



Australian  
Competition &  
Consumer  
Commission

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

**Draft Report**

**March 2013**

**Public version**



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## List of abbreviations and acronyms

2008 Model Terms	<i>Model Non-Price Terms &amp; Conditions Determination 2008</i>
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ADSL	Asymmetric Digital Subscriber Line
AGVC	Aggregating Virtual Circuit
ARPU	average revenue per user
ATM	asynchronous transfer mode
BBM	Building Block Model
BRAS	broadband remote access server
BROC	binding rule of conduct
CBD	Central Business District
CCA	<i>Competition and Consumer Act 2010</i>
c-i-c	commercial in confidence
CMUX	customer multiplexer
CPI	Consumer Price Index
CSP	carriage service provider
DRP	debt risk premium
DSL	Digital Subscriber Line
DSLAM	digital subscriber line access multiplexer
DTCS	domestic transmission capacity service
ESA	Exchange Service Area
ETC	early termination charge
FAD	final access determination

February 2012 Discussion paper	<i>ACCC Public inquiry to make a final access determination for the wholesale ADSL service, Discussion Paper, February 2012</i>
HFC	hybrid fibre-coaxial
IAD	interim access determination
IGR	internet gateway router
ISDN	Integrated Services Digital Network
July 2012 Issues Paper	<i>ACCC Public inquiry to make a final access determination for the wholesale ADSL service, Issues Paper, July 2012</i>
LPGS	Large pair gain system
LCS	local carriage service
LSS	line sharing service
LTIE	long-term interests of end-users
Mbps	megabits per second
NBN	National Broadband Network
NPTCs	non-price terms and conditions
POI	point of interconnection
POTS	plain old telephone service
PSTN	public switched telephone network
PSTN OTA	PSTN originating and terminating access
RAB	regulatory asset base
RAF	regulatory accounting framework
RFI	request for information
RIM	Remote Integrated Multiplexer
RKR	record keeping rule

RMRC	retail minus retail cost
RSPs	retail service providers
SAOs	standard access obligations
SIOs	services in operation
SSU	Structural Separation Undertaking
TCP Code	Telecommunications Consumer Protection Code
TEM	Telstra Economic Model
TIO	Telecommunications Industry Ombudsman
TSLRIC	total service long run incremental cost
ULLS	Unconditioned local loop service
VLAN	virtual local area network
WACC	weighted average cost of capital
WLR	Wholesale line rental

## Executive summary

This draft report and the attached draft final access determination (FAD) are part of the Australian Competition and Consumer Commission's (ACCC) public inquiry into the making of an access determination for the declared wholesale asymmetric digital subscriber line (ADSL) service under Part XIC of the *Competition and Consumer Act 2010*.

Once this inquiry is finalised, the FAD will provide a base set of terms and conditions that access seekers can rely on if they are unable to reach agreement with an access provider on the terms and conditions of access to the declared wholesale ADSL service. If parties can reach agreement on terms and conditions of access, their access agreement will prevail over the FAD to the extent of any inconsistency.

This report reflects the outcomes of consultation on the wholesale ADSL FAD during 2012 as well as the ACCC's own analysis. The report discusses the key issues raised in the consultations and explains the ACCC's reasoning underlying the price and non-price terms contained in the draft wholesale ADSL FAD.

The ACCC invites submissions on the draft wholesale ADSL FAD. After considering submissions, the ACCC proposes to publish a final report and make an FAD for the wholesale ADSL service in mid 2013.

### ***The ACCC has determined draft cost-based prices for the wholesale ADSL service.***

The ACCC has determined price terms for this draft FAD using a cost-based pricing approach. The ACCC considers that estimating wholesale ADSL prices using a cost-based approach will best promote the long-term interests of end-users, relative to other pricing methodologies such as the retail minus retail cost approach.

The ACCC considers that a cost-based approach will:

- provide a direct estimate of the efficient costs of supplying the service as a basis for setting prices. This will promote efficiency as well as greater competition in the retail markets.
- allow for the access provider to be adequately compensated for the costs of providing the wholesale ADSL service over time. The estimated revenue requirement allows the access provider to recoup its efficiently incurred costs, including a commercial rate of return.
- be consistent with the pricing approach used for the other declared fixed line services, which use many of the same network assets as the wholesale ADSL service. This will reduce the risk of Telstra over- or under-recovering its costs of supplying the declared fixed line services.
- ensure that line costs are not recovered twice. This is because wholesale ADSL services are supplied by Telstra only when an active PSTN voice service is operating on the same line as the wholesale ADSL service. Accordingly, the costs associated with the customer access network for wholesale ADSL are recovered from the voice service operating on that line.

The ACCC has updated the cost-based Fixed Line Services Model (FLSM) in order to price the wholesale ADSL service. This model was developed through extensive industry consultation during the public inquiries to develop a building block model and to estimate prices for the July 2011 declared fixed line services FADs.<sup>1</sup> The details of the amendments made to the FLSM are discussed in chapter 4 of this report.

While Telstra has proposed that the ACCC set prices for the wholesale ADSL service which directly address congestion on the ADSL network, the ACCC's view is to not include price terms that attempt to address congestion in this FAD. Market evidence suggests that congestion management is not a primary objective for retail ADSL service providers, given that many retail plans offer lower per unit prices as data usage increases and some retail services include unmetered content downloads. The ACCC considers that such retail pricing encourages high data use, which in turn increases traffic on the ADSL network.

In the absence of congestion pricing being adopted more generally at the retail level, implementing congestion pricing for the wholesale ADSL service alone would be likely, in the ACCC's view, to put wholesale ADSL access seekers at a competitive disadvantage in the retail market compared with Telstra. Using the ACCC's cost-based model (the FLSM), the ACCC has determined the following draft prices for wholesale ADSL for 2013-14. The interim (IAD) prices that have applied since 14 February 2012 are shown for comparison purposes. The IAD prices were determined using a retail-minus approach.

The total cost-based prices for the wholesale ADSL service (that is, the combined port and AGVC/VLAN charges) are somewhat lower than the retail-minus prices included in the IAD.

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<sup>1</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services, Final Report*, July 2011. The July 2011 FADs set terms and conditions relating to the following services: Unconditioned Local Loop Service (ULLS), Wholesale Line Rental (WLR), Local Carriage Service (LCS), Line Sharing Service (LSS) and PSTN Originating and Terminating Access (PSTN OTA).



**Draft FAD prices for wholesale ADSL and interim prices**

	Draft FAD prices (per month)	Interim (IAD) prices (per month)	
	Until 30 June 2014	Up to 30 June 2012	From 1 July 2012
Port price – Zone 1	\$24.56	\$25.40	\$25.40
Port price – Zone 2/3	\$29.81	\$30.80	\$30.80
AGVC/VLAN (per Mbps)	\$36.08	\$45.50	\$33.65

*The FAD will apply to June 2014 to align wholesale ADSL pricing with the other declared fixed line services in the next regulatory period.*

The ACCC is proposing that these wholesale ADSL prices will apply from the commencement of the FAD until 30 June 2014. The cost-based prices for wholesale ADSL will then be reviewed at the same time as the ACCC conducts an inquiry into setting new FADs for the other declared fixed line services<sup>2</sup>—these FADs expire on 30 June 2014. The inquiry will involve updating the inputs to the FLSM in order to estimate prices for the subsequent regulatory period. Aligning the regulatory periods for the wholesale ADSL service and the other declared fixed line services will ensure consistency in the application of the pricing methodology and minimise the risk of over- or under-recovery of costs by Telstra.

*The FAD will apply in all geographic areas where Telstra supplies wholesale ADSL services.*

The ACCC does not propose to limit the application of the FAD to certain Exchange Service Areas (ESAs). Telstra had submitted that the ACCC should limit the scope of the FAD, that is give effect to geographic exemptions to the application of the FAD, so that regulated terms and conditions would not apply in certain ESAs where Telstra’s three largest competitors are present.

After reviewing the information before it, the ACCC does not consider that granting geographic exemptions would promote the long-term interests of end-users, the legitimate business interests of the access provider, the interest of access seekers or the efficient use of or investment in infrastructure. While a relatively more competitive market structure has developed in areas where access seekers have deployed DSLAM<sup>3</sup> infrastructure, Telstra remains the dominant provider of wholesale ADSL services and is, in the ACCC’s view, likely to remain so. This is because, for certain segments of the market, there are commercial barriers (such as the costs of sourcing wholesale ADSL services from multiple suppliers and

<sup>2</sup> Assuming that some or all of the currently declared fixed line services are re-declared for a further period.

<sup>3</sup> Digital Subscriber Line Access Multiplexer.

large pair gain systems) that reduce the contestability of those market segments by access seekers.

***The FAD will include a term exempting wholesale ADSL service providers other than Telstra from compliance with the FAD.***

The ACCC considers there are unlikely to be any significant benefits from extending the application of the FAD to all wholesale ADSL service providers, as these service providers are already effectively constrained in the supply of the wholesale service through competition with Telstra. The ACCC has no evidence that non-Telstra providers are engaging in anti-competitive behaviour.

The ACCC is concerned that imposing regulated terms and conditions on non-Telstra providers could have a material effect on their ability to offer differentiated products. It could also adversely affect their incentives to invest in infrastructure, or innovations, to supply wholesale ADSL services, with detrimental impacts on competition in wholesale and retail ADSL markets and on efficient use of and investment in infrastructure.

***The ACCC will not require Telstra to alter its network configuration for supplying ADSL services.***

The ACCC has reviewed submissions regarding the supply of the wholesale ADSL service over Telstra's network, in particular regarding:

- Telstra's requirement for an active PSTN voice service to be provided on a line where a wholesale ADSL service is to be supplied; and
- the location of Telstra's points of interconnect.

The ACCC is of the view that Telstra should not be required to alter its network configuration for supplying wholesale ADSL services.

The ACCC considers that including terms requiring Telstra to alter its network configuration would not promote the long-term interests of end-users as there would be significant costs associated with re-engineering Telstra's ADSL network and deploying additional network components. Such terms would thereby generate inefficiencies in both the level of investment and the use of existing network infrastructure.

# 1 Introduction

The Australian Competition and Consumer Commission (ACCC) has formed its draft views on the terms of the final access determination (FAD) for the declared wholesale asymmetric digital subscriber line (ADSL) service and released a draft FAD.<sup>4</sup> This paper sets out the ACCC's reasons for the draft FAD and its assessments of the terms and conditions of the draft FAD against the legislated matters it must take into account.

## 1.1 Background

ADSL is the dominant technology for providing fixed line broadband internet access in Australia. It is supplied over Telstra's near-ubiquitous customer access network (CAN) which runs from the exchange building to premises. Other high bandwidth technologies which are capable of providing comparable broadband internet access include hybrid fibre-coaxial (HFC) and optical fibre networks, which operate in limited geographical areas of Australia.

As the operator of the CAN, Telstra is the dominant access provider of ADSL services at the wholesale level and currently supplies ADSL services at some 2800 ADSL-enabled exchanges nationally. Some access seekers acquire the unconditioned local loop service (ULLS) and line sharing service (LSS) from Telstra and combine the service with additional infrastructure to either self-supply or to supply third parties with an ADSL service at the wholesale level. As at September 2012, ULLS and/or LSS access seekers were present in 592 Exchange Service Areas (ESAs).<sup>5</sup>

Competition concerns arising from Telstra's dominance in the wholesale fixed line broadband market over some years culminated in the ACCC's decision to declare the wholesale ADSL service on 14 February 2012.<sup>6</sup> The declaration will expire on 13 February 2017. The relevant service description can be found in **Appendix A**.

## 1.2 Public inquiry process to date

The ACCC commenced the public inquiry into making an FAD for the wholesale ADSL service and released the first discussion paper on 14 February 2012 (**February 2012 Discussion Paper**). This paper set out the issues that the ACCC considered relevant in making the FAD and invited stakeholders' submissions on those issues.<sup>7</sup> After considering the six submissions received in response to the Discussion Paper, the ACCC released a

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<sup>4</sup> The draft FAD can be found in **Appendix E**.

<sup>5</sup> Source: ACCC, *Snapshot of Telstra's customer access network as at September 2012*, available at: <http://www.accc.gov.au/content/index.phtml/itemId/853523>. Note there is considerable overlap between exchanges where ULLS and LSS access seekers are present.

<sup>6</sup> ACCC, *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final decision*, February 2012. This paper is available on the ACCC's website at: <http://www.accc.gov.au/content/index.phtml/itemId/1022756>.

<sup>7</sup> ACCC, *Public inquiry to make a final access determination for the wholesale ADSL service, Discussion Paper*, February 2012. This paper is available on the ACCC's website at: <http://www.accc.gov.au/content/index.phtml/itemId/1032830>.

second discussion paper (**July 2012 Issues Paper**) on 6 July 2012, which set out the ACCC's preliminary views on some issues and sought further submissions on a range of matters to inform the making of the FAD.<sup>8</sup> The ACCC received 7 submissions, from AAPT, the Competitive Carriers' Coalition (CCC), Herbert Geer (on behalf of Adam Internet and iiNet), Macquarie Telecom, Nextgen Networks, Optus and Telstra. To assist it in forming a view on some issues, the ACCC also sought specific pricing information from Telstra.

In response to the July 2012 Issues Paper, Telstra submitted on the relevance of network congestion to setting terms of access to wholesale ADSL. The issue of congestion was not addressed in the ACCC's consultation papers. On 5 September 2012 the ACCC sought further submissions on congestion on ADSL networks. The ACCC received 4 submissions, from AAPT, Herbert Geer (on behalf of Adam Internet and iiNet), Macquarie Telecom and Optus. On 16 November 2012 the ACCC received a reply submission from Telstra regarding congestion.

Further, between October and December 2012, Telstra provided the ACCC with reply submissions and consultants' reports on matters relating to this inquiry.

As the ACCC considered it unlikely that an FAD could be made within the six month period following the commencement of the public inquiry, the ACCC extended the decision making period to 13 February 2013. As a result of the further consultations, new/delayed submissions and complexity of the issues, the ACCC has further extended the decision making period to 13 August 2013. This extension will allow sufficient time for the ACCC to make and consult on a draft FAD, and then to finalise the FAD. The ACCC also extended the expiry date of the IAD up until the time that the ACCC makes the FAD for wholesale ADSL.

### **1.3 Consultation process for the final access determination**

Following its review of submissions made during this inquiry and specific responses to information requests, the ACCC has determined its draft positions on the price and non-price terms to be included in the FAD. These terms are set out in the draft FAD released with this paper (see **Appendix E**). The ACCC now seeks submissions in response to the draft FAD.

The ACCC requests written submissions from interested parties before 5:00 pm on 5 April 2013. After consideration of these submissions, the ACCC intends to issue an FAD and an explanatory statement.

The ACCC encourages industry participants, other stakeholders and the general public to make submissions to the ACCC to assist it in determining the content of the FAD for the wholesale ADSL service. The ACCC invites submissions on the statutory criteria the ACCC must apply under subsection 152BCA(1) of the *Competition and Consumer Act 2010* (CCA) and any other matters that respondents consider relevant.

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<sup>8</sup> ACCC, *Public inquiry to make a final access determination for the wholesale ADSL service, Issues Paper*, July 2012. This paper is available on the ACCC's website at: <http://www.accc.gov.au/content/index.phtml/itemId/1032830>.

To foster an open, informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. If interested parties wish to submit commercial-in-confidence material as part of their submission to the ACCC, parties should submit both a public and a confidential version of their submission. The public version of the submission should clearly identify the confidential material by replacing the confidential material with 'c-i-c'.

Parties to this consultation process should be given an opportunity to consider, review and comment on confidential material provided to the ACCC in relation to the draft FAD. The ACCC encourages providers of confidential material to establish confidentiality arrangements that allow other parties to view their confidential information.

The *ACCC-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC website: <http://www.accc.gov.au/content/index.phtml/itemId/846791>.

The ACCC prefers to receive submissions in electronic forms which allow the submission text to be searched. For accessibility purposes, please provide the submission in both PDF and Microsoft Word format. Please forward the submission and contact details for inquiries relating to the exchange of confidential information to [accessdeterminations@acc.gov.au](mailto:accessdeterminations@acc.gov.au) by **5:00 pm** on 5 April 2013. Any submission received after this time may not be considered.

For further information, please contact:

**Jessica Wicks**

Communications Group

Australian Competition and Consumer Commission

Email: [jessica.wicks@acc.gov.au](mailto:jessica.wicks@acc.gov.au)

Phone: **03 9568 6461**

## 2 Legislative framework for access determinations

This section briefly sets out the terms an FAD may contain and the criteria the ACCC must consider in making an FAD. Further information on the legislative framework is attached at **Appendix C**.

### 2.1 Content of an FAD

An FAD may include, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the applicable standard access obligations (SAOs) provided for in the CCA and terms and conditions of access to a declared service.<sup>9</sup>

The draft wholesale ADSL FAD (in **Appendix E**) contains both price and non-price terms and conditions for the wholesale ADSL service.

### 2.2 Matters the Commission must take into account when making an FAD

The ACCC must have regard to certain criteria when making an FAD.<sup>10</sup> These criteria are:

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

The ACCC may also take into account any other matters that it thinks are relevant when making an FAD.<sup>11</sup> Further details on the access regime and criteria for making FADs can be found in **Appendix C**.

Compliance with an FAD is both a carrier licence condition and a service provider rule.<sup>12</sup> A breach of either a carrier licence condition or a service provider rule may lead to a pecuniary

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<sup>9</sup> Section 152BC of the CCA.

<sup>10</sup> Subsection 152BCA(1) of the CCA.

<sup>11</sup> Subsection 152BCA(3) of the CCA.

<sup>12</sup> Sections 152BCO and 152BCP of the CCA.

penalty of up to \$10 million for each contravention.<sup>13</sup> Private action to enforce an FAD may also be taken in the Federal Court.<sup>14</sup>

### **2.3 Variation inquiry and binding rule of conduct**

If an FAD results in unintended consequences, the ACCC may consider initiating an inquiry into varying the FAD or issuing a binding rule of conduct (BROC).

The ACCC may make a BROC for the wholesale ADSL service if it considers that there is an urgent need to specify terms and conditions for a carrier or CSP to comply with the SAOs or to require compliance with the SAOs as specified in the BROC. The BROC would prevail over any provision of the FAD to the extent of any inconsistency.<sup>15</sup>

The duration of a BROC is limited to a maximum of 12 months. If the ACCC makes a BROC in relation to the wholesale ADSL service, it must also commence a public inquiry to vary the existing FAD or make a new FAD to address the issues raised in the BROC on a more permanent basis.

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<sup>13</sup> Section 570 of the Telco Act.

<sup>14</sup> Section 152BCQ of the CCA.

<sup>15</sup> Section 152BDE of the CCA.

## Part A: Price terms

In specifying terms and conditions in an FAD, the ACCC must ‘include terms and conditions relating to price or a method of ascertaining price’.<sup>16</sup> This section discusses the price terms proposed to be included in the wholesale ADSL FAD and provides the reasons for the ACCC’s views on these terms.

The matters that the ACCC must take into account when making an FAD, as outlined in **Section 2.2** are further discussed in **Appendix C**. In coming to a draft position on the price terms and conditions for the wholesale ADSL FAD, the ACCC had regard to these matters. The ACCC’s assessment of the pricing methodology against the legislated matters for consideration is provided in **Section 3.7**. The ACCC’s assessment of the price terms against the legislated matters for consideration is provided in **Section 6.2**.

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<sup>16</sup> Subsection 152BC(8) of the CCA.



### 3 Pricing Methodology

This chapter sets out the ACCC's reasons for its draft decision to adopt a cost-based pricing methodology in determining the price terms for the wholesale ADSL FAD.

#### 3.1 Issues

In the February 2012 Discussion Paper, the ACCC noted that wholesale ADSL prices could be estimated using alternative pricing methodologies. It gave examples of general methodologies that had previously been applied in estimating access prices for other fixed line services:

- A cost-based methodology was used to calculate prices for the declared fixed line services (ULLS, LSS, WLR, LCS, PSTN OTA) for the July 2011 FADs.<sup>17</sup>
- A 'retail minus retail cost' (retail-minus or RMRC) methodology was previously used to calculate prices for WLR and LCS.<sup>18</sup>
- A benchmarking methodology was used to calculate prices for the Domestic Transmission Capacity Service (DTCS) for the June 2012 FAD.

The ACCC sought submissions on what methodology(s) should be used to develop price terms for the wholesale ADSL FAD.

#### 3.2 Summary of submissions

Telstra submitted that the 'most effective pricing methodology, in the context of...competitive metropolitan areas and nationally consistent retail pricing, is the RMRC approach'.<sup>19</sup> Telstra submitted that, in light of the growth in retail ADSL services, a 'RMRC-based price provides the correct incentives for investment to occur, while allowing access seekers a fair rate of return on their own investments'.<sup>20</sup>

Telstra submitted that an RMRC pricing methodology would promote the long-term interests of end-users (LTIE) because:

- Telstra's retail ADSL prices are 'efficient and competitively set' and 'are set in the context of strong competition' in competitive areas, which means that prices are not inflated as a result of a lack of competition;
- RMRC is relatively inexpensive to implement; and

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<sup>17</sup> See ACCC, *Inquiry to make final access determinations for the fixed line declared services, Final Report*, July 2011.

<sup>18</sup> ACCC, *Local carriage service and wholesale line rental - final pricing principles and indicative prices for 2008-2009*, August 2008.

<sup>19</sup> Telstra, April 2012 submission, p. 22. Note: a full list of submissions received during this public inquiry, and the ACCC's abbreviated titles for the submissions (used in footnotes in this draft report), are available in Appendix B.

<sup>20</sup> Telstra, April 2012 submission, p. 22.

- the wholesale prices would be ‘equivalent’ to the prices that would be produced by a competitive market that is ‘unaffected by vertical integration’.<sup>21</sup>

Telstra also submitted that the retail-minus approach is more suited to managing congestion than a ‘resource-cost based approach’.<sup>22</sup> Telstra submitted that the use of a building block model and, more particularly, the Fixed Line Services Model (FLSM), for pricing wholesale ADSL will ‘substantially harm the statutory criteria’.<sup>23</sup>

Telstra submitted that it agrees with the ‘adoption of RMRC for the pricing of ADSL’ in the interim access determination (IAD) but submitted that the ACCC has made ‘a number of ad hoc changes to Telstra’s RMRC calculation which undermines [the ACCC’s] use of RMRC’.<sup>24</sup>

Optus submitted that ‘a cost based methodology should be adopted’ because it is ‘consistent with the pricing principles applied by the ACCC in pricing the declared fixed line services’ and the existing fixed line services model.<sup>25</sup> Optus submitted that there are a number of advantages with using a cost-based approach in that it is established, accepted and transparent.<sup>26</sup> Optus submitted that a retail minus approach is not appropriate because access seekers are unlikely to ‘earn a normal commercial return using a retail minus wholesale pricing construct’, and therefore it is unlikely to ‘result in vigorous competition in the resale ADSL market’.<sup>27</sup> Optus submitted that it does not support the use of benchmarking for wholesale ADSL.<sup>28</sup>

Optus submitted that, in settling on a pricing methodology, the ACCC must balance the need to maximise competition and current usage (static efficiency) and the desire to ensure efficient re-investment (dynamic efficiency).<sup>29</sup> However, Optus submitted that, due to the deployment of the NBN, the ACCC should give primacy to static efficiency when determining the methodology to be used to set wholesale ADSL prices.<sup>30</sup>

AAPT submitted that cost-based pricing is required to achieve the broader objective of pricing wholesale ADSL in a manner that best promotes the LTIE. AAPT stated that the ACCC previously concluded that the building block model (BBM) pricing approach reflects efficient costs and meets the objectives of promoting the LTIE and that this reasoning is applicable to the pricing of wholesale ADSL.<sup>31</sup>

Herbert Geer (on behalf of Adam Internet, iiNet, Internode, Primus Telecom, and TransACT Communications) submitted that charges for wholesale ADSL should be calculated using the

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<sup>21</sup> Telstra, August 2012 pricing submission, pp. 19-21.

<sup>22</sup> Telstra, November 2012 submission, p. 3.

<sup>23</sup> Telstra, August 2012 pricing submission, p. 22.

<sup>24</sup> Telstra, April 2012 submission, p. 22.

<sup>25</sup> Optus, April 2012 submission, p. 10.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid, p. 11.

<sup>28</sup> Optus, August 2012 submission, p. 6.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> AAPT, April 2012 submission, p. 4.

BBM pricing methodology in line with other declared fixed line services charges.<sup>32</sup> Herbert Geer stated that the ACCC previously concluded that the BBM pricing approach reflects efficient costs and meets the objectives of promoting the LTIE and that these conclusions equally apply in regards to wholesale ADSL pricing.<sup>33</sup> Herbert Geer submitted that the ‘most obvious ways’ of setting the wholesale ADSL port charge seem to be either BBM and/or a wholesale ADSL specific cost charge that operates in the same way that the LSS charge is currently set.<sup>34</sup>

Macquarie Telecom submitted that a cost-based methodology should be used because it ‘is widely considered to be industry best practice and is consistent with the methodology used by the ACCC for the setting of price terms for other fixed network access services’.<sup>35</sup>

Macquarie Telecom submitted that the ACCC could also determine price terms by reference to a combination of benchmark prices and data derived from Telstra’s TEM<sup>36</sup> in recognition of a cost-based methodology being ‘complex and a potentially time consuming and costly exercise’.<sup>37</sup>

Vocus stated that the ACCC has previously concluded that the BBM approach to setting prices reflects efficient costs and meets the objectives of promoting the LTIE. Vocus submitted that these conclusions equally apply in regards to wholesale ADSL pricing.<sup>38</sup>

### **3.3 Cost-based Building Block Model approach**

A cost-based approach to access pricing is one where access prices for a service are based on an estimation of the costs associated with providing that service. The ACCC has typically applied cost-based pricing using a Building Block Model (BBM).

A BBM is a method of pricing that seeks to estimate prices based on the efficient costs incurred by a firm in supplying access services. To implement a BBM, the ACCC must establish an initial value of the regulatory asset base (RAB). The initial RAB value is then ‘locked in’ and rolled forward by changes in the value of the asset base. The BBM accounts explicitly for each cost category or ‘building block’ faced by the regulated business, including:

- operating expenditure
- return of capital
- return on capital, and
- tax liabilities.

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<sup>32</sup> Herbert Geer, April 2012 submission, p. 6.

<sup>33</sup> Ibid, p. 7.

<sup>34</sup> Ibid.

<sup>35</sup> Macquarie Telecom, April 2012 submission, p. 4.

<sup>36</sup> Telstra Economic Model.

<sup>37</sup> Macquarie Telecom, April 2012 submission, p. 5.

<sup>38</sup> Vocus, April 2012 submission, p. 3.

The building blocks are added together to determine the business's total revenue requirement. The revenue requirement is then allocated to services provided over the network and prices for regulated services are estimated.

The ACCC established a BBM, called the Fixed Line Services Model (FLSM), for pricing the other declared fixed line telecommunications services in the July 2011 FADs. The FLSM was developed following extensive industry consultation to estimate cost-based prices for ULLS, LSS, WLR, LCS and PSTN OTA. The FLSM was not initially developed to price wholesale ADSL and therefore extensions are required to use the model to determine a cost-based price for wholesale ADSL.

The key benefit of using a BBM approach to set prices is that it is a method of directly estimating the efficient costs of supplying the services as a basis for setting prices. The model allows for the recovery of the access provider's efficient costs, including a return on and of the forecast capital expenditure, for example expenditure required to replace/refurbish assets and to meet changes in demand.

A drawback of a BBM approach is that a significant amount of data is required in order to build the model. That said, given that the ACCC has already established the FLSM for pricing Telstra's services and that there is a significant overlap between the network assets used in providing wholesale ADSL and the other declared fixed line services, much of the information required to establish a BBM is already available.

### **3.4 Retail-minus approach**

A retail-minus methodology determines access prices by deducting the access provider's estimated retail costs from an identified retail price for the relevant service.

That is, the retail-minus method estimates a price for supplying a wholesale ADSL service from Telstra's retail ADSL revenues after deducting the estimated costs Telstra incurs to transform the wholesale input into a retail service. The residual revenue amount is the implicit wholesale revenue that Telstra would have available to recover its wholesale input costs when it supplies ADSL services.

In the context of the IAD for wholesale ADSL, the ACCC identified a 'reference price' (or wholesale yield) for wholesale ADSL by subtracting both the fixed and variable retail costs (calculated as a per SIO, per month value) from an estimated average retail ADSL price. The reference price represents the monthly wholesale revenue per SIO to be recovered by Telstra. The reference price was broken down into a wholesale rate table that included the material individual charge items that wholesale customers face (e.g. monthly end-user access port charges and AGVC charges).

A retail-minus approach has two advantages compared to a cost-based approach. First, it is less information-intensive than a cost-based approach and can therefore be suitable for setting a price quickly. Second, it can be used to address immediate competition concerns.

In the IAD, the ACCC stated that the retail-minus methodology could, if properly applied, address the immediate competition concerns relating to the wholesale ADSL service. It also noted that the retail-minus approach can be applied relatively quickly, as typically less

information is required and necessary data are more readily available as compared with other pricing methodologies.<sup>39</sup>

However, the retail-minus methodology only provides an indirect indication of the relevant costs of supplying the service, in contrast to the cost-based approach which involves a bottom-up assessment of the costs of providing the service. A major drawback of the retail-minus methodology, therefore, is that the wholesale prices derived from applying such a methodology do not necessarily reflect the efficient costs of supplying the service.

In addition, the ACCC notes that a retail-minus approach may be less transparent than a cost-based approach. Determining a retail-minus access price for the wholesale ADSL service requires a method of ascertaining a single 'retail price' given that there are more than [c-i-c] [c-i-c] Telstra retail ADSL plans with varying prices, data allowances and other conditions in the market. The ACCC considers that, in these circumstances, it is likely to be appropriate to use a measure of the retail yield as it will include discounts provided to retail customers.

Based on these considerations, the ACCC considered that the retail-minus methodology was most appropriately applied as an interim measure until a robust cost-based methodology could be developed and implemented.

Details of the ACCC's considerations regarding the potential implementation of a retail-minus approach, including price estimates, are included at Appendix D.

### **3.5 Network congestion**

During the FAD inquiry process, submissions were received that related network congestion to the choice of pricing methodology for the wholesale ADSL FAD.

In July 2012, the ACCC published a consultation paper (July 2012 Issues Paper) seeking submissions on a range of predominantly non-price issues. In response, Telstra submitted that setting wholesale ADSL prices for the FAD higher than those included in the interim access determination (IAD) was optimal to account for the 'social cost of congestion'.<sup>40</sup>

In September 2012, following Telstra's detailed submission on congestion, the ACCC published an open letter inviting stakeholders to comment on this issue. Submissions were received from Optus, Macquarie Telecom, Herbert Geer (on behalf of iiNet and Adam Internet) and AAPT. On 16 November 2012, Telstra provided a further response and submission on ADSL congestion.

#### **3.5.1 Summary of submissions**

In its August 2012 submission, Telstra stated that setting a higher wholesale ADSL price to 'reflect the social cost of congestion' would best promote the statutory criteria for the FAD.<sup>41</sup>

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<sup>39</sup> ACCC, *Interim access determination for the wholesale ADSL service, Statement of reasons*, February 2012, p. 10.

<sup>40</sup> Telstra, August 2012 pricing submission, p. 16.

<sup>41</sup> Ibid.

Telstra submitted that [c-i-c] [c-i-c] are now served by network elements that have a level of occupancy higher than the threshold over which congestion occurs, [c-i-c] [c-i-c].<sup>42</sup>

Telstra stated that when congestion occurs, customer experience worsens, mainly through slower downloads, pixelated video, traffic-intensive devices not working and Australian businesses potentially suffering lost sales.<sup>43</sup> Telstra submitted that from an economic perspective, these outcomes result in lower social welfare.<sup>44</sup> Telstra submitted that it has three instruments at its disposal to manage congestion:<sup>45</sup>

- Investing in the network—Telstra stated that it has invested [c-i-c] [c-i-c] since January 2008 in its ADSL network
- Setting a retail price structure designed to manage congestion (such as charging higher prices for higher download limits)
- [c-i-c] [c-i-c].

