and HFC networks. The 'declared fixed line services' are the ULLS, LSS, WLR, LCS, wholesale ADSL, FOAS and FTAS.
HFC network	Hybrid Fibre-Coaxial Cable network. A combination of fibre optic and copper coaxial cables able to deliver large amounts of data. Typically used to deliver internet services and pay television services.
LSS	The declared Line Sharing Service. Allows access seekers to share the use of the copper line connecting end-users to the telephone exchange, allowing them to provide fixed internet services using their own equipment. An alternative provider provides the voice services.

retail service provider	Company that offer telecommunications services to end-users.
	<p>Standard Access Obligations. Under section 152AR of the CCA, the category A SAOs require an access provider to:</p> <ul style="list-style-type: none"> • supply the service to an access seeker on request • take all reasonable steps to ensure that the technical and operational quality and fault detection, handling and rectification of the service provided to the access seeker is equivalent to that which it provides to itself, and
SAOs	allow interconnection.
SIO	Service In Operation. Refers to an active telecommunications service provided to an end-user.
ULLS	The declared Unconditioned Local Loop Service. Allows access seekers to use the copper line connecting end-users to the local telephone exchange, allowing them to provide both fixed internet (broadband) and voice services using their own DSLAMs and other exchange equipment.
Wholesale ADSL	The declared Wholesale ADSL service. Allows access seekers to purchase a Wholesale ADSL product from an access provider and resell internet services to end-users.

Executive Summary

The Australian Competition and Consumer Commission (ACCC) has formed the draft view that the wholesale asymmetric digital subscriber line (ADSL) service declaration should be extended for a further five years until 13 February 2022.

The wholesale ADSL service is a point-to-point service which enables network providers to deliver high speed fixed-line broadband internet services to their customers.

The ACCC considers that continued declaration of the wholesale ADSL service will promote the long-term interests of end-users (LTIE). In particular, declaration will:

- promote competition – declaration will continue to promote competition in the markets for high speed and superfast fixed-line broadband services in the lead up to the completion of the National Broadband Network (NBN) rollout. Telstra currently retains the dominant position in both the national retail and wholesale markets for high-speed fixed-line broadband services. By having access to the service on regulated price and non-price terms and conditions, access seekers can continue competing effectively in the wholesale and retail markets to the benefit of end-users.
- achieve any-to-any connectivity – the ACCC does not consider that declaration will have an impact on the achievement of any-to-any connectivity.
- encourage the economically efficient use of, and investment in, infrastructure –
 - the supply of the wholesale ADSL service does not raise concerns around technical feasibility or have a negative impact on the operation or performance of the network. The supply of the wholesale ADSL service will involve costs that are likely to be reasonable.
 - declaration would not have an effect on Telstra's ability to exploit economies of scale and scope or its ability to make a return on its investment.
 - declaration is unlikely to impact investment incentives. The slowing investment in the unconditioned local loop service (ULLS), line sharing service (LSS) and digital subscriber line (DSL) equipment is likely to be a result of access seekers reaching the limit of their efficient investment and the increasing pace of the NBN rollout with the transition of customers to NBN-based services.
 - declaration will promote efficient use of the wholesale ADSL service and the underlying fixed-line infrastructure.

The ACCC notes that most submitters to the ACCC's wholesale ADSL declaration inquiry discussion paper (released in July 2016) supported continued declaration of the same wholesale ADSL service as declared in 2012.

While Telstra broadly supported declaration of the wholesale ADSL service, it considered a number of exchange service areas (ESAs) are competitive and should be exempt from declaration. The ACCC considers that declaring the wholesale ADSL service (including all 289 ESAs which Telstra argues should be exempt) will promote the LTIE. This is because, without declaration:

- the ability of access seekers to compete with Telstra in supplying wholesale ADSL services to a significant segment of the national wholesale and also, importantly, retail high speed fixed-line markets, would be reduced. This is because access seekers have smaller digital subscriber line access multiplexer (DSLAM) footprints (compared with Telstra) and many purchasers of the wholesale ADSL service require national coverage to supply retail customers who have operations across Australia. Also, there are likely to be significant costs in obtaining wholesale ADSL services from multiple suppliers.

- Telstra, as the vertically integrated national supplier, has the incentive and ability to favour its own operations to maintain and grow its overall market share. Declaring the wholesale ADSL service will limit Telstra's ability to do so.
- ULLS and/or LSS based wholesale ADSL services are unlikely to be sufficient alternatives to Telstra's wholesale ADSL service. Declaring the wholesale ADSL service would reduce the need for retail providers to rely upon these alternatives. In this regard, the ACCC notes that:
 - alternative infrastructure providers may have limited excess capacity on their DSLAMs that could be used to service new customers, and
 - there is unlikely to be significant new DSL investment to service new customers as the rollout of the NBN has weakened investment incentives.

The ACCC's draft decision is to retain the current service description. The ACCC considers that it adequately describes the wholesale ADSL service.

The ACCC's draft decision is also to adopt a declaration period of five years. This is because having a longer regulatory period will provide certainty during the rollout of the NBN.

The ACCC invites submissions on the draft decision. Submissions to the draft decision are due on 14 November 2016. The ACCC intends to publish its final report in early 2017.

1. Introduction

1.1. Purpose

The ACCC is currently conducting a public inquiry into the declaration of the wholesale ADSL service. The current declaration is set to expire on 13 February 2017.

On 4 July 2016, the ACCC released a discussion paper commencing a declaration inquiry under Part 25 of the *Telecommunications Act 1997* into whether the wholesale ADSL service should be regulated.¹ Submissions were received from Telstra Corporation Limited, Optus, Vocus Communications, Macquarie Telecom Group (Macquarie), Exetel, Australian Communications Consumer Action Network (ACCAN), National Farmers' Federation (NFF) and Innovative Synergies.

This report sets out the ACCC's draft decision about whether declaration of the wholesale ADSL service will promote the LTIE having regard to the submissions made to the discussion paper and other available information. The ACCC is seeking comments from interested parties on the ACCC's draft decision before it makes a final decision.

1.2. Overview and background

1.2.1. Legislative framework

Under Part XIC of the *Competition and Consumer Act 2010* (CCA), the ACCC can declare a specified eligible service² if it is satisfied that this will promote the LTIE of carriage services or of services provided by means of carriage services.³

When determining whether declaration of the service promotes the LTIE, the ACCC must have regard to the extent to which declaration is likely to result in the achievement of the following three objectives:⁴

- promoting competition in markets for telecommunications services⁵
- achieving any-to-any connectivity
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied, and any other infrastructure by which such services are, or are likely to become, capable of being supplied.

Appendix C sets out the legislative framework in more detail, including the ACCC's approach to the LTIE test and the key issues that it will consider under the test.

If a service is declared it is subject to the standard access obligations (SAOs) and the access provider must provide access, if requested, to that service to access seekers.⁶ The

¹ ACCC, *Wholesale ADSL service declaration inquiry, Discussion paper*, July 2016, <http://www.accc.gov.au/system/files/ACCC%20wholesale%20ADSL%20declaration%20discussion%20paper%20-%20July%202016.pdf>

² An 'eligible service' is (a) a listed carriage service (as defined by the *Telecommunications Act 1997* (Cth) (Telco Act)); or (b) a service that facilitates the supply of a listed carriage services (as defined by the Telco Act), where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider (whether to itself or to other persons): section 152AL(1) CCA.

³ CCA, section 152AL.

⁴ CCA, section 152AB.

⁵ By 'telecommunications services', the ACCC means 'carriage services or services supplied by means of carriage services.'

⁶ CCA, section 152AR.

access provider may also be required to comply with regulated price and non-price terms and conditions set by the ACCC.⁷

1.2.2. The wholesale ADSL service

DSL technology provides fixed-line broadband services over copper networks and is currently the major technology for broadband internet connections in Australia. ADSL broadband services have a high downstream data rate coupled with a lower upstream data rate and are typically used by residential or small business customers. As the NBN is being rolled out, the ADSL fixed-line broadband services will no longer be available as services are progressively migrated from Telstra's legacy network to the NBN network.

The ACCC first declared the wholesale ADSL service in February 2012.⁸ The ACCC declared the wholesale ADSL service as it considered this would promote the LTIE in the following ways⁹:

- Promoting competition – declaration would address the ongoing concerns about the level and structure of Telstra's wholesale ADSL pricing. It would also address concerns about Telstra's ability to leverage its market power in the supply of the wholesale ADSL service to impede competition through restrictive contractual terms. Declaration would also prevent the potential for anti-competitive price discrimination between wholesale ADSL access seekers. These were seen to be important in providing certainty in the lead-up to the NBN.
- Achieving any-to-any connectivity – declaration would not have any impact on the achievement of any-to-any connectivity.
- Encouraging economically efficient use of, and investment in, infrastructure – declaration would be unlikely to impact on the incentives for efficient investment given significant further expansion of the footprint for wholesale ADSL services using competitive infrastructure (ULLS and DSL infrastructure) was not anticipated. Further, it was unlikely that Telstra's legitimate commercial interests would be impacted given its ability to continue to make a return on its existing investments.

The ACCC has made a final access determination (FAD) establishing the regulated price and non-price terms and conditions to apply where commercial agreement cannot be reached.¹⁰ The ACCC decided the wholesale ADSL service FAD and SAOs would only apply to Telstra and not to other carriers or carriage service providers. This was because Telstra remains the dominant provider of the wholesale ADSL service and there was no significant benefit in applying the SAOs to non-Telstra providers given they were already effectively constrained in the supply of the wholesale service through competition with Telstra.¹¹

If through this public inquiry the ACCC was to declare the wholesale ADSL service as is currently declared, the current FAD¹² would remain in place until it expires on 30 June 2019.

⁷ CCA, section 152AY.

⁸ ACCC, *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final decision (Wholesale ADSL service declaration – Final decision)* February 2012, <https://www.accc.gov.au/system/files/Declaration%20of%20the%20wholesale%20ADSL%20service%20-%20final%20decision%20paper.pdf>.

⁹ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012, p. 1-2.

¹⁰ ACCC, *Public inquiry into final access determinations for fixed line services*, Final Decision, October 2015, <http://www.accc.gov.au/system/files/FSR%20FAD%20Final%20Decision%20Report%20-%20Public%20Version.pdf>

¹¹ ACCC, *Public inquiry into final access determinations for fixed line services*, Final Decision, October 2015, p. 227.

¹² *Final Access Determination No.8 of 2015 (WADSL)*, <http://registers.accc.gov.au/content/item.phtml?itemId=1190014&nodeId=334e39870420b8779c7d7cb1908bc110&fn=Final%20Access%20Determination%20Nos.%202%20to%208%20of%202015%20for%20Fixed%20Line%20Services.pdf>

Section 3 of the wholesale ADSL service declaration inquiry discussion paper provided further background to the current declaration of the wholesale ADSL service, related processes and outlined some key issues and trends in the industry.¹³

1.3. Consultation

The ACCC encourages industry participants, other stakeholders and the public to consider the issues set out in this draft decision and make a submission.

The ACCC seeks written submissions on the issues raised in this report by **no later than 14 November 2016**.

The ACCC prefers to receive electronic copies of submissions, either in PDF or Microsoft Word format allowing for the submission text to be searched. Please email submissions to:

Claire.Preston@acc.gov.au

Cc Nicole.Ross@acc.gov.au and WADSLdeclarationinquiry@acc.gov.au

Please contact Claire Preston regarding any questions you have regarding this consultation on (03) 9290 1995.

The ACCC expects to finalise its decision in February 2017.

1.3.1. Confidentiality

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both 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 has published a Confidentiality Guideline which sets out the process parties should follow when submitting confidential information to communications inquiries commenced by the ACCC. The Guideline describes the ACCC's legal obligations with respect to confidential information, the process for submitting confidential information and how the ACCC will treat confidential information provided in submissions. A copy of the Guideline can be downloaded from the website.

The *ACCC-AER information policy: the collection, use and disclosure of information* is also a useful reference and can be downloaded from [the ACCC's website](#).¹⁴

1.4. Structure of the Report

The draft report is set out as follows:

Section 2 sets out the ACCC's draft views about whether the declaration of the wholesale ADSL service is likely to promote the LTIE, including whether declaration will result in the achievement of the objectives of promoting competition, achieving any-to-any connectivity and encouraging the economically efficient use of, and investment in, infrastructure by which the service is supplied.

¹³ ACCC, *Wholesale ADSL service declaration inquiry, Discussion paper*, July 2016.

¹⁴ <https://www.acc.gov.au/publications/acc-aer-information-policy-collection-and-disclosure-of-information>. Note: the AER is the Australian Energy Regulator.

Section 3 outlines the ACCC's draft views in relation to the wholesale ADSL service description, the length of the declaration and the regulatory burden associated with declaration.

Appendix A provides the draft service description for the wholesale ADSL service.

Appendix B sets out an overview of DSL technology.

Appendix C provides an outline of the legislative framework the ACCC must have regard to in deciding whether to declare a service.

Appendix D lists the submissions, received by the ACCC to date to this inquiry, and their short titles.