Telstra submitted that setting prices that do not substantially worsen congestion is a difficult objective to meet, given the ‘significant, ongoing growth in traffic demand’.<sup>46</sup> Telstra submitted that [c-i-c] [c-i-c].<sup>47</sup> Since January 2010, average peak throughput on its network has grown by [c-i-c] [c-i-c] per annum.<sup>48</sup>

Telstra considered that in the standard economic model, price should optimally be set to reflect the costs of production.<sup>49</sup> It stated however that unpriced congestion will create an externality and therefore the optimal price will depend on both the costs of production and the congestion costs imposed by the consumer on other consumers (i.e. the externality).<sup>50</sup>

Telstra referred to a consultants’ report prepared for Telstra by Gowrisankaran and MacKie-Mason that ‘current observed congestion prices in the Australian ADSL market do not reflect optimal prices going forward and indeed are lower than the optimal prices’.<sup>51</sup> Telstra submitted that the retail-minus approach is better suited to managing congestion than cost-based pricing.<sup>52</sup> It submitted that prices should be increased above the IAD level to account for congestion, as this would, in its view, best promote the statutory criteria.<sup>53</sup> Telstra supplied a further consultants’ report, from Frontier Economics,<sup>54</sup> in support of its submission.

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<sup>42</sup> Ibid, p. 3.

<sup>43</sup> Ibid, p. 11.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid, pp. 6-7.

<sup>46</sup> Telstra, August 2012 executive summary, p. 5.

<sup>47</sup> Telstra, August 2012 pricing submission, p. 7.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid, p. 13.

<sup>50</sup> Ibid, p. 14.

<sup>51</sup> Ibid.

<sup>52</sup> Telstra, November 2012 congestion submission, p. 7.

<sup>53</sup> Telstra, August 2012 pricing submission, p. 24.

<sup>54</sup> Frontier Economics, August 2012 report for Telstra.

In response to Telstra's submission, access seekers submitted that the ACCC should not price for congestion in the FAD.

Macquarie Telecom submitted that Telstra's 'unsolicited' pricing proposals were causing unnecessary delays to concluding the ACCC's inquiry and was evidence of Telstra 'gaming' the regulatory process.<sup>55</sup> Optus also submitted that Telstra was gaming the regulatory process by providing adequate capacity for NBN Co's transit network while 'claiming inadequate capacity for access seekers relying on regulated access'.<sup>56</sup>

Optus submitted that a cost-based approach should be used to estimate the FAD prices, to ensure consistency with other fixed line decisions and appropriate treatment of sunk assets.<sup>57</sup> It stated that this approach would allow for cost recovery of the efficient investments required to provide additional capacity.<sup>58</sup> Macquarie Telecom<sup>59</sup> and Herbert Geer<sup>60</sup> also submitted that they supported using a cost-based approach.

Optus stated that the current pricing structure (whereby access seekers are required to pay an AGVC capacity charge to access Telstra's network) ensures efficient management of capacity costs, as it encourages access seekers to choose the most efficient solution (by either smoothing demand or purchasing additional capacity).<sup>61</sup> Herbert Geer submitted that most access seekers already design retail plans that attempt to manage demand by smoothing usage between peak and off peak periods.<sup>62</sup> AAPT made a similar statement, noting that it would purchase more AGVC if it required more capacity.<sup>63</sup>

Herbert Geer also submitted that Telstra Retail customers were disproportionately contributing to network congestion and that an attempt to deal with congestion by increasing wholesale pricing is likely to 'make the playing field even more uneven, with resultant negative effects on competition'.<sup>64</sup>

Optus,<sup>65</sup> Macquarie Telecom<sup>66</sup> and Herbert Geer<sup>67</sup> submitted that if the ACCC considered capacity management to be a genuine issue, the transmission elements of the network should be unbundled to enable access seekers to self-supply backhaul.

Macquarie Telecom submitted that managing congestion in telecommunications was 'nothing new' and that it is fundamental to the design of any network to ensure capacity can cope with the expected volume of traffic.<sup>68</sup> AAPT submitted that the concept of network

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<sup>55</sup> Macquarie Telecom, October 2012 congestion submission, p. 1.

<sup>56</sup> Optus, October 2012 congestion submission, p. 6.

<sup>57</sup> Ibid, p. 9.

<sup>58</sup> Ibid, p. 8.

<sup>59</sup> Macquarie Telecom, October 2012 congestion submission, p. 3.

<sup>60</sup> Herbert Geer, October 2012 congestion submission, p. 4.

<sup>61</sup> Optus, October 2012 congestion submission, p. 7.

<sup>62</sup> Herbert Geer, October 2012 congestion submission, p. 4.

<sup>63</sup> AAPT, October 2012 congestion submission, p. 4.

<sup>64</sup> Herbert Geer, October 2012 congestion submission, p. 4.

<sup>65</sup> Optus, October 2012 congestion submission, p. 4.

<sup>66</sup> Macquarie Telecom, October 2012 congestion submission, p. 6.

<sup>67</sup> Herbert Geer, October 2012 congestion submission, p. 2.

<sup>68</sup> Macquarie Telecom, October 2012 congestion submission, p. 2.

congestion and bandwidth at peak times is also ‘nothing new’.<sup>69</sup> Optus made a similar statement, noting that significant growth in data usage was occurring across all access technologies.<sup>70</sup>

Optus cited previous Australian Competition Tribunal (ACT) and ACCC decisions (regarding Mobile Terminating Access Service – MTAS) rejecting proposals for externality pricing as precedent that it was inappropriate to introduce congestion pricing for wholesale ADSL.<sup>71</sup>

In November 2012, Telstra provided a reply submission to access seekers’ submissions; the submission expanded on its previous views.<sup>72</sup> Telstra also provided additional supporting material from consultants Frontier Economics<sup>73</sup> and Gowrisankaran and MacKie-Mason.<sup>74</sup>

### 3.5.2 ACCC draft views on congestion

The ACCC recognises that congestion issues may arise on any network that has capacity constraints. The management of such issues may be particularly challenging in markets where network usage is significantly increasing and/or where usage patterns are changing. End-users accessing Telstra’s ADSL network, both wholesale ADSL and Telstra Retail are, by definition, contributing to traffic on the network and therefore to any network congestion.

The ACCC notes that there are a range of tools available to manage network usage and congestion, including both price and non-price measures. In the context of this inquiry, Telstra has raised the question of whether price terms should be specified in the FAD to address network congestion and proposed changes to both price levels and pricing methodologies.

The ACCC considers that price measures to address congestion must apply to those whose demand is causing the congestion if they are to be effective: that is, end-users at the retail level should face price signals related to their usage of the network at peak times (when the network is congested). However, market evidence supports a view that congestion management is not a primary objective for retail service providers (RSPs) offering ADSL services in Australia. Telstra and other RSPs offer plans where the ‘cost per gigabyte’ substantially decreases as data allowances in retail plans increase. The ACCC considers that such retail pricing encourages high data use, which in turn increases traffic on the network.

Telstra also offers significant amounts of unmetered (i.e. unlimited data allowance) high-traffic content to its retail customers, including on T-Box services and Foxtel on T-Box services. These types of video services typically use large amounts of data.<sup>75</sup> Telstra has

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<sup>69</sup> AAPT, October 2012 congestion submission, p. 3.

<sup>70</sup> Optus, October 2012 congestion submission, p. 5.

<sup>71</sup> Ibid, p. 15.

<sup>72</sup> Telstra, November 2012 congestion submission.

<sup>73</sup> Frontier Economics, December 2012 report for Telstra.

<sup>74</sup> Gowrisankaran and MacKie-Mason, December 2012 report for Telstra.

<sup>75</sup> For example, Foxtel on Xbox 360 is advertised as requiring 800 MB of data downloaded per hour of use for the high quality Live TV, Catch UP TV and On Demand services. See: <http://www.foxtel.com.au/xbox/faqs/default.htm>.



submitted that its unmetered content currently makes up [Telstra c-i-c] [Telstra c-i-c] of total traffic on its BigPond network.<sup>76</sup> Telstra typically charges a flat fee for these services and does not generally charge for usage (except for certain services, such as video on demand services). The ACCC considers that end-users of these services face limited incentives to manage their usage, including during peak times when the network experiences congestion. The ACCC considers that current retail offerings appear to encourage greater use of data on the ADSL network rather than seeking to manage data growth or congestion.

The ACCC does not accept Telstra's contention that a 'higher' wholesale ADSL price alone would necessarily make a significant contribution to managing network congestion. While a higher wholesale price may be passed through to wholesale ADSL end-users and subsequently choke off some demand on the network, Telstra Retail customers would not face the same incentive to reduce their demand. Given that the end-users of wholesale ADSL access seekers make up approximately 25 per cent of total users on Telstra's ADSL network,<sup>77</sup> any impact on wholesale ADSL demand would have a limited impact on overall demand for bandwidth on Telstra's network. In the ACCC's view, the most likely outcome of such a price increase for wholesale ADSL access seekers would be to put them at a competitive disadvantage in the retail market compared with Telstra.

For these reasons, the ACCC proposes not to include price terms that attempt to address network congestion issues in the FAD. In the event that Telstra were to implement pricing structures which actively managed congestion at a retail level, the ACCC may further consider the implications for wholesale pricing in future FAD inquiries.

### **3.6 ACCC draft views on pricing methodology**

In determining its draft views on a pricing methodology for the FAD, the ACCC has had regard to the submissions received during the inquiry as well as its own analysis.

As noted above, submissions supported either a cost-based or retail-minus approach. Since no submissions preferred other approaches (such as benchmarking), the ACCC has focused on these two methodologies.

As discussed in section 3.3, the ACCC considers that the cost-based approach has the following main advantages:

- When effectively implemented, a cost-based approach provides a direct estimate of the efficient costs of supplying the service as a basis for setting prices.
- The cost-based approach ensures the access provider is adequately compensated for the costs of providing the wholesale ADSL service over time. The estimated revenue requirement allows the access provider to recoup its efficiently incurred costs, including a commercial rate of return.

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<sup>76</sup> Telstra, November 2012 congestion submission, p. 13.

<sup>77</sup> Comparing total wholesale fixed broadband in the Telstra 2012 Annual Report (767,000 SIOs) with Telstra's CAN RKR reported Total Voice and DSL customers (2,993,895 SIOs as at June 2012).

- A cost-based price directly provides for the recovery (over time) of the costs of the access provider's investments. The incentive to invest is strengthened by setting the regulated price to allow the access provider to recover the cost of its investment.
- Using the FLSM to estimate wholesale ADSL prices will promote consistency with the pricing approach used in setting the prices for the other declared fixed line services, which use many of the same network assets as wholesale ADSL. This is likely to reduce the risk of Telstra over- or under-recovering its costs of supplying the declared fixed line services.
- Determining prices through a transparent and cost-based pricing model is likely to provide regulatory certainty for both the access provider and access seekers about the way in which the ACCC will set prices over time.

The ACCC recognises that there can be certain disadvantages associated with a cost-based approach:

- It typically requires a significant amount of data, both to develop a suitable model and to obtain reasonable forecasts of operating and capital expenditure and demand.
- There are challenges involved in determining relevant costs and how to allocate these costs in the model (especially sunk costs).

However, given that the ACCC has already established the FLSM for pricing Telstra's services and many of the assets used in providing wholesale ADSL are also used in providing the other declared fixed line services, much of the information required to estimate cost-based wholesale ADSL prices is already available. Furthermore, the FLSM already provides a basis for allocating costs to different services.

In comparison, the retail-minus methodology has the following main advantages (as discussed in section 3.4):

- Retail-minus is usually less information-intensive than a cost-based approach and can therefore be suitable for setting a price quickly.
- By estimating access prices with reference to the access provider's retail offerings, a retail-minus approach can be used to address immediate competition concerns by allowing access seekers to enter at a price level that enables them to compete with the access provider in downstream markets.

However, the retail-minus methodology also has a number of disadvantages:

- The retail-minus methodology entails a greater risk of setting prices that do not reflect costs because it does not directly estimate the costs of providing the service.
- The retail-minus methodology could build into wholesale ADSL prices any monopoly profits that are included in retail ADSL prices.
- Being linked to Telstra's retail prices, an access price based on a retail-minus methodology may be subject to greater change over time than cost-based prices. This is because retail price changes could reflect changes in retail market conditions rather than changes in the underlying costs of supplying ADSL services. In addition, Telstra

could influence the estimated ‘retail price’ by changing its retail plans or price structures.

- In contrast to a cost-based approach, under a retail-minus approach there is no direct link between the access provider’s costs, including its costs of investing, and the wholesale price. Under a retail-minus approach a high retail price will result in a higher wholesale price regardless of whether or not the access provider has incurred investment costs.

On balance, the ACCC considers that using a cost-based approach to set prices for wholesale ADSL will best meet the LTIE and the other matters to which the ACCC must have regard (see section 3.7 for further detail on these matters).

As discussed in section 3.5 above, the ACCC has noted Telstra’s submissions that a retail-minus methodology is better suited to managing congestion than cost-based pricing.<sup>78</sup> A retail-minus approach would potentially allow any future adoption of congestion pricing at the retail level to flow through to wholesale prices. However, given the large number of retail plans, the ACCC would have to consider (and consult on) the best way to reflect retail congestion pricing in calculating a ‘retail price’ to use in implementing a retail-minus approach. There may be significant complexities in determining the best approach if congestion pricing was only adopted in some retail ADSL plans.

In addition, the costs of additional investment in expanding network capacity to reduce congestion would not be reflected directly in a retail-minus price. This would likely result in weaker incentives to invest efficiently for the purposes of managing congestion than would be the case under a cost-based approach.

Telstra has submitted that the use of a BBM and, more particularly, the FLSM, for pricing wholesale ADSL will ‘substantially harm the statutory criteria’.<sup>79</sup> Telstra gave several reasons for this statement:<sup>80</sup>

- Telstra considers that the calculation of unit costs is based on peak historic demand and that this causes a ‘unitisation error’ in the FLSM.<sup>81</sup>
- Actual capital expenditure and operating expenditure requirements can quickly deviate from forecasts, meaning that efficient investment would be discouraged through an inability for Telstra to be compensated.
- The FLSM would need to truncate asset lives relating to additional capital expenditure, should the NBN be rolled out in accordance with NBN Co’s corporate plan.

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<sup>78</sup> Telstra, November 2012 congestion submission, p. 7.

<sup>79</sup> Telstra, August 2012 pricing submission, p. 21.

<sup>80</sup> Ibid, p. 21-22.

<sup>81</sup> Ibid, p. 25.

- Telstra submitted that ‘current prices for ADSL are comparable to similar NBN services’ and that a change in wholesale ADSL prices would ‘impact the incentives for customers to migrate to the NBN’.
- **[c-i-c] [c-i-c]**

The ACCC has noted Telstra’s concerns regarding a cost-based pricing approach for wholesale ADSL. However, for the reasons set out in the July 2011 FADs, the ACCC maintains its view that the approach used to estimate cost allocation factors and unit costs in the FLSM is appropriate in these circumstances.<sup>82</sup> The ACCC’s response to this issue is discussed in further detail in chapter 4.

The ACCC considers that using forecast expenditure in a BBM is consistent with the legislated matters that the ACCC is required to take into account (as discussed in section 3.7 below). It is reasonable for an efficient access provider to be compensated for the expected costs of providing a service, including an appropriate risk-adjusted return on its investments. A BBM approach does not necessarily guarantee ex-post compensation for the actual costs incurred by an access provider. The approach adopted in the FLSM of using forecasts of expenditure gives Telstra an incentive to improve its efficiency in supplying the fixed line services as it retains the financial benefits from any under-expenditure compared to the forecasts for that regulatory period; conversely, Telstra is not compensated for inefficient over-expenditure compared to the forecasts.

In applying a cost-based BBM methodology, the ACCC’s standard approach is to seek forecasts of operating and capital expenditures and demand from the regulated business and consult with industry on the reasonableness of the forecasts. The ACCC notes that it sought information from Telstra regarding forecast expenditure relating to the supply of wholesale ADSL; however, Telstra has informed the ACCC that it is not in a position to provide specific forecasts. Chapter 4 sets out the ACCC’s proposed forecasts for estimating wholesale ADSL prices using the FLSM.

The ACCC proposes to consider the implications of the NBN rollout and copper network decommissioning further in the 2013-14 review of the fixed line services FADs. Congestion issues are discussed in section 3.5 above.

The ACCC notes that the submissions received from other parties during this inquiry support the use of a cost-based methodology for estimating wholesale ADSL prices for the FAD.

Having regard to these considerations, the ACCC proposes to set prices for wholesale ADSL using a cost-based methodology. The implementation of this approach is described in chapters 4-6.

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<sup>82</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services, Final Report*, July 2011, p. 100.

### **3.7 Consideration of the legislated matters regarding pricing methodology**

#### **3.7.1 Paragraph 152BCA(1)(a) – whether the determination will promote the long-term interests of end-users**

A cost-based pricing methodology directly estimates prices that reflect efficient costs. The ACCC considers that adopting a cost-based approach to setting prices for wholesale ADSL meets the objectives of promoting the LTIE because setting prices that reflect efficient costs will promote competition in the markets for carriage services and encourage efficient use of and investment in infrastructure.

Access prices that reflect efficient costs, and do not include any monopoly profits, will facilitate access to wholesale ADSL services so that access seekers will be better able to compete against Telstra in the provision broadband services across a broad range of exchange service areas (ESAs) where ADSL services are available.

In addition, the ACCC considers that adopting a cost-based approach will promote the LTIE for the following reasons:

- The cost-based approach ensures the access provider is adequately compensated for the cost of providing the declared service over time. The estimated revenue requirement allows the access provider to recoup its efficiently incurred costs, including a commercial risk-adjusted return on its investments.
- Determining pricing through a transparent and cost-based pricing model will provide regulatory certainty for both the access provider and access seekers about the way in which the ACCC will set prices for wholesale ADSL over time. Such certainty promotes efficient investment and competition in the markets for carriage services.
- Using a cost-based approach will ensure that prices for wholesale ADSL services are based on the efficient costs of providing access. This will allow access seekers to obtain access to the wholesale ADSL service on reasonable price terms for the purpose of providing downstream broadband services and thereby promote competition in downstream markets.

The ACCC considers that a retail-minus methodology would not promote the LTIE, compared to a cost-based approach, for the purpose of estimating prices for the wholesale ADSL service. In particular, the ACCC notes that:

- The retail-minus approach entails a greater risk of setting prices that do not reflect costs because it does not directly estimate the costs of providing the service.
- The retail-minus methodology would build into wholesale ADSL prices any monopoly profits that are included in retail ADSL prices.

Prices that do not reflect the efficient costs of supplying the service are expected to result in less efficient use of and investment in the infrastructure used in supplying wholesale ADSL services.

Further the retail-minus methodology is less likely than a cost-based methodology to promote competition in a vertically integrated industry. Where wholesale access prices calculated using a retail-minus approach include monopoly profits (that are included in retail prices), the integrated access provider can use those monopoly profits in countering the retail price offers of its downstream competitors (that is, it can leverage the profits made at the wholesale level to undercut its retail competitors).

Telstra submitted that the ACCC ‘should be mindful that its intervention does not reduce investment incentives, which would reduce dynamic efficiency in the market for retail and wholesale ADSL services’.<sup>83</sup> The ACCC considers that, by directly reflecting the costs of efficient capital expenditure in estimating wholesale ADSL prices (over time), the cost-based approach provides incentives for efficient investment in assets required to support wholesale ADSL and will thereby promote dynamic efficiency in the market for ADSL services.

Telstra submitted that cost-based pricing may not result in the efficient use of or investment in infrastructure when there are congestible networks.<sup>84</sup> The ACCC has considered the implications of congestion for the wholesale ADSL FAD; for the reasons set out in section 3.6, the ACCC’s draft view is that the FAD will not include price terms that attempt to address any network congestion issues. In summary, the ACCC does not accept that setting the wholesale ADSL price higher than the costs of supplying the service would necessarily make a significant contribution to managing network congestion when Telstra has not implemented congestion pricing for its own retail customers. In the ACCC’s view, the most likely outcome of such a price increase for wholesale ADSL access seekers would be to put them at a competitive disadvantage in the retail market compared with Telstra.

### **3.7.2 Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider**

The ACCC accepts that a retail-minus approach can meet the legitimate business interests of the access provider in that such prices will allow the access provider to recover its costs of supplying wholesale ADSL services. However, it is less certain, in comparison with a cost-based approach, that a retail-minus methodology will produce prices that reflect the efficient costs of the access provider.

However, the ACCC also considers that the access provider’s legitimate business interests are met by adopting a cost-based approach because it allows Telstra to recover its efficient costs of supplying wholesale ADSL services. The cost-based approach (implemented using the FLSM) allows Telstra to recover its costs in the following ways:

- The RAB places a value on the network assets used by the access provider in providing the wholesale ADSL service. The RAB is rolled forward each year to update the RAB to reflect forecasts for capital expenditure, depreciation and asset disposals for that year.

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<sup>83</sup> Telstra, April 2012 submission, p. 5.

<sup>84</sup> Telstra, August 2012 pricing submission, p. 14.

- The ACCC considers that a roll-forward process that allows for the recovery of investment costs will promote the legitimate interests of the access provider.
- The FLSM includes a return on capital through the Weighted Average Cost of Capital (WACC). The WACC provides a commercial rate of return that takes into account the commercial risks associated with providing the declared wholesale ADSL service. This gives the access provider an incentive to undertake efficient investments in the assets used to provide the service.
- The FLSM includes an allowance for regulatory depreciation which enables the access provider to recover its investments in the assets used to provide wholesale ADSL over the lives of those assets.
- The FLSM includes allowances for the access provider to recover the operating costs incurred both directly and indirectly in supplying the wholesale ADSL service.

Macquarie Telecom submitted that cost-based pricing of wholesale ADSL was in the legitimate business interests of Telstra because it ‘will ensure that Telstra does not price the wholesale ADSL service below cost’ (and incur losses supplying wholesale ADSL).<sup>85</sup>

Telstra submitted, in the context of congestion, that its legitimate business interests ‘extend beyond issues of cost recovery’ and that it is legitimate for a business to ‘price so as to try to minimise congestion’ on its network.<sup>86</sup> The ACCC considers that Telstra’s legitimate business interests regarding wholesale ADSL will be met sufficiently under a cost-based pricing approach because the FLSM will allow the access provider to recover any investments it makes to address congestion on the network.

### **3.7.3 Paragraph 152BCA(1)(c) – interests of all persons who have rights to use the declared service**

The ACCC considers that adopting a cost-based approach to pricing wholesale ADSL ensures that prices are set with regard to the costs of supplying the service. This will allow access seekers to compete more effectively in downstream markets where wholesale ADSL is an input to supplying services in downstream (e.g. retail) markets.

The ACCC considers that adopting a cost-based approach provides transparency for access seekers about how wholesale ADSL prices have been set and how the ACCC will set prices in future regulatory periods. This will assist access seekers in making decisions on investments in other assets (e.g. core network routing equipment) used to provide telecommunications services in downstream markets.

While a retail-minus approach to estimating access prices may still promote the interests of access seekers to some degree, e.g. compared with unregulated prices, the ACCC considers that these interests are better promoted by a cost-based approach, for the reasons described above.

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<sup>85</sup> Macquarie Telecom, April 2012 submission, p. 3.

<sup>86</sup> Telstra, August 2012 pricing submission, p. 14.

### **3.7.4 Paragraph 152BCA(1)(d) – direct cost of providing access to the declared service**

The ACCC considers that a cost-based approach ensures that the direct costs of providing wholesale ADSL services are included in the revenue requirement used to estimate prices. The revenue requirement calculated using a cost-based approach includes an allowance for all of the costs incurred in providing the service. These costs are forecast direct and indirect operating costs, a return on and of capital, and tax liabilities.

Where joint and common costs are incurred in providing a number of services, cost allocation factors are used in the FLSM to ensure that the aggregate revenue requirement is appropriately allocated to each service. The cost allocation factors are based on the directly attributable costs of providing the wholesale ADSL service, as well as a share of non-attributable costs.

A number of submissions supported the ACCC's conclusions on this matter. For example, AAPT submitted that cost-based prices should be determined because the estimated prices would reflect the efficient costs of providing wholesale ADSL.<sup>87</sup> Macquarie Telecom submitted that cost-based pricing of wholesale ADSL would ensure that Telstra's direct costs incurred in supplying wholesale ADSL services would be fully recovered through the prices determined by the ACCC.<sup>88</sup>

A retail-minus approach would not directly estimate the direct costs of providing access to wholesale ADSL. However, it could be assumed that the approach would implicitly allow the access provider to (at least) recover their direct costs, which are likely to be included in the retail prices.

### **3.7.5 Paragraph 152BCA(1)(e) – value to a party of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC is of the view that this criterion is not relevant to its decision to adopt a cost-based approach to setting prices for wholesale ADSL.

### **3.7.6 Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility**

The ACCC considers that the cost-based approach will not compromise the safe and reliable operation of any carriage service, telecommunications network or facility.

The efficient costs of providing wholesale ADSL during the regulatory period are accounted for in a cost-based approach. This will allow the access provider to recover the costs of necessary maintenance expenditures and network asset replacement costs required to ensure that wholesale ADSL is provided in a safe and reliable manner.

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<sup>87</sup> AAPT, April 2012 submission, p. 4.

<sup>88</sup> Macquarie Telecom, April 2012 submission, p. 3.



The retail-minus approach would also not compromise the safe and reliable operation of any carriage service, telecommunications network or facility.

### **3.7.7 Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service, a telecommunications network or a facility**

The ACCC considers that adopting a cost-based approach to setting prices for the wholesale ADSL service will encourage the efficient operation of the service and other carriage services provided by the access provider's network. Using the FLSM, only efficient costs are included in calculating the revenue requirement that is used in estimating prices.

The ACCC considers that a retail-minus approach is less likely to promote the economically efficient operation of the wholesale ADSL service, as prices are not determined with reference to the underlying costs of supplying the service. These considerations are further detailed relating to the LTIE in section 3.7.1.

### **3.7.8 Paragraph 152BCA(2) – supply of one or more other eligible services**

The ACCC considers that the cost-based approach, specifically the FLSM, takes into consideration the costs and revenues associated with other eligible services supplied using the PSTN. In particular, the use of the FLSM to price wholesale ADSL will ensure consistency with the approach taken to estimate prices for the other declared fixed line services.

The cost allocation factors in the FLSM allocate to wholesale ADSL only those costs incurred in providing the service. The costs and revenues associated with providing other services over the PSTN are not included in the revenue requirement for wholesale ADSL.

Using a retail-minus approach to estimate wholesale ADSL prices would not have direct regard to the supply of other services on the access provider's network. This may create a risk of double-recovery of costs of supplying services using the network.

## **4 Summary of implementation of the cost-based approach**

For the reasons discussed in chapter 3, the ACCC considers that a cost-based building block model (BBM) should be used to estimate draft prices for the wholesale ADSL FAD. The ACCC has decided to estimate wholesale ADSL prices within the framework of the Fixed Line Services Model (FLSM) that was used to estimate prices for the six declared fixed line services in the July 2011 fixed line services final access determinations (FADs).<sup>89</sup>

The ACCC considers that this approach will be in the long-term interests of end-users (LTIE) and will facilitate the ACCC's determination of efficient cost-based prices that will promote competition in the (downstream) retail ADSL market and the efficient use of and investment in Telstra's copper network and access seekers' own investments (see section 6.2 of this report). In addition, by applying a consistent methodology for setting prices for most of the declared fixed line services using Telstra's PSTN, it will reduce the risk of over- or under-recovery of Telstra's costs of supplying wholesale ADSL services and the other declared fixed line services. This will, in turn, promote competition in retail fixed line markets and the efficient use of and investment in infrastructure.

Section 4.1 of this chapter provides a brief overview of the BBM developed by the ACCC to estimate prices for the fixed line services, the Fixed Line Services Model (FLSM), and section 4.2 describes the amendments the ACCC has made to the July 2011 version of the FLSM in order to estimate wholesale ADSL prices.

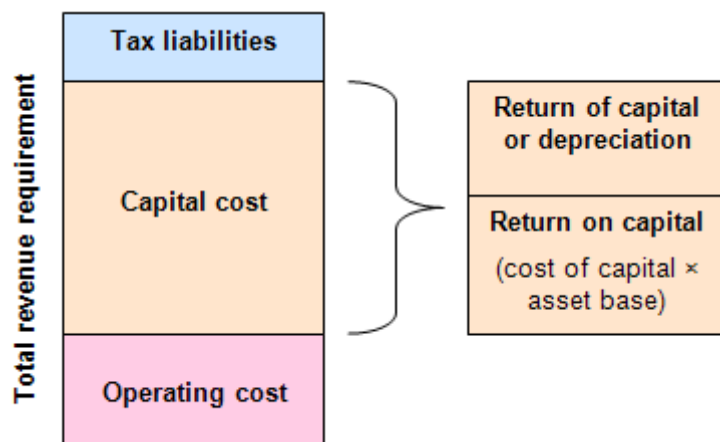
### **4.1 Overview of the FLSM**

A BBM explicitly accounts for each cost category or 'building block' faced by the regulated business; these building blocks are operating expenditure, return of capital, return on capital and tax liabilities. The four building blocks are added together to determine the business's total revenue requirement (see figure 4.1 below). The revenue requirement calculated using a BBM represents the service provider's efficient costs, including a commercial return on investments that is commensurate with its legitimate commercial interests.

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<sup>89</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services, Final Report*, July 2011. The declared fixed line services are: Unconditioned Local Loop Service (ULLS), Line Sharing Service (LSS), Wholesale Line Rental (WLR), Local Carriage Service (LCS), Public Switched Telephone Network Originating Access (PSTN OA), and PSTN Terminating Access (PSTN TA).

**Figure 4.1: Building blocks in a BBM**



Source: Based on OECD, *Access Pricing in Telecommunications*, 2004, p. 168, amended by the ACCC.

The FLSM contains spreadsheets that calculate each of the cost blocks in the BBM shown in figure 4.1. Each cost block is calculated for each separate asset class in the model. The amounts calculated for each of these cost blocks are summed to obtain the aggregate revenue requirement for each year of the estimation period (for each asset class). A share of the aggregate revenue requirement is then allocated to each of the declared fixed line services (including wholesale ADSL) and unit prices are calculated by dividing the revenue requirement for each service by demand for that service. Full details of how the model works are set out in the FLSM user manual.<sup>90</sup>

The FLSM undertakes all calculations to determine the revenue requirement and prices in real terms, except for the tax calculations which must be calculated in nominal terms. The FLSM undertakes all real calculations in the ‘base year’ dollar values, that is, as at 1 July 2009, because 2009–10 is used as the base year. Estimated real prices are then converted to nominal prices by applying the forecast inflation rate.

The ACCC consulted extensively during the development of the FLSM, and incorporated a number of revisions to its proposed model in response to submissions, prior to making the final access determinations for the declared fixed line services in July 2011. More detail on the consultation process for the FLSM, and the ACCC’s adjustments to the model, can be found in the ACCC’s April 2011 discussion paper<sup>91</sup> and July 2011 final decision.<sup>92</sup>

As noted above, the version of the FLSM released in July 2011 was developed to estimate prices for the declared fixed line services included in the July 2011 FADs. However, the model was designed to allow for additional declared services and assets to be added at a later

<sup>90</sup> The FLSM and accompanying user manual are available on the ACCC’s website, [www.accc.gov.au](http://www.accc.gov.au), or by request from the ACCC.

<sup>91</sup> ACCC, *Public inquiry to make final access determinations for the declared fixed line services*, Discussion Paper, April 2011, available at: <http://www.accc.gov.au/content/index.phtml/itemId/1044279>.

<sup>92</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services*, Final Report, July 2011, available at: <http://www.accc.gov.au/content/index.phtml/itemId/1044279>.

date. While the provision of wholesale ADSL services requires the use of a large number of assets that were included in the July 2011 version of the FLSM, the ACCC was required to add certain new assets—and associated operating and capital expenditure—in order to estimate prices for wholesale ADSL in the FLSM.

The ACCC has modified the FLSM used for the July 2011 FADs by adding a new service (wholesale ADSL) and a new asset class ('Data Equipment'). In estimating prices for the draft wholesale ADSL FAD, the ACCC has generally followed the methodologies and assumptions used to estimate prices for the July 2011 FADs. As these methodologies were subject to extensive consultation during the public inquiry to make the July 2011 FADs, the ACCC considers that these methodologies generally represent suitable starting points for estimating draft prices for the wholesale ADSL FAD. Where the ACCC has made minor changes from the methodologies used in the July 2011 FADs, these are explained below. The ACCC seeks industry views on its proposed modelling methodology.

## **4.2 Amendments to the FLSM**

This section describes the ACCC's amendments to the FLSM. Section 4.2.1 describes the ACCC's approach to establishing which assets are used to provide wholesale ADSL services. Section 4.2.2 describes the ACCC's approach for forecasting capital expenditure. Section 4.2.3 discusses depreciation and the ACCC's methodology for estimating asset lives. The ACCC's methodologies for forecasting operating expenditure and demand are described in section 4.2.4 and section 4.2.5, respectively. Section 4.2.6 describes the ACCC's methodologies for obtaining, and adjusting, cost allocation factors. Finally, section 4.2.7 describes the ACCC's approach to estimating the Weighted Average Cost of Capital (WACC).

### **4.2.1 Establishing which assets are used in providing wholesale ADSL services**

The supply of wholesale ADSL involves the use of many assets that are already in the FLSM: for example, assets such as transmission equipment and inter-exchange cables. These assets can be termed 'shared' assets. However, many assets used to supply ADSL services—such as digital subscriber line access multiplexers (DSLAMs) and routers—are not included in the July 2011 FLSM's regulatory asset base (RAB). Both 'shared' and new assets form part of the RAB in the ACCC's revised FLSM used to estimate the draft FAD prices for wholesale ADSL.

To determine which new assets should be added to the FLSM, the ACCC undertook a detailed analysis of information provided in Telstra's wholesale ADSL asset register,<sup>93</sup> and compared it to asset information provided by Telstra during the July 2011 fixed line services FADs inquiry. During the inquiry to make the July 2011 FADs, Telstra provided a list of assets that are used to supply the six declared fixed line services. By comparing the wholesale ADSL asset register to this information, the ACCC was able to determine which of

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<sup>93</sup> In response to an information request by the ACCC, Telstra provided an asset register, listing the assets used to supply wholesale ADSL services, to the ACCC in October 2012.

the assets used in supplying wholesale ADSL services are already included in the FLSM's RAB (i.e., are 'shared' assets) and which new assets need to be added to the RAB for wholesale ADSL.

The ACCC identified assets that need to be added to the RAB by first identifying assets that it considered, for a number of reasons, should not be added to the RAB. The ACCC decided that assets did not need to be added to the revised FLSM's RAB if:

- the asset was in one of the data sources that the ACCC used to establish the initial RAB in the FLSM for the July 2011 FADs<sup>94</sup> or was a slight variation of an existing asset in the FLSM<sup>95</sup> or
- the ACCC considered that the assets are not relevant to or used in the supply of wholesale ADSL.<sup>96</sup>

The ACCC considers that any of the assets in the above categories should not be added to the RAB—either because (i) they are 'shared' assets (i.e., are part of the existing RAB in the FLSM, for the declared fixed line services, as at 1 July 2013), or (ii) because they are not relevant to or used in the supply of wholesale ADSL.

### ***Assets added to the RAB***

After identifying which assets should not be added to the RAB, as described above, the ACCC added the remaining assets in Telstra's asset register to the RAB.

The ACCC's analysis identified that these assets correspond to three asset classes in the Regulatory Accounting Framework (RAF)—'Data Equipment', 'Pair Gain Systems' and 'Switching Equipment – Local'. The ACCC considers that, although these assets correspond to different asset classes in the RAF, all of these assets should form part of one asset class ('Data Equipment') in the revised FLSM's RAB.

The ACCC decided to re-classify the 'Switching Equipment – Local' and 'Pair Gain Systems' assets to the combined 'Data Equipment' asset class because only two assets from the 'Switching Equipment – Local' asset class, which appear to be similar to other 'Data Equipment' assets, require re-classification. In addition, most of the 'Pair Gain Systems' assets in the wholesale ADSL asset register are ADSL line cards and DSLAMs, along with other related assets. DSLAM-type equipment in Telstra's asset register was assigned to the RAF 'Pair Gain Systems' asset class only: that is, no DSLAMs in Telstra's asset register were assigned to other RAF asset classes. The ACCC notes that the Analysys model's cost

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<sup>94</sup> The ACCC used information submitted by Telstra and RAF data to establish the initial RAB for different asset classes in the FLSM for the July 2011 FADs. More detail on the ACCC's methodologies can be found in the April 2011 discussion paper and July 2011 final decision for the declared fixed line services.

<sup>95</sup> For example, the ACCC identified inter-exchange cables with a different number of optical fibres per cable than the inter-exchange cables in Telstra's asset register for the July 2011 FADs.

<sup>96</sup> Telstra's wholesale ADSL asset register included a number of assets in the CAN 'Other Communications Plant and Equipment' asset class that appear to be CAN Radio-type assets (and were not in the fixed line services asset register provided by Telstra for the July 2011 FADs). The ACCC considers that these assets would not be used to supply wholesale ADSL and has therefore not included them in the RAB.

allocation factors (see section 4.2.6) were developed under the assumption that these types of assets form part of the ‘Data Equipment’ asset class. In addition, the ACCC considers that these types of assets are more logically located within a ‘Data Equipment’ asset class than ‘Pair Gain Systems’, given the definitions of the ‘Pair Gain Systems’ and ‘Data Equipment’ asset classes in the RAF Record Keeping Rule.<sup>97</sup>

Throughout this chapter, references to the ‘Data Equipment’ asset class should be read to include the re-classification of ‘Switching Equipment – Local’ and ‘Pair Gain Systems’ assets unless specified otherwise.

### ***RAB value and tax asset value for the ‘Data Equipment’ asset class***

The FLSM has a base year of 2009–10 and requires a RAB value and tax asset value to be entered as at 30 June 2009. However, the asset values provided by Telstra were specified as at 30 June 2012. In the absence of Telstra’s June 2009 RAB data for the ‘Data Equipment’ asset class, the ACCC estimated the June 2009 RAB using the following information: the June 2012 RAB value; capital expenditure data (see section 4.2.2), and asset lives (see section 4.2.3). Using this information, the ACCC ‘rolled back’ the 2012 ‘Data Equipment’ RAB value to 2009—such that, when the calculated June 2009 RAB value is ‘rolled forward’ (using capital expenditure figures for 2009–10, 2010–11 and 2011–12), it equals the RAB value for June 2012.

The ACCC notes that—given the assumed remaining asset life that applies to the 2009 RAB and tax asset values of the ‘Data Equipment’ asset class—the ‘rolling back’ methodology has no implications for the prices estimated for wholesale ADSL in the revised FLSM for 2013–14. This is because the relatively short remaining asset life for the ‘Data Equipment’ asset class causes the 2009 RAB and tax asset values to be fully depreciated prior to the start of 2013–14. That is, the 2009 RAB and 2009 tax asset value for ‘Data Equipment’ are essentially entered into the model purely for modelling purposes and have no effect on estimated wholesale ADSL prices for 2013–14 or later. Because Telstra did not provide the ACCC with its wholesale ADSL tax asset values as at 30 June 2009, the ACCC has set the 30 June 2009 tax asset value for ‘Data Equipment’ equal to the 30 June 2009 RAB value. The ACCC notes that this assumption also has no impact on the estimated draft wholesale ADSL FAD prices (or any future prices estimated in the FLSM).

The ACCC’s draft view is that the ‘Data Equipment’ RAB value as at 1 July 2012 is \$1.094 billion and the ‘Data Equipment’ tax asset value as at 1 July 2012 is \$1.087 billion.

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<sup>97</sup> The description of the ‘Pair Gain Systems’ asset class in the RAF is ‘Pair gain systems operating between the customer premises and a local exchange’, while the ‘Data Equipment’ asset class has the description ‘Equipment used in the network including modem and network terminating units to enable transmission of different data services such as Text, Data Communication Packet Switching, Digital Data Network, Electronic Funds Transfer Network and other data services network equipment’. ACCC, *Telecommunications Industry Regulatory Accounting Framework*, October 2003, p. 31, available at: [www.accc.gov.au/content/index.phtml?itemId=844151](http://www.accc.gov.au/content/index.phtml?itemId=844151).

*Assets relevant to the supply of wholesale ADSL services*

Table 4.1 below identifies which assets included in the amended FLSM are used in supplying the wholesale ADSL service.

Asset classes in the FLSM are split into two separate parts of the network: the Customer Access Network (CAN) and the Core network. Table 4.1 contains a list of the FLSM’s asset classes, split into the CAN and Core sections of the model. The table identifies the asset classes from which costs are allocated to wholesale ADSL in the revised FLSM (marked with an asterisk). The ‘shared’ asset classes are in normal font and marked with an asterisk, while the new asset class (‘Data Equipment’) is in bold font and marked with an asterisk.

**Table 4.1: FLSM asset classes and asset classes used to supply wholesale ADSL**

CAN	Core
<ul style="list-style-type: none"> <li>• Ducts and pipes</li> <li>• Copper cables</li> <li>• Other cables</li> <li>• Pair gain systems</li> <li>• CAN radio bearer equipment</li> <li>• Other CAN assets</li> <li>• Other communications plant and equipment</li> <li>• Network land</li> <li>• Network buildings/support</li> <li>• Indirect capital assets</li> </ul>	<ul style="list-style-type: none"> <li>• Switching equipment – local*</li> <li>• Switching equipment – trunk*</li> <li>• Switching equipment – other</li> <li>• Inter-exchange cables*</li> <li>• Transmission equipment*</li> <li>• Core radio bearer equipment*</li> <li>• Other communications plant and equipment*</li> <li>• Network land*</li> <li>• Network buildings/support*</li> <li>• Indirect capital assets*</li> <li>• LSS equipment</li> <li>• <b>Data equipment*</b></li> </ul>

\* Costs allocated to wholesale ADSL from this asset class

As shown in the table, costs are allocated to wholesale ADSL from the Core network only.<sup>98</sup> Wholesale ADSL costs are allocated mainly from shared asset classes, with only one new asset class (‘Data Equipment’).

The ACCC has only allocated costs from the Core asset classes to wholesale ADSL because:

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<sup>98</sup> However, the ACCC re-classified certain assets from the ‘Pair Gain Systems’ asset class (in the CAN) to the ‘Data Equipment’ asset class (in the Core). The reasons for this adjustment are described in more detail earlier in this section.

- (i) wholesale ADSL services are currently supplied by Telstra only when an active PSTN service is operating on the same line as the wholesale ADSL service.<sup>99</sup> Accordingly, the costs associated with the access network (the CAN) for wholesale ADSL are recovered from the PSTN voice service operating on that line. If the line is a Telstra retail line, the CAN costs are recovered through the Telstra retail line rental charge; if the line is a wholesale line, the CAN costs are recovered through the WLR service charge.
- (ii) the Analysys model<sup>100</sup> contains cost allocation factors for wholesale ADSL for Core asset classes only. The Analysys model's documentation states that this is because 'the cost of the line is recovered through the voice service'.<sup>101</sup> This is consistent with the fact that wholesale ADSL is only supplied by Telstra when there is also an active PSTN service, as discussed at (i).
- (iii) Telstra's wholesale ADSL asset register shows that the assets used to supply wholesale ADSL are located within Core asset classes in the FLSM.<sup>102</sup>

## 4.2.2 Capital expenditure

This section discusses the ACCC's methodology for determining capital expenditure forecasts for the 'shared' asset classes and for the 'Data Equipment' asset class.

### *'Shared' asset classes*

The ACCC has maintained the capital expenditure forecasts from the July 2011 FADs for all 'shared' asset classes in the revised FLSM. This approach ensures that the 'shared' asset classes have the same rolled-forward RAB values, as at 30 June 2014, for all of the declared fixed line services (that is, the declared fixed line services in the July 2011 FADs and the wholesale ADSL service). As a result, the prices for all of the declared fixed line services can be estimated within a single pricing model in future FADs (should the fixed line services be re-declared).

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<sup>99</sup> As discussed in chapter 8, the ACCC's draft view is that the status quo should be maintained with regard to unbundling, whereby Telstra is not required to offer an unbundled wholesale ADSL service.

<sup>100</sup> The Analysys Cost Model was developed by Analysys (now Analysys Mason) for the ACCC during 2008-09 to determine prices for the declared fixed line services on a Total Service Long Run Increment Cost (TSLRIC+) basis. The model was built using information from Telstra's RAF, geographic data and other data from Analysys. The Analysys model is available on the ACCC's website: [www.accc.gov.au/content/index.phtml?itemId=889101](http://www.accc.gov.au/content/index.phtml?itemId=889101).

<sup>101</sup> Analysys, *Fixed LRIC model documentation – version 2.0*, August 2009, p. 13, available at: [www.accc.gov.au/content/index.phtml/itemId/889281](http://www.accc.gov.au/content/index.phtml/itemId/889281).

<sup>102</sup> With the exception of some assets that correspond to the RAF's 'Pair Gain Systems' asset class, which the ACCC has re-classified, as discussed earlier in section 4.2.1. In addition, certain asset classes in the FLSM are located in both CAN and Core: 'Other Communications Plant and Equipment', 'Network Land', 'Network Buildings/Support', and 'Indirect Capital Assets'. The ACCC consulted on its methodology for allocating these assets to the respective CAN and Core asset classes during the inquiry to make the July 2011 FADs; further details on the consultation are available in the ACCC's April 2011 discussion paper and July 2011 final decision.



The ACCC considers that it is in Telstra’s legitimate business interests, the interests of access seekers, and the LTIE to estimate prices within a single pricing model using the same forecast inputs for all of the declared fixed line services as this will reduce the risk of over- or under-recovery of the costs of supplying services that are supplied using many of the same assets.

Table 4.2 contains the capital expenditure forecasts for the shared asset classes, which are the same as the forecasts used in estimating the fixed line service prices included in 2011 fixed line services FADs.

**Table 4.2: Allocation of forecast capital expenditure by ‘shared’ Core asset class (\$m at 1 July 2009)**

Core asset class	2013–14
Switching equipment – Local	[c-i-c]
Switching equipment – Trunk	
Inter-exchange cables	
Transmission equipment	
Radio bearer equipment	
Other communications plant and equipment	
Network land	
Network buildings/support	
Indirect capital assets	[c-i-c]

***‘Data Equipment’ asset class***

The ACCC requested capital expenditure information from Telstra in its information request to Telstra on 10 August 2012.<sup>103</sup> While Telstra provided data on its actual capital expenditure in recent years, it did not provide the capital expenditure forecasts requested by the ACCC. The following sections discuss the ACCC’s methodology for calculating actual and forecast capital expenditure for the ‘Data Equipment’ asset class.

*Actual capital expenditure*

In estimating the draft FAD prices for wholesale ADSL, the ACCC used the actual capital expenditure information provided by Telstra for the ‘Data Equipment’ asset class. The ACCC deflated the (nominal) capital expenditure figures provided by Telstra to (real) 1 July 2009 dollars using a simple average of the ABS’s labour price index for private information media and telecommunications and the ABS’s producer price index for communication equipment manufacturing for each relevant year. This methodology was used to deflate

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<sup>103</sup> ACCC, *Wholesale ADSL FAD inquiry—Request for information*, 10 August 2012, available at: [www.accc.gov.au/content/index.phtml?itemId=1032830](http://www.accc.gov.au/content/index.phtml?itemId=1032830).

capital expenditure figures in the July 2011 FADs, and the ACCC’s draft view is that this methodology remains appropriate in the circumstances.

*Forecast capital expenditure*

In the absence of capital expenditure forecasts from Telstra, the ACCC produced its own capital expenditure forecasts for the ‘Data Equipment’ asset class. The ACCC used the most recent year of actual capital expenditure data on ‘Data Equipment’ assets (2011–12), and applied a nominal [c-i-c] [c-i-c] per annum growth rate to it to generate capital expenditure forecasts for 2012–13 and 2013–14. The ACCC used a similar methodology in the July 2011 FADs, based on Telstra’s March 2011 submission suggesting that the ACCC could adopt this nominal growth rate in order to forecast capital expenditure. The ACCC considers that this methodology, which represents a real decline in capital expenditure, remains appropriate for the purposes of estimating draft prices for the wholesale ADSL FAD.

Table 4.3 contains the actual capital expenditure figures for 2011–12, and the ACCC’s forecasts for 2012–13 and 2013–14, for the ‘Data Equipment’ asset class. For consistency with the methodology used for the other declared fixed line services, the ACCC has also applied a half-WACC adjustment to capital expenditure incurred during the year, prior to the expenditure being rolled into the RAB at the end of that year.

**Table 4.3: Capital expenditure for the ‘Data Equipment’ asset class (\$m at 1 July 2009)**

Asset class	2011–12 (actual)	2012–13 (forecast)	2013–14 (forecast)
Data Equipment	[c-i-c]		[c-i-c]

**4.2.3 Depreciation and asset lives**

The ACCC used the straight line method to calculate depreciation in the July 2011 FADs. This method divides the up-front cost of the asset by the asset life to spread annual depreciation expenses equally over the life of the asset. The ACCC’s draft view is that the straight line method is appropriate for calculating the depreciation schedule in estimating prices for the wholesale ADSL service.

Estimates of each asset class’s total and remaining asset life are needed to determine depreciation schedules. The total asset life is used to depreciate new assets; the remaining asset life is used to depreciate the ‘initial’ RAB value, as at 30 June 2009, that is entered into the FLSM. The use of a ‘remaining asset life’ is due to the fact that the assets in the 30 June 2009 RAB have already been partially depreciated; that is, the 30 June 2009 RAB value reflects the ‘written down’ value of those assets as at 30 June 2009.

*‘Shared’ asset classes*

The ACCC’s draft view is that the total and remaining asset lives from the July 2011 FADs should be maintained for each of the ‘shared’ asset classes for wholesale ADSL; these asset lives are shown in table 4.4. The depreciation schedule for the ‘shared’ asset classes is

unchanged from the July 2011 FADs (because the 2009 RAB value, capital expenditure values and asset lives are unchanged for each asset class).

**Table 4.4: Estimated total and remaining asset lives for ‘shared’ asset classes (in years)**

Asset class	Total asset life	Remaining asset life (for 2009 RAB)
Switching equipment – Local	27	[c-i-c]
Switching equipment – Trunk	25	
Inter-exchange cables	38	
Transmission equipment	[c-i-c] [c-i-c]	
Core radio bearer equipment	16	
Other communications plant & equipment (Core)	[c-i-c] [c-i-c]	[c-i-c]
Network land	10 000	10 000
Network buildings & support	[c-i-c] [c-i-c]	[c-i-c] [c-i-c]
Indirect capital assets	10	5

#### *‘Data Equipment’ asset class*

The ACCC has estimated the total and remaining asset lives for the ‘Data Equipment’ asset class using a similar methodology to the methodology used in the July 2011 FADs. The total asset life was obtained from the Analysys model, based on a weighted average of the asset lives for each asset in the ‘Data Equipment’ asset class. This yielded an estimated total asset life of 6.3 years, which the ACCC has rounded down to 6.0 years.<sup>104</sup> To check the reasonableness of this estimated total asset life, the ACCC also estimated a total asset life for the ‘Data Equipment’ asset class using the information from Telstra’s asset register. Using a weighted average of the ‘service life’ information in the wholesale ADSL asset register, the ACCC estimated that the total asset life for the ‘Data Equipment’ asset class is approximately [c-i-c] [c-i-c] years. This estimate is broadly consistent with the rounded-down total asset life derived from the Analysys model.

The ACCC estimated the remaining asset life using the same methodology as was used for the July 2011 FADs. The ACCC multiplied the estimated undepreciated percentage of the ‘Data Equipment’ asset class (derived from the 2008–09 RAF) by the estimated total asset life of 6.0 years. The undepreciated percentage of the ‘Data Equipment’ asset class is [c-i-c] [c-i-c] per cent, yielding an estimated remaining asset life [c-i-c] [c-i-c] years.

The ACCC’s draft view is that the estimated total asset life of 6.0 years and estimated remaining asset life of [c-i-c] [c-i-c] years for the ‘Data Equipment’ asset class are appropriate. Both estimates are based on a methodology that was consulted on extensively during the inquiry to make the July 2011 FADs.

<sup>104</sup> Asset lives were rounded to the nearest year for a number of asset classes in the FLSM for the July 2011 FADs.

#### 4.2.4 Operating expenditure

This section discusses the ACCC's methodology for determining operating expenditure forecasts for the 'shared' asset classes and for the 'Data Equipment' asset class.

##### *'Shared' asset classes*

The ACCC's draft view is that the operating expenditure forecasts used in estimating the prices included in the July 2011 FADs should be maintained for the 'shared' asset classes.

For the July 2011 FADs, operating expenditure forecasts were estimated on the basis of RAF data. The ACCC estimated direct operating expenditure for Core asset classes by assuming that real operating expenditure would remain the same as the average level of operating expenditure over the five years to 2009–10. The ACCC applied an 80 per cent mark-up on direct operating expenditure to account for corporate overheads (i.e., indirect operating expenditure). Operating expenditure allocation factors, based on each asset class's share of the total undepreciated asset value in 2008–09, were used to allocate total (CAN or Core) operating expenditure to each asset class. The ACCC's methodology is explained in more detail in chapter 7 of the July 2011 final decision for the fixed line services FADs.

The ACCC stated in the July 2011 final decision that it did not intend to make adjustments for 'unders or overs' in actual expenditure, compared to forecast expenditure, during the regulatory period.<sup>105</sup> Therefore, the ACCC considers that the operating expenditure forecasts for the 'shared' asset classes from the July 2011 FADs should be maintained. Table 4.5 contains the ACCC's proposed operating expenditure forecasts for the 'shared' asset classes in 2013–14.

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<sup>105</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services, Final Report*, July 2011, p. 87.

**Table 4.5: Allocation of operating expenditure by shared asset class (\$m at 1 July 2009)**

Core asset class	2013–14
Switching equipment – Local	[c-i-c]
Switching equipment – Trunk	
Inter-exchange Cables	
Transmission Equipment	
Radio Bearer Equipment	
Other Communications Plant and Equipment	
Network Land	
Network Buildings/Support	
Indirect Capital Assets	[c-i-c]

***‘Data Equipment’ asset class***

The ACCC requested operating expenditure information from Telstra in an information request to Telstra on 10 August 2012.<sup>106</sup> Telstra provided data on its actual operating expenditure on wholesale ADSL in recent years; however, this information was provided in a format that was disaggregated by Telstra Economic Model (TEM) category, rather than by FLSM or RAF asset class (as requested by the ACCC). Telstra did not provide the operating expenditure forecasts for 2012–13 and 2013–14 requested by the ACCC. Therefore, the ACCC was required to compute its own forecasts of operating expenditure for the ‘Data Equipment’ asset class.

The ACCC used a broadly similar methodology as adopted for the July 2011 FADs in order to produce operating expenditure forecasts for the ‘Data Equipment’ asset class. In brief, the ACCC collected RAF data, took a five-year average and applied an 80 per cent mark-up for indirect operating expenditure. However, the ACCC made two adjustments. First, it re-classified some operating expenditure from the ‘Pair Gain Systems’ and ‘Switching Equipment – Local’ asset class to the combined ‘Data Equipment’ asset class. The ACCC considers that this re-classification is appropriate, given that certain assets have been re-classified from the ‘Pair Gain Systems’ and ‘Switching Equipment – Local’ to the combined ‘Data Equipment’ asset class in the RAB (as discussed in section 4.2.1). Second, the ACCC adjusted the operating expenditure figures to reflect the fact that not all of the operating expenditure in the RAF relates to wholesale ADSL. For example, the ‘Data Equipment’ asset class in the RAF is quite broad and is likely to contain many assets that are not used in the

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<sup>106</sup> ACCC, *Wholesale ADSL FAD inquiry—Request for information*, 10 August 2012, available at: [www.accc.gov.au/content/index.phtml?id=1032830](http://www.accc.gov.au/content/index.phtml?id=1032830).

supply of ADSL. Therefore, the ACCC estimated the proportion of operating expenditure that relates to wholesale ADSL in each RAF asset class by using the historic cost data contained in Telstra's asset register and the RAF. A step-by-step explanation of the ACCC's methodology is contained below.

### *Methodology*

The ACCC estimated forecasts of operating expenditure for the combined 'Data Equipment' asset class using the following methodology:

1. Collect operating expenditure data from the RAF, using Telstra's 'maintenance' and 'other expenses' expenditure on the 'Data Equipment', 'Pair Gain Systems' and 'Switching Equipment – Local' RAF asset classes (**the three RAF asset classes**), for each year from 2007–08 to 2011–12.
2. Index each year's operating expenditure to 1 July 2009 dollars. This is done by inflating or deflating the (nominal) operating expenditure in each year using the following index (for each relevant year): a simple average of the ABS's labour price index for private information media and telecommunications and the ABS's producer price index for communication equipment manufacturing.
3. Calculate the five-year average, from 2007–08 to 2011–12, of real operating expenditure (in 2009 dollars), as calculated at step 2.
4. Apply an 80 per cent mark-up to the value calculated at step 3 to account for indirect operating expenditure.
5. Using information from the 'fixed asset statement' section of the RAF, calculate the historic cost of all of the assets in each of the three RAF asset classes (as at the end of 2011–12).
6. Using information from Telstra's wholesale ADSL asset register, calculate the historic cost of the assets in the asset register that map across to each of the three RAF asset classes (as at the end of 2011–12).<sup>107</sup>
7. For each of the three RAF asset classes, calculate the proportion of assets that are in the wholesale ADSL asset register relative to the RAF (that is, divide the value from step 6 by the value from step 5).
8. For each asset class, multiply the proportion calculated in step 7 by the total amount of operating expenditure calculated in step 4 (i.e., direct and indirect operating expenditure).
9. Sum the operating expenditure values calculated at step 8—i.e., for each of the three RAF asset classes—to calculate a total operating expenditure figure for the 'Data Equipment' asset class.

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<sup>107</sup> In response to an ACCC request, Telstra provided information that mapped the assets in its wholesale ADSL asset register to the corresponding RAF asset class.

### 2013–14 ‘Data Equipment’ operating expenditure forecasts

The ACCC’s draft view is that the operating expenditure forecasts in table 4.6, based on the methodology described earlier in section 4.2.4, are appropriate for the ‘Data Equipment’ asset class.

**Table 4.6: Operating expenditure for the combined ‘Data Equipment’ asset class (\$m at 1 July 2009)**

Asset class	2013–14
Data Equipment (combined)	[c-i-c] [c-i-c]
<i>Consisting of</i>	
<i>Data Equipment (RAF)</i>	[c-i-c]
<i>Pair Gain Systems (RAF)</i>	
<i>Switching Equipment – Local (RAF)</i>	[c-i-c]

### 4.2.5 Demand forecasts

The ACCC requested demand information for wholesale ADSL services in its information request to Telstra on 10 August 2012.<sup>108</sup> While Telstra provided the requested demand data for recent years, it did not provide the demand forecasts requested by the ACCC. Demand forecasts are required both for services in operation (SIOs) and for usage (in Megabits per second (Mbps)). Forecasts for wholesale ADSL SIOs are used for a number of purposes in the model, including adjusting the cost allocation factors (see section 4.2.6) and calculating prices from the estimated revenue requirement. Usage forecasts are used to calculate the AGVC charge (per Mbps). The ACCC’s methodology for determining its own demand forecasts is described below.

#### *Usage forecasts*

In developing its usage forecasts, the ACCC used actual usage information collected from three data sources: Telstra’s responses to the ACCC’s information requests; the retail-minus model used to set prices for the wholesale ADSL IAD; and Telstra Economic Model (TEM) reports, which are submitted quarterly by Telstra to the ACCC. These data sources provided information on ADSL usage and SIOs, as at June 2011 and June 2012, for Telstra’s wholesale and retail ADSL customers. Based on this information, the ACCC was able to calculate an ‘average usage per SIO’ figure for ADSL customers on Telstra’s network—that is, an average across both wholesale and retail ADSL customers. The ACCC produced forecasts of ‘average usage per SIO’ for June 2013 and June 2014 using an arithmetic progression of the June 2011 and June 2012 figures. That is, forecasts were produced using the following formula:

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<sup>108</sup> ACCC, *Wholesale ADSL FAD inquiry—Request for information*, 10 August 2012.

$$\text{Usage}_{t+1} = \text{Usage}_t + (\text{Usage}_t - \text{Usage}_{t-1})$$

The ACCC calculated the usage value for a financial year as the mid-point of the starting and ending usage values for that financial year (for example, the 2013–14 usage value is calculated as the mid-point of the June 2013 and June 2014 usage forecasts). This methodology is similar to the methodology that was used in the IAD model.

Table 4.7 contains actual and forecast ‘average usage per SIO’ for 2010–11 to 2013–14. The ACCC’s draft view is that the yearly average figures in the table represent reasonable forecasts of average usage per SIO (in Mbps) on Telstra’s ADSL network.

**Table 4.7: Average usage per SIO (in Mbps)**

	2010–11 (actual)	2011–12 (actual)	2012–13 (forecast)	2013–14 (forecast)
Average usage per SIO (June)	[TEM c-i-c] <sup>a</sup>			
Average usage per SIO (yearly average)				[TEM c-i-c]

<sup>a</sup> This figure is for Telstra’s retail ADSL usage per SIO only.

### *SIO forecasts*

Telstra’s wholesale ADSL SIOs have declined by an average of approximately 12 per cent per annum over the past five years.<sup>109</sup> The trend for the past two years is similar. However, Telstra’s most recent financial results show that there was a decline of 6,000 wholesale ADSL SIOs over the half year ending on 31 December 2012.<sup>110</sup> The ACCC considers that a range of factors may have caused this relatively small decline in SIOs over the most recent half year. Uncertainty surrounding the NBN rollout schedule may have led to fewer DSLAM investments by access seekers, thereby slowing the migration of wholesale ADSL SIOs to ULLS- or LSS-based retail ADSL services. In addition, the effect of the wholesale ADSL declaration and IAD in early 2012 may have altered the recent trend in wholesale ADSL SIOs. Therefore, the ACCC’s draft view—having regard to recent trends in Telstra’s wholesale ADSL SIOs, as well as trends in Telstra’s retail ADSL SIOs, ULLS SIOs and LSS SIOs—is that a decline of 5 per cent per annum is appropriate for forecasting wholesale ADSL SIOs for the 2012–13 and 2013–14 financial years.

As described in section 4.2.6, the ACCC has adjusted most cost allocation factors by demand to effectively hold fairly constant the share of costs allocated to each unit of the service. Changes in demand for wholesale ADSL will therefore be reflected in the total costs allocated to the service. That is, if demand for wholesale ADSL increases (decreases), the total share of costs allocated to the service will increase (decrease) to reflect its increased (decreased) usage of the assets and costs used to provide it. The ACCC notes that this adjustment will limit the impact on unit costs (and prices) of any demand forecasting errors. The ACCC’s draft view is that the demand forecasts in table 4.8 are appropriate.

<sup>109</sup> Telstra, *Telstra Corporation Limited Financial Results for the year ended 30 June 2012*, 9 August 2012.

<sup>110</sup> Telstra, *Telstra Corporation Limited Financial Results for the Half Year ended 31 December 2012*, 7 February 2013.