2. Will declaration promote the LTIE?

Key points:

- The ACCC considers declaration of the wholesale ADSL service will promote the LTIE.
 - Consistent with its approach in 2012, the ACCC considers the relevant markets are the national wholesale and retail markets for high speed fixed-line broadband internet services.
 - The ACCC considers superfast broadband services are in a separate but related market to high speed fixed-line broadband services and does not currently consider wireless broadband services to be effective substitutes.
 - In both the national wholesale and retail markets for high speed fixed-line broadband services, Telstra continues to retain its dominant position.
 - The ACCC considers declaration is likely to continue promoting competition in the relevant markets by providing access to the wholesale ADSL service on regulated price and non-price terms and conditions so access seekers can effectively compete.
 - Declaration of the wholesale ADSL service is unlikely to impact the objective of achieving any-to-any connectivity.
 - Declaration of the wholesale ADSL service is likely to further encourage the economically efficient use of, and investment in, infrastructure. Declaration would not affect Telstra's ability to exploit economies of scale or make an investment return, and would encourage efficient use of Telstra's existing infrastructure.
-

As outlined above, in deciding to declare a service, the ACCC must be satisfied that declaration will promote the LTIE of carriage services or services supplied by means of carriage services. In deciding whether declaration is likely to promote the LTIE, the ACCC must have regard to the extent to which declaration is likely to result in the achievement of the following three objectives:

- promoting competition in markets for listed services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users
- encouraging the economically efficient use of, and the economically efficient investment in, infrastructure.

This section sets out the ACCC's analysis of whether declaration of the wholesale ADSL service would promote the LTIE.

2.1. Relevant markets including substitutes

As discussed in section 1.2.1, the CCA requires the ACCC to consider whether declaring a service is likely to promote competition in markets for listed services.¹⁵ This involves identifying the markets in which the eligible service is supplied and in which declaration is likely to promote competition. To define the market, the ACCC considers the service in question and substitutes for that service. The ACCC is not required to define the scope of relevant markets precisely for the purpose of a declaration inquiry. It is sufficient to broadly identify the scope of the markets likely to be affected by the declared service.¹⁶

¹⁵ Subsection 152AB(2) of the CCA.

¹⁶ ACCC, *A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010*, August 2016, p.33.

In the discussion paper, the ACCC noted that it may be appropriate to consider the wholesale and retail markets on a national basis. This is consistent with the approach adopted in the previous declaration inquiry.

The ACCC also considered it unlikely that wireless broadband services (offered over mobile broadband, fixed wireless or satellite) are in either the high speed fixed-line or superfast broadband markets.

The ACCC was of the view that high speed fixed-line broadband markets supplied by ADSL services are likely to be relevant to this declaration inquiry. It also noted that customers appear to be substituting out of the high speed fixed-line broadband market (supplied on ADSL networks) into the superfast fixed-line broadband market. The ACCC requested stakeholder views on whether there are separate but related markets for high speed fixed-line broadband services and superfast broadband services.

Submissions

Market definition

Exetel, Optus, Telstra and Vocus considered the relevant markets for the purpose of the inquiry to be the retail and wholesale markets.¹⁷ Telstra and Exetel agreed with the ACCC that the geographic scope of the market should be defined on a national basis.¹⁸ Vocus considered that the ACCC should look across the different geographic bands when applying the LTIE test.¹⁹ Optus added that while it supported a national market definition, it should be recognised that use of the wholesale ADSL service is more prominent in areas without ULLS access which results in higher retail prices than other broadband networks.²⁰

Notwithstanding that Telstra supported a national market definition, it submitted that the ACCC needs to consider the level of competition within segments of the market and determine whether declaration of those segments is within the LTIE.²¹

Substitute services

Telstra considered that Hybrid Fibre Coaxial (HFC), ULLS/LSS based ADSL, fibre-to-the-basement (FTTB), NBN and fixed wireless technologies are all strong demand-side substitutes for the wholesale ADSL service and retail ADSL services.²²

Telstra also considered high speed fixed-line broadband services and superfast broadband services to be close substitutes as consumers consider options in both markets before deciding on a supplier for broadband services. Telstra noted that mass migration from public switched telephone network (PSTN)-based services to NBN-based services does not indicate a lack of substitutability between the technologies. This is because customers have

¹⁷ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.1. Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, pp.10-11. Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.17. Vocus, *ACCC WADSL service declaration enquiry – Vocus submission*, p.2.

¹⁸ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.17. Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p. 2.

¹⁹ Vocus, *ACCC WADSL service declaration enquiry – Vocus submission*, p.2.

²⁰ Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.12.

²¹ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p, 17.

²² Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p. 17.

some choice as to when, but ultimately not whether, they want to substitute the PSTN with the NBN.²³

Both Exetel and Optus considered that the high speed fixed-line broadband and superfast broadband markets should be treated as separate markets. They noted that, while there is increasing demand for superfast broadband services, the level of substitution is restricted based on network availability.²⁴ Exetel observed that only a small number of end-users currently have a choice of using high speed and superfast broadband services concurrently, and this diminishes as the NBN disconnection date draws near.²⁵

While Optus supported the separation of the two markets for market definition purposes, Optus considered the markets to be related, noting that market power and competition issues are easily transferred across these markets.²⁶

Telstra considered that for many applications mobile and fixed broadband are substitutes, as well as complements. However, it noted that for market definition purposes it does not consider that including mobile competition in the market is necessary for the purpose of considering whether to declare the wholesale ADSL service.²⁷

Vocus and Exetel did not consider mobile broadband services to be a substitute for ADSL-based high speed broadband services. They noted that:

- price and data caps on mobile broadband services presently make access technology not a direct substitute for fixed services.²⁸
- the majority of wireless broadband services (either as dedicated Mobile Broadband data only services or using 3/4G Mobile Voice services data tethered) are currently acquired as a complementary service to high speed fixed-line broadband service to be used outside of home or workplace. However, this will change in the future with the emergence of 5G technologies.²⁹

Optus noted that while there is a small but growing market that sees wireless broadband as a substitute for ADSL-based services, this group of end-users are likely to have specific usage requirements (such as low demand for data downloads and increased need for mobility) that make wireless attractive.³⁰

ACCC's draft view

Functional dimension

Consistent with the 2012 wholesale ADSL declaration decision, the ACCC considers that the relevant markets are the wholesale and retail markets for fixed-line broadband internet services.³¹

²³ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016 p.18.

²⁴ Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.11. Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, pp.1-2.

²⁵ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, pp.1-2.

²⁶ Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.11.

²⁷ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.18.

²⁸ Vocus, *ACCC WADSL service declaration enquiry – Vocus submission*, p.2.

²⁹ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.2.

³⁰ Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.11.

³¹ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012.

In relation to the wholesale market for fixed-line broadband, the ACCC also considers that consistent with the 2012 declaration decision the wholesale market can be further categorised into two segments:

- the self-supply of fixed-line wholesale broadband services, including retail service provider's use of their own ULLS/LSS networks to self-supply at the wholesale level.
- retail service providers that resell fixed-line wholesale broadband services. That is, retail service providers that supply wholesale ADSL services to other retail services providers by using their own ULLS/LSS networks and/or resale of wholesale ADSL from Telstra.

Product dimension

In the discussion paper, the ACCC considered that both high speed and superfast fixed-line broadband products were likely to be relevant to the declaration inquiry. It also noted that customers appear to be substituting out of high speed fixed-line broadband services (supplied on ADSL networks) into the superfast fixed-line broadband services (supplied via the NBN).

The ACCC considers these two separate products are distinguished by the broadband data rates they are capable of supplying. Consistent with the ACCC's declaration inquiry for the superfast access broadband service, superfast fixed-line broadband services are those with download transmission rates that are normally 25 megabits per second (Mbps) or higher.³² High speed fixed-line broadband services have an upper limit of 24 Mbps.³³

The ACCC considers the high speed and superfast fixed-line broadband markets to be separate but related markets. Though in the discussion paper the ACCC characterised the migration to the NBN as customers substituting out of the high speed fixed-line broadband market into the superfast fixed-line broadband market, following submissions and further analysis it does not consider this to be correct. Ultimately, customers will not have a choice about transitioning to the NBN and therefore the ACCC does not consider high speed and superfast fixed-line broadband services to be substitutes in the technical sense. In this regard, the ACCC notes Optus and Exetel's submissions which considered superfast services is a replacement for high speed services. As noted by submitters, customers may have some choice as to when they take up an NBN service, but not whether they can choose between the two types of broadband services.

The ACCC does not currently consider mobile broadband services are a strong substitute for high speed or superfast fixed-line broadband services. While data rates are comparable, customers currently appear to maintain a preference for fixed-line broadband for data intensive activities given the more expensive retail prices and smaller data allowances for mobile broadband services. While mobile data allowances may be increasing as noted by Telstra,³⁴ the fixed-line data allowances are also increasing, with many retail service providers now offering unlimited data.

This suggests that at present, mobile and fixed-line broadband services are not full substitutes. However, the ACCC acknowledges that the extent of substitution may change as there are a growing proportion of customers with specific usage requirements who appear to be using mobile broadband as a substitute for fixed-line broadband services.³⁵

³² ACCC, *Superfast Broadband Access Service declaration inquiry*, Final decision, July 2016, p. 20.

³³ High speed is defined by the maximum speed of ADSL2+.

³⁴ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.7.

³⁵ Australian Communications Consumer Action Network, *New study confirms mobile is Australian's number one communication device*, September 2012, http://accan.org.au/index.php?option=com_content&view=article&id=489:new-study-confirms-mobile-is-australians-number-one-communications-device-&catid=111:general-communications&Itemid=113

The ACCC also does not consider fixed wireless broadband services are a strong substitute to fixed-line broadband services, given the limited availability of the service. Fixed wireless broadband services are usually offered in regional and rural areas and in outskirts of major cities where fixed-line broadband is not available. The ACCC notes that the cost of retail plans and data inclusions are not comparable to fixed-line broadband services. However, retail service providers are beginning to offer retail plans for fixed wireless broadband services, which may start to become competitive over time. For example, Optus' newly launched home wireless broadband plans retail for \$80 to \$90 per month for a 200GB of data allowance.³⁶

Further, the ACCC does not consider satellite broadband services are a strong substitute due to the more expensive retail plans with smaller data allowances, usage restrictions and limited availability of the satellite broadband service (the NBN satellite service is offered to customers that fall outside the fixed line and fixed wireless areas in Australia).

Geographic dimension

Consistent with the 2012 declaration, the ACCC considers it appropriate to retain a national market definition for the purpose of conducting the LTIE analysis, because Telstra competes nationally in the supply of broadband services to end-users, including offering national retail prices.³⁷

2.2. State of competition

This section sets out the ACCC's assessment of the effectiveness of competition in the relevant markets. When assessing the effectiveness of competition, the ACCC will not only consider current conditions and behaviour. It will also consider features likely to affect the competitive supply of services in the future, which include the potential for sustainable competition to emerge and the extent to which the threat of entry (or expansion of existing suppliers) constrains pricing and output decisions.

In the discussion paper the ACCC observed that the state of competition in the high speed fixed-line broadband market appears to have changed very little since the 2012 declaration of the wholesale ADSL service. It was noted that Telstra seems to have retained its relatively dominant position in both the wholesale and retail markets.

Submissions

Vocus, Optus and Macquarie considered that the state of competition has changed very little since the previous declaration and noted that Telstra continues to retain its dominant position in both retail and wholesale markets.³⁸

In contrast, Telstra and Exetel considered there to be a high degree of competition in the retail and wholesale markets where infrastructure competition exists.³⁹ However Exetel noted that there has been a reduction of choice and product differential available in the retail market due to recent market consolidation.⁴⁰

³⁶ <http://www.optus.com.au/shop/broadband/home-wireless-broadband/plans#Plans> Accessed 9 September 2016.

³⁷ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.17.

³⁸ Vocus, *ACCC WADSL service declaration inquiry – Vocus submission*, p.3. Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p. 12. Macquarie, *Submission to WADSL Declaration Inquiry*, 28 July 2016, p.1.

³⁹ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.19. Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p. 2.

⁴⁰ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p. 2.

Optus and Macquarie noted that market power in the provision of high speed fixed-line broadband services via ADSL-based broadband has seemed to result in Telstra emerging as increasingly dominant in wholesale markets for NBN access services.⁴¹ They both observed that Telstra has a wholesale market share of more than 47 per cent in relation to wholesale services delivered over the fibre to the premises (FTTP) footprint, rising to more than 58 per cent in the early fibre to the node (FTTN) rollout footprint.⁴²

Optus submitted that market power in the provision of ADSL-based broadband is easily transferrable across services supplied over the NBN using FTTN/B technologies, due to the use of ADSL-VDSL modems that enable 'automatic' migration of end-users. Optus also considered that 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.⁴³

Macquarie considered that there are very strong incentives for Telstra to maximise its retail and wholesale market share during the period that customers are migrating from Telstra's copper network to the NBN. Macquarie further considered that removing regulated access to Telstra's legacy network risks inviting conduct intended to further disadvantage competitive access seekers at this critical time in communications markets.⁴⁴

Telstra submitted that there is effective competition in some areas of the market and that the ACCC needs to consider the level of competition within segments of that market and determine whether declaration of those segments is in the LTIE.⁴⁵ It noted that access seekers have choice of multiple wholesale inputs in competitive areas, including ULLS and wholesale ADSL services. Telstra proposed exemption of 289 ESAs from declaration which it considered are demonstrably competitive based on the following two part test:

- all four of the largest infrastructure competitors (being Telstra, Optus, iiNet/TPG Telecom and Vocus/M2) in an ESA,⁴⁶ and
- non-Telstra competitors have a combined (ULLS and LSS services in operation (SIOs)) market share of at least 30 per cent in an ESA.⁴⁷

Telstra submitted that its aggregate retail market share in these 289 exchanges is only [c-i-c begins] [redacted] [c-i-c ends] percent and the combined market share of Telstra's retail and wholesale ADSL services is only [c-i-c begins] [redacted] [c-i-c ends] percent.⁴⁸

Telstra considered that exemption would not lead to anti-competitive conduct and that it is not aware of any complaints having been made about this kind of conduct. Telstra noted this is [c-i-c begins] [redacted]

[redacted] [c-i-c ends].⁴⁹

⁴¹ Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.15. Macquarie, *Submission to WADSL Declaration Inquiry*, 28 July 2016, p.1.