**Table 4.8: Wholesale ADSL SIOs for 2010–11 to 2013–14**

	2010–11 (actual)	2011–12 (actual)	2012–13 (forecast)	2013–14 (forecast)
Wholesale ADSL SIOs	[c-i-c]			[c-i-c]
<i>Growth rate</i>			–5%	–5%

#### **4.2.6 Cost allocation factors**

Each service’s share of the aggregate revenue requirement is calculated by applying cost allocation factors to the total operating, capital and tax costs associated with each of the asset classes in the FLSM. The cost allocation factors represent the share of costs incurred in supplying a particular service.

The methodology used by the ACCC to obtain cost allocation factors for wholesale ADSL is consistent with the cost allocation factor methodologies used in the July 2011 FADs. The ACCC consulted extensively, and received many submissions, on cost allocation factors during its inquiry to make the July 2011 FADs. The ACCC’s draft view is that the methodologies used to derive and modify the cost allocation factors in the July 2011 FADs are appropriate for wholesale ADSL. Table 4.9 contains the ACCC’s estimated draft cost allocation factors for each asset class. The ACCC’s derivation of cost allocation factors is described in more detail in the sections below.

**Table 4.9: Methods used to determine initial cost allocation factors and cost allocation factors for 2013–14**

	Initial cost allocation factor method	Allocation factor for 2013–14
<b>Core Asset Class</b>		
Switching equipment – local	A	0.03
Switching equipment – trunk	A	0.03
Inter-exchange cables	A	0.08
Transmission equipment	A	0.08
Core radio bearer equipment	A	0.08
Other communications plant and equipment	R	0.09
Network land	R	0.09
Network buildings and support	R	0.09
Indirect capital assets	R	0.09
Data equipment	A	0.14
<b>Legend</b>		
Analysys model basis	A	
Revenue share basis	R	

### *Initial cost allocation factors*

The ACCC obtained most of the initial cost allocation factors for wholesale ADSL from the Analysys model. Where cost allocation factors were unavailable in the Analysys model, the ACCC used a ‘revenue share’ approach to obtain an initial cost allocation factor. Each methodology is described in more detail in the sections below.

### *Analysys model*

The Analysys model derives cost allocation factors for Core network asset classes based on asset usage by the relevant services, routing factors and forecast demand.<sup>111</sup> The Analysys model contains cost allocation factors for wholesale ADSL for five asset classes that were already in the FLSM: ‘Switching Equipment – Local’, ‘Switching Equipment – Trunk’,

<sup>111</sup> A more detailed explanation of how the cost allocation factors in the Analysys model are derived is contained in the ACCC’s September 2010 draft report into making access pricing principles for fixed line services. ACCC, *Review of the 1997 telecommunications access pricing principles for fixed line services, Draft report*, September 2010, p. 44, available at: <http://www.accc.gov.au/content/index.phtml?itemId=904344>.

‘Inter-exchange Cables’, ‘Transmission Equipment’ and Core ‘Radio Bearer Equipment’. The ACCC used these cost allocation factors as its initial cost allocation factors for all five asset classes.

In addition, the Analysys model contains cost allocation factors for a further three asset classes for wholesale ADSL: ‘Data Equipment’, ‘Satellite Equipment’ and ‘International Cable Systems’. The ACCC has only used the ‘Data Equipment’ cost allocation factor in estimating wholesale ADSL prices. The ACCC considers that assets from the other two asset classes would not be used to supply wholesale ADSL services.<sup>112</sup>

#### *Revenue share approach*

The Analysys model does not contain cost allocation factors for wholesale ADSL for any of the following FLSM asset classes: ‘Network Land’; ‘Network Buildings/Support’; Core ‘Other Communications Plant and Equipment’; and ‘Indirect Capital Assets’. Instead, the ACCC used a ‘revenue share’ approach to derive cost allocation factors for these asset classes. The revenue share approach determines cost allocation factors for asset classes based on the average allocation of costs to the relevant service for asset classes where costs can be attributed more directly (that is, for asset classes that already have cost allocation factors).

The revenue share approach used to estimate wholesale ADSL cost allocation factors is the same as the approach adopted for the July 2011 FADs, except for two changes. First, the revenue share for wholesale ADSL includes revenue from the ‘Data Equipment’ asset class. This reflects the fact that the ‘Data Equipment’ asset class is used to supply wholesale ADSL (but not the other declared fixed line services in the FLSM), and it has a cost allocation factor from the Analysys model for wholesale ADSL. Second, the ACCC has calculated the revenue share as at 2012–13, rather than as at 2009–10. The ACCC considers that the revenue requirement, and therefore revenue share, determined at 2012–13 is more likely to accurately allocate the costs of the wholesale ADSL service than the 2009–10 revenue requirement.<sup>113</sup>

The revenue share approach involves the following steps:

- Step 1: Calculate the 2012–13 total revenue requirements for the following asset classes: ‘Switching Equipment – Local’, ‘Switching Equipment – Trunk’, ‘Inter-exchange Cables’, ‘Transmission Equipment’, Core ‘Radio Bearer Equipment’ and ‘Data Equipment’.
- Step 2: The 2012–13 revenue requirements related to the asset classes listed in Step 1 are calculated for wholesale ADSL—that is, the revenue requirements are multiplied by the

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<sup>112</sup> The ACCC notes that Telstra’s wholesale ADSL asset register does not contain any assets that map across to the ‘Satellite Equipment’ and ‘International Cable Systems’ asset classes in the RAF.

<sup>113</sup> The ACCC has reached this view because, as discussed in section 4.2.1, the RAB and tax asset value for the ‘Data Equipment’ asset class are accurate as at the beginning of 2012–13. By contrast, the RAB and tax asset values at the beginning of 2009–10 have been estimated by ‘rolling back’ the later RAB values.

respective Analysys cost allocation factor (adjusted for changes in demand<sup>114</sup>) for each asset class.

- Step 3: The revenue requirement calculated for wholesale ADSL in Step 2 is divided by the total revenue requirement calculated in Step 1 to obtain the ‘revenue share’ cost allocation factor for 2012–13.

The ACCC has used the same revenue share-based cost allocation factor for all four of the wholesale ADSL asset classes that do not have a cost allocation factor from the Analysys model: ‘Network Land’; ‘Network Buildings/Support’; Core ‘Other Communications Plant and Equipment’; and ‘Indirect Capital Assets’.

### *Adjustments to the cost allocation factors*

The ACCC modified the initial cost allocation factors, discussed in the previous section, by adjusting them for changes in service demand. This adjustment is made in each year to every cost allocation factor for the wholesale ADSL service (except ‘Transmission Equipment’). The ACCC adjusted the cost allocation factor for ‘Transmission Equipment’ to reflect the increasing share of data traffic, as a proportion of total traffic, on Telstra’s transmission network. This adjustment mirrors the adjustment made to the ‘Transmission Equipment’ cost allocation factor for the PSTN OTA service in the July 2011 FADs. Each adjustment is described in more detail below.

### *Adjustments for changes in service demand*

The ACCC has adjusted the initial cost allocation factors to reflect changes in service demand. This methodology effectively holds fairly constant the share of costs allocated to each unit of the service (i.e., each wholesale ADSL SIO). This means that if demand for wholesale ADSL decreases, its total share of costs will decrease to reflect the service’s lower usage of the assets (and other costs) required to provide the service. But the unit cost of the service—that is, the total cost (or revenue requirement) allocated to the service divided by the number of units of service demanded—will remain constant (assuming supply costs have not changed).

Cost allocation factors obtained from the Analysys model are adjusted by: (i) the difference between estimated 2008–09 demand in the Analysys model and actual 2008–09 demand; and (ii) subsequent changes in actual or forecast demand (that is, the difference between 2008–09 demand and demand in the year for which prices are being estimated). For the revenue share-based cost allocation factors, the demand adjustment applies only for changes in forecast wholesale ADSL demand compared to demand as at 2012–13 (the date at which the revenue share-based cost allocation factors are estimated).

### *Adjustment to the ‘Transmission Equipment’ cost allocation factor*

The ACCC has adjusted the cost allocation factor for the ‘Transmission Equipment’ asset class for wholesale ADSL to reflect the higher share of data traffic as a proportion of total

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<sup>114</sup> See description of demand adjustment in next section.

traffic on Telstra's transmission network. The ACCC made a similar adjustment to the 'Transmission Equipment' cost allocation factor for the PSTN OTA services. In contrast to wholesale ADSL, however, the PSTN OTA cost allocation factor for 'Transmission Equipment' decreased due to the declining share of PSTN voice traffic.

The adjustment involves estimating total traffic on Telstra's transmission network, and the different sources of that traffic. Three different types of traffic are measured: PSTN, Integrated Services Digital Network (ISDN) and data traffic. Estimates of data traffic are available from the ABS's *Internet Activity*; the RAF contains data on PSTN and ISDN call minutes, which are converted to megabytes of traffic by assuming a bit rate of 64 kilobits per second. The cost allocation factors for 'Transmission Equipment' for different services are then adjusted by the change in the relevant type of traffic as a proportion of total traffic—that is, PSTN voice traffic for PSTN OTA, and data traffic for wholesale ADSL.

The ACCC's draft view is that the methodology used to adjust the 'Transmission Equipment' cost allocation factor for PSTN OTA is also appropriate for adjusting the 'Transmission Equipment' cost allocation factor for wholesale ADSL. The methodology used is the same as the PSTN OTA methodology except that for wholesale ADSL:

- Actual data for 2010–11 and 2011–12 from the ABS and the RAF was used to estimate the volume of PSTN, ISDN and data traffic. The values for these years were forecasts in the July 2011 FADs.
- ISDN call minutes were assumed to grow at the same trend as the five-year average from 2006–07 to 2011–12, rather than the 2004–05 to 2009–10 average that was used for PSTN OTA in the July 2011 FADs.
- The initial 'Transmission Equipment' cost allocation factor for wholesale ADSL (from the Analysys model) was adjusted by the 'annual percentage change in *data traffic* as a proportion of total traffic', rather than the 'annual percentage change in *PSTN voice traffic* as a proportion of total traffic' that was used for PSTN OTA.

More details on the ACCC's methodology for adjusting the 'Transmission Equipment' cost allocation factor for PSTN OTA can be found in chapter 10 of both the April 2011 discussion paper and the July 2011 final decision for the fixed line services FADs.

### ***Response to Telstra's submission on 'unitisation error' in the FLSM***

In its response to the ACCC's July 2012 Issues Paper, Telstra submitted an appendix describing what it considered to be a 'unitisation error' in the FLSM. Telstra submitted that the calculation of unit costs 'is based on peak historic demand, therefore the FLSM minimises the costs per unit and then applies these costs as constant over the regulatory period, despite demand falling below their peak levels'.<sup>115</sup> Telstra submitted that the ACCC's approach was an error because: it is applied to variable costs, which are dependent on current demand; it incorrectly assumes that fixed costs are unrecoverable due to competition; and the ACCC incorrectly argues that Telstra has been compensated for this lack of recovery through

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<sup>115</sup> Telstra, August 2012 pricing submission, p. 25.

the WACC. Telstra re-iterated some of these views in subsequent correspondence with the ACCC, including its ‘Response [to access seekers’ submissions] and further submission on ADSL congestion’ in November 2012.<sup>116</sup>

#### *ACCC response to Telstra’s submission*

The ACCC maintains its views expressed in the July 2011 FADs that the approach used to estimate cost allocation factors in the FLSM is appropriate. The ACCC must take into account ‘the direct costs of providing access to the declared service’, when making an access determination. In this regard, the Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996* states that:

‘direct’ costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.<sup>117</sup>

The Explanatory Memorandum is consistent with the ACCC’s view that Telstra should not be compensated, through higher access prices, for a loss of market share or for reductions in the size of the market. The ACCC’s additional reasons for making these adjustments are explained further in section 10.3.1 of the July 2011 final decision; the ACCC maintains these views.

Further, the ACCC notes that the adjustments referred to in Telstra’s submission affect the cost allocation factors for the following asset classes: ‘Ducts and Pipes’, ‘Copper Cables’ and (for PSTN OTA only) the three ‘Switching Equipment’ asset classes. Therefore, these adjustments have no effect on the estimated draft wholesale ADSL prices.

#### **4.2.7 Weighted average cost of capital**

The WACC is multiplied by the opening RAB value to estimate the return on capital building block for a particular year. The FLSM treats all aspects of tax—including imputation credits and the interest deductibility of debt—in the cash flows. Hence, a vanilla WACC is used to estimate the return on capital building block. The use of a vanilla WACC is specified in the fixed principles provisions accompanying the July 2011 FADs.<sup>118</sup>

The vanilla WACC is calculated as follows:

$$WACC_{vanilla} = \frac{D}{V} \times E[Kd] + \frac{E}{V} \times E[Ke]$$

where  $D$  = the value of debt

$E$  = the market value of equity

$V$  = the market value of equity and debt

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<sup>116</sup> Telstra, November 2012 congestion submission, available at: [www.accc.gov.au/content/index.phtml?itemId=1086310](http://www.accc.gov.au/content/index.phtml?itemId=1086310).

<sup>117</sup> Trade Practices Amendment (Telecommunications) Bill 1996 Explanatory Memorandum, p. 44.

<sup>118</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services, Final Report*, July 2011, p. 183 (clause 6.12).

$E[Kd]$ =the required/expected return on debt<sup>119</sup>

$E[Ke]$ =the required/expected return on equity<sup>120</sup>

Having reviewed the WACC parameters, the ACCC's draft view is that the WACC parameters, and estimation methodologies, used in the July 2011 FADs are appropriate. In estimating draft FAD prices for wholesale ADSL, the ACCC has updated several WACC parameters that are estimated using specific observations of market data. These parameters—the risk free rate, the debt risk premium (DRP) and the debt raising costs—are updated in order to reflect current market conditions. The next section describes the ACCC's recalculation of these parameters in more detail. The ACCC intends to update these parameters prior to its final decision on the wholesale ADSL FAD.

The ACCC's draft view is that the other WACC parameters from the July 2011 FADs remain appropriate. The ACCC's reasons for choosing these parameters can be found in chapter 6 the July 2011 final decision.

The ACCC considers that it is appropriate to update the WACC to ensure it reflects current market conditions. The WACC, and WACC parameters, used by the ACCC in estimating draft FAD prices for wholesale ADSL is shown in table 4.10.

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<sup>119</sup> Where  $E[Kd] = \text{risk free rate} + \text{debt risk premium} + \text{debt issuance costs}$

<sup>120</sup> Where  $E[Ke] = \text{risk free rate} + \beta_e * (E[Rm] - \text{risk free rate})$ , and  
 $\beta_e$  is the firm's equity beta  
 $E[Rm]$  is the required/expected return on the market portfolio  
 $(E[Rm] - \text{risk free rate})$  is the market risk premium (MRP)

**Table 4.10: Estimates of the vanilla WACC and WACC parameters**

WACC parameter	Wholesale ADSL draft decision
Nominal risk-free rate	3.44%
Expected inflation	2.55%
Real risk-free rate	0.87%
Nominal debt risk premium	1.47%
Debt issuance cost	0.074%
Nominal market risk premium	6%
Equity beta	0.7
Debt gearing	40%
Gamma	0.45
Equity issuance costs	0%
<b>Nominal vanilla WACC</b>	<b>6.58%</b>
<i>Real vanilla WACC</i>	<i>3.93%</i>

***Recalculation of WACC parameters***

The ACCC has recalculated three WACC parameters to reflect current market conditions: the risk free rate, the DRP and debt raising costs. These parameters are updated based on market data from the period just prior to the ACCC’s decision. The following sections describe the ACCC’s methodologies for estimating these parameters.

***Risk free rate***

In updating its estimate of the risk free rate for the draft wholesale ADSL FAD, the ACCC has used the same Commonwealth Government Securities (CGS) bonds to calculate the risk free rate as adopted for the July 2011 FADs.<sup>121</sup> The ACCC has updated its estimate of the risk free rate by taking the 20 day average from 15 January 2013 to 12 February 2013 which gives a nominal risk free rate of 3.44 per cent. This methodology—a 20 day averaging period as close as possible to the commencement of the regulatory period—is consistent with the approach used in the July 2011 FADs.

Expected inflation has also been updated for the RBA’s latest short-term inflation forecasts.<sup>122</sup> In calculating expected inflation, the ACCC has used the ten year period from 2012–13 to 2021–22. This period aligns the ten year inflation period with the ten year horizon used to calculate other WACC parameters such as the risk free rate and DRP. The expected inflation forecast uses the RBA’s short-term inflation forecasts for 2012–13, 2013–14 and 2014–15, and the midpoint of the RBA’s inflation target range (2.5 per cent) for the

<sup>121</sup> Bloomberg ticker: C12710Y Index.

<sup>122</sup> RBA, *Statement on monetary policy*, 8 February 2013, p. 63.



remaining years. The updated inflation forecast is 2.55 per cent. Using the estimated nominal risk-free rate and expected inflation, the real risk-free rate is 0.87 per cent.

### *Debt risk premium*

The ACCC maintains its view from the July 2011 FADs that:

- the DRP can be estimated using a benchmark A-rated bond to estimate the efficient cost of debt of an A-rated telecommunications business; and
- in the absence of a benchmark A-rated bond, long-term Telstra bonds can be used as a proxy for the benchmark bond.

The ACCC considers that the Telstra bond used to estimate the DRP in the July 2011 FADs remains relevant for estimating the DRP in the current decision.<sup>123</sup> In addition, Telstra has issued two new bonds since the July 2011 FADs.<sup>124</sup> These three bonds have maturity dates of 15 July 2020, 25 May 2022 and 19 December 2023, respectively.

The ACCC's draft view is that all three bonds should be used for the purpose of estimating the DRP. The ACCC notes that all three bonds have a term to maturity that is relatively close to the 10-year benchmark term. The ACCC considers that this method takes into account information from all relevant bonds. The ACCC notes that Telstra previously submitted that the ACCC should be 'cautious in relying too heavily on a single bond observation' to estimate the DRP.<sup>125</sup>

The ACCC considers that an appropriate method for calculating the DRP is to take a simple average of the three DRPs. The ACCC calculated the DRP for each bond using a similar method as adopted for the July 2011 FADs: that is, the ACCC took a 20 day average of each bond from 15 January 2013 to 12 February 2013 and subtracted the corresponding average yield on the Bloomberg 10 year CGS<sup>126</sup> from it. The averaging period used is the same 20 day period as used for estimating the risk-free rate. The resulting DRP estimates for each bond, and the simple average of the three DRPs, are shown in table 4.11.

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<sup>123</sup> Bloomberg ticker: EI2917587 Corp.

<sup>124</sup> Bloomberg tickers: EJ19493167 Corp and EI9022241 Corp.

<sup>125</sup> Telstra, *Public inquiry to make final access determinations for the declared fixed services part A of Telstra's response to the Commission's Discussion Paper*, 3 June 2011, p. 57.

<sup>126</sup> Bloomberg ticker: C12710Y Index.

**Table 4.11: Estimate of the DRP**

	EI2917587 Corp	EJ19493167 Corp	EI9022241 Corp	Simple average
Nominal bond yield	4.63%	4.97%	5.13%	<b>4.91%</b>
Nominal risk-free rate	3.44%	3.44%	3.44%	<b>3.44%</b>
Nominal debt risk premium	1.19%	1.53%	1.68%	<b>1.47%</b>

*Debt issuance costs*

Debt issuance costs are the costs associated with raising debt. They can be recovered through a direct cash flow allowance or an adjustment to the WACC. Consistent with the approach adopted for the July 2011 FADs, the ACCC proposes to: estimate debt issuance costs using the Allen Consulting Group's methodology;<sup>127</sup> and allow Telstra to recover the costs through an adjustment to the WACC. This methodology involves updating inputs such as the bond data and the nominal vanilla WACC (which is used to amortise the upfront costs incurred in issuing debt). Further information on the ACCC's methodology for estimating debt issuance costs can be found in section 6.3.3 of both the April 2011 discussion paper and July 2011 final decision. This methodology results in an updated draft estimate of debt issuance costs of 7.4 basis points.

**4.3 Proposed amendments to the BBM record keeping rule**

The ACCC requires forecasts and actual data from Telstra relating to operating expenditure, capital expenditure, depreciation and demand to effectively implement the FLSM to price the wholesale ADSL service.

The ACCC recognises that Telstra cooperated with the ACCC by providing some expenditure and demand information following information requests by the ACCC in the second half of 2012. For estimating wholesale ADSL prices for future regulatory periods, the ACCC will need to obtain further information for use in the FLSM.

The ACCC therefore proposes to vary the current BBM record keeping rule (RKR)<sup>128</sup> to require Telstra to provide forecasts and actual data on expenditure, depreciation and demand relating to the wholesale ADSL service for future regulatory periods.

The proposed amendments to the BBM RKR would clearly specify the information required, the nature of the supporting information required, the format for presenting the information and timeframes for providing it. This will provide certainty to Telstra on the information it will be required to provide to the ACCC. In addition, it will provide transparency for industry on the implementation of the BBM, which will, in the ACCC's view, promote industry confidence in the ACCC's pricing approach for the wholesale ADSL service.

<sup>127</sup> The Allen Consulting Group, *Debt and Equity Raising Transaction Costs, Final Report*, December 2004.

<sup>128</sup> The Building Block Model Record Keeping and Reporting Rule was made by the ACCC under section 151BU of the CCA in August 2012.

The ACCC will consult on varying the BBM RKR in due course after the ACCC has released final FAD for the wholesale ADSL service. The ACCC seeks initial submissions on the ACCC's intention to amend the BBM RKR as described in this section.

## 5 Price structure

In the February 2012 Discussion Paper, the ACCC sought views on three key price structure issues:

- port and AGVC/VLAN product components
- geographic pricing (e.g. based on the ‘zone’ structure)
- ancillary charges--connection, early termination and other miscellaneous fees and charges related to wholesale ADSL.

The ACCC sought views on the structure of prices and whether charges should vary in different circumstances. These issues are discussed in the following sections.

In forming its views on the proposed price structure, the ACCC has had regard to the LTIE and other relevant legislative criteria. The ACCC’s assessment of the proposed price structure against these criteria is included in chapter 6.

### 5.1 Product components – port and AGVC/VLAN

Wholesale ADSL has typically been supplied by Telstra via a two-part pricing structure:

- a fixed ‘port’ (or end-user access) charge for each ADSL service in operation (SIO) and
- a capacity-based ‘Aggregating Virtual Circuit’ (AGVC) charge.<sup>129</sup>

The AGVC/VLAN products provide an access seeker with network capacity in megabits per second (Mbps) measured at the internet gateway router (IGR). An access seeker purchases AGVC throughput capacity that it requires to satisfy its end-user demand for data usage (allowing for contention and traffic management). For simplicity, this decision uses ‘AGVC’ to refer to AGVC/VLAN.

This two-part pricing structure was included in the wholesale ADSL IAD.

For the IAD, the ACCC determined the port and AGVC charges using the retail-minus model that was used to estimate prices for the IAD. Certain assumptions were made in order to allocate an average reference price or ‘retail yield’ between a port charge and AGVC charge.

The IAD (and the original Telstra SSU model) assumed that AGVC prices would fall on a per unit basis over time (i.e. as data usage volume increases). This is reflected in Telstra’s retail pricing approach—data caps become larger over time as retail customer usage increases. This also reflects the economies of scale associated with providing data/transmission services.

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<sup>129</sup> An AGVC is technically only used to support customers on older ATM protocol DSLAMs. Customers on newer Ethernet protocol DSLAMs require an Ethernet AGVC equivalent – a Virtual Local Area Network (VLAN). The interim access determination for wholesale ADSL set the same price for the AGVC and VLAN products.

During the SSU process, Telstra stated that AGVC prices would decline over time:<sup>130</sup>

Increases in retail customer usage mean that more data needs to be transported from its sources to end users and, to replicate the offers made by Telstra's retail business units, wholesale customers would need to purchase more AGVC transmission. Therefore, the AGVC price component will need to fall as Telstra's retail customer usage increases.

The ACCC estimated the AGVC price in the IAD by first calculating the monthly AGVC yield that was implied from Telstra's price model using the model's figures for the AGVC charge per Mbps and the average AGVC usage.

The ACCC then used this yield, as well as forecast network utilisation rates for Telstra's retail ADSL services, to calculate a corresponding AGVC price per Mbps for the period covered by the IAD. This methodology is described in more detail in the IAD Statement of Reasons.<sup>131</sup>

This methodology allowed the ACCC to convert the total revenue yield per customer (calculated from the retail-minus model) into prices for port charges and AGVC charges. The IAD set monthly AGVC prices of \$45.50 per Mbps until 30 June 2012 and \$33.65 per Mbps from 1 July 2012.

### 5.1.1 Summary of submissions

Telstra submitted that the FAD should set prices for port and AGVC charges (as well as the connection and early termination charges, which are considered in section 5.3).<sup>132</sup> Telstra submitted that 'the balance of charges between connection, access and usage as it currently stands should remain.'<sup>133</sup>

Optus submitted that it 'supports the ACCC proposal to address in the FAD charges that have been addressed in the IAD.'<sup>134</sup> Optus submitted that 'all access seekers who purchase Telstra's wholesale ADSL service are required to also purchase the AGVC/VLAN service [and that regulating wholesale ADSL] without incorporating the AGVC/VLAN service would provide Telstra with the opportunity to use AGVC/VLAN pricing to deter access seekers from accessing the wholesale ADSL service.'<sup>135</sup>

Optus submitted that it supports the approach the ACCC has taken in the IAD stating that 'as the usage fee is calculated based on the size of the AGVC/Subscribed Data Speed, it restricts Telstra from favouring carrier service providers (CSPs) who have a larger customer base and require higher level of network utilisation.'<sup>136</sup>

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<sup>130</sup> See Telstra, "A guide to Telstra's price-related interim equivalence and transparency obligations," published on 5 September, at p. 3, and available at: <http://www.accc.gov.au/content/index.phtml/itemId/1003999>.

<sup>131</sup> ACCC, Interim access determination for the wholesale ADSL service, Statement of Reasons, February 2012, pp. 14-15.

<sup>132</sup> Telstra, April 2012 submission, p. 19.

<sup>133</sup> Ibid, p. 21.

<sup>134</sup> Ibid, p. 5.

<sup>135</sup> Ibid, pp. 5-6.

<sup>136</sup> Ibid.

Macquarie Telecom stated that it is broadly satisfied with the structure of charges for the wholesale ADSL service as set out in the wholesale ADSL IAD. However it expressed concern that ‘the pricing of the AGVC as set out in the ADSL IAD is excessive’ and noted that the NBN Co connectivity virtual circuit (CVC) price is \$20 per Mbps.<sup>137</sup>

Herbert Geer (on behalf of Adam Internet, iiNet, Internode, Primus and TransACT) submitted that ‘the port and AGVC/VLAN charges are the most important charges that need to be addressed in the FAD’.<sup>138</sup> Herbert Geer submitted that AGVC/VLAN charges should be cost-based and that ‘if the ACCC considers a similar approach can be utilised in setting AGVC rates, then ... NBN Co’s CVC pricing structure should be closely examined on the basis that it is closely comparable to the AGVC and based on reasonably current modelling.’<sup>139</sup>

Herbert Geer submitted that ‘the AGVC cannot be excluded from the WDSL service description and must have a set regulated charge, as in many areas Telstra is the sole backhaul provider’.<sup>140</sup> However, Herbert Geer submitted that ‘forced AGVC bundling’ should be removed (a reference to the location of wholesale ADSL points of interconnect discussed in chapter 9).

### **5.1.2 ACCC draft views**

The ACCC is of the view that the use of the port and AGVC pricing structures should be maintained for this FAD.

Specifying a fixed port charge and a capacity-based AGVC charge recognises that the supply of wholesale ADSL involves fixed costs as well as costs that vary (over time) with data usage i.e. as greater network capacity is needed to meet demand for data. Furthermore, maintaining the AGVC pricing structure, where access seekers’ costs vary with the amount of AGVC capacity required to supply their end-users’ data usage, provides price signals regarding the use of network capacity. No submissions advocated the removal of the AGVC pricing structure.

The ACCC has reviewed the appropriate level of the AGVC pricing component relative to the per SIO port charges.

The ACCC considers that ideally the AGVC and port charges should reflect the costs of providing each component of the service. However, the cost information obtained during this inquiry and used in the Fixed Line Services Model (FLSM) is not sufficiently detailed to enable the allocation of costs on this basis. Furthermore, the ACCC considers that, on the basis of the information provided by Telstra, it may not be feasible at this stage to obtain the required cost information.

Without detailed cost information, the ACCC has decided to maintain the relativities between the port and AGVC components of the total IAD charge per SIO to determine the allocation

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<sup>137</sup> Macquarie Telecom, April 2012 submission, p. 5.

<sup>138</sup> Herbert Geer, April 2012 submission, p. 5.

<sup>139</sup> Ibid, p. 8.

<sup>140</sup> Ibid.

of costs to the AGVC. This approach was supported by a number of submissions which indicated support for the current relativities.

For the purposes of this FAD, the ACCC proposes to use the price relativities from the IAD model to allocate the per SIO revenue requirement between a port charge and an AGVC charge. The revenue requirement per SIO is allocated to the two components—AGVC (per SIO) and weighted average port price—based on each component’s percentage of the weighted average total price estimated by the FLSM. Table 5.1 sets out how the price relativities are calculated from the IAD model.

**Table 5.1: IAD model product price relativities between the AGVC and port components**

Component	IAD prices	AGVC/Port price relativity
AGVC per SIO	[c-i-c] [c-i-c]	[c-i-c] [c-i-c]
Port Zone 1	\$25.38	
Port Zone 2/3	\$30.80	
Port Weighted Average	[c-i-c] [c-i-c]	[c-i-c] [c-i-c]
Total Average	[c-i-c] [c-i-c]	100.00%

This approach results in [c-i-c] [c-i-c] per cent of the revenue requirement per SIO being used to calculate the AGVC charge and [c-i-c] [c-i-c] per cent of the revenue requirement per SIO used to derive the port charges. The ACCC may review the allocation between port and AGVC prices in the future, should further information become available.

In order to convert the AGVC proportion of the per SIO revenue requirement into a per Mbps price for AGVC, the ACCC adopted a similar approach used in the IAD. That is, the monthly AGVC per SIO charge and a forecast of usage (in Mbps) per SIO are used to determine an AGVC price per Mbps.

The ACCC requested AGVC usage forecasts from Telstra; however Telstra stated that it was unable to provide forecasts. Therefore, the ACCC forecast AGVC per SIO usage using a similar method to that used in the IAD model. The forecasts for usage in 2012-13 and 2013-14 assume that traffic will grow by the same amount as in 2011-12 (the most recent period for which actual data is available).<sup>141</sup> The 2011-12 usage figures were derived from Telstra’s quarterly Telstra Economic Model (TEM) reports.

The average per SIO usage forecast for 2013–14 is [TEM c-i-c] [TEM c-i-c].

<sup>141</sup> This method is an arithmetic progression:  $Usage_{t+1} = Usage_t + (Usage_t - Usage_{t-1})$ . The ACCC maintained the methodology of calculating each annual usage value as the mid-point of the starting and ending usage values for that year (for example, the 2013–14 usage value is calculated as the mid-point of the June 2013 and June 2014 usage forecasts).

The ACCC has used a forecast of AGVC usage per *average* ADSL SIO (which includes both Telstra retail and wholesale usage per SIO), rather than Telstra retail ADSL usage per SIO alone (as used in the IAD). The reason for this change is as follows. The retail-minus model used for the IAD focused on enabling an access seeker to replicate the retail offers of Telstra and hence used estimates of Telstra retail ADSL usage per SIO. However, the cost-based model sets prices based on average AGVC costs (Telstra retail and wholesale) and therefore the average ADSL usage per SIO across all users is the more relevant estimate.

Using this approach, the ACCC has determined a draft FAD AGVC price of \$36.08 per Mbps for 2013–14.

The ACCC notes that the IAD model used forecast usage information based on Telstra’s SSU retail-minus model. These forecasts estimated a higher level of data usage growth over 2011-12 than actually occurred. In calculating the draft FAD price, the ACCC updated the forecasts with actual usage data from the TEM reports. The ACCC notes this change in usage data (in conjunction with the different pricing methodology) explain the increase in the AGVC charge from the IAD price of \$33.65 per Mbps (from 1 July 2012) to the draft FAD price of \$36.08 per Mbps for 2013-14.