⁴² Macquarie, *Submission to WADSL Declaration Inquiry*, 28 July 2016, pp.1-2. Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.15.

⁴³ Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.15.

⁴⁴ Macquarie, *Submission to WADSL Declaration Inquiry*, 28 July 2016, p.2.

⁴⁵ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p 9-15.

⁴⁶ Optus, TPG and Vocus use the ULLS / LSS and their own DSL infrastructure to provide competing services.

⁴⁷ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p14.

⁴⁸ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Confidential version, 29 July 2016, p.14.

⁴⁹ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Confidential version, 29 July 2016, p.15.

ACCC's draft view

The ACCC's draft view is that Telstra retains a dominant position in both the national wholesale and retail markets for high speed fixed-line broadband services. On a more disaggregated, ESA-basis, the ACCC acknowledges that there are instances where there appears to be infrastructure competition in the wholesale market (via the ULLS and access seeker's DSL infrastructure). However, infrastructure competition does not exist on a national basis and as a result there is limited competition at the retail level on a national basis.

Wholesale market for high-speed broadband services

As outlined in section 2.1 above, the ACCC considers that the wholesale market can be categorised into two segments: the self-supply of fixed-line wholesale broadband services and service providers that resell fixed-line wholesale broadband services.

In relation to the self-supply of high speed fixed-line wholesale broadband services, the market shares for wholesale ADSL services are set out in Table 2.1. These illustrate that nationally Telstra retains a dominant market position in the wholesale market for high speed fixed-line broadband services. Competition is strongest in Bands 1 and 2.

Table 2.1 - Telstra wholesale ADSL service market shares based on CAN RKR data

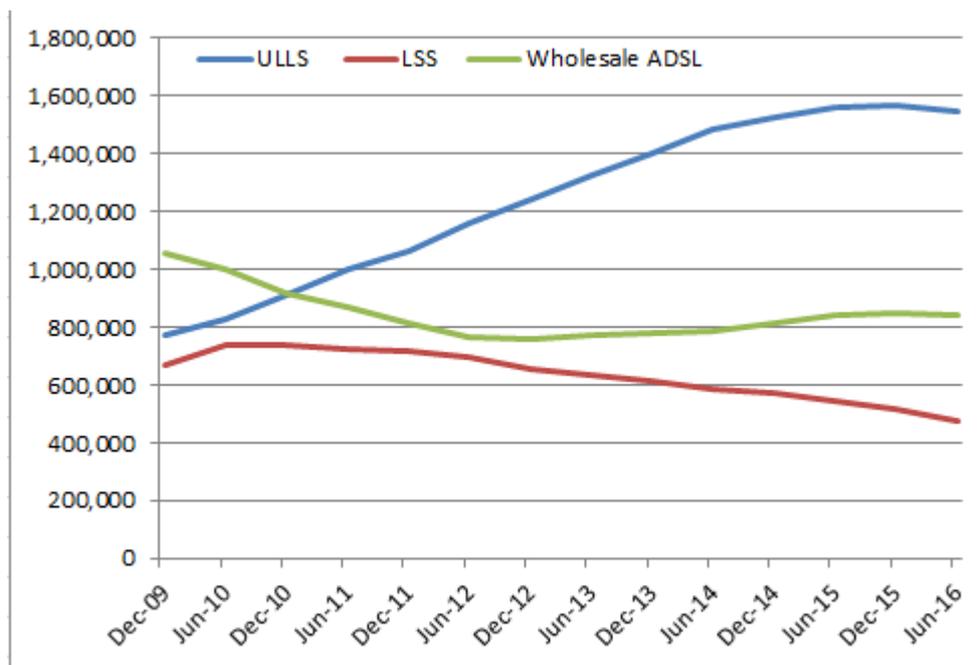
	Telstra	Other
National market share	61.62%	38.38%
Share in Bands 1 and 2	49.01%	50.99%
Share in Bands 3 and 4	95.62%	4.38%
Number of exchanges with a DSLAM presence	2873	606

Source: Based on ACCC, *Snapshot of Telstra's customer access network as at June 2016*

These market shares reflect that Telstra currently supplies ADSL services in approximately 2873 ADSL enabled ESAs out of a total 5067 ESA's nationally. In comparison, access seekers, utilising ULLS and/or LSS and their own DSL infrastructure, supply competing ADSL services in 606 ESAs, or 21 per cent of Telstra's ADSL footprint.

The ACCC notes that despite strong growth in ULLS investment by access seekers prior to December 2014, more recently access seeker investment in ULLS has plateaued and slightly declined. Chart 2.1 illustrates this investment trend for ULLS and also shows the trends for LSS and wholesale ADSL via SIOs.

Chart 2.1 - Number of access seekers' services in operation



Source: Data sourced from Telstra Corporation Ltd Financial results 2010-12 and Financial results supporting material 2013-16 at: <https://www.telstra.com.au/aboutus/investors/financial-information/financial-results>. The ACCC notes slight differences in SIO numbers provided by Telstra in the Telstra Economic Modelling (TEM) reports.

This trend appears to correlate with the increased acceleration of the NBN roll out and commercial decisions being made to minimise investment in DSL infrastructure as the payoff period becomes limited. Several submitters noted there were barriers to ULLS investment, including:

- the return on investment for network build/expansion/upgrade, particularly in areas beyond Band 2
- the uncertainty around the timing and location of the roll-out of the NBN, which has increased the risks associated with DSL investment, particularly given the investment will be redundant when the NBN is deployed.⁵⁰

ULLS and LSS investment by access seekers is highest in Bands 1 and 2,⁵¹ which is reflected in the market shares shown in Table 2.1. Band 2 predominately covers metropolitan areas and larger regional towns, while Band 1 covers central business district (CBD) locations.

In its submission to the discussion paper, Telstra considered there is effective competition in 289 ESAs where there are four or more infrastructure competitors utilising ULLS or LSS and non-Telstra competitors have a market share of at least 30 per cent in an ESA. The ACCC understands that most of the ESAs Telstra proposes for exemption are in Band 2 (273), with the remainder (16) being in Band 1. The ACCC also notes that Telstra proposed 289 ESAs should be exempt from the application of the SAOs in the 2012 wholesale ADSL FAD process. In that inquiry, however, Telstra proposed a different test – a modified version of

⁵⁰ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.3. Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.13, Macquarie, *Submission to WADSL Declaration Inquiry*, 28 July 2016, p.2.

⁵¹ ACCC, *Snapshot of Telstra's customer access network – June 2016*.

Wholesale market for resale of fixed-line wholesale broadband services

In relation to the resale market for fixed-line wholesale broadband services, the ACCC notes there are alternative providers such as Optus,⁵⁶ Vocus⁵⁷ and AAPT⁵⁸ reselling wholesale ADSL services.⁵⁹

However, the ACCC considers that the resale competition is limited and wholesale ADSL services offered by alternative providers do not pose a material competitive constraint on Telstra in the supply of fixed-line broadband services on a national basis. The ACCC notes that confidential market share information on the resale of wholesale ADSL services provided by stakeholders during the 2013 Fixed Line Services FAD inquiry supports the view that Telstra remains the dominant provider in the national resale market.⁶⁰ As at June 2015, Telstra provided [c-i-c begins] [REDACTED] [c-i-c ends] wholesale ADSL services compared to the second largest resale provider, [c-i-c begins] [REDACTED] [c-i-c ends], which provided [c-i-c begins] [REDACTED] [c-i-c ends] wholesale ADSL services.

Further, as outlined above, the footprint of competing DSL networks is far more limited than Telstra's network and there is unlikely to be further expansion in the DSL footprint given the transition to the NBN.

Telstra submitted that [c-i-c begins] [REDACTED]
[REDACTED]
[REDACTED] [c-i-c ends].⁶¹ However, this has only occurred where there is infrastructure competition and does not demonstrate an effectively competitive national market.

Retail markets for high-speed and superfast broadband services

It also appears that Telstra has a relatively strong position in the national retail market for high speed broadband services. The retail market shares for fixed-line broadband services (ADSL services) are illustrated in Chart 2.2. As at June 2015 Telstra had the highest proportion of subscribers, which has not changed since the wholesale ADSL service was declared in February 2012. Following declaration, there have been some movements in the market shares of other retail service providers, with Optus' market share decreasing by 3 percentage points and M2 holding a sufficient proportion of market share to be reported separately to other retail service providers.

⁵⁶ <http://www.optus.com.au/wholesale/solutions/broadband-and-nbn> accessed 9 September 2016.

⁵⁷ <https://www.vocus.com.au/wholesale/wholesale-dsl> accessed 9 September 2016.

⁵⁸ <https://aapt.com.au/wholesale/products/wholesale-ADSL> accessed 9 September 2016.

⁵⁹ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, pp.6-7 & p.11. Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.2.

⁶⁰ ACCC, *Fixed Line Services FAD inquiry: request for further information*, 3 June 2015.

⁶¹ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Confidential version, 29 July 2016, p.19.

Chart 2.2 Retail market shares for fixed-line broadband services



Source: ACCC Report, *Competition in the Australian telecommunication sector*, using ACCC Division 12 RKR, voluntary data provided by M2, and Australian Bureau of Statistics, Internet Activity Australia (8153.0).

Since June 2015 the above market shares have been further impacted by the merger of TPG and iiNet and other changes in the market. As a result of this consolidation there are now four large providers which, based on the market shares as at June 2015, supply 91 per cent of the market.

While Telstra has a relatively strong position in the retail market for high speed broadband services, there does appear to be a degree of retail competition. The ACCC considers that this competition is occurring in a national market, noting that the price/service (e.g. speed, data allowances) offerings from most retail service providers are generally available and consistent nation-wide.

Competition is evidenced by the variety of price/service offerings available and the differentiation that occurs when services are being supplied on-net compared to off-net (i.e. on a retail service provider's own network as compared to on Telstra's network or that of another wholesale provider). This variety is illustrated by the following ADSL2+ plans that are currently in the market:

- Telstra has plans ranging from \$75 per month for 100GB of data to \$120 per month for 1000GB of data⁶²
- Optus has a plan of \$80 per month for unlimited data⁶³
- TPG has on-net plans ranging from \$29.99 per month for 50GB of data to \$59.99 per month for unlimited data and off-net plans ranging from \$49.99 per month for 50GB of data to \$99.99 per month for unlimited data⁶⁴
- iiNet has on-net plans ranging from \$59.99 per month for 250GB of data to \$79.99 per month for unlimited data and off-net plans ranging from \$69.99 per month for 100GB of data to \$89.99 per month for 250GB of peak and 250GB of off peak data⁶⁵

⁶² Telstra did not appear to have standalone high speed broadband plans and these prices included calls <https://www.telstra.com.au/bundles?ti=TR:TR:Jan16:doubledata:pershome:bundles> accessed 2 September 2016.

⁶³ <http://www.optus.com.au/shop/broadband/home-broadband/plans?bt=UDSL&tl=LAU> accessed 2 September 2016.

⁶⁴ http://www.tpg.com.au/products_services/adsl2-standalone and http://www.tpg.com.au/products_services/broadband-offnet accessed 2 September 2016.

⁶⁵ <https://www.iinet.net.au/internet-products/broadband/adsl/> and <https://www.iinet.net.au/internet-products/broadband/adsl/offnet/> accessed 2 September 2016.

- Dodo (in the M2 group) has plans ranging from \$19.90 per month for 10GB of data, to \$24.90 per month for 50GB of data to \$29.90 per month for unlimited data (with bring your own modem and no set up fees)⁶⁶
- iPrimus (in the M2 group) has on-net plans ranging from \$39.95 per month for 40GB of data to \$99.95 per month for unlimited data and off-net plans in Zone 2 ranging from \$59.95 per month for 40GB of data to \$129.95 per month for unlimited data⁶⁷
- Exetel has standalone plans ranging from \$29.99 per month for 100GB of data to \$49.99 per month for unlimited data.⁶⁸

Exetel submitted that there is more retail competition in the high speed broadband market in those areas where there is greater wholesale competition. It noted that its retail plans are between \$10-\$20 per month more expensive when it is using Telstra wholesale ADSL services as distinct from those of others (Exetel uses the Optus network).⁶⁹ This can be seen more broadly in the above price/service offerings where TPG, iiNet and iPrimus all have cheaper on-net than off-net plans.

Exetel also submitted that the recent market consolidation has limited choice and resulted in harmonising of retail offers by TPG and M2/Vocus groups (Dodo and iPrimus are in this group). It stated that network owners are now moving into an earn-out phase to maximise their return on investment in their ADSL networks prior to the arrival of the NBN.⁷⁰ The ACCC has not seen evidence of this; the above price/service offerings demonstrate some differentiation between the services of TPG, iiNet, Dodo and iPrimus, as well as more broadly across the market.

There were also real price reductions in retail ADSL broadband prices of 1.8 percent over 2014-15,⁷¹ suggesting there is some price competition. This reduction was greater than the overall real price reduction of 0.5 per cent recorded for all telecommunications services. However, this was less than the average annual reduction in ADSL broadband prices of 2.8 per cent experienced since the index was baselined in 2006-07.⁷² Telstra observed that this showed prices for internet services have declined consistently over the last eight years.⁷³ In contrast, Macquarie submitted that the inadequate state of competition is reflected in the stagnation of prices for telecommunications services and that the telecommunications services price index shows prices have reached a plateau.⁷⁴

The ACCC also understands that a current driver for competition in the retail market for high speed broadband services is the transition to NBN services. From submissions to the discussion paper, it appears that there is benefit from retail service providers acquiring market share in the market for high speed broadband services, which can then be transferred through the migration process to the market for superfast broadband services (in

⁶⁶ <http://www.dodo.com/internet/quick-links/adsl-plans/> accessed 2 September 2016.

⁶⁷ <http://www.iprimus.com.au/products/adsl-broadband/#/TELSTRA2> and <http://www.iprimus.com.au/products/adsl-broadband/#/TELSTRA2> accessed 2 September 2016.

⁶⁸ Exetel differentiates between standalone plans where a customer brings its own phone line and bundled plans where Exetel supplies its phone line. The bundled plans are around \$10 more expensive. The ACCC understands that this may also represent on-net and off net-pricing <https://www.exetel.com.au/broadband/adsl-standalone> accessed 2 September 2016.

⁶⁹ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.2.

⁷⁰ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.2.

⁷¹ ACCC, *Competition in the Australian telecommunications sector Price changes for telecommunications services in Australia*, February 2016, p 75.

⁷² ACCC, *Competition in the Australian telecommunications sector Price changes for telecommunications services in Australia*, February 2016, p 75.

⁷³ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.12.

⁷⁴ Macquarie, *Submission to WADSL Declaration Inquiry*, 28 July 2016, p.2.

which NBN services are supplied). Exetel, Vocus and Optus all explicitly addressed this issue:

- Exetel submitted that existing market shares in high speed broadband market will provide a material comparative advantage in competing for superfast broadband services.⁷⁵ It continues to acquire ADSL customers prior to the NBN becoming available and offers a free transfer to NBN services when they become available, waiving any early ADSL termination fees.
- Vocus noted that in the process of migrating to the NBN, it is advantageous to acquire or retain as many subscribers from the supply of ADSL services.⁷⁶ Further, it stated that it is five times more expensive to win a new customer than retain an existing customer. This may be more pronounced during the early days of full NBN deployment due to potential migration and customer acquisition uncertainties.
- Optus submitted that failure to re-declare the wholesale ADSL service would adversely impact competition in related markets, including the market for superfast broadband services. It noted that current market shares for NBN connections show that Telstra is successfully transferring its dominance in the supply of wholesale ADSL services over to the NBN.⁷⁷

In relation to the market for superfast broadband services, the wholesale market shares in Table 2.3 illustrate that Telstra has a relatively dominant market position. Promoting competition in the market for high speed broadband services is therefore likely to also have flow on benefits to the market for superfast broadband services.

Table 2.3 – NBN wholesale market shares

	Total	Fibre to the basement	Fibre to the node
Telstra	48%	48%	57%
TPG	26%	29%	20%
Optus	14%	15%	13%
Vocus	6%	6%	8%
Other	6%	3%	1%

Source: ACCC, *NBN wholesale market indicators report* (table 4), June 2016.

2.3. Promoting competition

In determining whether declaration of the wholesale ADSL service will promote the LTIE, the ACCC must have regard to the extent to which declaration is likely to promote competition in the relevant markets. As part of its assessment, the ACCC has considered the likely future state of competition in the relevant markets with and without declaration. The ACCC has also had regard to the extent to which declaration will remove obstacles to end-users of listed services gaining access to listed services.⁷⁸

⁷⁵ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.4.

⁷⁶ Vocus, *ACCC WADSL service declaration enquiry – Vocus submission*, p.4.

⁷⁷ Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.15.

⁷⁸ Section 152AB(4) of the CCA.

In the discussion paper, the ACCC noted that the 2012 declaration of the wholesale ADSL service has provided the opportunity for competition to be promoted via stable regulated prices, particularly as the NBN is progressively rolled out. It noted that there had been few complaints about wholesale ADSL since the 2012 declaration and sought views about whether the conduct causing competition concerns prior to declaration could re-emerge if the service was not declared.

The ACCC also noted that anecdotally it appears retail service providers are seeking to obtain market share in high speed fixed-line broadband services prior to transitioning customers onto the NBN (where they will acquire superfast broadband services). If this was the case, it would suggest that provision of fixed-line high speed broadband services via ADSL is important in gaining fixed-line superfast broadband market share. This would suggest that declaration and cost reflective access to the wholesale ADSL service will be important to establish conditions where competition is more likely to occur in the fixed-line superfast broadband services market.

Submissions

Most submitters considered that declaration of the wholesale ADSL service would promote and/or maintain the level of existing competition in the relevant markets.⁷⁹ Telstra did not consider that declaration would promote competition where competition already exists for example, where there are at least four competitors.⁸⁰

Optus considered that the failure to re-declare the wholesale ADSL service would adversely impact competition in related markets, including the market for superfast broadband services.⁸¹ Optus noted that current market shares for NBN connections show that Telstra is successfully transferring its PSTN-dominance over to the NBN. Absent declaration, Telstra would have the incentive and ability to limit ADSL-based competition in order to maximise its subscriber numbers to migrate to the NBN.⁸²

Innovative Synergies raised concerns with the overall application of the Part XIC legislative framework. In particular, it considered that promoting infrastructure-based competition is a flawed concept and that competitive infrastructure ultimately leads to the detriment of the end-user.⁸³ The ACCC notes a number of issues raised by this submitter fell outside the scope of this declaration inquiry.

ACCC's draft view

The ACCC is of the view that declaration will promote competition in the markets for high speed and superfast fixed-line broadband services. In forming this conclusion it has considered the likely future state of competition in the high speed and superfast fixed-line broadband markets with and without declaration.

⁷⁹ Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.14. Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, Public version, p.3. Vocus, *ACCC WADSL service declaration enquiry – Vocus submission*, p.5. National Farmers' Federation, *Wholesale ADSL Service Declaration Inquiry submission*, Public Version, p.1.

⁸⁰ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.19.

⁸¹ Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.15.

⁸² Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.15.

⁸³ Innovative Synergies, *Submission to the ACCC on the Wholesale ADSL Service Declaration Inquiry (Discussion Paper)*, July 2011, p.41.

Future without declaration

As set out in section 2.2, the ACCC is of the view that there are national wholesale and retail markets for high speed and superfast fixed-line broadband services and that there is some, but limited competition in these markets. The ACCC considers that the future without declaration of the wholesale ADSL service is unlikely to promote competition in the relevant markets, relative to a future with declaration. The ACCC considers that without declaration, the state of competition in the high speed and superfast fixed-line broadband markets may lessen.

The ACCC considers that without declaration, Telstra would have similar incentives and opportunities as it did prior to the 2012 declaration to engage in entry deterring or expansion deterring conduct to maintain and grow its market share.

The conduct of concern outlined in the ACCC's 2012 final declaration decision⁸⁴ included that without declaration:

- Telstra would have the incentive and opportunity to set wholesale and retail prices for ADSL services in a manner which could lessen competition. For example:
 - Telstra may set wholesale prices for ADSL services above cost and above the level of prices which would be expected in a competitive market, and/or it may set retail prices for ADSL services at relatively low levels compared to the wholesale ADSL prices, limiting the ability of access seekers to compete in the downstream retail market. In its 2012 final decision, the ACCC noted the feedback it had received in the declaration inquiry about these concerns.⁸⁵
 - Telstra may structure its prices such that they are based on the availability of competitive infrastructure rather than cost, with prices being lower in areas where there is competitive infrastructure and higher where there is no competitive infrastructure.⁸⁶
- Telstra might inefficiently price discriminate between access seekers with the potential to prevent effective competitors from using their scale to develop their own retail price offerings which compete with Telstra.⁸⁷
- Telstra might leverage its dominant position by putting in place terms and conditions which would diminish retail and wholesale competition, particularly during the transition to the NBN.⁸⁸

In relation to the NBN, the ACCC noted in the 2012 final declaration decision that availability of the wholesale ADSL service on reasonable terms while the NBN was being deployed was important to the development of effective retail-based competition in the medium to long term. This was because declaration of the wholesale ADSL service could enable access seekers to effectively compete with Telstra for retail customers and then migrate them onto the NBN.⁸⁹

Several submissions to the discussion paper supported the view that Telstra's conduct would be similar today as it was prior to the 2012 declaration of the wholesale ADSL service:

⁸⁴ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012.

⁸⁵ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012, p. 33-34.

⁸⁶ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012, p. 35-36.

⁸⁷ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012, p. 39-41.

⁸⁸ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012, p. 42-44.

⁸⁹ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012, p. 44.

- Exetel noted that if services were not declared the competition concerns that existed prior to declaration would re-emerge, particularly in uncontested areas.⁹⁰
- Optus was of the view that even with declaration, Telstra is able to maintain its market dominance in the retail market for ADSL. Without declaration, competition would likely be further restricted as Telstra would set prices for wholesale ADSL services above the current regulated prices. Further, that a future without declaration would also adversely impact competition in related markets, including the market for superfast fixed-line broadband services.⁹¹
- Vocus was of the view that the prevailing conditions that led to the declaration of the wholesale ADSL service in 2012 remain in the market today and that the incentive and capability exists for Telstra to favour its own retail business over wholesale customers should the price and non-price constraints associated with declaration be removed. Further, Vocus noted that it is essential in the lead up to the completion of the NBN rollout that there be no disruption to high speed broadband competitors' ability to win or retain customers or they will be put at a significant disadvantage to the incumbent (Telstra).⁹²
- Macquarie noted the conditions that gave rise to the original declaration decision persist, and suggested competition concerns would reemerge if wholesale ADSL was not declared. It considered the incentives to deter entry and/or expansion may be more powerful than in 2012 when wholesale ADSL was first declared. This reflects the transition from high speed fixed-line broadband services supplied via ADSL and the strong incentives for Telstra to maximise its retail and wholesale market share.⁹³

The ACCC considers that the conditions and circumstances that existed prior to the 2012 final declaration decision, and which led to the above competition concerns, also largely exist today. This includes that:

- Telstra remains vertically integrated when supplying high speed fixed-line broadband services over its legacy network. Without declaration, Telstra has an incentive and opportunity to favour itself in the supply of the wholesale ADSL service.
- NBN services are being deployed and customers are being transitioned from high speed fixed-line broadband services using ADSL technology to superfast fixed-line broadband services on the NBN.
- Significant new investment in ULLS/LSS and DSL infrastructure that competes with the wholesale ADSL is not expected.

The ACCC considers that as a vertically integrated supplier, Telstra would have the incentive and opportunity to engage in conduct which may raise competition concerns if the wholesale ADSL service was not declared.

If the wholesale ADSL service was not declared, then under Telstra's Structural Separation Undertaking (SSU) different price equivalence arrangements would apply compared to if the service was declared. The ACCC has previously publicly stated its view that the SSU price equivalence arrangements when the wholesale ADSL service is not declared appear comparatively weak to those that apply when the service is declared.⁹⁴ The SSU price equivalence arrangements were considered comparatively weak because:

⁹⁰ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.3.

⁹¹ Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.15.

⁹² Vocus, *ACCC WADSL service declaration enquiry – Vocus submission*, p.4.

⁹³ Macquarie, *Submission to WADSL Declaration Inquiry*, 28 July 2016, p.1-2.

⁹⁴ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012, p. 44.

- Telstra would retain considerable latitude in developing and applying the pricing methodology
- the measures do not prevent Telstra from engaging in discriminatory behaviour, and
- the ACCC would be limited in its ability to direct Telstra to change its pricing conduct under the equivalence commitment.

In the ACCC's 2012 final declaration decision the ACCC did not accept Telstra's submission that the SSU would address concerns in relation to Telstra's supply and pricing decisions such that declaration is unnecessary.⁹⁵ The price equivalence arrangements have not changed since the wholesale ADSL service was declared in 2012.

Promotion of competition in superfast broadband markets

In relation to the rollout of the NBN, compared to 2012 it is now more advanced and competition for customers and market share in the superfast fixed-line broadband market is more of a focus. In this regard, the ACCC considers that in a future without declaration of the wholesale ADSL service, the incentives for Telstra to engage in entry or expansion deterring conduct may be heightened in order to secure a dominant market share in the superfast fixed-line broadband market. This reflects that many retail service providers, including Telstra, appear to be seeking to gain market share in the supply of high speed broadband services and then transitioning those customers onto the NBN.

As a result, in a future without declaration of the wholesale ADSL service, the ACCC is concerned that, the opportunities and environment for competition in the related market for superfast fixed-line broadband services could be impacted.