The ACCC has considered submissions that the AGVC price level should be similar to the current NBN Co CVC charge. The ACCC notes that the pricing principles relevant to the two product constructs appear to be similar—that is, setting a price related to usage of network capacity to provide price signals that promote both efficient use of network capacity and efficient investment in network capacity. However, the ACCC does not consider that it is reasonable to expect that the price levels for Telstra’s AGVC and NBN Co’s CVC will necessarily be similar. This is because the underlying costs that relate to the AGVC and CVC services are not necessarily comparable because of the different network architectures, the different degrees of aggregation involved (and thus number of network elements), and the different cost structures of Telstra’s copper network and the NBN.

## 5.2 Geographic pricing structure

Prior to the declaration of wholesale ADSL, Telstra adopted a geographic ‘zone’ structure in setting wholesale ADSL prices for most, but not all, access seekers. The monthly port charge paid by access seekers was dependent upon the zone in which the end-user is located.

Telstra effectively used a two zone structure for setting prices. The first of these zones (Zone 1) comprises Exchange Service Areas (ESAs) that are predominantly located in metropolitan areas, but also include some regional areas. Zone 2/3 comprises all ADSL-enabled ESAs that are not included in Zone 1.

The ACCC notes that ESAs contained in Zone 1 overlap significantly with those ESAs in which competing DSL networks have been built. Few such ESAs are contained in Zone 2/3.<sup>142</sup>

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<sup>142</sup> Exchanges specified by Telstra on the ADSL-Enabled Exchange list as Zone 1 exchanges correlate strongly with the presence of competitor infrastructure (as shown in data obtained under the Telstra CAN RKR).



Telstra's geographic Zone-based pricing structure was adopted by the ACCC in the IAD. Different port prices were determined for Zone 1 (\$25.40) and Zone 2/3 (\$30.80). The geographical price differential primarily reflected the treatment of retail costs in the retail-minus model.<sup>143</sup>

In the February 2012 Discussion Paper, the ACCC sought views on the zone pricing structure. The ACCC noted that a zoned pricing construct could be appropriate if there is a significant disparity in the unit costs of supplying different regions. The ACCC noted that a zoned pricing structure is generally not appropriate where underlying unit costs are broadly the same.<sup>144</sup>

The ACCC noted further that a zoning construct that did not group areas based upon broad similarities in the underlying costs of operating the DSL and/or backhaul networks, but was rather being applied to gain a competitive advantage, would not be appropriate.<sup>145</sup>

### 5.2.1 Summary of submissions

Telstra submitted that it supports the use of the zones for pricing wholesale ADSL. Telstra stated that 'prices in Zone 1 should be lower than in Zones 2 and 3, as, broadly speaking, services in Zones 2 and 3 are more expensive to supply than they are in Zone 1 ... for example, transmission distances tend to be longer and scale smaller in Zones 2 and 3.'<sup>146</sup>

Optus submitted that access charges should be levied on a nationally consistent basis. Optus stated that 'it appears that Telstra has just arbitrarily classified the different ESAs into the three zones... [and] Telstra's motive to implement a "zone" structure appears to be to price competitors out of the market.'<sup>147</sup>

Optus also submitted that 'a national monthly access wholesale DSL charge will ... provide access seekers a smooth transition to the NBN' given that 'uniform wholesale pricing is one of the pricing objectives NBN Co needs to achieve.'<sup>148</sup> Optus cited the statements made by the ACCC during the 2011 fixed line services FAD inquiry, that averaging Band 1-3 Unconditioned Local Loop Service (ULLS) prices would 'ease industry's transition to national wholesale pricing for the NBN.'<sup>149</sup> Optus also noted that Telstra and some access seekers' retail plans are priced nationally, and that a national wholesale ADSL price will assist an access seeker to price its downstream services in a more efficient way.<sup>150</sup>

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There are also public sources for ESAs in which competitor DSL infrastructure has been deployed. For example, iiNet publishes its infrastructure coverage on its website:

<http://www.iinet.net.au/iinetwork/coverage.html>

<sup>143</sup> ACCC, *Interim access determination for the wholesale ADSL service, Statement of Reasons*, February 2012, p. 13.

<sup>144</sup> ACCC, February 2012 Discussion Paper, p. 8.

<sup>145</sup> Ibid.

<sup>146</sup> Telstra, April 2012 submission, p. 21.

<sup>147</sup> Optus, April 2012 submission, p. 11.

<sup>148</sup> Ibid, p. 12.

<sup>149</sup> Optus, April 2012 submission, p. 12; ACCC, *Public inquiry to make final access determinations for the declared fixed line services, Discussion paper*, April 2011, pp. 143-144.

<sup>150</sup> Optus, April 2012 submission, p. 13.

Herbert Geer submitted that ‘artificially determined zoned pricing is detrimental to the LTIE’.<sup>151</sup> Herbert Geer submitted that ‘the ACCC’s views in regards to averaging and de-averaging ULLS, WLR and LSS prices are relevant to WDSL pricing’. Herbert Geer drew a distinction between network costs (e.g. copper line costs) and wholesale ADSL specific costs. Herbert Geer submitted that wholesale ADSL specific costs are ‘unlikely to vary significantly between geographic areas’.<sup>152</sup>

Macquarie Telecom noted the ‘relative merits of de-averaged versus nationally averaged pricing of wholesale access services’.<sup>153</sup> It submitted that the two-tiered pricing structure which the ACCC had adopted in the IAD ‘is an appropriate balance between the competing pressures and should be adopted in the ADSL FAD’.<sup>154</sup> Macquarie Telecom submitted that a two-tiered pricing structure ‘should be based on costs’ and stated that ‘in the absence of a cost study of Telstra’s exchanges, this may ... be estimated on the basis of CBD and metropolitan exchanges versus regional and remote exchanges’.<sup>155</sup>

## 5.2.2 ACCC draft views

The ACCC considers that there are likely to be material cost differences in supplying wholesale ADSL in different geographic regions. Cost differences are likely to arise from the longer transmission links and lack of scale in serving regional and rural areas. In addition, higher operating expenditure is likely to be required per SIO in regional areas in order to support the dispersed exchange facilities.<sup>156</sup>

However, the ACCC notes that neither Telstra nor access seekers have submitted evidence during this inquiry on how significantly costs vary between different geographic zones. The cost information available to the ACCC (and used to estimate cost-based prices) is not disaggregated by geographic area. The ACCC notes Macquarie Telecom’s submission that specific data on the costs of supplying wholesale ADSL—disaggregated on an ESA by ESA or Zone basis— may not be readily available to Telstra without undertaking a specific cost study.

Although specific evidence on cost differentials between urban and rural/regional areas is not available, the ACCC considers that it would be inappropriate to dismiss these cost differences as insignificant. The ACCC has previously noted the efficiency benefits that can arise from determining access prices that reflect costs in different geographic areas.<sup>157</sup>

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<sup>151</sup> Herbert Geer, April 2012 submission, p. 9.

<sup>152</sup> Ibid, pp. 9-10.

<sup>153</sup> Macquarie Telecom, April 2012 submission, p. 5.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Conceptually and practically, it is not possible to precisely allocate the costs of supplying wholesale ADSL to different pricing components, e.g. to fixed and usage-based charges. For example, there are fixed and usage-based costs associated with the provision of transmission services.

<sup>157</sup> For example a detailed discussion of these issues is included in ACCC, *Submission to the Department of Broadband, Communications and the Digital Economy – “National Broadband Network: Regulatory Reform for the 21<sup>st</sup> Century Broadband”*, Public Version, June 2009, Appendix E, available at: <http://www.accc.gov.au/content/index.phtml?itemId=889814>.

The ACCC has recognised, in the context of other fixed line services, that supply costs vary across different geographic areas and has implemented geographically differentiated pricing. The ACCC’s Domestic Transmission Capacity Service (DTCS) FAD identified the distance of a transmission route as one of the key drivers of prices of DTCS services.<sup>158</sup> The ACCC also implemented geographically de-averaged pricing for the ULLS in the 2011 fixed line services FADs. A higher ULLS price was set for Band 4 to reflect the relatively higher line costs in Band 4 areas compared to line costs in Bands 1-3.

Some access seekers have submitted that the ULLS Bands could be used to specify geographically-differentiated wholesale ADSL prices.<sup>159</sup> The ACCC does not consider this to be an appropriate approach for the wholesale ADSL FAD as the cost differentials in ULLS bands mostly relate to copper line costs (i.e. ‘ducts and pipes’ and ‘copper cables’)<sup>160</sup> which are not included in the costs of supplying wholesale ADSL (see section 4.2.1).

In the ACCC’s view, Telstra’s zone construct appears to provide a reasonable approximation of ESAs where the costs of supplying broadband are relatively higher. Further, the ACCC considers that maintaining the two zone pricing structure will provide an appropriate balance between setting prices to reflect the geographic differences in costs of supply and easing the industry’s transition to uniform national wholesale prices by NBN Co.

In the absence of specific cost information, the ACCC proposes to set geographically-differentiated prices in the FAD using the price relativities from the IAD. Table 5.2 shows the zone relativities for the IAD port charges. These relativities set a Zone 1 port charge that is [c-i-c] [c-i-c] per cent of the port component of the average per SIO revenue requirement and a Zone 2/3 charge that is [c-i-c] [c-i-c] per cent of this level.

**Table 5.2: IAD model price relativities – geographic zones**

Port Components	IAD prices	Zone 1 - Zone 2/3 price relativity
Port Zone 1	\$25.38	[c-i-c] [c-i-c]
Port Zone 2/3	\$30.80	[c-i-c] [c-i-c]
Port Weighted. Average	[c-i-c] [c-i-c]	100%

The ACCC considers that maintaining price relativities applied in the IAD will recognise the geographic cost differences and is appropriate given the absence of robust alternative information on geographic costs of supplying wholesale ADSL.

<sup>158</sup> ACCC, *Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement*, June 2012, p. 22.

<sup>159</sup> For example, Herbert Geer, April 2012 submission, pp. 9-10.

<sup>160</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services, Final Report*, July 2011, p. 102.

The draft FAD specifies the classification of ESAs by Zone as at 11 February 2013 and references the ADSL enabled exchange list that Telstra maintains for the purpose of calculating monthly end-user access charges for a Service. The ACCC will publish a version of this list on its website.

### 5.3 Connection and ancillary charges

Telstra levies a range of connection and miscellaneous charges associated with its supply of the wholesale ADSL service.

In the IAD, the ACCC set prices for connection charges and an early termination charge (ETC) as part of its price terms and conditions. The IAD Statement of Reasons defined a connection charge as a ‘one off charge for the connection of an ADSL service and can be referred to as an installation charge or a transfer charge’.<sup>161</sup>

The IAD instrument specified prices for three categories of wholesale connection charges:

- ‘Type A Transfer’—the end-user service is being migrated from another wholesale ADSL service—\$22.50
- ‘Type B Transfer’—the end-user service is being migrated from a line sharing service—\$80.00
- all other types of completed installation or transfer requests—\$80.00.

The IAD defined wholesale ETC as a ‘one off charge that is imposed on cancellation of a service’.<sup>162</sup> Telstra imposes this charge where a service is cancelled within a specified period from connection (i.e. six months). The IAD maintained Telstra’s \$50.00 ETC where the service is connected for less than six months. The IAD specified that no ETC applied where a service is connected for six months or longer.

The ACCC noted that Telstra waives this fee for services that migrate to a Telstra wholesale fibre access broadband service, but not when services are migrated to competing networks. Therefore, the ACCC noted that this price term has the potential to distort commercial decisions of access seekers about migrating services to wholesale fibre products.<sup>163</sup> The ACCC did not address these issues in the IAD because it was not clear that there would be significant migration of services from wholesale ADSL to fibre networks during the IAD period.<sup>164</sup>

In the February 2012 Discussion Paper, the ACCC sought submissions on what charges should be addressed in the FAD.<sup>165</sup>

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<sup>161</sup> ACCC, *Interim access determination for the wholesale ADSL service, Statement of Reasons*, February 2012, p .4.

<sup>162</sup> Ibid

<sup>163</sup> Ibid, p. 16.

<sup>164</sup> Ibid.

<sup>165</sup> ACCC, February 2012 Discussion Paper, p. 7.

### 5.3.1 Summary of submissions

Telstra submitted that the proposed FAD should ‘only apply to connection, port, AGVC and early termination charges’. It submitted that other charges ‘tend to be once off charges for changes to the service, or charges to encourage appropriate behaviour by wholesale customers (for example, for incorrect call out fees, incorrect fault reports etc)’.<sup>166</sup>

Optus submitted that the ACCC should determine a number of ancillary charges in the FAD, including:

- installation charges
- connection charges
- speed upgrade charges
- incorrect call out charges where a Telstra technician attends and incorrect fault report charge.

Optus stated that ‘to regulate a wholesale ADSL service without incorporating...ancillary charges will provide Telstra with an opportunity to raise prices...and deter access seekers from acquiring a competitively priced ADSL service’.<sup>167</sup>

Optus supported the ACCC’s approach to setting connection and miscellaneous charges in the IAD.<sup>168</sup> Optus stated that [c-i-c] [c-i-c].<sup>169</sup>

Optus stated that [c-i-c] [c-i-c]. Optus submitted that it ‘considers this charge to be unreasonable’ and ‘not in the LTIE’ because Telstra should ‘provide access seekers the best available ADSL line transmission rate’ for wholesale ADSL services and ‘Telstra has effectively restricted Optus from providing better quality services to its customers and to compete with Telstra on a level playing field’.<sup>170</sup>

Optus submitted that the ‘FAD should address [the incorrect callout and the incorrect fault report charge] as they are excessive and do not reflect the true costs of providing the services’.<sup>171</sup> Optus submitted that ‘[the incorrect fault report charge] should reflect the lower costs of online lodgement and testing’.<sup>172</sup> Optus also submitted that Telstra’s increase to the incorrect call out charge is not reasonable.

In its submission to the July 2012 Issues Paper, Optus submitted that the ACCC should address all the relevant ancillary charges in its FAD. Optus stated that regulating only some of the charges will provide Telstra the opportunity to exploit non-regulated prices to limit

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<sup>166</sup> Telstra, April 2012 submission, p. 22.

<sup>167</sup> Optus, April 2012 submission, p. 3.

<sup>168</sup> Ibid, p. 5.

<sup>169</sup> Ibid, p. 6.

<sup>170</sup> Ibid, p. 7-8.

<sup>171</sup> Optus, April 2012 submission, p. 9.

<sup>172</sup> Ibid.

access seekers' use of the wholesale ADSL service.<sup>173</sup> Optus also reiterated its views on connection and miscellaneous charges from its April 2012 submission to the IAD.<sup>174</sup>

Herbert Geer submitted (on behalf of Adam Internet and iiNet) that each of the following charges should be set in the FAD using a cost-based approach:

- installation charge
- end-user configuration change charge (Speed upgrade/downgrade)<sup>175</sup>
- WDSL/WLR bundling charge
- early termination charge (ETC)
- Type A transfer via LOLO/LOLIG charge<sup>176</sup>
- Type B transfer via LOLO/LOLIG charge
- non-infrastructure based DSL request charge
- Type A reversal via LOLO/LOLIG charge
- Type B reversal via LOLO/LOLIG charge
- migration from LSS to WDSL via LOLO/LOLIG charge
- migration from LSS to WDSL rejects/withdrawals and retargets charge
- Broadband Transfer rejects/withdrawals and retargets charges.

Herbert Geer submitted that the early termination charge is a charge 'without justification' and should be zero because 'set-up costs are recovered via the connection fee'.<sup>177</sup> Herbert Geer further stated that although an ETC may be applicable in a retail setting to offset customer acquisition costs, 'no such [cost] occurs in the wholesale environment'.<sup>178</sup>

### 5.3.2 ACCC draft views

As for other declared and unregulated services supplied by Telstra, there are a number of different connection and ancillary charges that may be incurred by access seekers in connection with the use of wholesale ADSL.

The ACCC's current view not to set prices for the full range of charges associated with the supply of the wholesale ADSL. The submissions received by the ACCC have not provided sufficient information on the costs on which these charges are based and the frequency of

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<sup>173</sup> Optus, August 2012 submission, p. 8.

<sup>174</sup> Ibid.

<sup>175</sup> Herbert Geer's submission did not explain this charge. Based on information from Optus' April 2012 submission, Telstra charges access seekers different prices for the speed of their wholesale ADSL service – the faster the speed, the higher the price. Optus also submitted that Telstra charges access seekers for changing the speed of their wholesale ADSL service.

<sup>176</sup> LOLO – LinxOnLine Ordering; LOLIG – business-to-business ordering of end-user accesses.

<sup>177</sup> Herbert Geer, April 2012 submission, p. 6.

<sup>178</sup> Ibid, p. 6.

which they are incurred. Furthermore, seeking to estimate prices for every possible ancillary charge that access seekers may face would likely lead to a significantly increased regulatory burden. This is consistent with the ACCC's previous approach in the July 2011 FADs for the declared fixed line services where a subset of ULLS and LSS charges (the monthly access charges and some connection and disconnection charges) was set.

The ACCC proposes to set prices for a key subset of charges, namely the connection charges and ETC. The ACCC will reconsider the scope of regulated charges associated with the supply of wholesale ADSL and the other declared services during its inquiry into the new FADs to apply from 1 July 2014. The ACCC notes that should specific competition concerns be raised prior to that inquiry, the ACCC can take other measures to address such concerns, such as binding rules of conduct (BROC).

The ACCC proposes to include connection charges in the FAD because these charges are faced by all access seekers in connecting new end-users, and are likely to be the most material of the ancillary charges incurred by access seekers. If the ACCC did not set prices for these key charges in the FAD, Telstra may have an opportunity and incentive to raise the level of these charges to increase its revenues or to compensate for falls in revenue from other charges.

The FLSM does not estimate connection and disconnection charges. Similar charges for the other declared fixed line services (e.g. LSS and ULLS) were initially calculated by reference to a study of the costs incurred in making connections and disconnections obtained from previous reviews of the charges (in 2007 and 2008) and subsequently indexed.<sup>179</sup> The ACCC does not have information on the cost of making connections and disconnections for wholesale ADSL services and submissions did not provide relevant cost information. The ACCC proposes therefore to maintain the connection charges at their existing levels in the IAD and to reconsider them during the next FAD inquiry.

For the ETC, the ACCC did not receive information regarding how frequently this charge is typically incurred. Therefore, it is difficult to assess the impact of the ETC on access seekers. In addition, the ACCC notes that Telstra may incur costs that would not be recovered if access seekers terminate their wholesale ADSL services early. The ACCC remains concerned that the imposition and waiving of the ETC have the potential to distort commercial decisions of access seekers regarding migration to other networks. However, as noted in the ACCC's February 2012 Statement of Reasons for the IAD, it is not clear that there will be a significant migration of services from wholesale ADSL to fibre networks during the period in which the FAD will be in effect. The ACCC proposes therefore to maintain the ETC at its existing level in the IAD and to seek further information during the next FAD inquiry.

In relation to the speed upgrade charges, the ACCC considers that these charges primarily relate to access seekers who want to move SIOs to FAD prices from pre-declaration access agreements that set prices based on speed tiers. As such, speed upgrade charges are expected

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<sup>179</sup> ACCC, *Public inquiry to make final access determinations for the declared fixed line services, Discussion Paper*, April 2011, p. 31; ACCC, *Inquiry to make final access determinations for the declared fixed line services, Final Report*, July 2011, p. 119.

to be one-off charges related to shifting to regulated pricing and are unlikely to relate to the future provision of the wholesale ADSL service. The ACCC considers that there are likely to be costs involved in migrating these SIOs from existing products and price structures and that it is reasonable for Telstra to recover these costs to the extent that they occur. The ACCC currently does not have information available to ascertain the level of these costs.

For these reasons, the ACCC does not intend to set a set speed upgrade charge in this FAD. The ACCC considers that it is open to access seekers that have significant numbers of end-users on pre-declaration arrangements to negotiate with Telstra on transferring these customers on to new pricing arrangements, which reflect the terms and conditions of the ACCC's FAD.



## 6 Wholesale ADSL prices

### 6.1 Draft prices

Table 6.1 sets out the draft FAD prices for wholesale ADSL. These prices are based on the prices estimated using the amended FLSM based on the assumptions and forecasts described in chapter 4 and the price structure described in chapter 5. These prices are proposed to apply from the commencement of the FAD until 30 June 2014.

**Table 6.1: Draft FAD prices for wholesale ADSL (monthly charges) and IAD charges**

	Draft FAD prices (per month)	IAD prices (per month)	
	Until 30 June 2014	Up to 30 June 2012	From 1 July 2012
<b>Port price – Zone 1</b>	<b>\$24.56</b>	\$25.40	\$25.40
<b>Port price – Zone 2/3</b>	<b>\$29.81</b>	\$30.80	\$30.80
<b>AGVC/VLAN (per Mbps)</b>	<b>\$36.08</b>	\$45.50	\$33.65

The total cost-based prices (that is, the combined port and AGVC/VLAN charges) are somewhat lower than the retail-minus prices included in the IAD.

The ACCC proposes to include the following connection and ancillary charges in the FAD, based on the considerations set out in section 5.3 of this report.

**Table 6.2: Draft FAD connection charges**

Connection type	Charge per connection
<b>Completed Type A Transfer standard Transfer Request via LOLO/LOLIG</b>	<b>\$22.50</b>
<b>Completed Type B Transfer standard Transfer Request via LOLO/LOLIG</b>	<b>\$80.00</b>
<b>All other completed installation or transfer requests</b>	<b>\$80.00</b>

**Table 6.3: Draft FAD early termination charges**

<b>Circumstance</b>	<b>Charge per termination</b>
<b>Where the Service is connected for 6 months or longer</b>	<b>\$0</b>
<b>Where the Service is connected for less than 6 months</b>	<b>\$50</b>

## **6.2 Consideration of the legislated matters**

### **6.2.1 Paragraph 152BCA(1)(a) – whether the determination will promote the long-term interests of end-users**

To obtain the prices included in this draft decision, the ACCC used its FLSM to estimate prices based on the efficient costs of providing the declared fixed lines services. The ACCC considers that the prices included in the draft FAD reflect the efficient costs of supplying wholesale ADSL services and will therefore promote competition in the markets for carriage services, thereby promoting the LTIE.

Setting access prices for wholesale ADSL that are based on efficient costs will facilitate access seekers' ability to provide competitive services in retail markets. Moreover, the proposed prices will provide efficient signals for access seekers' decisions on market entry and their own complementary infrastructure investments.

Setting prices that allow the access provider to recoup its efficiently incurred costs, including a commercial return on its investments, will encourage the efficient use of, and investment in, the infrastructure used to provide wholesale ADSL services.

The ACCC considers that the price structures proposed to be adopted for wholesale ADSL will promote the LTIE. Specifying both a fixed port charge and a capacity-based AGVC charge recognises that the supply of wholesale ADSL involves fixed costs as well as costs that vary (over time) with data usage i.e. as greater network capacity is needed to meet demand for data. Maintaining the AGVC pricing structure, where access seekers' costs vary with the amount of AGVC capacity required to supply their end-users' data usage, provides price signals regarding the use of network capacity. Such price signals will encourage greater efficiency in the use of network capacity and promote efficient investments in expanding network capacity.

The ACCC considers that maintaining the two geographic zones for determining wholesale ADSL port prices will have efficiency benefits. The zone pricing structure results in higher prices in Zones 2/3, where the costs of supplying wholesale ADSL are, on average, higher than in Zone 1. The ACCC considers that efficiency is promoted by setting prices that reflect the costs of supply, subject to the available information about geographic differences in the costs of supplying the service. More closely aligning prices with the underlying costs of supply will create incentives for more efficient use and investment in the infrastructure used to supply wholesale ADSL services.

The ACCC considers that the connection and ancillary charges proposed for the FAD will promote the LTIE. Setting a key subset of ancillary charges in the FAD will prevent Telstra from exploiting any incentives it may have to raise the level of these charges to compensate for any loss of revenue from other services.

The ACCC considers that the objective of achieving any-to-any connectivity it is not directly relevant to estimating prices, as neither the price levels or price structures concern connectivity between telecommunications networks.

### **6.2.2 Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider**

The ACCC considers that the legitimate business interests of the access provider are promoted by setting access prices that allow it to recover its efficient costs of supplying wholesale ADSL services. Access prices that reflect efficient costs will support efficient investment decisions by the access provider.

The ACCC considers that the proposed connection and ancillary charges will promote the legitimate business interests of the access provider as they are likely to allow the access provider to recover the costs of providing these services.

### **6.2.3 Paragraph 152BCA(1)(c) – interests of all persons who have rights to use the declared service**

The ACCC has given weight to access seekers' interests in determining the values of the assumptions and inputs used to amend the FLSM to estimate the draft prices for wholesale ADSL.

The proposed prices will restrain the access provider from leveraging its market power by charging wholesale access prices that include monopoly profits. Access prices that included monopoly profits would unfairly disadvantage access seekers seeking to compete against the access provider in providing communications services to end-users.

Wholesale ADSL prices that reflect efficient costs will support efficient investments by access seekers. In addition, such prices will promote efficient investment decisions by the access provider in network assets used to supply wholesale ADSL services. Efficient investment in network assets will support the provision of services that meet the needs of access seekers in relation to service quality and availability.

### **6.2.4 Paragraph 152BCA(1)(d) – direct cost of providing access to the declared service**

The ACCC considers that the draft prices for wholesale ADSL will allow the access provider to recover its direct costs of providing access to the service.

The ACCC has identified and included the direct costs of providing access to wholesale ADSL in the FLSM. The proposed cost allocation factors used in the FLSM allocate directly attributable costs to the wholesale ADSL service. For costs that cannot be directly attributed

to the service, the cost allocation factors allocate a share of these indirect costs to wholesale ADSL based on allocation rules broadly related to the service's usage of network assets.

The ACCC considers that the proposed connection and ancillary charges will allow the access provider to recover the direct costs of providing those services.

#### **6.2.5 Paragraph 152BCA(1)(e) – value to a party of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that this criterion is not directly relevant to setting prices for wholesale ADSL.

#### **6.2.6 Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility**

The ACCC is of the view that the draft prices for the wholesale ADSL service will contribute to promoting the safe and reliable operation of the service and the access provider's network.

The draft prices for wholesale ADSL will allow Telstra to recover the efficient costs of providing the service. These costs include the costs of maintenance and asset replacements that are needed to meet the operational and technical requirements necessary for the safe and reliable operation of the wholesale ADSL service and the access provider's network. By ensuring that the access provider can meet the costs associated with these operational and technical requirements, the draft prices will provide an incentive for the access provider to undertake the necessary expenditures.

#### **6.2.7 Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service, a telecommunications network or a facility**

The ACCC considers that setting cost-based prices for the wholesale ADSL service will encourage the efficient operation of carriage services on the access provider's network.

Setting prices that recover efficient costs will provide the access provider with incentives to make efficient decisions relating to the operation of its network, provision of wholesale ADSL services, and investment in the assets used to provide the service.

#### **6.2.8 Paragraph 152BCA(2) – supply of one or more other eligible services**

In determining the draft prices for the wholesale ADSL service, the ACCC has taken into account the costs and revenues associated with providing other services over the access provider's network.

Using the FLSM to estimate the costs of supplying wholesale ADSL will ensure consistency with the pricing approach used in setting the prices for the other declared fixed line services, which use many of the same network assets as wholesale ADSL services. This will in turn reduce the risk of Telstra over- or under-recovering its costs of supplying the declared

services. The cost allocation factors in the FLSM ensure that only those costs incurred in providing the wholesale ADSL service are allocated to the service in estimating prices.

In determining the costs associated with supplying the wholesale ADSL service, the ACCC has also taken into account the recovery of network costs by other services, in particular copper line costs that are recovered via other services (e.g. the Wholesale Line Rental or other PSTN services).

## **Part B: Other terms and conditions**

This Part B discusses the inclusion of other terms and conditions in the FAD for wholesale ADSL, including:

- the scope of the application of the standard access obligations
- bundling with PSTN services
- points of interconnection for the wholesale ADSL service
- standard non-price terms and conditions, and
- other issues.

The matters that the ACCC must take into account when making an FAD are discussed in **Appendix C**. In coming to a draft position on the price terms and conditions for the wholesale ADSL FAD, the ACCC had regard to these matters.

## 7 Scope of the application of the standard access obligations

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 of the CCA. The category A SAOs require that an access provider:

- supplies the service to an access seeker on request
- takes 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
- allows interconnection<sup>180</sup>

As the wholesale ADSL service was declared on a national basis, the SAOs apply to all access providers nationally. However, the ACCC may include terms and conditions in the FAD which provide that the SAOs do not apply to a carrier or carriage service provider (CSP) either unconditionally or subject to certain conditions and limitations.<sup>181</sup> The ACCC generally refers to the inclusion of such terms in an FAD as ‘exemptions’; however these differ from ‘exemption orders’ that could be made under the previous legislative regime.<sup>182</sup>

In the July 2012 Issues Paper, the ACCC sought submissions on two potential exemptions which could limit the scope of application of the SAOs in respect of the wholesale ADSL service.

First, the ACCC sought submissions on the issue of geographic exemptions, which was raised by Telstra in the declaration inquiry. The question was whether certain metropolitan Exchange Service Areas (ESAs) should be exempt from the application of the SAOs because the deployment of DSLAM infrastructure in those areas provides a sufficient competitive constraint on Telstra.

Second, the ACCC sought submissions on the issue of carrier-specific exemptions. In the IAD, the ACCC specified that the SAOs were not applicable to operators of ‘non-dominant networks’.<sup>183</sup> The reason for including carrier-specific exemptions was that only Telstra’s access terms have given rise to competition concerns in regard to the service.

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<sup>180</sup> Section 152AR of the CCA.

<sup>181</sup> Subsections 152BC(3)(h) and (i) of the CCA.

<sup>182</sup> The ACCC is permitted to make an Access Determination that does a range of things, including providing that category A SAOs do not apply in a manner specified by the Access Determination - *Competition and Consumer Act 2010*, subsections 152BC(3)(h) and (i).

<sup>183</sup> Operators of ‘non-Telstra networks’ are access providers other than Telstra.

## 7.1 Geographic exemptions

### 7.1.1 Background

The issue of ESA based exemptions from SAOs based on other presence of competitor-installed equipment has been extensively considered previously by the ACCC.<sup>184</sup>

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

In the February 2012 Final Decision on declaring the wholesale ADSL service, the ACCC considered that having applied the LTIE test on a national basis it was appropriate to declare the service on a national basis. The ACCC considered that Telstra had not made a compelling case to exempt the then 285 ESAs that Telstra submitted met the Australian Competition Tribunal's (Tribunal) threshold test for the WLR/LCS and PSTN OA exemptions (the 'competitive footprint', as defined by Telstra).<sup>185</sup> However, the ACCC noted that the access determination inquiry would provide a further opportunity to consider the issue.<sup>186</sup>

In the July 2012 Issues Paper, the ACCC identified a number of issues relevant to determining whether infrastructure-based competition in certain ESAs in which DSLAMs are deployed is sufficient to warrant geographic exemptions from the application of the SAOs.

The ACCC considered a number of factors are relevant to determining the effectiveness of competition, such as the market structure, the state of competition, effective use of infrastructure, the availability of substitutes, supply-side constraints and the conduct of market participants.

The ACCC sought submissions on Telstra's proposed test for assessing effective competition based on the scale of competitive entry and investment in DSLAM infrastructure. Specifically, Telstra proposed to include geographic exemptions for the 289<sup>187</sup> ESAs where the three largest DSLAM network operators have a presence.

The ACCC considered that both ULLS and LSS, used in conjunction with DSLAMs and transmission services, are substitutable for wholesale ADSL, subject to the limitation

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<sup>184</sup> ACCC, *Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services*, Issues Paper, September 2011, pp. 10-17.