ULLS/LSS based competition

Since the declaration of wholesale ADSL service in 2012, there has been continued investment in competing ULLS/LLS and DSL infrastructure. However, this has slowed and slightly declined over 2016. This has resulted in some limited competition which has largely occurred in Band 2 ESAs (see section 2.2), including the 289 ESAs that Telstra considered as being effectively competitive. While noting the ULL/LSS and DSL infrastructure investment that has occurred to date, the ACCC considers it likely there will be limited future investment.

In submissions to the discussion paper both Optus and Vocus, who have made ULLS/LSS and DSL technology investments, considered that future investment would be limited. Optus stated that the uncertainty around the timing and location of the roll-out of the NBN has increased the risks associated with investing in DSLAMs that will be redundant once the NBN has been deployed. Optus submitted that it is unlikely that access seekers will make further large scale investments in DSLAMs.⁹⁶ Vocus also noted that a combination of a lack of economic returns and the transition to the NBN has meant that competitive providers are not investing in further DSLAM rollouts.⁹⁷ Macquarie also noted that, with the roll-out of the NBN, ULLS/LSS investment in Band 1 and 2 will become less economic as the timeframes available to recover investments are shortened.⁹⁸

Given this, the ACCC considers that in a future without declaration of the wholesale ADSL service, and with limited future investment in ULLS/LSS and DSL infrastructure, competition

⁹⁵ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012, p. 32.

⁹⁶ Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.12-13.

⁹⁷ Vocus, *ACCC WADSL service declaration enquiry – Vocus submission*, p.4.

⁹⁸ Macquarie, *Submission to WADSL Declaration Inquiry*, 28 July 2016, p.1-2.

is likely to be reduced. In these circumstances, while customers could be supplied via existing DSL infrastructure (primarily Band 1 and 2 ESAs), competition for other customers beyond the capacity of the existing DSL infrastructure could only occur via the wholesale ADSL service. As outlined above, if the wholesale ADSL service was not declared then the ACCC considers Telstra would have the incentive and opportunity to engage in conduct that raises competition concerns.

Consistent with the ACCC's views set out in its 2013 wholesale ADSL FAD decision, the removal of declaration would reduce the ability of these access seekers to compete with Telstra in supplying wholesale ADSL services to a significant segment of the national wholesale market as:⁹⁹

- access seekers have smaller DSLAM footprints (compared with Telstra) which means they are unable to provide their wholesale customers with wholesale ADSL services on a national basis using their own network
- many potential purchasers of wholesale ADSL services require national coverage so that they can supply their retail customers, specifically business and government customers that have operations in metropolitan and regional areas across Australia.
- there may be significant incremental costs to sourcing wholesale ADSL services from multiple suppliers. The ACCC considered that this would reduce the ability of access seekers with DSLAM networks to compete with Telstra in supplying wholesale ADSL services to a significant segment of the wholesale market.

Geographic exemptions

The ACCC notes Telstra's proposal to exempt from declaration 289 ESAs where it considers effective competition is present. Telstra did not consider declaration will promote competition in areas where competition already exists, as best practice regulation requires wholesale ADSL declaration not to apply where there is demonstrable, effective competition.¹⁰⁰

Telstra considered that within competitive areas, access seekers have a choice of multiple alternative wholesale inputs.¹⁰¹ Telstra considered ULLS and LSS allow access seekers to install their own DSL aggregation equipment in exchanges and provide ADSL services to other access seekers and end users. It also considered that access seekers are able to utilise alternative networks to deliver broadband services to end-users, such as NBN services, FTTB and wireless broadband. Telstra submitted that the presence of infrastructure-based competition delivers benefits to customers through lower prices and innovative offerings.¹⁰²

The ACCC considers it appropriate to examine the issue of whether competition will be promoted within the context of a national market, because Telstra competes nationally in the supply of wholesale broadband products.

The ACCC acknowledges that the aggregate broadband market share across the 289 ESAs indicates that the state of competition in these areas is stronger compared to the national market. Telstra stated that **[c-i-c begins]** [REDACTED]

⁹⁹ ACCC, *Public inquiry to make a final access determination for the wholesale ADSL service, Final Report*, May 2013, Public version, p. 68.

¹⁰⁰ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.9.

¹⁰¹ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, pp.10-13.

¹⁰² Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.12.

[c-i-c ends].¹⁰³

However, on an even more disaggregated basis, the ACCC notes that the state of competition varies significantly across the 289 ESAs. As identified in Table 2.2 above, Telstra has a market share of [c-i-c begins] [c-i-c ends] per cent or more in [c-i-c begins] [c-i-c ends] of the relevant ESAs. This demonstrates that Telstra remains the dominant provider of the wholesale ADSL service in a number of the 289 ESAs proposed for exemption.

The ACCC notes that the test for declaration is not whether there is effective competition present, but rather whether declaration will promote the LTIE and in determining this, the ACCC has regard to the extent to which declaration is likely to promote competition. The ACCC considers that absent declaration in the 289 ESAs:

- there would be a reduction in the ability of access seekers with DSLAM networks to compete with Telstra in the wholesale and retail high speed fixed-line markets
- Telstra would be provided with the opportunity, alongside an environment where there is the incentive, to potentially engage in anti-competitive conduct, and
- ULLS/LSS based wholesale ADSL services would not provide a sufficient alternative to Telstra's wholesale ADSL service because of the smaller DSL footprint, unlikelihood of significant new DSL investment and potential capacity constraints.

If geographic exemptions were granted for the 289 ESAs, this would reduce the ability of access seekers with DSLAM networks to compete with Telstra in significant segments of the wholesale and also, importantly, retail high speed fixed-line markets. This is because DSL providers have smaller DSLAM footprints (compared to Telstra) and therefore are unable to provide their customers with wholesale ADSL services on a national basis using their own network. In order to service customers with national operations, it is likely that DSL providers would need to purchase the wholesale ADSL service from Telstra or another DSL provider in the 289 ESAs as well as outside the 289 ESAs. The ACCC notes that there may be significant costs in sourcing wholesale ADSL services from multiple suppliers.

Further to this, without declaration (and therefore access to regulated price and non-price terms and conditions) in the 289 ESAs, Telstra, as the vertically integrated national supplier, would have some incentive and ability to leverage its position in the exempt 289 ESAs to favour its own operations over those of its competitors. This could have the effect of reducing competition in the retail market for high speed broadband internet services on a national level.

In addition, the ACCC considers that ULLS and/or LSS based wholesale ADSL services are insufficient alternatives to Telstra's wholesale ADSL service because of the smaller DSL footprint and potential capacity constraints. As discussed above at section 2.2, there is unlikely to be significant new DSL investment to service new customers as the rollout of the NBN appears to have weakened investment incentives. In order to service new retail and/or wholesale customers in the national market beyond the capacity of its existing DSL infrastructure,¹⁰⁴ access seekers will need to rely on Telstra's wholesale ADSL service.

The ACCC considers that without declaration in the 289 ESAs, an access seeker's ability to acquire the wholesale ADSL service on reasonable terms and conditions is likely to be reduced. In turn, access seekers may choose to exit the broadband retail market, thereby negatively impacting end-users. The ACCC considers that the opportunities and

¹⁰³ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Confidential version, 29 July 2016, p.13.

¹⁰⁴ The ACCC understands that the largest DSLAMs service 384 customers.

environment for competition would be reduced were the service to be declared with geographic exemptions for the 289 ESAs, than if the service were declared without exemptions.

In relation to Telstra's submission on carving out premises affected by remote integrated multiplexers (RIMs) and Pair Gain systems (PGS) from exemption, the ACCC does not consider this issue is a relevant consideration. This is because, whether or not premises affected by RIMs or PGS are excluded from scope of the exemption, for the reasons noted above, the ACCC does not consider that compared to a future where the service is declared in all ESAs, granting the proposed exemptions would promote competition.

Future with declaration

The ACCC considers that a future with declaration of the wholesale ADSL service in all ESAs would promote competition. This is because with declaration the ACCC would set regulated price and non-price terms and conditions which will better reflect those under competitive market conditions.¹⁰⁵ This will limit the opportunity of Telstra to engage in entry deterring or expansion deterring conduct, including treating itself more favourably. Having access to regulated terms and conditions for the wholesale ADSL service (in the event that they are unable to reach agreement with Telstra) would mean that service providers would be able to continue competing in the downstream retail market to develop and offer different ADSL broadband products to meet the needs of end-users.

The ACCC also considers that competition will be promoted by declaring the wholesale ADSL service in all areas, including the 289 ESAs Telstra seeks exemption for, by:

- providing the opportunity for retail service providers to obtain access to the wholesale ADSL service on terms and conditions that reflect competitive market conditions in all geographic areas in order to provide alternative national wholesale and retail market offerings
- limiting the opportunity, in an environment where there is the incentive, for Telstra to potentially engage in anti-competitive conduct in those 289 ESAs (and more broadly), and
- reducing the need for retail service providers to rely upon ULLS/LSS based wholesale ADSL services from non-Telstra suppliers which are unlikely to be sufficient alternatives to Telstra's wholesale ADSL service.

The ACCC considers that a future with declaration will remove obstacles to end-users gaining access to the broadband service.¹⁰⁶ Declaration would promote retail-based competition, relative to a situation where the service is not declared, and therefore end-users would continue to benefit from having access to lower retail prices, increased quality of services and greater choice in product offerings.

Further, the ACCC considers that declaration will promote competition in both the markets for high speed and superfast fixed-line broadband services. As set out above, as the NBN is rolled out many retail service providers are competing for customers in the high speed fixed-line broadband market and then transitioning those customers onto the NBN in the superfast fixed-line broadband market. This is seen to be a cost effective strategy for gaining market

¹⁰⁵ The ACCC has already set price and non-price terms and conditions and these would continue to be in place if the wholesale ADSL service is declared. The basis for these terms and conditions, as well as the actual terms and conditions, can be found in ACCC, *Public inquiry into final access determinations for fixed line services*, Final Decision, October 2015 and ACCC, *Telecommunications Final Access Determination Inquiries, Non-price terms and conditions, Final decision for MTAS and views for fixed line services and DTCS*, August 2015. On 5 November 2015, Telstra applied to the Federal Court for judicial review of the ACCC's fixed-line service final access determination. Hearings on this matter were completed in March 2016 and the ACCC is now awaiting a judgement.

¹⁰⁶ CCA, subsection 152AB(4).

share and as a result, the state of competition in the high speed fixed-line broadband market will also impact the superfast fixed-line broadband market.

2.4. Any-to-any connectivity

The CCA provides that the objective of any-to-any connectivity is achieved when each end-user is able to communicate with other end-users, whether or not they are connected to the same telecommunications network.¹⁰⁷

The achievement of any-to-any connectivity is particularly relevant when considering services that require interconnection between different networks. When considering other types of services (such as carriage services that are inputs to an end-to-end service or distribution services such as the carriage of pay television), the ACCC generally considers that this matter will be given less weight.¹⁰⁸

In the discussion paper, the ACCC noted that it did not consider it likely that any-to-any connectivity will be impacted by declaration of the wholesale ADSL service.

Submissions

Telstra, Optus and Exetel agreed that declaration of the wholesale ADSL service will not have an impact on any-to-any connectivity.¹⁰⁹

ACCC's draft view

The ACCC considers that declaration of the wholesale ADSL service is unlikely to impact the objective of achieving any-to-any connectivity, consistent with the 2012 declaration. The ACCC notes that the wholesale ADSL service continues to be an input to an end-to-end service with no switching capability and does not in and of itself involve communications between end-users.

2.5. Efficient use of and investment in infrastructure

The CCA requires the ACCC to have regard to the extent to which declaration is likely to encourage the economically efficient use of, and the economically efficient investment in, infrastructure.

The ACCC will examine efficiency from an economic perspective, as outlined below. The economic concept of efficiency consists of three components:

- **Productive efficiency** refers to the efficient use of resources within each firm to produce goods and services using the least cost combination of inputs.
- **Allocative efficiency** refers to the allocation of goods and services across the economy in a way that is most valued by consumers. It can also refer to the allocation of production across firms within an industry in a way that minimises industry-wide costs.
- **Dynamic efficiency** refers to the efficiencies flowing from innovation leading to the development of new services or improvements in production techniques. It also refers to

¹⁰⁷ CCA, subsection 152AB(8).

¹⁰⁸ ACCC, *A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010*, August 2016, p.40

¹⁰⁹ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.21. Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.16. Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.4.

the efficient deployment of resources between present and future uses so that the welfare of society is maximised over time.

The ACCC will apply these concepts of efficiency when having regard to the following matters that it must consider:

- Whether it is, or is likely to become, technically feasible for the services to be supplied and charged for.
- The legitimate commercial interests of the supplier or suppliers of the services, including the ability of the suppliers to exploit economies of scale and scope.
- The incentives for investment in infrastructure, including:
 - the infrastructure by which the services are supplied
 - any other infrastructure by which the services are, or are likely to become, capable of being supplied.

In the discussion paper, the ACCC considered that declaration of the wholesale ADSL service in 2012 did not appear to have impacted Telstra's investment in DSL and related equipment nor the investment incentives in competing DSL networks. The ACCC noted that slowing investment in ULLS, LSS and DSL equipment was likely to be a combination of access seekers reaching the limit of their efficient investment and increased NBN rollout with the transition of customers to these services.