<sup>185</sup> Telstra, *Response to the Commission's Discussion Paper into whether wholesale ADSL services should be declared under Part XIC of the Competition and Consumer Act 2010*, 19 January 2012, p. 18.

<sup>186</sup> ACCC, *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*, Final Decision, February 2012, pp. 54-56.

<sup>187</sup> In its response to the ACCC's February 2012 Discussion Paper (and subsequent references), Telstra amended the number of ESAs it proposed should include geographic exemptions from 285 to 289.



imposed by the use of large pair gain systems (LPGS).<sup>188</sup> In areas where HFC and optic fibre are available, they also provide competitive alternatives to ADSL services in the fixed broadband market. However, the ACCC did not consider mobile wireless services to be in the relevant market.

The ACCC also sought submissions on the extent to which the use of LPGS may affect competition in the competitive footprint and how it may be taken into account in setting the terms of the FAD.

The use of LPGS enables more end-users to connect to Telstra's network but lines affected by LPGS are not contestable by services provided over ULLS or LSS. Therefore access seekers have to purchase wholesale ADSL from Telstra to provide retail broadband services to those end-users on lines affected by LPGS. Some ESAs in Telstra's proposed competitive footprint have lines affected by LPGS. A large number of pair gain lines in an ESA may also reduce incentives for investment in DSLAM infrastructure because a smaller proportion of lines in the ESA can be serviced using ULLS or LSS.

The ACCC considered the conduct of market participants and noted a number of concerns in relation to Telstra's conduct as the dominant access provider in relation to the price and structure of wholesale ADSL pricing, inefficient price discrimination and leveraging conduct.

The ACCC sought submissions on any market evidence that the availability of substitutes has acted as a competitive constraint on Telstra's terms and conditions in relation to the wholesale ADSL service, and the likely effect geographic exemptions in certain ESAs would have on Telstra's behaviour in relation to those ESAs.

### **7.1.2 Summary of submissions**

In response to the ACCC's July 2012 Issues Paper, Telstra submitted that the ACCC should allow for geographic exemptions in 289 'competitive ESAs' (the 289 ESAs) and stated that extending exemptions beyond the 289 ESAs would be in the LTIE. Conversely, AAPT, Herbert Geer (on behalf of Adam Internet and iiNet), Macquarie Telecom and Optus submitted that there should be no geographic exemptions and that the FAD should apply on a national basis.

#### ***Market structure and the state of competition***

Telstra submitted that the ACCC should exempt service providers from the application of the SAOs within the 289 ESAs. Telstra submitted that, within the 289 ESAs, there is a minimum presence of Optus, iiNet, TPG and Telstra DSLAMs. As a result, retail and wholesale customers are able to purchase services from a range of providers.<sup>189</sup>

Telstra stated that the number of entrants, presence of competitive infrastructure and ongoing investment, changes in market share, churn and changes in end-user value and service

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<sup>188</sup> LPGS allow a large number of premises to be connected to Telstra's copper network through the use of a street-side cabinet. Each end-user is connected to the cabinet by way of a dedicated copper line, with the cabinet connected back to one of Telstra's exchange buildings by means of an optical fibre.

<sup>189</sup> Telstra, August 2012 non-price terms submission, pp. 19-20 & 75.

innovation all indicate that the 289 ESAs are effectively competitive. Telstra considered that these factors would act as a competitive constraint on all retail and wholesale ADSL service providers.<sup>190</sup>

Telstra provided a graphical comparison of Telstra retail, Telstra wholesale and ULLS/LSS SIOs for the 289 ESAs. Telstra submitted that the higher share of ULLS/LSS DSL SIOs in these ESAs is attributable to the previous absence of a regulated ADSL resale service.<sup>191</sup>

Macquarie Telecom submitted that Telstra has an ‘overwhelming’ wholesale ADSL market share, which provides it with market power. It further submitted that the industry is currently in a phase of consolidation, which is making existing market structures unstable.<sup>192</sup>

Optus submitted that Telstra has the majority of market shares in ULLS band 1 and 2 areas, citing previous ACCC findings.<sup>193</sup>

AAPT submitted that applying regulation on a ‘geographically segmented’ basis may reduce competition in currently competitive areas as ‘segmented regulation’ could result in unfair bundling of regulated and non-regulated products and permit cross-subsidies between unregulated and regulated areas.<sup>194</sup>

Herbert Geer (on behalf of Adam Internet and iiNet) submitted that granting the exemptions would reduce the ability of access seekers to compete, particularly access seekers that have not installed DSLAMs in the exempt ESAs. Further, it would enable Telstra to leverage its non-regulated position in the exempt ESAs to reduce competition in exempt and non-exempt ESAs.<sup>195</sup>

### *Large pair gain systems (LPGS)*

In response to the July 2012 Issues Paper, Telstra submitted that ‘LPGS do not limit the competitive constraint of ULLS/LSS-based services (particularly within the 289 ESAs)’.<sup>196</sup> It stated that LPGS has not negatively impacted on competition in the market for DSL services because:

- LPGS serve only [c-i-c] [c-i-c] of total CAN SIOs within the 289 ESAs
- The presence of LPGS has not reduced investment in DSLAMs or the take-up of unbundled services
- End-users supplied by Telstra using LPGS benefit from Telstra’s response at the retail and wholesale level to DSLAM-based competition
- Telstra is not able to bill wholesale customers on a SIO by SIO basis. It is therefore unable to adopt differentiated billing based on whether an end-user is served by an exchange or cabinet-based DSLAM

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<sup>190</sup> Ibid, pp. 10-13, 17-19 & 76.

<sup>191</sup> Telstra, August 2012 non-price terms submission, p. 23.

<sup>192</sup> Macquarie Telecom, August 2012 submission, pp. 4-5.

<sup>193</sup> Optus, April 2012 submission, p. 26.

<sup>194</sup> AAPT, April 2012 submission, pp. 9-10.

<sup>195</sup> Herbert Geer, April 2012 submission, pp. 28-29.

<sup>196</sup> Telstra, August 2012 non-price terms submission, p. 75.

- Recent Telstra investment (including the Top Hat project) has reduced the degree of service differentiation for end-users served by LPGS. Such end-users get access to ADSL2+, where they previously were restricted to ADSL headline speeds.<sup>197</sup>

On 19 October 2012, Telstra submitted that the use of LPGS is not currently being expanded in the network, but that it would be if the need arose. Telstra noted that existing cabinets either have POTS<sup>198</sup> only or POTS plus limited ADSL capability and capacity and that none have ADSL2+ capability.<sup>199</sup>

Telstra submitted that the Top Hat project installs ADSL2+ capable DSLAMs on top of existing LPGS cabinets.<sup>200</sup> Telstra submitted that Top Hats are being installed at sites where there is presently limited or no broadband capacity and there is a known level of demand for broadband services. Telstra noted that, where a LPGS-affected end-user can be served by copper running to the exchange and capacity exists, they can be enabled for ULLS/LSS. In addition, Telstra's systems and processes prevent an end-user being moved from a working exchange-based service to a cabinet-based service.<sup>201</sup>

Optus, the Competitive Carriers' Coalition, Herbert Geer, Macquarie Telecom and AAPT all made submissions that LPGS impose a significant limitation on the ability of ULLS/LSS to constrain Telstra within the retail and wholesale markets.<sup>202</sup> They submitted further that if geographic exemptions are granted, such exemptions should not extend to SIOs connected via LPGS.<sup>203</sup>

Herbert Geer submitted that end-users connected via LPGS cannot be served by ULLS or LSS. Therefore, these end-users can only be served via Telstra retail services or by an access seeker reselling Telstra's wholesale ADSL service. End-users can request Telstra to shift their service to a continuous copper line, but this is only possible in rare cases where a spare line is available.<sup>204</sup>

AAPT submitted that LPGS are increasing in number and in the size of the LPGS footprint and that Telstra's Top Hat project will increase the number of ADSL services that can only be supplied by the Telstra ADSL network.<sup>205</sup> Similar submissions were made by most access seekers.

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<sup>197</sup> Ibid, p. 21.

<sup>198</sup> Plain Old Telephone Service.

<sup>199</sup> Telstra, October 2012 submission, p. 7.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid, p. 8.

<sup>202</sup> Optus, August 2012 submission, p. 12; CCC, August 2012 submission, p. 2; Herbert Geer, August 2012 submission, 24 August 2012, p. 6; Macquarie Telecom, August 2012 submission, p. 5; AAPT, August 2012 submission, pp. 5-6.

<sup>203</sup> Herbert Geer, August 2012 submission, p. 7.; AAPT, August 2012 submission, p. 11.

<sup>204</sup> Herbert Geer, August 2012 submission, p. 6.

<sup>205</sup> AAPT, August 2012 submission, p. 11.

Optus submitted LPGS are ‘distributed widely throughout the CAN’ and if certain geographic areas are exempted from the SAOs it will have the effect of denying access seekers from accessing Telstra’s wholesale ADSL services on LPGS affected lines.<sup>206</sup>

Herbert Geer submitted that, in addition to preventing access seekers from providing ADSL services over their own DSLAM networks, LPGS ‘damages an ISP’s brand and ability to market their services to all consumers’. That is, where an advertised ADSL product cannot be supplied to a customer, due to the presence of LPGS, this reflects poorly on the ISP, rather than the underlying provider (Telstra) that installed the LPGS.<sup>207</sup>

### *Efficient use of, and investment in, infrastructure*

Telstra submitted that the ‘application of the SAOs increases the regulatory risks faced by Telstra in investing to provide ADSL services’. Unnecessary regulatory intervention would risk undermining competitive market dynamics because it would:<sup>208</sup>

- reduce competitive investment, innovation and differentiation among wholesale ADSL service providers (including Telstra)
- restrict Telstra’s ability to compete with other wholesale service providers
- increase transaction costs and impose additional costs on the market and
- increase the overall level of regulatory uncertainty and risk, leading to increased costs and suboptimal investment decisions.

Access seekers submitted that giving effect to geographic exemptions will not alter Telstra’s investment incentives.

Herbert Geer submitted that applying the SAOs to Telstra will result in it achieving a lower, but reasonable, rate of return from its wholesale customers. Where Telstra can generate profits, the incentive to invest will remain.<sup>209</sup>

Macquarie Telecom submitted that Telstra has a significant disincentive to invest in copper infrastructure, regardless of whether or not the SAOs apply in all or some of the ESAs. Telstra’s incentives to invest in copper infrastructure are likely to be influenced by its contractual agreement with NBN Co to migrate its customers to the NBN and decommission its network.<sup>210</sup>

Telstra submitted that applying regulated prices in ESAs where service providers have already made, and continue to make, investments that enable them to compete for wholesale and retail ADSL customers, is likely to reduce investment incentives. Telstra cited previous public statements by TPG and iiNet in support of its submission.<sup>211</sup>

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<sup>206</sup> Optus, April 2012 submission, pp. 26-27.

<sup>207</sup> Herbert Geer, August 2012 submission, p. 6.

<sup>208</sup> Telstra, August 2012 non-price terms submission, pp. 17 & 24.

<sup>209</sup> Herbert Geer, August 2012 submission, p. 12.

<sup>210</sup> Macquarie Telecom, August 2012 submission, p. 10.

<sup>211</sup> Telstra, August 2012 non-price terms submission, p. 22.

Access seekers submitted that regulating the wholesale ADSL service will not materially alter investment in, and usage of existing, competitive DSLAM infrastructure.

A number of DSLAM infrastructure owners submitted that they will continue to use, and not decommission, their existing DSLAMs, irrespective of the application of the SAOs to the 289 ESAs.<sup>212</sup> Optus stated that [c-i-c] [c-i-c].<sup>213</sup> In addition, AAPT stated that DSLAMs [c-i-c] [c-i-c].<sup>214</sup>

Access seekers submitted that the benefits of self-supplying, rather than purchasing, wholesale ADSL services include:

- control over the technical specifications (and input costs) of backhaul, core and broadband access networks<sup>215</sup>
- lower ULLS prices, relative to wholesale ADSL<sup>216</sup>
- provision of both data and voice services<sup>217</sup>
- superior quality control<sup>218</sup> and
- ability to differentiate products.<sup>219</sup>

Herbert Geer and Optus submitted that access seekers will continue to invest in DSLAMs where it is efficient and profitable to do so.<sup>220</sup> However, AAPT and Macquarie Telecom submitted that they have [c-i-c] [c-i-c].<sup>221</sup> AAPT stated that it [c-i-c] [c-i-c].<sup>222</sup> Optus submitted that [c-i-c] [c-i-c].<sup>223</sup>

AAPT stated that [c-i-c] [c-i-c].<sup>224</sup>

Optus and Herbert Geer submitted that the rollout of the NBN has resulted in a decline in DSLAM investment (both in expansion and deepening of access seekers' DSLAM footprints) by reducing the expected return from a DSLAM investment. This was attributed to the NBN roll-out reducing the available time to recoup DSLAM investment costs.<sup>225</sup>

Optus provided cost estimates of DSLAM installation costs and stated that the planning, funding approval and construction lead time is in excess of [c-i-c] [c-i-c].<sup>226</sup>

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<sup>212</sup> Macquarie Telecom, August 2012 submission, p. 9; [c-i-c] [c-i-c].

<sup>213</sup> Optus, August 2012 submission, p. 22.

<sup>214</sup> AAPT, August 2012 submission, p. 16.

<sup>215</sup> Herbert Geer, August 2012 submission, p. 10; AAPT, August 2012 submission, p. 15.

<sup>216</sup> Optus, August 2012 submission, pp. 21-22.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Herbert Geer, August 2012 submission, p. 11; Optus, August 2012 submission, pp. 21-22.

<sup>221</sup> AAPT, August 2012 submission, p. 17; Macquarie Telecom, August 2012 submission, p. 9.

<sup>222</sup> AAPT, August 2012 submission, pp. 15-16.

<sup>223</sup> Optus, August 2012 submission, p. 14.

<sup>224</sup> AAPT, August 2012 submission, p. 16.

<sup>225</sup> Optus, August 2012 submission, pp. 14, 20-21; Herbert Geer, August 2012 submission, pp. 11-12.

<sup>226</sup> Optus, August 2012 submission, p. 16.

Optus submitted that if geographic exemptions are granted, access seekers will be forced to invest in expanding or upgrading their DSLAMs, even when it is not efficient to do so. This is because access seekers must guarantee ongoing services to end-users in order to gain sufficient scale to compete effectively over the NBN.<sup>227</sup>

Telstra submitted that since the Australian Government announced the NBN roll-out, there has been no identifiable impact on DSLAM deployment. Telstra also submitted that the number of spare interconnect pairs held by access seekers within the 289 ESAs is sufficient to service the entire market for DSL services within the 289 ESAs.<sup>228</sup>

### **7.1.3 ACCC draft views**

In its Final Decision the ACCC decided to declare the wholesale ADSL service on a national basis, but noted that the wholesale ADSL access determination inquiry would provide it with another opportunity to consider this issue.<sup>229</sup>

The ACCC has decided not to make terms and conditions that give effect to geographic exemptions in the wholesale ADSL FAD. In arriving at this decision, the ACCC has considered and formed views on three key issues that are relevant to the LTIE and the other legislative matters to which it must have regard:

- market structure and the state of competition
- the impact of large pair gain systems on the scope for competition and
- efficient use of, and investment in, infrastructure.

The ACCC's assessment of its decision against the legislative matters to which it must have regard is set out in section 7.3.

### **7.1.4 Market structure and state of competition**

The ACCC's examination of market conditions and investment trends that existed prior to the declaration of wholesale ADSL (i.e. where wholesale ADSL was unregulated) provides the best available indicator of the expected effect of giving effect to geographic exemptions within the 289 ESAs.

There is evidence that access seekers have a larger market share, and the state of competition is stronger, within the 289 ESAs than in the national market as a whole. Nevertheless, Telstra has a higher combined wholesale and retail ADSL market share in the 289 ESAs than any of the access seekers in those ESAs. In addition, market structures and the state of competition vary significantly across the 289 ESAs, with Telstra retaining a dominant position in a significant proportion of them.

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<sup>227</sup> Ibid, p. 22.

<sup>228</sup> Telstra, August 2012 non-price terms submission, pp. 8-9.

<sup>229</sup> ACCC, *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final Decision*, February 2012, pp. 54-56.

In regard to the resale supply of wholesale ADSL services, Telstra remains the dominant provider and is likely to remain so. This is because, for certain segments of the market, there are commercial barriers that reduce the contestability of those market segments by access seekers.

Taking these considerations into account, the ACCC considers that Telstra is unlikely to be significantly constrained by alternative wholesale ADSL service offerings by competing providers in the 289 ESAs as a whole. This section sets out the ACCC's detailed reasoning in reaching this conclusion.

In considering the state of competition, the ACCC's first step is to define the relevant market. The ACCC maintains its view, for the same reasons as set out in its wholesale ADSL declaration decision,<sup>230</sup> that the relevant markets for the services to which this FAD relates are the national wholesale and retail markets for fixed line broadband services. Specifically, at a product level, the ACCC maintains its view that:

- all forms of ADSL1 and ADSL2+ are in the relevant market<sup>231</sup>
- HFC is part of the same market as retail ADSL services, but that neither Optus nor Telstra's networks are configured for wholesale resale<sup>232</sup>
- optical fibre is in the relevant market, but the effect of its constraint on ADSL services may be limited<sup>233</sup> and
- wireless broadband is not in the same market as ADSL.<sup>234</sup>

Consistent with the ACCC's final declaration decision for wholesale ADSL, and for the same reasons set out in that decision, the ACCC will use the ESA, or groupings of ESAs, as a basis for considering geographic exemptions.<sup>235</sup>

As at June 2012, the 289 ESAs cumulatively contained approximately [CAN RKR c-i-c] [CAN RKR c-i-c] of all [CAN RKR c-i-c] [CAN RKR c-i-c] ADSL SIOs.<sup>236</sup> Within the 289 ESAs, approximately [CAN RKR c-i-c] [CAN RKR c-i-c] per cent of ADSL services are supplied by Telstra ADSL infrastructure (i.e. Telstra wholesale or Telstra retail services), compared to over [CAN RKR c-i-c] [CAN RKR c-i-c] per cent outside of the 289 ESAs.<sup>237</sup>

Figure 7.1 shows the increase in ADSL SIOs in the 289 ESAs during the period September 2007 to June 2012, which is represented by the shaded area. The proportion of ADSL SIOs supplied by access seekers using ULLS/LSS grew over the period, but at a declining rate, which is represented by the dashed line.

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<sup>230</sup> Ibid, pp. 9-16.

<sup>231</sup> Ibid, p. 12.

<sup>232</sup> Ibid, p. 11.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> As HFC data is not disaggregated in a manner that can be reconciled with ADSL data from the CAN RKR, the ACCC has not been able to precisely assess the effect of HFC on competition within the 289 ESAs.

<sup>236</sup> CAN RKR data – June 2012.

<sup>237</sup> Ibid.

**Figure 7.1: Growth of ADSL services in operation in the 289 ESAs, September 2007 to June 2012 [CAN RKR c-i-c]**

**[CAN RKR c-i-c]**

Note: CAN RKR data includes both wholesale and retail SIOs supplied by Telstra (POTS + ADSL) and access seekers (ULLS +LSS).

The ACCC notes that, as at June 2012, ULLS/LSS SIOs comprised approximately [CAN RKR c-i-c] [CAN RKR c-i-c] per cent of all ADSL SIOs within the 289 ESAs. This was an increase of less than [CAN RKR c-i-c] [CAN RKR c-i-c] per cent from June 2011.<sup>238</sup> This may indicate that the relative market shares of Telstra and access seekers within the 289 ESAs are beginning to stabilise.

Telstra remains the largest single supplier of wholesale and retail ADSL services in the 289 ESAs, with a total market share of [CAN RKR c-i-c] [CAN RKR c-i-c] per cent in June 2012. In comparison, Optus, TPG and iiNet respectively supplied [CAN RKR c-i-c] [CAN RKR c-i-c], [CAN RKR c-i-c] [CAN RKR c-i-c] and [CAN RKR c-i-c] [CAN RKR c-i-c] per cent of ADSL SIOs within the 289 ESAs over their own infrastructure.<sup>239</sup> Telstra's market share remains significantly larger than that of its largest competitor.

Further, the proportion of ADSL SIOs in the 289 ESAs that are supplied using ULLS and LSS ranges between [CAN RKR c-i-c] [CAN RKR c-i-c] per cent and [CAN RKR c-i-c] [CAN RKR c-i-c] per cent across these ESAs, as shown by figure 7.2.<sup>240</sup> Examining the 289 ESAs at a more granular level indicates that market structures and the state of competition vary significantly across them, with a significant proportion being much less competitive than for the 289 ESAs on average.

This evidence indicates that in some of the 289 ESAs, Telstra is unlikely to be significantly constrained by alternative wholesale ADSL service offerings by competing providers.

**Figure 7.2: Variation in the proportion of ULLS and LSS SIOs across the 289 ESAs, June 2012 [CAN RKR c-i-c]**

**[CAN RKR c-i-c]**

The ACCC has also examined the state of competition for the resale supply of wholesale ADSL services using aggregate data for Telstra's Zone 1 obtained during this inquiry and previous inquiries. Table 7.1 shows that the number of Telstra wholesale ADSL SIOs in Zone 1 is significantly larger than those of Optus, iiNet and AAPT.

While Zone 1 does not coincide exactly with the 289 ESAs and the data is compiled from different sources and dates, the ACCC notes that it has used the best available information

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<sup>238</sup> CAN RKR data – June 2011 and June 2012.

<sup>239</sup> CAN RKR data – June 2012.

<sup>240</sup> CAN RKR data – June 2012.



and that such information can be used as a reasonable proxy for the 289 ESAs. From this data, the ACCC is of the view that Optus is the only major competitor to Telstra in the provision of wholesale ADSL services.

**Table 7.1: Number of wholesale ADSL SIOs**

	Optus	iiNet	TPG	AAPT	Telstra (TW Zone 1)
No. of ESAs in which ADSL services are provided	[CAN RKR c-i-c]			[CAN RKR c-i-c]	554
No. of wholesale ADSL SIOs	[c-i-c] [c-i-c]	[c-i-c] [c-i-c] c]	[c-i-c] [c-i-c]	[c-i-c] [c-i-c]	[c-i-c] [c-i-c]

The ACCC considers that Telstra’s market share of resale wholesale ADSL services, at [c-i-c] [c-i-c], is large enough to be dominant.

The ACCC notes Optus’ submission that it is unable to provide its wholesale customers with the national coverage that they often require (so as to allow them to supply retail customers in both metropolitan and regional areas) using only its own DSLAM network.<sup>241</sup>

The ACCC also notes that there are significant incremental costs to sourcing wholesale ADSL services from multiple suppliers. For example, Optus submitted that wholesale customers face IT integration costs per wholesale ADSL supplier of [c-i-c] [c-i-c].<sup>242</sup>

The ACCC considers that these factors will create barriers for some access seekers in purchasing non-Telstra wholesale ADSL services. Consequently Telstra is likely to retain its dominant position in supplying wholesale ADSL services.

Taking these considerations into account, the ACCC is of the view that Telstra is likely to retain its dominant position in supplying wholesale ADSL services in the 289 ESAs as a whole. The presence of LPGS (discussed below) further extends the segment of the wholesale and retail market that cannot be addressed by non-Telstra suppliers of wholesale ADSL services and by access seekers using ULLS/LSS and their own DSLAMs.

### 7.1.5 Large pair gain systems

With respect to end-users served by LPGS, the ACCC has reached the draft view that giving effect to geographic exemptions has the potential to negatively impact on retail competition within the 289 ESAs. This view is based on two findings. First, the presence of LPGS reduces the substitutability of ULLS/LSS (in conjunction with the use of access seekers’ own DSLAMs) for wholesale ADSL services. Second, giving effect to geographic exemptions has the potential to reduce the competitiveness of access seekers’ ‘off-net’ retail plans with Telstra’s retail plans (due to the absence of a regulated wholesale ADSL price), in addition to preventing access seekers’ ‘on-net’ plans being offered to LPGS served end-users.

<sup>241</sup> Optus, August 2012 submission, pp. 19 & 24.

<sup>242</sup> Ibid, p. 19.

This section sets out the ACCC's reasons in reaching its view on the impact of LPGS.

LPGS allow a large number of premises to be connected to Telstra's copper network through the use of a street-side cabinet. Each end-user is connected to the cabinet by way of a dedicated copper line, with the cabinet connected back to one of Telstra's exchange buildings by means of an optical fibre. These were initially installed as a way of supplementing Telstra's exchange building infrastructure and boosting capacity on Telstra's PSTN network.

Telstra submitted that LPGS serve [c-i-c] [c-i-c] per cent of total CAN SIOs within the 289 ESAs.<sup>243</sup> It also indicated that the number of LPGS is no longer increasing, as they 'were deployed in the CAN at a time when it was considered a best practice approach for the cost effective extension of PSTN services to end users'.<sup>244</sup>

Over time, limited numbers of end-users served by LPGS were given access to ADSL services from Telstra. More recently, Telstra has been rolling out its Top Hat project, which involves the installation of DSLAMs on top of existing street cabinets across the CAN. As a result, a greater proportion of the [c-i-c] [c-i-c] per cent of end-users served by LPGS in the 289 ESAs are able to access Telstra's retail or wholesale based ADSL services. It is the ACCC's understanding that Telstra's Top Hat project is delivering end-users ADSL2+ services that are identical to those provided through exchange-based DSLAMs.

Access seekers have submitted that the presence of LPGS limits the ability of self-supply using ULLS/LSS and access seekers' own DSLAMs to constrain Telstra's wholesale ADSL service offerings. The ACCC found in the declaration inquiry for wholesale ADSL that:<sup>245</sup>

Telstra's cabinets are not designed to accommodate third-party DSLAM equipment, and hence network operators would need to install their own cabinet and obtain ULLS or LSS services via a cross-connect cable. The relatively high costs associated with installing this infrastructure and the limited number of serviceable customers results in unprofitable deployment of DSLAMs.

The ACCC is of the view that the presence of LPGS is a technological impediment that limits the substitutability of ULLS/LSS for Telstra's wholesale ADSL services. As a consequence, this limits the ability of non-Telstra providers to constrain the pricing and terms and conditions of supply of Telstra's wholesale ADSL services within the 289 ESAs.

Telstra submitted that this limitation on substitutability does not result in harm to competition at the retail and wholesale levels. Telstra argued that end-users on Telstra's network benefit from Telstra's response to DSLAM-based competition, which affects its national uniform retail prices and thus has flow-on benefits for end-users affected by LPGS.<sup>246</sup>

The ACCC notes that Telstra's retail plans differ in price and data inclusions from access seeker 'off-net' plans (i.e. services that use the wholesale ADSL service as an input). The ACCC considers that end-users are likely to benefit from the availability of competitive 'off-net' plans because they can choose a plan that best suits their own needs. This is particularly

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<sup>243</sup> Telstra, August 2012 non-price terms submission, p. 21.

<sup>244</sup> Telstra, October 2012 submission, p. 7.

<sup>245</sup> ACCC, *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final Decision*, February 2012, p. 24.

<sup>246</sup> Telstra, August 2012 non-price terms submission, p. 15.

important for LPGS served end-users, for whom access seekers' 'on-net' plans are not available. The ACCC considers that removing access to a regulated wholesale ADSL price in the 289 ESAs by giving effect to geographic exemptions has the potential to reduce the competitiveness of access seeker 'off-net' retail plans with Telstra's retail plans, with detrimental effects on the interests of LPGS served end-users.

Having regard to these considerations, the ACCC is of the view that giving effect to geographic exemptions would not be in the LTIE and would be likely to harm competition in respect of SIOs affected by LPGS.

### **7.1.6 Efficient use of, and investment in, infrastructure**

The ACCC considers that the potential effect on productive, allocative and dynamic efficiency is an important consideration in assessing the benefits of giving effect to geographic exemptions.

In the declaration decision, the ACCC described these concepts of economic efficiency as:<sup>247</sup>

- *Productive efficiency* refers to the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs.
- *Allocative efficiency* refers to the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers. It also refers to the distribution of production costs amongst firms within an industry to minimise industry-wide costs.
- *Dynamic efficiency* refers to the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

The expected impact of giving effect to geographic exemptions on these aspects of economic efficiency are directly relevant to the legislative criteria relating to the efficient use of and investment in infrastructure. The ACCC considers that the relevant infrastructure includes Telstra's network assets used in supplying ADSL services and access seekers' DSLAM footprints.

In response to the July 2012 Issues Paper, interested parties predominantly submitted on the investment incentives that geographic exemptions may create for Telstra and non-Telstra owners of DSLAM networks.

As noted in section 7.1.2, Telstra submitted that applying the SAOs in the 289 ESAs will increase the regulatory risks faced by Telstra in investing to provide ADSL services. It indicated that regulatory risk can lead to increased costs and suboptimal business, marketing and investment decisions.<sup>248</sup>

Conversely, access seekers submitted that giving effect to geographic exemptions will not alter Telstra's investment incentives. In regard to an access seeker's own investment

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<sup>247</sup> ACCC, *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*, Final Decision, February 2012, p. 50.

<sup>248</sup> Telstra, August 2012 non-price terms submission, p. 24.

incentives, access seekers submitted that there are benefits of self-supplying rather than purchasing wholesale ADSL services. Consequently, regardless of the presence or non-presence of geographic exemptions, access seekers are likely to continue to expand and deepen their DSLAM footprints where it is profitable to do so and to continue to use their existing DSLAMs to supply ADSL services.

To obtain evidence on actual investments by access seekers, the ACCC has examined recent changes in the size of the access seeker DSLAM footprint. The ACCC has made two main findings.

First, the rate of expansion in the density of the access seeker DSLAM footprint, that is the number of access seekers in each ESA, has slowed. The ACCC has examined the aggregate number of ESAs in which each access seeker has installed at least one DSLAM. This indicator increased by [CAN RKR c-i-c] [CAN RKR c-i-c] per cent in the 12 months to September 2012, compared to [CAN RKR c-i-c] [CAN RKR c-i-c] per cent in the 12 months to December 2011 and [CAN RKR c-i-c] [CAN RKR c-i-c] per cent in the 12 months to December 2008.<sup>249</sup>

Second, expansion of the access seeker DSLAM footprint has also slowed. During the 12 months to September 2012, the number of ESAs that saw the installation of a first access seeker DSLAM (i.e. went from no access seeker presence to at least one) grew by [CAN RKR c-i-c] [CAN RKR c-i-c] per cent.<sup>250</sup> This compares with the annual growth to September 2008, 2009, 2010 and 2011 of [CAN RKR c-i-c] [CAN RKR c-i-c] per cent, respectively.<sup>251</sup>

The ACCC considers that there are a number of explanations for the slowing in the widening and deepening of the access seeker DSLAM footprint. A potential reason identified in a number of access seeker submissions is that the rollout of the NBN may have reduced the payback period for DSLAM investments. A further potential reason is that the expected commercial returns from further DSLAM investments falls as the footprint expands. This is because access seekers are more likely to install DSLAMs in the more profitable ESAs before expanding their DSLAM footprint to less profitable ESAs.

As these trends commenced and predominantly existed during a period where wholesale ADSL was unregulated, they are likely to provide a reasonable indication of access seekers' likely infrastructure investments were the ACCC to give effect to geographic exemptions, given that the broader environment for DSLAM investments has not changed significantly since the declaration of the wholesale ADSL service in February 2012.

Further, the ACCC notes that its analysis of DSLAM investments relates to the entire access seeker DSLAM footprint. The ACCC expects that a similar analysis of the 289 ESAs would find a more pronounced reduction in the growth of access seeker density because the narrower footprint of 289 ESAs, which by definition all contain at least three access seekers, is likely to be more mature and saturated than the full DSLAM footprint.

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<sup>249</sup> CAN RKR data – December 2008, December 2011 & September 2012.

<sup>250</sup> CAN RKR data – September 2011 & September 2012.

<sup>251</sup> CAN RKR data – September 2007, September 2008, September 2009, September 2010 & September 2011.

In regard to Telstra's investment incentives, the ACCC considers that Telstra has the incentive to invest where it can make a reasonable rate of return on an investment. The ACCC's FAD pricing approach and prices (see Part A) will enable Telstra to recoup its efficient investment costs over time and recover a risk adjusted rate of return on those investments. For these reasons, the ACCC is of the view that it is unlikely that the presence of a regulated wholesale ADSL price for the 289 ESAs will alter Telstra's incentives to invest efficiently.

Having regard to all of these considerations, the ACCC is of the view that giving effect to geographic exemptions is unlikely to better promote efficient investment in competitive infrastructure or reduce incentives to make efficient use of existing infrastructure.

## **7.2 Carrier-specific exemptions**

Once a service is declared, an access providers supplying the declared service to itself or to another person must also supply the service, upon request, to service providers in accordance with the SAOs set out in section 152AR. Service declaration therefore imposes access obligations on all network operators that supply the declared service, regardless of whether they currently supply wholesale access services to third parties.<sup>252</sup>

The ACCC has included a term in the FAD exempting all non-Telstra access providers from the SAOs on the grounds that they are already sufficiently constrained by competition from Telstra.

In assessing whether giving effect to carrier-specific exemptions will promote the LTIE, for the purposes of which the ACCC must have regard to the extent to which carrier-specific exemptions are likely to result in the achievement of the objectives of promotion of competition in downstream markets and efficient use of and investment in infrastructure, the ACCC has adopted a similar approach to assessing the degree of competitive constraint as that used in the ACCC's assessment of the expected impact of giving effect to geographic exemptions. The subset of ESAs under consideration is the competitive footprint, that is ESAs where at least one access seeker has installed its own DSLAMs.

### **7.2.1 Background**

In the July 2012 Issues Paper, the ACCC identified a number of relevant considerations when assessing the degree of competitive constraint the non-Telstra operators face from Telstra. It also noted that Telstra's market share in supplying wholesale ADSL significantly exceeds that of any other provider. Further, the ACCC has not identified any competition concerns regarding non-Telstra network operators in supplying of wholesale ADSL services.

Having regard to these considerations, the ACCC expressed its preliminary view that non-Telstra network operators are already strongly constrained by the competition from Telstra. In these circumstances, applying the SAOs to non-Telstra network providers is unlikely to promote competition in the relevant markets.

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<sup>252</sup> Subsection 152AR(2) of the CCA.

## 7.2.2 Summary of submissions

In the February 2012 Discussion Paper and July 2012 Issues Paper, the ACCC requested submissions on making terms and conditions that would give effect to carrier-specific exemptions. In response, Telstra submitted that SAOs should apply to all access providers equally and thus that there should be no carrier-specific exemptions.

Telstra submitted that ‘in areas where the Commission does determine to apply the SAOs, they should be applied to all service providers. To do otherwise would introduce further distortions to the ADSL services market.’<sup>253</sup> Telstra submitted that non-Telstra network providers may not be constrained in setting wholesale ADSL terms and conditions as they may not face a real risk of losing customers to Telstra. Telstra cited the costs associated with switching to another provider.<sup>254</sup>

AAPT, Herbert Geer<sup>255</sup>, Macquarie Telecom and Optus submitted that the SAOs should not apply to non-Telstra providers and thus that there should be carrier-specific exemptions.

Optus, Herbert Geer and AAPT submitted that non-Telstra network operators lack market power and do not have the ability to collect monopoly rents, and that consequently they are subject to competitive constraint by Telstra. They concluded on the basis of this argument that there are no grounds for regulation.<sup>256</sup> They also submitted that regulating these networks may harm competition at the wholesale level because it will:

- impose a regulated price that reflects Telstra’s cost base, which is not the same as the cost bases of non-Telstra network providers<sup>257</sup>
- restrict product differentiation<sup>258</sup> and
- create unnecessary regulatory burden.<sup>259</sup>

Herbert Geer submitted that the mere presence of DSLAM competitors in an ESA does not establish that there is effective competition. Telstra’s market share in supplying wholesale ADSL services is significantly greater than the market shares of non-Telstra service providers. For example, Telstra supplies [c-i-c] [c-i-c] wholesale ADSL services in 361 ESAs, compared to [c-i-c] [c-i-c] supplied by iiNet nationally.<sup>260</sup>

Optus submitted that it is subject to competitive constraints from Telstra and does not have any market power. It stated that wholesale ADSL customers often require national coverage to allow them to supply metropolitan and regional customers, and that Telstra’s network covers 90 per cent of Australian homes and businesses, while non-Telstra providers have a

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<sup>253</sup> Telstra, October 2012 submission, p. 76.

<sup>254</sup> Telstra, April 2012 submission, p. 18.

<sup>255</sup> In its 10 April 2012 submission, Herbert Geer made submissions on behalf of Adam Internet, iiNet, Internode, Primus and TransACT.

<sup>256</sup> Herbert Geer, August 2012 submission, p. 13; AAPT, August 2012 submission, pp. 17-18; Optus, August 2012 submission, p. 24.

<sup>257</sup> AAPT, August 2012 submission, pp. 17-18; Herbert Geer, August 2012 submission, p. 13.

<sup>258</sup> Ibid.

<sup>259</sup> Optus, April 2012 submission, p. 24.

<sup>260</sup> Herbert Geer, August 2012 submission, p. 3

much smaller wholesale DSL footprint.<sup>261</sup> It stated further that wholesale customers do not wish to acquire wholesale ADSL from multiple providers as it is costly largely due to IT integration costs.<sup>262</sup> As a result, Optus considered that unless a wholesale provider can offer a price significantly lower than Telstra, wholesale customers will purchase ADSL from Telstra.<sup>263</sup>

AAPT submitted that imposing regulation on non-Telstra suppliers could have a ‘serious effect’ on their legitimate business interests as they may have a different cost base to Telstra.<sup>264</sup>

Herbert Geer submitted that non-Telstra access providers can seek to compete in the market by differentiating by means other than price, and the imposing a regulated price ceiling could make such offerings unviable.<sup>265</sup> AAPT stated there would still be some flow-on effect from Telstra’s regulated price as non-Telstra access seekers would have an incentive to either match the price or offer a differentiated service, which would increase competition and be in the LTIE.<sup>266</sup>

Herbert Geer submitted that there are high switching costs with wholesale ADSL services, but that high costs and delays in switching are the result of Telstra’s processes. Switching between wholesale ADSL service providers involves costs in terms of ‘the resources and staff required to get a solution in place’.<sup>267</sup> Macquarie Telecom also submitted that access seekers may incur significant switching costs.<sup>268</sup>

Macquarie Telecom submitted that to be effective, regulation should focus on ‘moderating market behaviour where the market is unable to reach a timely and efficient outcome’ – that is, competition concerns with the supply of wholesale services lie with Telstra, not non-Telstra networks. It stated there is a risk that imposing SAOs on non-Telstra suppliers would be detrimental (for example, if they were required to invest in operational services).<sup>269</sup>

Herbert Geer submitted that while [c-i-c] [c-i-c].<sup>270</sup>

### 7.2.3 ACCC draft views

Telstra is the dominant provider of wholesale ADSL services. As at 30 June 2012, Telstra had a significantly larger market share than its competitors and a considerably higher number of ADSL SIOs fall within its DSLAM footprint. As a result, the minimum number of addressable SIOs it could supply with ADSL services is significantly larger than its next

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<sup>261</sup> Optus, August 2012 submission, p 24.

<sup>262</sup> Ibid, p 19.

<sup>263</sup> Ibid, p 24.

<sup>264</sup> AAPT, August 2012 submission, pp. 17-18.

<sup>265</sup> Herbert Geer, August 2012 submission, p. 13.

<sup>266</sup> AAPT, August 2012 submission, p. 14.

<sup>267</sup> Herbert Geer, August 2012 submission, p. 14.

<sup>268</sup> Macquarie Telecom, August 2012 submission, p. 11.

<sup>269</sup> Ibid, p. 8.

<sup>270</sup> Herbert Geer, August 2012 submission, pp 13-14.

largest competitor. In addition as noted in section 7.1.5, the presence of LPGS reduces the size of the presently addressable market for Telstra’s wholesale resale competitors.

Table 7.2 below calculates the actual market share within the wholesale ADSL portion of the relevant markets. Telstra dominates the market with a national market share of over [c-i-c] [c-i-c] per cent.

**Table 7.2: Major suppliers of wholesale ADSL services**

	No. of ESAs	Total ADSL SIOs within footprint	% of Total DSL SIOs in footprint	No. of wholesale ADSL SIOs	Approximate wholesale resale market share
Telstra	[CAN RKR c-i-c]	[CAN RKR c-i-c]	[CAN RKR c-i-c]	[c-i-c] [c-i-c] <sup>a</sup>	[c-i-c] [c-i-c]
Optus				[c-i-c] [c-i-c] <sup>b</sup>	[c-i-c] [c-i-c]
iiNet				[c-i-c] [c-i-c] <sup>c</sup>	[c-i-c] [c-i-c]
TPG				[c-i-c] [c-i-c]	[c-i-c] [c-i-c]
AAPT <sup>d</sup>	[CAN RKR c-i-c]	[CAN RKR c-i-c]	[CAN RKR c-i-c]	[CAN RKR c-i-c] [CAN RKR c-i-c] <sup>e</sup>	[c-i-c] [c-i-c]
<b>AUS Total</b>	5067	4,903,127		[c-i-c] [c-i-c]	

Data Source: CAN RKR – June 2012, submissions to ACCC declaration and FAD inquiry processes.

a Telstra, *Non-price terms (confidential version)*, 19 October 2012, p. 12. b ACCC, *Declaration of the wholesale ADSL service under Part XIC of the CCA 2010*, February 2012, p. 21. c Herbert Geer Lawyers, *Submission on behalf of Adam Internet and iiNet Limited*, 24 August 2012, p. 3. d Includes Nextep (NEC Australia) ULLS/LSS SIOs - AAPT’s acquisition of Nextep is expected to be completed by 30 November. (Source: [www.aapt.com.au/aapt/media-centre/our-news/2012/aapt-acquires-nec-australia%E2%80%99s-nextep-business-and-signs-strategic](http://www.aapt.com.au/aapt/media-centre/our-news/2012/aapt-acquires-nec-australia%E2%80%99s-nextep-business-and-signs-strategic)). e ACCC, *Declaration of the wholesale ADSL service under Part XIC of the CCA 2010*, February 2012, p. 21. and CAN RKR.

As noted in section 7.1.4, Optus has submitted that it is unable to provide its wholesale customers with the national coverage that they often require (so as to allow them to supply retail customers in both metropolitan and regional areas) using only its own DSLAM network.<sup>271</sup> In addition, the ACCC notes submissions that there are significant incremental costs to sourcing wholesale ADSL services from multiple suppliers. For example, Optus submitted that wholesale customers face IT integration costs per wholesale ADSL supplier of [c-i-c] [c-i-c].<sup>272</sup>

<sup>271</sup> Optus, August 2012 submission, pp. 19 & 24.

<sup>272</sup> Optus, August 2012 submission, p. 19.



The ACCC considers that these factors will create barriers for some access seekers in purchasing non-Telstra wholesale ADSL services. Consequently Telstra is likely to retain its dominant position in supplying wholesale ADSL services for the foreseeable future.

As a result, the ACCC considers that applying the SAOs and price and non-price terms and conditions of the wholesale ADSL FAD to Telstra will have flow-on effects to other wholesale ADSL suppliers and constrain their market behaviour.

The ACCC has also not been provided with any evidence that non-Telstra access seekers are engaging in anti-competitive behaviour.

The ACCC notes that several submissions were made that some harm to competition may result if the SAOs apply to non-Telstra resale providers. AAPT and Herbert Geer both submitted that non-Telstra providers currently differentiate their products with innovative offerings, in order to attract wholesale customers. The ACCC is concerned that imposing terms and conditions on non-Telstra suppliers may have a material effect on their ability to offer such alternative products and further considers that non-Telstra suppliers will still have incentives to match the prices offered by the dominant supplier (Telstra), where they are providing similar products, or else risk losing market share.

The ACCC also considers that applying the SAOs to non-Telstra suppliers will reduce access seekers' incentives to invest in infrastructure, or innovations, to supply ADSL wholesale services, with detrimental impacts on competition in wholesale and retail ADSL markets and on efficient use of and investment in infrastructure.

Taking into account the considerations set out in this section, the ACCC has decided that giving effect to carrier-specific exemptions will be in the LTIE, promote competition in wholesale and retail ADSL markets, and encourage efficient use of and investment in infrastructure.

## **7.3 Consideration of the legislated matters**

When deciding whether or not exemptions should be incorporated into the relevant FADs, the ACCC must have regard to criteria in subsection 152BCA(1) of the CCA, which includes the promotion of the LTIE. The ACCC may also consider any other matters that it thinks are relevant, such as regulatory certainty and consistency.

To consider whether or not giving effect to exemptions will promote the LTIE, the ACCC must have regard to the objectives listed in subsection 152AB(2) of the CCA.

### **7.3.1 Paragraph 152BCA(1)(a) – whether the determination will promote the long-term interests of end-users**

Pursuant to section 152AB of the CCA, in determining whether a particular decision will promote the LTIE, regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

- promoting competition in markets for listed services
- encouraging the economically efficient use of infrastructure and
- encouraging efficient investment in infrastructure.

Consistent with the ACCC view in the July 2012 Issues Paper, the ACCC considers that the objective of achieving any-to-any connectivity is not relevant to this particular matter.<sup>273</sup>

### ***Geographic exemptions***

#### *Promotion of competition*

In regard to the supply of wholesale ADSL services, Telstra remains the dominant provider and is likely to remain so. This is because, for certain segments of the market, there are three major commercial and technical barriers that reduce the contestability of those market segments by access seekers.

First, the presence of LPGS means that approximately [c-i-c] [c-i-c] per cent of end-users within the 289 ESAs are not addressable by access seekers with ULLS/LSS and their own DSLAM infrastructure. This means that Telstra's wholesale ADSL is, in effect, the only input that can be used by access seekers to compete with Telstra for wholesale customers on lines affected by LPGS, which reduces the scope for competition within the 289 ESAs.

Second, access seekers' smaller DSLAM footprints than Telstra means that access seekers are unable to provide their wholesale customers with the national coverage that they often require (so as to allow them to supply retail customers in both metropolitan and regional areas) using only their own DSLAM network. This also reduces the scope for competition within the 289 ESAs, without reasonable access to Telstra's wholesale ADSL service.

Third, there are significant incremental costs to sourcing wholesale ADSL services from multiple suppliers, which increases the impact on competition of the second barrier noted above.

Taking these considerations into account, the ACCC considers that Telstra is unlikely to be significantly constrained by alternative wholesale ADSL service offerings by competing providers in the 289 ESAs as a whole. Consequently, a decision to give effect to geographic exemptions is likely not to promote or might even reduce competition.

The ACCC considers that there may be circumstances where effective deregulation of a wholesale service may encourage competitors to make efficient investments in the underlying infrastructure that can be used to self-supply and/or resell the wholesale service to third parties. As a result, the ACCC's conclusions on whether giving effect to geographic exemptions will promote competition is linked to its consideration of whether or not exemptions will encourage the efficient investment in, and use of, infrastructure. As discussed below, the ACCC expects that a decision to give effect to geographic exemptions is unlikely to promote efficient investment in competitive infrastructure.

#### *Economically efficient use of infrastructure*

The ACCC considers that access seekers obtain significant benefits from self-supplying wholesale ADSL services, such as the ability to differentiate their wholesale and retail ADSL product offerings. Regulated access to Telstra's wholesale ADSL services does not remove these benefits. Therefore, the ACCC is of the view that the availability of a regulated

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<sup>273</sup> ACCC, July 2012 Issues Paper, p. 32.

wholesale ADSL service is unlikely to lead to the inefficient decommissioning or disposal of access seeker DSLAMs. Therefore the ACCC considers that giving effect to geographic exemptions is unlikely to promote more efficient use of access seeker infrastructure.

#### *Efficient investment in infrastructure*

The ACCC's analysis of access seeker investment trends has shown a significant slowing in the expansion of the DSLAM footprint. Further, there has been a slowing in the growth of access seeker density within the existing DSLAM footprint; that is, fewer ESAs with existing access seeker infrastructure are being entered by new access seekers.

The general slowing of access seeker investment suggests that the majority of efficient access seeker investments in DSLAM infrastructure has already occurred. Primarily, the ACCC expects that this reflects the lower returns on DSLAM investments by access seekers both at the margins of the combined DSLAM footprint and where access seeker density within the existing DSLAM footprint is high. The ACCC also notes that the rollout of the NBN may have begun to influence access seekers' DSLAM investment decisions.

As these trends commenced and predominantly existed during a period where wholesale ADSL was unregulated, the ACCC is of the view that the abovementioned trends would continue regardless of whether or not the SAOs apply to the 289 ESAs. For this reason, the ACCC considers a decision to give effect to geographic exemptions is unlikely to encourage efficient investment in access seeker infrastructure.

The ACCC is of the view that Telstra will invest where it can make a reasonable return on its investment. The ACCC's pricing approach estimates the efficient costs of Telstra providing wholesale ADSL. This leads the ACCC to the view that where the SAOs apply, Telstra will have an incentive to invest in infrastructure where it is efficient to do so. This suggests that a decision to give effect to geographic exemptions will not further encourage Telstra to invest in infrastructure efficiently.

#### *Carrier-specific exemptions*

In having regard to whether a decision to make terms and conditions in the wholesale ADSL FAD that give effect to carrier-specific exemptions promotes the LTIE, the ACCC has considered the extent to which carrier specific exemptions are likely to result in the achievement of the objectives of promotion of competition and encouraging the economically efficient use of, and investment in, infrastructure.

The ACCC is of the view that the dominant market share of Telstra and the incremental costs of sourcing wholesale ADSL from more than one supplier suggest that non-Telstra providers are likely to respond to any changes in price for Telstra's wholesale ADSL service. The ACCC expects that this will result in non-Telstra providers indirectly responding to the regulated wholesale ADSL prices that the ACCC sets for Telstra.

In addition, the ACCC considers that giving effect to carrier-specific exemptions is likely to allow non-Telstra providers the flexibility to differentiate their product offerings from those of Telstra in order to attract wholesale customers. As a result, the ACCC is of the view that giving effect to carrier-specific exemptions is likely to promote competition.

The ACCC also notes that many owners of competitive DSLAM infrastructure do not currently have the capability to offer a wholesale ADSL service. Submissions have indicated that where a provider does not have such capability, it will have to undertake significant investment in billing and provisioning systems.

The ACCC notes that giving effect to carrier-specific exemptions is likely to ensure that providers without existing wholesale ADSL capability are not required to undertake significant investment without a business case that provides a risk adjusted rate of return. For this reason, the ACCC is of the view that giving effect to carrier-specific exemptions is likely to encourage efficient investment in infrastructure.

### **7.3.2 Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider**

The ACCC considers that it is in a carrier or carriage service provider's legitimate business interests to seek to recover its efficient costs, including a normal commercial return on investment having regard to the relevant risk involved.

In deciding not to give effect to geographic exemptions, and to give effect to carrier-specific exemptions, in the wholesale ADSL FAD, the ACCC has taken into account the legitimate business interests of both dominant and non-Telstra service providers.

The ACCC considers that it is in the dominant carrier or carriage service provider's legitimate business interests to seek to recover its costs including a normal commercial return on investment having regard to the relevant risk involved. Under the regulated pricing approach, the dominant carrier or carriage service provider receives a price that reflects the underlying cost of providing a wholesale ADSL broadband service.

The ACCC considers that it is in the non-Telstra carrier or carriage service provider's legitimate business interests to give effect to carrier-specific exemptions. This will encourage non-Telstra providers to compete on product differentiation, by providing different services and pricing structures to access seekers, without facing a regulated price ceiling. The ACCC considers that non-Telstra providers will nonetheless effectively be competitively constrained by Telstra's market position as discussed in section 7.2.3.

### **7.3.3 Paragraph 152BCA(1)(c) – interests of all persons who have rights to use the declared service**

In deciding not to give effect to geographic exemptions in the wholesale ADSL FAD, the ACCC has taken into account the legitimate business interests of access seekers. The ACCC's proposed decision will provide certainty for access seekers regarding the prices paid in all ESAs and thereby reduce investment risk. On balance the ACCC considers this will promote confidence for access seekers to undertake future investments, where it is efficient to do so.

In deciding to give effect to carrier-specific exemptions in the wholesale ADSL FAD, the ACCC has taken into account the legitimate business interests of access seekers. The ACCC considers that, on balance, providing carrier-specific exemptions will encourage product

differentiation by allowing non-Telstra access providers to compete by providing different services and pricing structures to access seekers.

#### **7.3.4 Paragraph 152BCA(1)(d) – direct cost of providing access to the declared service**

The ACCC must have regard to the costs incurred in providing access including a contribution to direct costs. The ACCC is of the view that not giving effect to geographic exemptions for wholesale ADSL services is consistent with the recovery by the access provider of its direct costs of providing the declared services.

As noted in sections 7.3.1 and 7.3.2, the ACCC considers that the proposed pricing approach ensures that the direct costs of providing access to the declared fixed line services are included in the revenue requirement used to calculate prices. The revenue requirement calculated using a cost-based approach includes an allowance for all of the costs incurred in providing the wholesale ADSL services. These costs are forecast direct and indirect operating costs, a return on and of capital, and tax liabilities. Therefore the ACCC considers Telstra would be allowed to recover the direct costs of providing a wholesale ADSL service.

The ACCC is of the view that giving effect to carrier-specific exemptions for wholesale ADSL services is consistent with the recovery by the access provider of its direct costs for providing the declared services.

#### **7.3.5 Paragraph 152BCA(1)(e) – value to a party of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC is of the view that the value to a party of extensions, or enhancement of capacity, whose cost is borne by someone else is not relevant to this particular matter.

#### **7.3.6 Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility**

This criterion requires the ACCC to consider the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility.

The ACCC is of the view that the safe and reliable operation of a carriage service, a telecommunications network, or a facility will be unaffected by the proposed exemption decisions.

#### **7.3.7 Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service, a telecommunications network or a facility**

This criterion requires the ACCC to consider the economically efficient operation of a carriage service, a telecommunications network or a facility.

As noted in sections 7.3.1 and 7.3.2, the ACCC considers that the proposed pricing approach ensures that the efficient costs of providing access to the declared fixed line services are included in the revenue requirement used to calculate prices. The ACCC considers that this will provide incentives to carriers to invest in a manner that encourages the efficient operation of carriage services and networks.

This leads the ACCC to the view that a decision to give effect to geographic exemptions will not further encourage the efficient operation of a carriage service, a telecommunications network, or a facility.

### **7.3.8 Paragraph 152BCA(2) – supply of one or more other eligible services**

The ACCC has considered the substitutability of other eligible services supplied by Telstra, such as the ULLS and LSS, for the supply of wholesale ADSL broadband services.

### **7.3.9 Subsection 152BCA(3) – other matters the ACCC considers relevant**

At this time, the ACCC considers that the matters it must take into account under s 152BCA(1) of the CCA are the only relevant considerations in determining this issue.<sup>274</sup>

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<sup>274</sup> Ibid, p. 70.

## 8 Bundling with PSTN services

This section outlines the ACCC's draft views regarding whether it should include in the draft FAD a term to the effect that a PSTN service is not required to be provided over the line on which the wholesale ADSL service is provisioned (referred to as unbundling).

Telstra currently supplies wholesale and retail ADSL services with an underlying PSTN service on the line (referred to as bundling).<sup>275</sup> This precludes access seekers from using Telstra's wholesale ADSL service to provision naked ADSL services to retail customers.<sup>276</sup> Naked ADSL services allow end-users to acquire ADSL services without a fixed line voice service. However, access seekers can supply naked ADSL services by purchasing ULLS and using their own DSLAM equipment. Alternatively, access seekers can acquire naked wholesale ADSL from an access provider other than Telstra.

### 8.1 Background

In the July 2012 Issues Paper, the ACCC stated that in setting terms and conditions in an FAD, it is able to include a term requiring, or not requiring, a PSTN service to be provided over the line on which a wholesale ADSL service is provisioned.<sup>277</sup> The ACCC considered three options:

- to maintain the status quo whereby an active PSTN service is required on a line before Telstra supplies wholesale ADSL (bundling)
- to require an access provider to offer a wholesale ADSL service on a stand-alone basis (full unbundling), although bundling is not precluded
- to require Telstra to offer a 'stripped back' line rental product in conjunction with the wholesale ADSL service (hybrid unbundling).

The ACCC's initial view was that unbundling is likely to promote competition in the form of lower prices and greater diversity of services for end-users.<sup>278</sup> However, as Telstra does not currently provide a naked ADSL service at the wholesale or retail level, the ACCC invited submissions regarding the technical feasibility, costs and potential efficiency gains of implementing an unbundled service.<sup>279</sup>

### 8.2 Summary of submissions

The ACCC received six submissions in response to the July 2012 Issues Paper. Telstra also provided a supplementary submission on this issue in October 2012. Telstra was in favour of maintaining the status quo. Conversely, AAPT, the CCC, Herbert Geer (on behalf of Adam

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<sup>275</sup> Ibid, p. 27.

<sup>276</sup> Naked ADSL refers to a standalone ADSL service on the local loop, that is, it is supplied without an associated PSTN service or dial tone.

<sup>277</sup> ACCC, July 2012 Issues Paper, p. 27.

<sup>278</sup> Ibid, p. 31.

<sup>279</sup> Ibid, pp. 31-34.

Internet and iiNet), Macquarie Telecom and Optus all submitted that Telstra should be required to provide a fully unbundled wholesale ADSL service. However, the hybrid approach received limited support from these access seekers.

## 8.2.1 Network architecture

Telstra submitted that the provision of ADSL on lines with an underlying PSTN service is a technical requirement of the way it has deployed ADSL on its network.<sup>280</sup> Telstra indicated that its core systems and applications are structured for the delivery of a PSTN service, around which other services are provided.<sup>281</sup> Telstra submitted that ADSL is treated as a product upon the PSTN service. Telstra leverages its existing systems so that the PSTN is crucial in the provisioning, ordering and maintenance of ADSL.<sup>282</sup>

AAPT, Herbert Geer and Optus submitted that bundling was a commercial decision rather than a technical requirement.<sup>283</sup> AAPT and Herbert Geer submitted that the technology used by Telstra to provide wholesale ADSL is not significantly different from that used to provide naked ADSL over the ULLS.<sup>284</sup> The CCC and Macquarie Telecom characterised bundling as an exercise of market power.<sup>285</sup>

## 8.2.2 Costs to implement unbundling

### *Full unbundling*

Telstra submitted that the benefits arising from an unbundling term are outweighed by the costs of requiring Telstra to unbundle.<sup>286</sup> Telstra submitted that such costs would include both upfront capital costs associated with upgrades and modification of systems, as well as the higher operating costs of providing naked wholesale ADSL.<sup>287</sup>

Telstra considers that, as a conservative preliminary estimate, [c-i-c] [c-i-c]<sup>288</sup> systems and processes would require upgrades or modification to provision a wholesale naked ADSL service. Telstra submitted that this would involve significant upfront capital costs in the order of [c-i-c] [c-i-c].<sup>289</sup> Telstra also indicated that these changes would be a significant impost in terms of time and management effort, which may detract from developing new products and systems for the NBN.<sup>290</sup>

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<sup>280</sup> Telstra, August 2012 non-price terms submission, p. 27.

<sup>281</sup> Ibid, p. 31.

<sup>282</sup> Ibid.

<sup>283</sup> AAPT, August 2012 submission, p. 20; Herbert Geer, August 2012 submission, pp. 15–6; Optus, August 2012 submission, pp. 26–7.

<sup>284</sup> AAPT, August 2012 submission, p. 20; Herbert Geer, August 2012 submission, p. 15.

<sup>285</sup> CCC, August 2012 submission, p. 3; Macquarie Telecom, August 2012 submission, p. 12.

<sup>286</sup> Telstra, August 2012 non-price terms submission, p. 78.

<sup>287</sup> Ibid, p. 33.

<sup>288</sup> Ibid, pp. 34–5.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid, p. 36.



Telstra also submitted that without an underlying PSTN service, its ongoing costs will increase due to higher line fault rates, assurance costs and complexity of management.<sup>291</sup> Telstra outlined access seekers' charges related to fault rectification and expected that these charges will be passed on to end-users.<sup>292</sup> While Telstra did not provide an overall estimate of the expected assurance cost increase, it indicated that these costs were likely to far exceed initial development costs.<sup>293</sup> Telstra submitted that its assurance costs are a major component of operating costs for the provision of copper services on its network.<sup>294</sup>

Telstra argued that line faults will increase without the wetting current provided by the PSTN service which is used to combat corrosion of joints.<sup>295</sup> Telstra submitted that increased line faults combined with less accurate and useful testing methods will result in dispatching technicians to customer premises more often, increasing assurance costs.<sup>296</sup> Telstra provided data for a six month period on interference investigation requests, where a technician is required to investigate and rectify a fault.<sup>297</sup> Telstra submitted that the difference in the rate of investigation requests between LSS, with an active PSTN service, and ULLS, which does not have such a service, illustrates increased fault rates resulting from the lack of a wetting current.<sup>298</sup> Telstra submitted that in the six months to August 2012, ULLS had 177 per cent of the interference investigation request rate, and therefore the fault rate, of LSS lines.<sup>299</sup>

Optus believed there would be [c-i-c] [c-i-c].<sup>300</sup> Optus stated that it is not aware of any issues with service quality in the provision of naked ADSL, and submitted that alternative testing methods are sufficient for service assurance, supported by fault reporting by access seekers.<sup>301</sup> However, access seekers did not provide detailed information regarding the potential costs associated with unbundling.

### ***Hybrid unbundling***

Telstra submitted that a stripped back line rental product does not avoid the infrastructure, systems and processes (such as front of house ordering and customer service processes) required to provide a full service product.<sup>302</sup> Therefore, Telstra submitted that the cost of providing a stripped back line rental product will not be significantly different to the provision of a bundled PSTN product.<sup>303</sup> Similarly, Telstra submitted that the costs to provide an InContact-like WLR service would be no less than the current price for WLR.<sup>304</sup>

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<sup>291</sup> Ibid.

<sup>292</sup> Telstra, October 2012 submission, p. 12.

<sup>293</sup> Telstra, August 2012 non-price terms submission, p. 36.

<sup>294</sup> Ibid, p. 38.

<sup>295</sup> Ibid.

<sup>296</sup> Ibid, pp. 39–40.

<sup>297</sup> Telstra, October 2012 submission, p. 11.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid, p. 12

<sup>300</sup> Optus, August 2012 submission, p. 28.

<sup>301</sup> Ibid, p. 26.

<sup>302</sup> Telstra, August 2012 non-price terms submission, p. 40.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

Further, Telstra submitted that the hybrid approach would require Telstra to pre-provision limited functionality and incur development costs to alter its systems and processes.<sup>305</sup>

AAPT, Herbert Geer and Optus submitted that the cost of a hybrid wholesale ADSL product would be similar to, or possibly higher than a fully unbundled service.<sup>306</sup> These submissions attribute this minimal or non-existent cost advantage to the continued use of the PSTN architecture.<sup>307</sup> Macquarie Telecom submitted that the full unbundling approach may involve higher costs than the hybrid approach, but the latter still requires an end-user to acquire a service they may not want or need.<sup>308</sup>

### **8.2.3 Efficiency**

#### ***Full unbundling***

Macquarie Telecom submitted that allocative efficiency is achieved with full unbundling.<sup>309</sup> Herbert Geer submitted that it is efficient for the cost of maintaining the PSTN architecture to be borne by those end-users who require such a service.<sup>310</sup>

Telstra submitted that unbundling is inefficient, in that it requires Telstra to bypass or remove existing infrastructure.<sup>311</sup> Telstra submitted that the PSTN architecture is ubiquitous and already in service, such that redeploying certain assets will not make the service available to end-users who value it more.<sup>312</sup> In addition, Telstra argued that it would be uneconomic to remove existing PSTN infrastructure, including POTS cards from exchanges, and redeploy these elsewhere.<sup>313</sup>

#### ***Hybrid unbundling***

Telstra submitted that the provision of a stripped back line rental product is an inefficient use of dialable number ranges, for which it must pay the ACMA.<sup>314</sup> AAPT submitted that the provision of stripped back line rental is an inefficient use of the PSTN architecture.<sup>315</sup> Herbert Geer submitted that hybrid bundling would deliver less efficiency gains than full unbundling because it 'continues to use obsolete PSTN ports and switches and to apply those costs to the service.'<sup>316</sup> Optus similarly submitted that the hybrid approach involves the use

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<sup>305</sup> Ibid.