Submissions

Exetel considered that there are still opportunities for efficient investment in competing DSL networks in increasing coverage, backhaul capacity and product features.¹¹⁰ In contrast, Optus and Macquarie submitted that the rollout of the NBN has considerably reduced the incentive to invest in competing DSL networks.¹¹¹

Optus considered that less weight should be placed on whether declaration promotes efficient investment in fixed-line infrastructure given that Telstra's copper network will be shut down and replaced by the NBN and the transfer to, and investment by, NBN Co will occur irrespective of the outcomes of this inquiry.¹¹²

Optus noted the decline in ULLS and DSLAM investments increases the importance of efficient use of existing ADSL infrastructure. Optus submitted that declaration would promote efficient use of fixed-line infrastructure and that absent declaration, Telstra will likely increase the cost of access, thereby limiting the efficient use of existing ADSL-based broadband services.¹¹³

Telstra observed that while some competitors are still investing in their DSL networks, the competitive DSLAM footprint has only increased by 2 per cent in the three years prior to December 2015 and that this was likely influenced by the accelerating NBN rollout and the migration of customers off ULLS and LSS competitive infrastructure.¹¹⁴

¹¹⁰ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, pp.4-5.

¹¹¹ Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.16. Macquarie, *Submission to WADSL Declaration Inquiry*, 28 July 2016, p.2.

¹¹² Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p. 16.

¹¹³ Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, p.16.

¹¹⁴ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.21.

Telstra noted that in its case, there is an ongoing need to invest to meet customer demand for ADSL, however noted that its decision to invest are complicated by the 2015 Fixed Line Services FAD, uncertainty about the next FAD and the migration of DSL customers to the NBN.¹¹⁵

Exetel noted that it did not face any issues around technical feasibility but considered for new entrants, there were many issues (however did not elaborate).¹¹⁶

ACCC's draft view

The ACCC considers that declaration of the wholesale ADSL service is likely to encourage the economically efficient use of, and the economically efficient investment in, infrastructure.

In particular, declaration would not raise any concerns about technical feasibility in the supply of the wholesale ADSL service given that Telstra currently supplies and charges for the service. The ACCC considers that the compliance cost for Telstra in complying with the SAOs would be reasonable given Telstra is providing the service and already has systems in place.

In relation to a supplier's legitimate commercial interests, the ACCC considers that declaration would not affect Telstra's ability to exploit economies of scale and scope or its ability to make a return on its investment. This is because Telstra would not be required to invest in a new network or additional infrastructure to provide the wholesale ADSL service. The ACCC notes that the regulated prices set under a FAD would allow Telstra to make a normal commercial return on investment and provides an appropriate incentive for Telstra to maintain, improve and invest in the efficient provision of the wholesale ADSL service.¹¹⁷

The ACCC considers that declaration of the wholesale ADSL service is unlikely to adversely impact Telstra's efficient investment in its existing network. The ACCC notes that Telstra has continued to invest in its DSL network as evidenced by its recent announcement in June 2016 to invest \$250 million in its infrastructure to improve network performance (one of the key areas being increasing ADSL broadband capacity).¹¹⁸ While the exact scale of the ADSL investment is unclear, the ACCC notes that Telstra Wholesale has forward investment plans (at least in 2016 and 2017) on its website relating to ADSL capacity increases in exchanges and the access network, as well as for DSLAM backhaul relief.¹¹⁹

The ACCC notes Optus' observations that continued investment in copper infrastructure in the long term is no longer relevant given the shutdown of Telstra's copper network.¹²⁰ While the ACCC agrees that the promotion of investment in the long term is becoming a less important consideration, the ACCC notes that the completion of the NBN rollout will still take some time and there may be justification for efficient investment during this regulatory period particularly investment in maintenance and improvements to Telstra's existing network as discussed above.

¹¹⁵ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.21.

¹¹⁶ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.5.

¹¹⁷ ACCC, *Public inquiry into final access determinations for fixed line services*, Final Decision, October 2015, p.235. ACCC, *A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010*, August 2016, p.44.

¹¹⁸ <https://exchange.telstra.com.au/2016/06/29/improving-network-performance/> accessed 9 September 2016.

¹¹⁹ <https://www.telstrawholesale.com.au/products/broadband/adsl/adsl-reports-plans.html>, accessed 12 September 2016.

¹²⁰ Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, pp.9 and 16.

Further, the ACCC considers that declaration will not impact incentives for efficient investment in competing DSL networks by access seekers since further investment in competing DSL networks is unlikely given:

- the accelerating NBN rollout and migration of customers to the NBN. As discussed in section 2.2 above, it appears that commercial decisions are being made to minimise investment in DSL infrastructure when the payoff period may be limited.
- some ESAs (particularly in regional and rural areas) exhibit natural monopoly characteristics and appear to be barriers to competitive entry due to low population density and lack of backhaul services which makes investment in these areas uneconomical as reflected in the broadband market shares in Table 2.1.

The ACCC also considers that declaration would promote efficient use of Telstra's existing infrastructure. As noted by Optus, the decline in investment in competing DSL infrastructure increases the importance of efficient use of existing ADSL infrastructure and the wholesale ADSL service.¹²¹ The ACCC considers that without declaration Telstra would have the ability and incentive to charge prices for the wholesale ADSL service that exceeds the efficient cost of supplying the service and also limit the efficient use of the wholesale ADSL service.

¹²¹ Optus, *Submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, pp.9 and 16.

3. The declared service

Key points:

- The ACCC considers that the current service description with national coverage remains appropriate and should be retained.
 - The ACCC considers the declaration period of the wholesale ADSL service should be five years to provide certainty during the NBN roll out. While the ACCC recognises the merit in aligning the expiry of the wholesale ADSL service declaration with the other fixed-line services declarations, this does not warrant a declaration period that is less than three years. Re-examining the declaration in such a short time period is likely to be unnecessary and impose an additional regulatory burden on industry.
-

3.1. Coverage

In the discussion paper the ACCC considered that it is likely to be appropriate to define the relevant markets on a national basis. The ACCC noted that if it established that declaration of the wholesale ADSL service would promote the LTIE then it would likely be appropriate to retain a service description, which has national coverage.

Submissions

While submitters considered the scope of the market should be defined on a national basis as outlined in section 2.1, only Exetel and Telstra specifically commented on the coverage of the service description. Exetel considered that the service description should cover the wholesale ADSL services nationally and Telstra submitted that 289 ESAs should be exempted from declaration.¹²²

ACCC's draft view

The ACCC remains of the view that it is appropriate to retain a service description which has national coverage as declaration of the wholesale ADSL service on a national basis is in the LTIE. As discussed in sections 2.2 and 2.3 above, the ACCC considers that wholesale and retail high speed fixed-line broadband services are provided in a national market and that it is appropriate to consider the state of competition and whether declaration promotes the LTIE on this basis, rather than on an ESA by ESA basis. This reflects that retail competition occurs on a national basis, which is promoted by the availability of competitive wholesale inputs on a national basis.

3.2. Service description

In developing the current service description, the ACCC had regard to the following principles as set out in the 2012 Final Decision:¹²³

- While some degree of technical specification will be required, the ACCC's preference is to make the service description in terms which are as functional as possible.
- The eligible service should be described in a manner which provides sufficient clarity for application of the SAOs.

¹²² Exetel, *Wholesale ADSL Service Declaration Inquiry submission*, Public version, August 2016, p. 5. Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.21.

¹²³ ACCC, *Wholesale ADSL service declaration – Final decision*, February 2012, p.57.

- The service should be technically feasible to supply and charge for. Additionally, the service should be one which potential access providers are supplying to themselves and others.
- Terms and conditions of access should not be included in the service description.

In the discussion paper, the ACCC considered that the current service description adequately described the service which access seekers require in order to provide ADSL services.¹²⁴ The ACCC sought stakeholder views on whether the current service description remains appropriate, or whether there is a need to change the service description.

Submissions

Telstra and Exetel agreed with the ACCC that the current service description remains appropriate.¹²⁵ Telstra considered that the service description in its current form is well-understood by industry and will ensure stability and certainty during the roll-out of the NBN.¹²⁶

Optus, however, submitted that the service description should be revised to make it clear that the declared wholesale ADSL service and the terms set out in the FAD are sufficient to enable access seekers to acquire the service. In particular, the service description should make it clear that the only charges applicable to the wholesale ADSL service are the port and aggregating virtual circuit (AGVC)/virtual local area network (VLAN) charges.¹²⁷ Optus noted that it is not possible to acquire just the wholesale ADSL service on the terms set out in the related FAD¹²⁸ as Telstra Wholesale mandates additional services be acquired in order to be supplied with the wholesale ADSL service.¹²⁹ Optus further claimed that Telstra is charging prices for these additional services at any level it sees fit.¹³⁰ Optus raised particular concerns about Telstra's Wholesale Business Grade Ethernet (TWBGE) product which is required to obtain Ethernet access to Telstra's Internet Gateway Routers, and which Optus claimed is mandatory in order to acquire Telstra's wholesale ADSL service.¹³¹

ACCC's draft view

The ACCC maintains the view that the current service description adequately describes the wholesale ADSL service and does not consider it necessary to alter the service description.

The wholesale ADSL service is a point to point service for the carriage of communications between a user-network interface and a network-network interface that is a point of interconnect, that is supplied by digital subscriber line technology over a customer access network (CAN), and uses a static layer 2 tunnelling protocol.

¹²⁴ ACCC, *Wholesale ADSL Service Declaration Inquiry Discussion Paper*, July 2016, p. 32.

¹²⁵ Telstra, *Wholesale ADSL Service Declaration Inquiry: Telstra's response to the Commission's Discussion Paper*, July 2016, p. 8. Exetel, *Wholesale ADSL Service Declaration Inquiry submission*, August 2016, p. 5.

¹²⁶ Telstra, *Wholesale ADSL Service Declaration Inquiry: Telstra's response to the Commission's Discussion Paper*, July 2016, p. 8.

¹²⁷ Optus, *Submission in response to ACCC Wholesale ADSL Service Declaration Inquiry Discussion Paper*, Public version, July 2016, p.18-19.

¹²⁸ Optus, *Submission in response to ACCC Wholesale ADSL Service Declaration Inquiry Discussion Paper*, Public version, July 2016, p.18.

¹²⁹ Optus, *Submission in response to ACCC Wholesale ADSL Service Declaration Inquiry Discussion Paper*, Public version, July 2016, p.18.

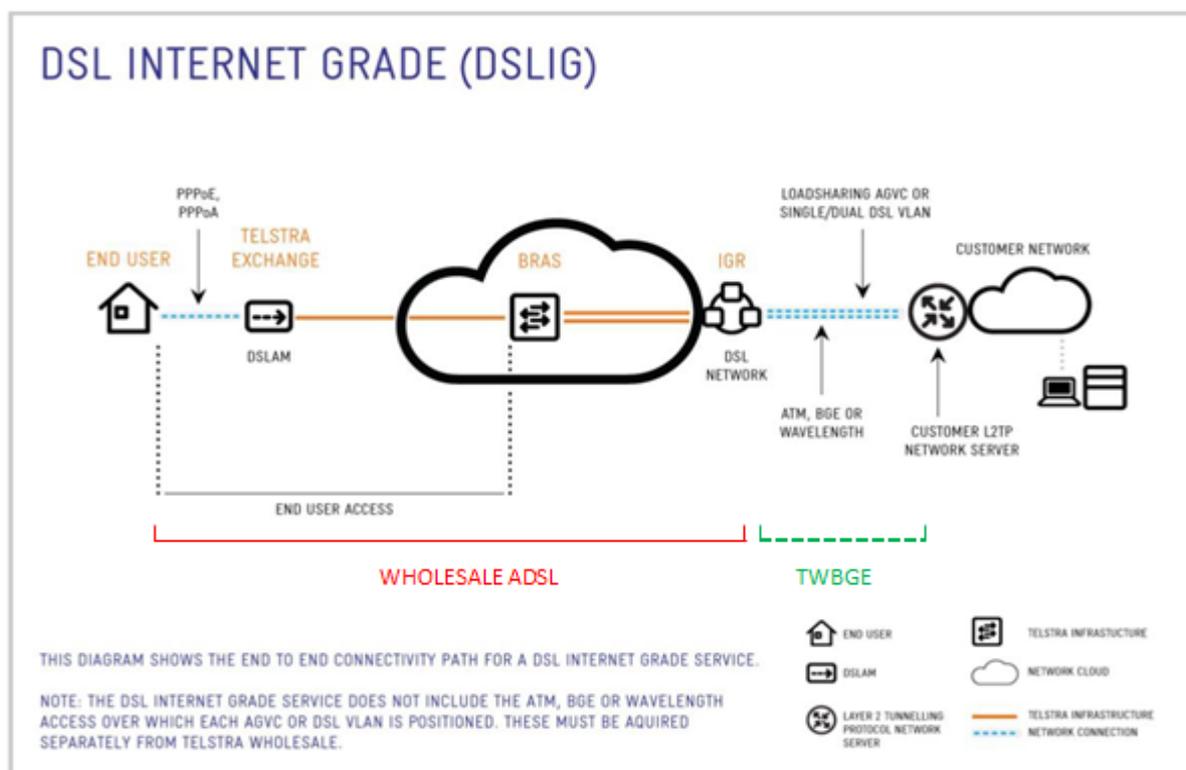
¹³⁰ Optus, *Submission in response to ACCC Wholesale ADSL Service Declaration Inquiry Discussion Paper*, Public version, July 2016, p.18.

¹³¹ Optus, *Submission in response to ACCC Wholesale ADSL Service Declaration Inquiry Discussion Paper*, Public version, July 2016, p.18.

The ACCC understands the TWBGE product Optus referred to is a premium service that enables data to be sent from the network-network interface (NNI) that is also the point of interconnect (POI) to a retail service provider's point of presence (PoP). The TWBGE (or an equivalent transmission product) is required for the transmission of data between the POI and each retail service provider's PoP. The ACCC further understands that the TWBGE product is different to the Domestic Transmission Capacity Service (DTCS) because unlike the DTCS, TWBGE is an asymmetric and contended service. The DTCS could, however, be used as an alternative to TWBGE.

Diagram 3.1 uses the image provided in Optus' submission¹³² from Telstra Wholesale to demonstrate the ACCC's understanding of the wholesale ADSL service (highlighted with the solid red line) and TWBGE product (highlighted with the green dashed line). As reflected in the diagram, the ACCC understands the wholesale ADSL and TWBGE services to be separate, and does not consider the TWBGE product to fall within the declared service description.

Diagram 3.1: A high level representation of the ACCC's understanding on the scope of the wholesale ADSL service and TWBGE product



Source of image: Telstra Wholesale (<https://www.telstrawholesale.com.au/products/broadband/adsl.html>)

On this basis, the ACCC does not consider it necessary to specify in the service description that the only applicable charges for the wholesale ADSL service are the port and AGVC/virtual LAN charges.

Noting Optus' submission, however, the ACCC acknowledges there is concern regarding how Telstra may be interpreting the service description and mandating the purchase of other products, such as the TWBGE product, with the supply of the wholesale ADSL service. The ACCC would like to understand this issue further and is requesting information from

¹³² Optus, *Submission in response to ACCC Wholesale ADSL Service Declaration Inquiry Discussion Paper*, Public version, July 2016, p.19.

stakeholders about the TWBGE product, including how the TWBGE is sold or purchased, and any concerns other stakeholders may have in acquiring the product.

3.3. Duration of declaration

The CCA states that in specifying an expiry date the ACCC must have regard to the principle that an expiry date for a declaration should occur in the period:

- beginning three years after the declaration was made; and
- ending five years after the declaration was made.¹³³

The ACCC has discretion to specify an expiry date for a declared service that is shorter than three years or longer than five years if it considers that circumstances warrant it.¹³⁴

In the discussion paper, the ACCC suggested three options for the duration of a declaration, including alignment with:

- the other fixed-line service declarations (expiry on 31 July 2019)
- the forecast date for completion of the NBN rollout (2020)
- the upper end of the declaration periods, i.e. five years (13 February 2022).

Submissions

Submitters expressed different views on the appropriate duration of the declaration. Telstra supported the expiry of the wholesale ADSL service declaration to align with the expiry of the current fixed-line services declaration so that the ACCC can consider the future of PSTN regulation consistently across the full suite of declared services.¹³⁵

Optus preferred aligning the wholesale ADSL declaration with the other fixed-line services declarations. However it noted that if this was not the ACCC's decision then it also sees the benefit of a five year declaration period as this would likely remove the need for a further declaration inquiry, given the current expectation of the NBN completion date.¹³⁶

ACCAN, Exetel and Vocus favoured a longer duration period of five years (beyond the forecast completion date of the NBN rollout) in order to take into account any delays in the completion of the NBN rollout.¹³⁷

ACCC's draft view

Five year regulatory period

The ACCC's draft view is to adopt a declaration period of five years which results in a declaration expiry date of 13 February 2022. The longer regulatory period takes into account any potential delays to the NBN rollout and minimises the need to potentially conduct another declaration inquiry for the wholesale ADSL service. If the NBN rollout is completed before 2022, the ACCC could consider initiating revocation of the declaration.

¹³³ CCA, subsection 152ALA(2)(a).

¹³⁴ CCA, subsection 152ALA(2).

¹³⁵ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.16 & 22.

¹³⁶ Optus, *submission in response to ACCC Discussion Paper, Wholesale ADSL Service Declaration Inquiry*, Public Version, July 2016, pp.16-17.

¹³⁷ Australian Communications Consumer Action Network (ACCAN), *untitled submission*, 29 July 2016, p.1. Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, public version, p.5. Vocus, *ACCC WADSL service declaration enquiry – Vocus submission*, p.5.

The ACCC also notes that under a five year regulatory period it can still consider price and non-price issues associated with the wholesale ADSL service on a consistent basis with the other fixed-line services. This is because the timing of the FADs for the wholesale ADSL service and the other fixed-line services are aligned.

Aligning declaration with the expiry of the fixed-line services declarations

The ACCC notes that aligning the expiry of the wholesale ADSL service declaration with the expiry of the fixed-line services declarations would also allow for a consistent assessment of all the fixed-line services. However, the declaration period is outside the recommended three to five year period. An expiry date of 31 July 2019 would mean that the wholesale ADSL service would only be regulated for approximately one year before the ACCC commences a new declaration inquiry.¹³⁸ Re-examining the declaration in such a short time period may be considered unnecessary and impose an additional regulatory burden on industry. Therefore the ACCC does not consider that consistency with declaration of other fixed-line services would warrant an expiry date that is less than three years.

Aligning declaration with forecast completion date of NBN rollout

The current forecast NBN rollout completion date is 2020 with a target of 8 million premises activated.¹³⁹ Aligning the wholesale ADSL service declaration with the forecast completion date would result in a declaration period of between three to four years. Adopting this approach would be consistent with the ACCC's approach in the previous declaration which was to adopt a regulatory period in close proximity to the NBN completion date or Designated Date (1 July 2018).¹⁴⁰

However, the ACCC does not consider it appropriate to align the declaration expiry date with the forecast NBN rollout completion date given that this approach does not account for the unexpected delays to the NBN rollout completion date and therefore there would be a risk of the declaration expiring prior to the completion of the NBN rollout.

3.4. Regulatory burden associated with declaration

In the discussion paper, the ACCC outlined the potential costs to access providers in supplying any services captured by the service description in accordance with the category A SAOs in the CCA. The ACCC sought stakeholder views on whether declaration of the wholesale ADSL service would lead to a substantial increase in regulatory burden and the costs that the ACCC should take into account when establishing the regulatory burden associated with declaration.

Submissions

Only two stakeholders submitted on this issue. Telstra considered that since wholesale ADSL services are presently declared, re-declaration would not lead to a *substantial increase* in regulatory burden since those burdens are already being faced, however it noted a more relevant question is whether there are net benefits from continued declaration.¹⁴¹

¹³⁸ CCA, subsection 152ALA(7) requires the ACCC to hold a public inquiry during the 18-month period preceding the expiry of an existing declaration to determine whether the existing declaration should be extended, revoked, varied, allow to expire or re-made.

¹³⁹ NBN Co, *Corporate plan 2016*, p.10.

¹⁴⁰ Under Telstra's Structural Separation Undertaking, Telstra will cease supplying retail services over its copper network after the Designated Day. The Designated Day is 1 July 2018 according to s577A(10) of the *Telecommunications Act 1997* but can be varied by the Minister.

¹⁴¹ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.22.

Telstra considered that distortions to investment, innovation and competitive behaviour caused by regulation could be reduced by removing regulation in the 289 ESAs where effective competition exists and any decision to regulate should be balanced against any loss of incentives to invest and to innovate.¹⁴²

Telstra also considered that the regulatory burden extends to other industry participants who also face costs associated with participation in regulatory processes and the decision to regulate needs to consider all relevant costs in order to establish whether there are net benefits from regulation.¹⁴³

Exetel considered that declaration would not lead to a substantial increase in regulatory burden for Exetel and that there are no particular costs that the ACCC should take into account when establishing the regulatory burden associated with declaring a wholesale ADSL service.¹⁴⁴

ACCC's draft view

As outlined above, the ACCC considers that declaration of the wholesale ADSL service will promote the LTIE. The declaration of the wholesale ADSL service means that an access provider must supply the wholesale ADSL service in accordance with the category A SAOs in the CCA.

As the proposed scope of the declaration of the wholesale ADSL service remains the same as the 2012 declaration, an access provider affected by declaration will already be providing access to the service and subject to the category A SAOs. In this case, it will have relevant systems and processes in place, and the people to administer them.

Therefore, the ACCC considers that declaration of the wholesale ADSL service would not lead to a substantial increase in regulatory burden since there would be no change and existing costs are already being faced (as noted by Telstra). Given this, the ACCC considers there would be minimal additional costs imposed by declaration.

In relation to Telstra's submission on the consideration of the net benefits associated with declaration in the particular areas where it considers that there is effective competition, the ACCC considers that, as noted in section 2.3, continued declaration in these areas is in the LTIE. Declaration in these areas would promote competition so that access seekers would continue competing in the downstream markets to the benefit of end-users who would have continued access to lower retail prices, increased quality of services and greater choice in product offerings.

¹⁴² Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.22.

¹⁴³ Telstra, *Wholesale ADSL service declaration inquiry, Telstra's response to the Commission's Discussion Paper*, Public version, 29 July 2016, p.22.

¹⁴⁴ Exetel, *Appendix A: Questions on which submissions are sought – Exetel*, Public version, pp.5-6.

A Wholesale ADSL service description

The wholesale ADSL service

The asymmetric digital subscriber line access service is a point to point service for the carriage of communications in digital form between a network-network interface that is a point of interconnection and a user-network interface that is supplied:

- (a) by means of digital subscriber line technology;
- (b) over a customer access network that includes a metallic path;

and uses:

- i. asymmetric upstream and downstream data rates
- ii. a static layer 2 tunnelling protocol.

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.

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

a network-network interface that is 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 user-network interface is located.

a user-network interface means the boundary point of the network that is

- i. associated with the end-user premise; and
- ii. ascertained in accordance with section 22 of the Telecommunications Act 1997

B Overview of DSL

DSL technologies enable access seekers to provide end-users with broadband carriage services. There are a number of features or functionalities which distinguish the DSL services:

- The service is provided over the existing copper wire infrastructure. The use of legacy copper networks limits the data rates that DSL can support and the maximum data rates that can be provided fall as the distance between the customer and the exchange building increases.
- The service is always on, that is, no dial-up is required (allowing the user to maintain a permanent connection to the network enabling real time delivery of services such as email).
- Users of the service can utilise both voice and data services simultaneously.
- The service enables faster upstream and downstream data rates than dial-up internet.

DSL technologies can be asymmetric or symmetric. ADSL (asymmetric) services have a high downstream data rate service coupled with a lower rate upstream service. This service is typically used by households/consumers. Symmetric DSL services have symmetric Bandwidth capacity and are typically used by businesses.

ADSL2+ is part of the DSL technologies, which can achieve higher data rates than standard ADSL technologies. Whereas “standard” ADSL can only achieve data rates of up to 8 Mbps downstream and 384 Kbps upstream, ADSL2+ can achieve data rates in excess of 20 Mbps downstream and 1 Mbps upstream.

ADSL services are marketed to both residential and business users. Telstra separately markets a residential ADSL product and a wholesale business DSL product.¹⁴⁵

The wholesale ADSL service comprises both a local access component, and a transmission component between DSL enabled exchanges and CBD points of interconnect (POI). In this respect, the wholesale ADSL service is generally a more bundled service than the services, which are currently declared (e.g. ULLS and domestic transmission capacity service (DTCS)).

¹⁴⁵ Telstra Wholesale, *DSL internet*, www.telstrawholesale.com/products/data/dsl-internet-grade.htm.

C Legislative framework and the ACCC's assessment approach

Legislative framework

Part XIC of the CCA sets out a telecommunications access regime. The access regime aims to promote the LTIE of telephone services by promoting competition through connectivity of any user to any other user no matter whose infrastructure is utilised for that purpose. The ACCC may declare an eligible service, making it subject to regulation under the Part XIC access regime.

An eligible service is a carriage service or a service that facilitates the supply of a carriage service.¹⁴⁶ A carriage service is defined in the *Telecommunications Act 1997* as a service for carrying communications by means of guided and/or unguided electromagnetic energy.¹⁴⁷ This includes communications services, such as telephone and internet services, that are provided using fixed-lines, satellite-based facilities, mobile towers and certain radio communications links. The unconditioned local loop service is an example of a carriage service, while access to facilities (such as ducts and exchange space) are examples of services that facilitate the supply of carriage services.

Once a service is declared, an access provider (typically an infrastructure operator) that supplies the declared service to itself or others must also supply the service, upon request, to service providers (or access seekers) in accordance with the standard access obligations set out in section 152AR of the CCA. The ACCC must also commence a public inquiry into making an access determination for that service. The access determination may include a broad range of terms and conditions but must specify price or a method of ascertaining price.¹⁴⁸

Declaration inquiries

Section 152AL(1) allows the ACCC to declare a specified eligible service if it:

- holds a public inquiry about its proposal to make a declaration
- prepares a report about the inquiry
- publishes that report within a 180 day period before any declaration is made, and
- is satisfied that the making of the declaration will promote the LTIE of carriage services or of services provided by means of carriage services.

Prior to commencing a public inquiry about a proposal to declare a service that is not already declared, the ACCC must consider whether to hold a public inquiry for an equivalent service that is supplied or capable of being supplied by a specified NBN Corporation.¹⁴⁹

Where a service is already declared, under section 152ALA(7), the ACCC must commence an inquiry during the 18 months prior to the expiry of the declaration and determine whether to:

- Extend, revoke or vary the declaration

¹⁴⁶ Where the service is supplied, or capable of being supplied, by a carrier or carriage service provider (whether to itself or other persons). CCA, subsection 152AL(1).

¹⁴⁷ Telecommunications Act 1997, section 7.

¹⁴⁸ CCA, subsections 152BC(3) and 152BC(8).

¹⁴⁹ CCA, subsections 152AL(3), 152AL(3B) and 152AL(8A).

- Allow the declaration to expire without making a new declaration
- Allow the declaration to expire and then make a new declaration under section 152AL or
- Extend the declaration by a period of not more than 12 months and allow the declaration to expire without making a new declaration.

The ACCC can combine two or more public inquiries about proposals to declare services.¹⁵⁰

Declaration ensures service providers have access to the inputs they need to supply competitive communications services to end-users on terms and conditions that promote the LTIE.

In deciding whether declaring the wholesale ADSL service would promote the LTIE, under section 152 AB(2), the ACCC must have regard to the extent to which declaration is likely to result in the achievement of the following three objectives:

- promoting competition in markets for listed services (which includes carriage services and services supplied by means of carriage services)
- achieving any-to-any connectivity (the ability of end-users on a particular network to communicate with end-users on any other network) and
- encouraging the efficient use of and investment in infrastructure by which the service is supplied, or are capable of being supplied.¹⁵¹

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 standard access obligations set out in section 152AR.
- The ACCC must commence a public inquiry within 30 days regarding making an access determination for that service.¹⁵² Access determinations can cover a broad range of terms and conditions but must specify price or a method of ascertaining price.¹⁵³

The ACCC's approach to the LTIE test

In deciding whether declaring the wholesale ADSL service would promote the LTIE, the ACCC must have regard the achievement of:

- promoting competition
- achieving any-to-any connectivity and
- encouraging efficient use of and investment in infrastructure.

Promoting Competition

Competition is the process of rivalry between firms, where each firm is constrained in its price and output decisions by the activity of other firms. Competition benefits consumers (the end-users) through lower prices, the level of service quality preferred by end-users, and a greater choice of services.

¹⁵⁰ CCA, section 152AN.

¹⁵¹ CCA, subsection 152AB(2). In determining the extent to which a particular thing is likely to result the achievement of promoting competition and encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure, regard must be had to other matters listed in subsections 152AB(4), (6) and (7) CCA.

¹⁵² CCA, section 152BCI(1).

¹⁵³ CCA, sections 152BC(3) and 152BC(8).

Competition may be inhibited where the structure of the market gives rise to market power. Market power is the ability of a firm or firms to constrain or manipulate the supply of products from the levels and quality that would be observed in a competitive market for a significant period of time.

An access regime such as Part XIC addresses the structure of a market, limiting or reducing the sources of market power, by allowing third parties to negotiate access to certain services on reasonable terms and conditions. Competition is promoted when market structures are altered such that the exercise of market power becomes more difficult. For example, barriers to entry may have been lowered (permitting more efficient competitors to enter a market and thereby constraining the pricing behaviour of the incumbents) or because the ability of firms to raise rivals' costs is restricted.

Subsection 152AB(4) of the CCA provides that, in determining the extent to which declaration is likely to result in the objective of 'promoting competition', regard must be had (but is not limited) to the extent to which declaration will remove obstacles to end-users of listed services gaining access to listed services.

Denying service providers access to necessary wholesale services on reasonable terms is a significant obstacle to end-users gaining access to services. Declaration can remove such obstacles by facilitating the entry of service providers, which promotes competition in markets supplying end-users.

When conducting a declaration inquiry, the ACCC is required under subsection 152AB(2) of the CCA to consider whether declaration of a service is likely to promote competition in relevant markets. The ACCC's approach to assessing this objective involves defining the relevant markets and assessing the level of competition in those markets. These concepts are explained below.

Identifying relevant markets

Section 4E of the CCA provides that the term "market" means a market in Australia for the goods or services under consideration, as well as any other goods or services that are substitutable for, or otherwise competitive with, those goods or services. The ACCC's approach to market definition is discussed in the ACCC's 2008 merger guidelines.¹⁵⁴

Substitution involves switching from one product to another in response to a change in the relative price, service or quality of the product that is the subject of the inquiry. There are two types of substitution:

- demand-side substitution, which involves customer switching, and
- supply-side substitution, which involves supplier switching.

There may be associated switching costs or difficulties which, if significant, can impede the substitutability of products.

When considering whether a product is substitutable, the ACCC may consider customer attitudes, the function or end use of the technology, past behaviours of buyers, relative price levels, and physical and technical characteristics of a product.¹⁵⁵

One of the methods the ACCC can use to determine if a product or service is a close substitute for the purposes of market definition is the hypothetical monopolist or 'SSNIP'

¹⁵⁴ ACCC, *Merger guidelines*, November 2008.

¹⁵⁵ A useful list of information the ACCC may consider when identifying close substitutes to the relevant product is contained in the 2008 Merger Guidelines, p. 19.

test.¹⁵⁶ The test establishes an area of product and geographic space over which a hypothetical monopolist would likely impose a 'small but significant non-transitory increase in price' (SSNIP). A SSNIP in the context of the hypothetical monopolist test usually consists of a price rise for the foreseeable future of 5 to 10 per cent above the price level that would prevail under competitive market conditions.

Delineation of the relevant geographic markets involves the identification of the area or areas over which a carrier or carriage service provider (CSP) and its rivals currently supply, or could supply, the relevant product.

Part XIC of the CCA does not require the ACCC to precisely define the scope of the relevant markets in a declaration inquiry. The ACCC considers that it is sufficient to broadly identify the scope of the relevant market(s) likely to be affected by the declaration. Accordingly, a market definition analysis under Part XIC should be seen in the context of shedding light on how declaration would or would not promote competition and the LTIE in those markets.

Assessing the state of competition

Once the relevant markets have been defined, the next step in the analysis is to assess the state of competition in relevant markets. If competition is determined to be effective, then declaration of the eligible services is not likely to have an effect in terms of promoting further competition. In assessing the state of competition, the ACCC considers factors such as the potential for sustainable competition to emerge and the extent to which the threat of entry (or expansion by existing suppliers) constrains pricing and output decisions.

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 or services are perfect substitutes, all firms and consumers have complete knowledge about the pricing/output decisions of others and all firms can freely enter and exit the relevant market. In reality, these conditions are rarely found in any market or industry, even those where competition between rival firms is relatively intense.

The concept of 'effective competition' recognises the practical limitations of the theory of perfect competition, especially when applied to the fixed-line telecommunications markets. Some characteristics of effective competition are that it:

- is more than the mere threat of competition – it requires that competitors are active in the market, holding a reasonably sustainable market position¹⁵⁷
- requires that, over the long run, prices are determined by underlying costs rather than the existence of market power
- requires that barriers to entry are sufficiently low and that the use 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]',¹⁵⁸ and
- does not preclude one party from holding a degree of market power from time to time but that power should 'pose no significant risk to present and future competition'.¹⁵⁹

¹⁵⁶ SSNIP stands for small but significant non-transitory increase in price.

¹⁵⁷ Olivier Boylaud and Biuseppe Nicoletti, *Regulation, market structure and performance in telecommunications*, OECD Economics Studies, no. 32, 2001/1.

¹⁵⁸ Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd (1976) 25 FLR 169.

¹⁵⁹ This is not intended to be an exhaustive list of the characteristics of effective competition.

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

When assessing whether effective competition exists in a relevant market, the ACCC examines certain structural and behavioural factors in the market, including but not limited to:

- 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 market and the existence and height of barriers to entry, expansion or exit in the relevant market
- the dynamic characteristics of the market, 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.

Our assessment of the current state of competition during this review will be used to assist us in determining whether declaration will promote the LTIE.

Assessing the impact of the declaration on relevant markets

The next step is to assess the likely effect of the proposed declaration on competition in each relevant market. As noted above, subsection 152AB(4) requires regard to be had to the extent to which a particular thing will remove obstacles to end-users gaining access to listed services.

The ACCC generally considers it helpful to apply the future with and without test as one way to determine whether the LTIE will be promoted by declaration. The test will compare the likely future situation if the wholesale ADSL service was declared and the likely future situation without the wholesale ADSL service declaration before deciding which situation will promote the LTIE.

Any-to-any connectivity

The objective of any-to-any connectivity is achieved when each end-user is able to communicate with other end-users, whether or not they are connected to the same telecommunications network.¹⁶⁰

The any-to-any connectivity requirement is particularly relevant when considering services that require interconnection between different networks. When considering services which do not require user-to-user connections (such as carriage services that are inputs to an end-to-end service or distribution services, such as the carriage of pay television), this criterion is generally less of an issue.

Subsection 152AB(8) states that the objective of any-to-any connectivity is achieved if, and 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 other end-users whether or not they are connected to the same network.

Efficient use of and investment in infrastructure

In determining the extent to which declaration is likely to encourage the economically efficient use of, and investment in, infrastructure, subsections 152AB(6) and (7) of the CCA provide that regard must be had (but is not limited) to the technical feasibility of providing

¹⁶⁰ CCA, subsection 152AB(8).

and charging for the services, the legitimate commercial interests of the supplier(s) of the services, and the incentives for investment in infrastructure.

Economic efficiency has three components:

- *Productive efficiency* refers to the efficient use of resources within each firm to produce goods and services using the least cost combination of inputs.
- *Allocative efficiency* is the efficient allocation of resources across the economy to produce goods and services that are most valued by consumers.
- *Dynamic efficiency* refers to efficiencies flowing from innovation leading to the development of new services or improvements in production techniques. It also refers to the efficient deployment of resources between present and future uses so that the welfare of society is maximised over time.

Facilitating access plays an important role in ensuring that existing infrastructure is used efficiently where it is inefficient to duplicate the existing networks or network elements. An access regime must not discourage investment in networks or network elements where such investment is efficient.

Paragraph 152AB(6)(a) requires the ACCC to have regard to a number of specific matters in examining whether declaration is likely to lead to achievement of the objective in paragraph 152AB(2)(e).

Technical feasibility

In assessing the technical feasibility of supplying and charging for a service, the ACCC considers:

- the technology that is in use, available or likely to become available
- whether the costs that would be involved are reasonable or likely to become reasonable, and
- the effects or likely effects of supplying and charging for the service on the operation or performance of telecommunications networks.

The ACCC assesses the technical feasibility of supplying the relevant service by examining the access provider's ability to provide the service and considering experiences in other jurisdictions.

The legitimate commercial interests of the supplier

An infrastructure operator's legitimate commercial interests relate to its obligations to the owners of the firm, including the need to recover the costs of providing services and to earn a normal commercial return on the investment in infrastructure. Allowing for a normal commercial return on investment provides an appropriate incentive for the access provider to maintain, improve and invest in the efficient provision of the service.

Paragraph 152AB(6)(b) of the CCA also requires the ACCC to have regard to whether providing access may affect the infrastructure operator's ability to exploit economies of scale and scope. Economies of scale arise from a production process in which the average (or per unit) cost of production decreases as the firm's output increases. Economies of scope arise where it is less costly for one firm to produce two (or more) products than it is for two (or more) firms to each separately produce the relevant products.

Declaration may be more likely to impact on an infrastructure operator's ability to exploit economies of scope than economies of scale. A limit in the capacity available to the owner

may constrain the number of services that the owner is able to provide using the infrastructure and thus prevent the realisation of economies of scope associated with the production of multiple services. In contrast, economies of scale derive from the use of the capacity of the network and can be realised regardless of whether that capacity is being used by the owner or by other carriers or carriage service providers. The ACCC assesses the effects on an infrastructure operator's ability to exploit both economies of scale and scope on a case-by-case basis.

Incentives for investment

Infrastructure operators should have the incentive to invest efficiently in the infrastructure by which the services are supplied (or are capable, or likely to become capable, of being supplied). In determining incentives for investment, regard must be had (but is not limited) to the risks involved in making the investment.¹⁶¹

Access regulation may promote efficient investment in infrastructure by avoiding the need for access seekers to duplicate existing infrastructure where duplication would be inefficient. It reduces the barriers to entry for competing providers of services to end-users and promotes efficient investments by these service providers in related equipment required to provide services to end-users.

Firms should have the incentive to invest efficiently in the infrastructure by which the services are supplied (or are capable, or are likely to become capable, of being supplied).

¹⁶¹ CCA, subsections 152AB(7A) and (7B).

D List of submissions

Submissions received in response to ACCC July 2016 Discussion paper
ACCAN, 29 July 2016
Exetel, (confidential and public versions), 28 July 2016
Innovative Synergies, 25 July 2016
Macquarie Telecom Group, 28 July 2016
National Farmers' Federation, 29 July 2016
Optus, 29 July 2016
Telstra, (confidential and public versions) , 29 July 2016
Vocus Communications, 5 August 2016