<sup>306</sup> Herbert Geer, August 2012 submission, p. 14; AAPT, August 2012 submission, p. 19; Optus, August 2012 submission, p. 27.

<sup>307</sup> Herbert Geer, August 2012 submission, p. 15; AAPT, August 2012 submission, pp. 19–20; Optus, August 2012 submission, p. 27.

<sup>308</sup> Macquarie Telecom, August 2012 submission, p. 12.

<sup>309</sup> Ibid, p. 13.

<sup>310</sup> Herbert Geer, August 2012 submission, p. 14.

<sup>311</sup> Telstra, August 2012 non-price terms submission, p. 37.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

<sup>314</sup> Ibid, p. 41.

<sup>315</sup> AAPT, August 2012 submission, p. 20.

<sup>316</sup> Herbert Geer, August 2012 submission, p. 15.

and cost of the PSTN architecture where the end-user may not require a stripped back line rental service.<sup>317</sup>

## 8.2.4 Contestable customer base

### *Full unbundling*

Telstra submitted that full unbundling is only likely to benefit those wholesale ADSL based end-users in ESAs in which competitors have not introduced DSLAMs to provide naked ADSL.<sup>318</sup> Telstra submitted that almost [c-i-c] [c-i-c] of end-users with a wholesale ADSL based service are located within ESAs where naked ADSL is already available (i.e. predominantly bands 1 and 2).<sup>319</sup> Therefore, Telstra concluded that unbundling will potentially benefit up to approximately [c-i-c] [c-i-c] wholesale ADSL based end-users who are currently outside this competitive footprint.<sup>320</sup> Several access seekers also provided confidential data on the take-up rates of naked ADSL on their networks (for example, [c-i-c] [c-i-c]<sup>321</sup>).

### *Hybrid unbundling*

Telstra submitted that access seekers have the option to reduce the functionality of WLR services they acquire to provide a stripped back line rental product to end-users. However, Telstra is not aware of any access seekers who have done so, which Telstra suggests demonstrates limited demand for such a service.<sup>322</sup>

## 8.2.5 Benefits for end-users

### *Full unbundling*

AAPT, Herbert Geer, Macquarie Telecom and Optus argued that full unbundling will allow the provision of innovative products with flexible prices and greater consumer choice.<sup>323</sup> Herbert Geer submitted that these developments will pressure Telstra retail to offer naked ADSL to end-users.<sup>324</sup> The CCC submitted that full unbundling provides cost transparency in the provision of ADSL, and the conditions for competitive entry.<sup>325</sup>

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<sup>317</sup> Optus, August 2012 submission, p. 26.

<sup>318</sup> Telstra, August 2012 non-price terms submission, pp. 42–3.

<sup>319</sup> Ibid, pp. 42–3.

<sup>320</sup> Ibid.

<sup>321</sup> Optus, August 2012 submission, p. 26; Herbert Geer, August 2012 submission, p. 15.

<sup>322</sup> Ibid, p. 42.

<sup>323</sup> AAPT, August 2012 submission, pp. 19-20; Herbert Geer, August 2012 submission, p. 17; Macquarie Telecom, August 2012 submission, p. 12; Optus, August 2012 submission, p. 25.

<sup>324</sup> Herbert Geer, August 2012 submission, p. 16.

<sup>325</sup> CCC, August 2012 submission, p. 3.

### *Hybrid unbundling*

Herbert Geer and Macquarie Telecom noted that the hybrid approach still required end-users to acquire a PSTN service which they do not want or need.<sup>326</sup> Optus submitted that access seekers would be required to absorb the costs of the stripped back line rental product, and this would reduce pricing flexibility and the scope of services able to be provided to end-users.<sup>327</sup> AAPT similarly submitted that the hybrid approach would limit its flexibility to add innovative services over the top of the ADSL service.<sup>328</sup>

## **8.3 Consideration of the legislated matters**

This preliminary assessment of the matters the ACCC must take into account only applies to whether or not the ACCC should include a term in the draft FAD, requiring Telstra to offer a fully unbundled or hybrid unbundled service. This view is based on an assessment of current circumstances and information available at this time. Should relevant circumstances change in the future, it may be appropriate for the ACCC to reconsider this issue.

### **8.3.1 Section 152BCA(1)(a) – whether the determination will promote the long-term interests of end-users (LTIE)**

The ACCC has taken into account the extent to which an unbundling term is likely to result in the achievement of the objective of promoting competition and encourage the economically efficient use of and investment in infrastructure to which regard must be had in determining whether an unbundling term promotes the LTIE.<sup>329</sup>

For the same reasons set out in the July 2012 Issues Paper, the ACCC considers that the objective of achieving any-to-any connectivity is not relevant to this particular matter.<sup>330</sup>

### *Promotion of competition*

In the July 2012 Issues Paper, the ACCC expressed an initial view that unbundling may promote competition in the form of lower prices and greater diversity of services for end-users.<sup>331</sup> However, the ACCC also noted that further information regarding technical feasibility, costs and ease of implementation were relevant in determining whether to include a term requiring unbundling.<sup>332</sup> Based on the submissions and information received in response to the July 2012 Issues Paper, the ACCC's preliminary view is that requiring Telstra to offer a fully unbundled or hybrid unbundled wholesale is unlikely to further promote competition at this time.

Telstra submitted that a requirement to provide naked wholesale ADSL would involve capital costs at [c-i-c] [c-i-c] associated with upgrades and modifications to [c-i-c] [c-i-c] systems

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<sup>326</sup> Macquarie Telecom, August 2012 submission, p. 12; Herbert Geer, August 2012 submission, p. 14.

<sup>327</sup> Optus, August 2012 submission, p. 26.

<sup>328</sup> AAPT, August 2012 submission, p. 19.

<sup>329</sup> Subsection 152AB(2) of the CCA.

<sup>330</sup> ACCC, July 2012 Issues Paper, p. 32.

<sup>331</sup> Ibid, pp. 30-31.

<sup>332</sup> Ibid, p. 33.

and processes.<sup>333</sup> The ACCC considers that, given its current network architecture, these costs may be high. Further, it is not unreasonable that Telstra would incur, and seek to recover, the relevant costs of providing a fully unbundled service. This may include the direct capital costs to modify its Operational Support Systems (OSS) and Business Support Systems (BSS) and the costs of providing a line for the service.

Any regulated access charge for a naked wholesale ADSL product would likely allow for the recovery of Telstra's upfront capital costs and ongoing operational costs to provide such a service. As outlined under section 152BCA(1)(f) below, the ACCC accepts Telstra's submission that a fully unbundled service may result in an increase in line faults. The ACCC also considers that the reliable operation of such a service will likely be diminished though Telstra's inability to deploy certain testing methods through the PSTN to diagnose and locate line faults. As such, the ACCC considers that access seekers may face higher service assurance charges for a naked wholesale ADSL service, levied by Telstra. The ACCC also considers that the network elements required for the provision of an ADSL service, such as BRAS devices, will be similar regardless of whether naked ADSL is provided over ULLS or via Telstra wholesale ADSL inputs.

The ACCC also considers that a fully unbundled service would involve costs associated with providing access to the copper line, a portion of which would likely be recovered in any access charge for such a service. The ACCC considers that an appropriate line rental contribution to be included in any overall regulated access price for such a service would fall between the regulated access charges for ULLS and WLR. This takes into account the relative levels of infrastructure and service provided by Telstra for each service. The access price of ULLS reflects the cost of the copper access from the premises to the exchange, whereas WLR represents the cost of an active PSTN voice service. The ACCC considers that a line which is used for the purpose of providing naked wholesale ADSL will involve some measure of network infrastructure and service between these two services.

The relevant differences in costs of providing a retail naked ADSL service for access seekers between ULLS and Telstra naked wholesale ADSL would be in the provision for Telstra's recovery of capital costs and contribution to the cost of a line in a greater number of regional areas (such as bands 3 and 4). Therefore, the ACCC considers that the cost for access seekers of providing a naked ADSL service via Telstra naked wholesale ADSL inputs is likely to be higher than the current costs of providing naked ADSL over ULLS.

The ACCC considers that these costs are likely to be passed on to end-users, either substantially diminishing or eliminating any retail price advantage which currently exists for naked ADSL provided over ULLS by access seekers using their own DSLAM equipment. If this is the case, the ACCC considers that the expected pricing flexibility associated with a naked wholesale ADSL service, a key benefit of full unbundling, will not result from requiring Telstra to provide a naked wholesale ADSL service at this time. For these reasons, the ACCC does not currently propose to depart from the status quo.

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<sup>333</sup> Telstra, August 2012 non-price terms submission, pp. 34–6.

Regarding hybrid unbundling, the ACCC considers that the cost of providing a hybrid product is likely to involve similar, or possibly higher, costs of providing a full service PSTN product, as it does not bypass the PSTN infrastructure required to provide a full service product. Therefore, the ACCC considers that requiring Telstra to provide a hybrid unbundled service is also unlikely to contribute to lower wholesale and retail ADSL prices.

The ACCC also considers that these additional costs may affect the ability of access seekers to deliver flexible and tailored product offerings. The ACCC notes that access seekers may be able to bundle ADSL with services other than PSTN voice at the retail level if Telstra was required to offer a naked wholesale ADSL service. However, these offerings are likely to be less attractive for end-users, given that the retail cost of the naked ADSL component alone will be comparable to an ADSL and PSTN voice bundle.

### *Economically efficient use of infrastructure*

Telstra stated that bundling with an underlying PSTN service is a technical requirement of the way it has developed and currently deploys ADSL on its network. The ongoing costs of requiring Telstra to provide a fully unbundled service are likely to increase compared to the status quo. This is likely to reduce pricing advantages for access seekers, therefore resulting in the offering of fewer services for end-users. This also suggests that a term requiring full unbundling may result in the wholesale ADSL service not being supplied at least cost. Therefore, at this time the ACCC considers that including a term in the draft FAD requiring full unbundling will not be an efficient use of infrastructure.

The ACCC also considers that a hybrid unbundled service will not be conducive to the efficient use of infrastructure as it does not bypass the PSTN infrastructure required to provide a full service product. Therefore the ACCC considers that a hybrid unbundled service at this time is inefficient, in that the same amount or combination of infrastructure resources may be used to produce a lesser number of services or capability.

The ACCC considers that regional areas are likely to represent the majority of the contestable customer base for a naked wholesale ADSL service, because end-users inside the competitive footprint already have access to naked ADSL services. The ACCC also considers that take up rates in ESAs outside the competitive footprint may be less than in ESAs where naked ADSL is currently available. A naked ADSL service provided via Telstra naked wholesale inputs may not be as price competitive as that provided over ULLS in metropolitan areas. Further, the majority of the relevant ESAs are located in regional or rural locations (i.e. bands 3 and 4). On this basis, it may not be an efficient use of infrastructure to require Telstra to implement a fully unbundled or hybrid unbundled service, given the relatively limited number of end-users who may benefit from such a service.

### *Efficient investment in infrastructure*

The ACCC considers that it would not currently be efficient for Telstra to invest in infrastructure to provide a fully unbundled or hybrid unbundled service. Regarding full unbundling, Telstra would need to invest in developing and supplying a new wholesale ADSL service. The ACCC accepts that requiring Telstra to undertake such an investment would involve capital and operational costs associated with systems modifications and

service assurance, which are likely to be high. Further, as there is expected to be a relatively limited contestable customer base, Telstra may not achieve economies of scale in the provision of a naked wholesale ADSL service.

Regarding hybrid unbundling, Telstra would be required to invest in infrastructure to pre-provision the limited functionality required for a stripped-back line rental product. On the basis of stakeholder submissions, this may be of minimal appeal to access seekers. The ACCC considers that requiring such investment may not represent an efficient use of Telstra's infrastructure. Similarly, the likely limited contestable customer base may impact on the ability of Telstra to achieve economies of scale in the provision of such a service.

The ACCC also considers that requiring Telstra to supply a fully unbundled or hybrid unbundled service is unlikely to impact on the investment decisions of access seekers. The ACCC expects that access seekers will use their competitive DSLAM equipment to continue to provide naked ADSL in more metropolitan areas. As noted in Chapter 7 above, the ACCC considers there has been a decline in investment in additional DSLAMs. Further access seeker investment and expansion may also be slowed given the rollout of the NBN. Access seekers' submissions also stated that the impending rollout of the NBN is reducing the attractiveness of DSLAM investment.<sup>334</sup>

The ACCC also considers the economic life investments by Telstra in relevant systems and infrastructure to provide an unbundled service may be uncertain given the progressive migration to the NBN. The ACCC considers this relevant where there are likely to be a limited number of end-users of a retail naked ADSL product supplied via Telstra naked wholesale ADSL inputs.

### **8.3.2 Section 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider**

The ACCC considers that it is within Telstra's legitimate commercial interests to recover the costs of providing a fully unbundled or hybrid unbundled service and to earn a normal commercial return on such an investment. It is also relevant that Telstra does not currently provide an unbundled service.

Regarding full unbundling, the ACCC accepts that the existence of an underlying PSTN service on a line is a technical requirement of the way Telstra currently provides wholesale ADSL. The ACCC considers that, given its current network architecture, it is not unreasonable that Telstra would incur, and seek to recover, the direct capital costs to accommodate a naked wholesale ADSL service as part any access charge for such a service. The ACCC considers that these upfront capital costs are likely to be high, and would include testing and the costs associated with obtaining or developing the expertise required to modify and upgrade PSTN legacy systems.

Similarly, it would also be in Telstra's legitimate business interests to recover the relevant costs of providing a hybrid unbundled service. The ACCC notes Telstra's submission that

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<sup>334</sup> Herbert Geer, August 2012 submission, p. 11; Macquarie Telecom, August 2012 submission, p. 9; Optus, August 2012 submission, p. 14.

these costs are likely to be comparable to providing a bundle with a full service PSTN product, and are likely to include the costs of pre-provisioning limited functionality.<sup>335</sup>

### **8.3.3 Section 152BCA(1)(c) – interests of all persons who have rights to use the declared service**

As discussed under section 152BCA(1)(a), the ACCC considers that the likely contestable customer base for a Telstra naked wholesale ADSL product is in more regional and rural areas, where naked ADSL will become available for the first time. A higher access charge may be passed on in retail pricing, significantly diminishing or eliminating the pricing advantages currently associated with naked ADSL provided over ULLS in metropolitan areas. Accordingly, the ACCC considers that an unbundling term is unlikely to improve the potential for access seekers to compete in ESAs outside the competitive DSLAM footprint. Further, as a fully unbundled service will also lose the PSTN voice service, a comparably priced product may not be demanded by end-users in these regional or rural ESAs.

The ACCC considers that a hybrid unbundled service is unlikely to improve the ability of access seekers to compete with Telstra retail, whether based on price competitiveness or the delivery of flexible and tailored services. The ACCC notes that the cost of providing a hybrid unbundled service is likely to be comparable to the cost of providing a wholesale ADSL service with a full service PSTN product.

Therefore, the ACCC considers that it will not currently be in the interests of access seekers to require Telstra to implement a fully unbundled and hybrid unbundled service. In particular, including such a term in the draft FAD is unlikely to provide pricing advantages for access seekers to compete with Telstra.

### **8.3.4 Section 152BCA(1)(d) – direct cost of providing access to the declared service**

As outlined under section 152BCA(1)(a), the ACCC considers that the cost of providing access to a fully unbundled service is likely to be comparable to, or higher than that for the current wholesale ADSL service. Therefore, while an unbundling term will not preclude Telstra recovering the direct costs of providing access to naked wholesale ADSL, it is likely that any regulated access charge will be higher to reflect cost increases associated with offering a fully unbundled service.

Similarly, Telstra would be entitled to recover the direct costs of providing a hybrid unbundled wholesale ADSL service. Telstra would likely incur direct costs to pre-provision limited functionality on the line and alter its systems to accommodate a hybrid unbundled product. Further, access seekers have submitted that the charge for a hybrid unbundled service is likely to be the same, if not higher, than Telstra's current wholesale ADSL service.

Based on these costs, it is likely there would be a limited cost differential between Telstra's supply of a fully or hybrid unbundled ADSL service and a bundled wholesale ADSL service.

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<sup>335</sup> Telstra, August 2012 non-price terms submission, p. 40.



### **8.3.5 Section 152BCA(1)(e) – value to a party of extensions, or enhancement of capability, whose cost is borne by someone else**

If an unbundling term were included in the wholesale ADSL FAD, the ACCC considers that the effect of such a term would be that Telstra would be required to enhance facilities to provide a naked wholesale ADSL service. The ACCC considers that the costs of these enhancements would be recovered as part of any access charge for a naked wholesale ADSL service and likely passed onto end-users. As outlined under section 152BCA(1)(a), an unbundled service provided via Telstra is unlikely to offer a retail price advantage compared to the status quo.

Similarly, at this time the ACCC considers that a hybrid unbundled wholesale ADSL service may not offer access seekers pricing advantages and is unlikely to offer access seekers the ability to innovate and provide new services. Further, such a service is likely to only attract a relatively small customer base. Therefore, the ACCC considers that the value to access seekers of the extensions and enhancements necessary to provide a hybrid unbundled service is relatively limited.

### **8.3.6 Section 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility**

The ACCC considers that maintaining the status quo will promote the reliability of Telstra's current wholesale ADSL services supplied over its current network. The ACCC accepts that requiring Telstra to offer a fully unbundled wholesale ADSL service without an underlying PSTN service may increase the incidence of line faults and affect the reliable operation of Telstra's current network infrastructure.

Further, the ACCC considers that the reliable operation of such a service will likely be diminished through Telstra's inability to deploy certain testing methods through the PSTN to diagnose and locate line faults. The ACCC accepts that requiring Telstra to offer a fully unbundled service may require the use of less accurate and more labour and time intensive methods to identify such faults.

The hybrid approach would still require an underlying PSTN service on the line, enabling the use of more reliable testing and diagnosis methods. Therefore, the inclusion of a hybrid unbundling term may not affect the reliable operation of a hybrid wholesale ADSL service.

### **8.3.7 Section 152BCA(1)(g) – economically efficient operation of a carriage service, a telecommunications network or a facility**

Regarding full unbundling, the absence of the underlying PSTN service is associated with capital costs and increased ongoing operational costs due to higher fault rates and assurance costs. The ACCC considers that requiring Telstra to provide a fully unbundled service over its current network may be inefficient as it may not be the least cost method of provision and may be comparable in cost to the status quo while delivering fewer services.

Regarding hybrid unbundling, the ACCC considers in some circumstances it may be inefficient to require a stripped back line rental product that does not appear to be highly demanded by access seekers. Further, this may require the use of infrastructure to provide a service that end-users do not wish to use. Therefore, the ACCC considers that requiring Telstra to provide a fully unbundled or hybrid unbundled service may not be conducive to the economically efficient operation of Telstra's current network infrastructure.

### **8.3.8 Power to require unbundling**

In response to the February 2012 Discussion Paper, Telstra raised the issue of whether an unbundling term is inconsistent with the SAOs and whether naked wholesale ADSL is an active declared service. The discussion above has set out the conclusion that an unbundling term will not be included in the draft FAD, and as such this issue does not arise.

## **8.4 ACCC draft view**

Based on the matters the ACCC must take into account, the ACCC's draft view is to maintain the status quo. The ACCC considers that requiring Telstra to offer a fully unbundled or hybrid unbundled wholesale ADSL service is not currently appropriate, having regard to these legislative matters. Therefore, the ACCC does not propose to include a term in the draft FAD requiring Telstra to supply such services.

The ACCC accepts Telstra's ADSL network is configured in a manner that requires an underlying PSTN service on the line before an ADSL service can be provisioned. The SAOs oblige Telstra to offer to supply wholesale ADSL in similar circumstances to those in which it provides the product to itself.<sup>336</sup> In the absence of an unbundling term (or Telstra retail naked ADSL product), the FAD prices for Wholesale ADSL only apply in circumstances where there is an active PSTN voice product on the end-user's access line.

The ACCC's draft view is based on an assessment of current circumstances and information available at this time. Should relevant circumstances change in the future (for example, if Telstra commenced supplying a fully unbundled or hybrid unbundled ADSL service), it may be appropriate for the ACCC to reconsider this issue. Further, notwithstanding the ACCC's draft views, the ACCC maintains its position that its powers are broad enough to include a term in an FAD requiring an access provider to offer a fully unbundled or hybrid wholesale ADSL service.

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<sup>336</sup> Section 152AR(3) of the CCA.

## 9 Points of interconnection for the wholesale ADSL service

This chapter considers whether a term should be included in the draft FAD requiring additional points of interconnection (POIs) for Telstra's ADSL network. This chapter also considers whether to include a term in the draft FAD that requires Telstra to provide a separate wholesale ADSL service where the wholesale ADSL local access component is provided separately from the backhaul component to potentially enable greater use of non-Telstra transmission services.

### 9.1 The wholesale ADSL service

The wholesale ADSL service involves both local access from the network termination point at the customer premise to the local exchange, and backhaul transmission/aggregation between the local exchange and the POI with the access seeker's network, which is typically a CBD exchange in the relevant state.

This backhaul transmission is aggregated such that data from the service provider's end-users, including end-users physically connected to different DSLAMs, is combined into a single 'stream' for delivery to the access seeker. The backhaul interface can be either an AGVC or VLAN (using either ATM or Gigabit Ethernet as the transport protocol respectively). The Access Seeker acquires an interface and then acquires capacity over that interface to a specified throughput that it chooses.

In acquiring a wholesale ADSL service an access seeker must pay for both the local access component and the backhaul component. Notwithstanding this aggregation in the backhaul component, the declared wholesale ADSL service is from the perspective of the access seeker a Layer 2 service, which is used by service providers to access end-users of wholesale ADSL services.

The ACCC, in deciding to declare the wholesale ADSL service, otherwise considered that high AGVC charges could negatively affect the development of competition in downstream markets. The ACCC considered that with declaration the availability of efficient AGVC pricing would promote competition for the supply of data intensive ADSL services.<sup>337</sup>

The wholesale ADSL service description defines a POI<sup>338</sup> as an interface that is:

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

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<sup>337</sup> ACCC, *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final Decision*, February 2012, p. 38.

<sup>338</sup> As defined in the service description for the wholesale ADSL service – see Appendix A.

The IAD for the wholesale ADSL service did not specify the number or location of POIs, leaving these as a matter of agreement between the access provider and access seeker. Telstra currently provides POIs in a small number of CBD exchanges in each relevant state.<sup>339</sup> A list of the relevant AGVC interconnection site for each ADSL-enabled ESA is available on the Telstra Wholesale website.<sup>340</sup>

In its July 2012 Issues Paper the ACCC noted that the FAD for the wholesale ADSL service could nominate POIs or it could leave these to be the subject of agreement. If the FAD did nominate POIs, these could match the existing POIs offered by Telstra or specify additional POIs.<sup>341</sup>

## 9.2 Summary of submissions

Submitters in favour of the inclusion of a term in the FAD generally identified two possible ways to achieve such a goal: to require Telstra to deploy additional POIs; or, to require Telstra to separate the access component of the wholesale ADSL service from its backhaul component.

Herbert Geer (on behalf of iiNet and Adam Internet), Macquarie Telecom and Optus submitted that consideration should be given to the providing additional POIs and that the benefits of additional POIs would exceed the costs. Optus supported specifying additional POIs for the wholesale ADSL service as it would be in the LTIE because it promotes competition and encourages the efficient use of and investment in infrastructure.<sup>342</sup> Optus submitted that additional POIs would promote competition in the retail broadband market. Macquarie Telecom submitted that the benefits of additional POIs would include greater flexibility for access seekers to manage network interconnectivity and promoting development of transmission markets with flow-on benefits to downstream markets.

Nextgen also submitted that specifying additional POIs may encourage efficient investment in infrastructure to provide transmission services to access seekers, including that which may be used to interconnect to the NBN in the future.<sup>343</sup>

Macquarie Telecom identified the costs to establish additional POIs as including the physical costs of network equipment, on-going costs (such as housing, securing, powering, controlling and maintaining), the potential for loss of scale economies and loss of administration control.<sup>344</sup>

AAPT, the Competitive Carriers' Coalition, Herbert Geer, Macquarie Telecom and Nextgen also generally submitted that the FAD should contain a provision requiring Telstra to provide a wholesale ADSL service where the wholesale ADSL port component was provided

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<sup>339</sup> Telstra, August 2012 non-price terms submission, p. 24.

<sup>340</sup> Telstra, AGVC location for ADSL sites, <http://www.telstrawholesale.com.au/download/document/access-broadband-telstrae.xls> (accessed 18 January 2013).

<sup>341</sup> ACCC, July 2012 Issues Paper, p. 35.

<sup>342</sup> Optus, August 2012 submission, p. 28.

<sup>343</sup> Nextgen Networks, August 2012 submission, p. 3.

<sup>344</sup> Macquarie Telecom, August 2012 submission, p. 15.

separately from an AGVC component. A number of submissions stated this was a preferable alternative to terms that required the establishment of additional POIs.

Submitters other than Telstra generally identified that such a provision would encourage entry in order to supply transmission services for the wholesale ADSL service which in turn would result in greater competition for the provision of transmission infrastructure which would likely result in lower prices for end-users. Submitters acknowledged that Telstra would be required to deploy hardware (and associated capital expenditure) to allow aggregation points to operate deeper into its network.

Telstra submitted that the FAD should not specify POIs that are different to those already defined in the service description for the wholesale ADSL service. Telstra submitted that requiring additional POIs deeper into its network or to a POI requested by an access seeker would be inefficient relative to its current network design.<sup>345</sup>

Telstra provided further information on the technical feasibility of and costs associated with providing additional POIs. Telstra submitted that it currently employs [c-i-c] [c-i-c] BRAS devices in [c-i-c] [c-i-c] of its [c-i-c] [c-i-c] ESAs. It submitted that some of these BRAS devices are needed to aggregate traffic to support DSLAMS employing ATM-based technology (A-BRAS) and others are needed for Ethernet-based Technology (E-BRAS) and similarly (depending on the type of DSLAM) traffic may traverse a number of different transmission elements.<sup>346</sup> Telstra also stated that it employs [c-i-c] [c-i-c] IGR devices [c-i-c] [c-i-c].

Telstra indicated that providing a greater number of POI locations would require moving the BRAS and IGR devices closer to the end-user DSLAMs and deployment of a far greater number of these devices than is currently required in the current centralised network. Telstra submitted that depending on the technology at a particular ESA it may need to deploy: both an A-BRAS and E-BRAS (which Telstra indicated may cost in the order of [c-i-c] [c-i-c]) and IGR devices (which Telstra indicated may cost in the order of [c-i-c] [c-i-c]). Telstra noted that these figures do not include development costs and other costs including re-engineering and the bypass of existing network elements.<sup>347</sup>

Telstra submitted that wholesale ADSL is entirely different to the unbundled services such as the ULLS and LSS which simply provide infrastructure and require the access seeker to deploy their own equipment to provide a service.<sup>348</sup> Telstra submitted that it is not possible to allow interconnection between the DSLAM and the BRAS/IGR. It submitted that ADSL traffic cannot be split or separated at the DSLAM and that the DSLAM is not capable of providing any of the header information required to authenticate and terminate end-user sessions (which is provided by the BRAS device).<sup>349</sup>

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<sup>345</sup> Telstra, August 2012 non-price terms submission, pp. 47-49.

<sup>346</sup> Ibid, pp. 47-48.

<sup>347</sup> Ibid, pp. 55-56.

<sup>348</sup> Ibid, p. 45.

<sup>349</sup> Ibid, pp. 46-47.

Telstra indicated that these and other necessary functions for the provision of a wholesale service (such as aggregation of signals from multiple DSLAM devices) reside in the BRAS and IGR network components. Telstra argued that irrespective of where the POI is located, an unbroken local loop; DSLAM; BRAS; IGR; and necessary transmission links connecting each of these network elements must be present in addition to operational support systems and business support systems in order to provide a wholesale service.<sup>350</sup> Without all of these elements Telstra asserted that it is not possible to provide an ADSL service.<sup>351</sup>

### 9.3 ACCC draft views

This section sets out the ACCC's assessment of whether to include in the FAD:

- a term requiring the deployment of additional POIs
- a term that has the effect of separating the ADSL service such that the local access component is provided separately from the backhaul transmission/aggregation component.

The ACCC's assessment takes into account the submissions summarised above and the relevant matters set out section 152BCA of the CCA, specifically:

- whether these terms will promote the long-term interests of end-users
- the legitimate business interests of a carrier or carriage service provider
- the interests of all persons who have rights to use the declared service
- the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else
- operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- economically efficient operation of a carriage service, a telecommunications network or a facility.<sup>352</sup>

For the following reasons, the ACCC has not included these terms in the draft FAD. The ACCC has formed the draft view that including these terms is not in the LTIE as there are likely to be significant costs associated with the re-engineering of Telstra's ADSL network and the deployment of additional expensive network components that will lead to an inefficient level of investment and under-utilisation of the relevant facility. The ACCC notes that the following assessment relates to Telstra's current network and ADSL POIs, as distinct from its views about the appropriate locations for POIs in the context of a new network build, such as the NBN.

For the same reasons set out in the July 2012 Issues Paper, the ACCC considers that the objective of achieving any-to-any connectivity is not relevant to this particular matter.

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<sup>350</sup> Ibid, pp. 46-47.

<sup>351</sup> Ibid, p. 46.

<sup>352</sup> Subsections 152BCA(1)(a), (b), (c), (d), (e), (f) and (g) of the CCA.

However, the objectives of promoting competition and encouraging the economically efficient use of and investment in infrastructure by which the listed services are supplied (or are likely to become capable of being supplied) are relevant.<sup>353</sup>

Firstly, in the July 2012 Issues Paper, the ACCC noted that providing additional POIs may promote competition by facilitating lower prices for end-users and could promote competition in retail markets where competitive transmission services are available to service providers.<sup>354</sup> However, Telstra has provided information concerning the likely significant direct costs through the extension or enhancement of a facility that would require an element of re-engineering its network and to deploy a greater number of additional network components. This includes BRAS and IGR devices (which cost in the order of [c-i-c] [c-i-c] and [c-i-c] [c-i-c] respectively) and reconfiguring existing transmission paths would be required. In addition, transmission links and operational and business support systems would be required in order to provide a wholesale service.

It would be reasonable for Telstra to recover the costs associated with implementing further POIs in the charge for the wholesale ADSL service and this would likely lead to increased prices for end-users. To recover these costs would be in Telstra's legitimate business interests in earning a normal commercial return on its investment.<sup>355</sup> Therefore, a potential reduction in backhaul charges through the entry of backhaul providers may be offset by the additional costs of the required equipment investment by Telstra.

The ACCC considers that the costs of providing additional POIs or to allow access seekers to utilise competitive backhaul would appear to require Telstra to significantly re-engineer its network and to deploy a greater number of additional expensive network components. It is likely that Telstra would seek to recover the direct costs of its additional investment.<sup>356</sup> In aggregate, this may potentially lead to higher prices for end-users and is therefore unlikely to promote competition. However, the ACCC notes that stakeholders did not provide submissions on how the costs of providing additional POIs or facilitating access to competitive backhaul should be recovered. Further, uncertainty surrounding the progressive rollout of the NBN may impact the recovery of such investments.

Secondly, the ACCC considers that the inclusion of a term in the draft FAD requiring Telstra to deploy additional POIs or to separate the access and backhaul components of the wholesale ADSL service is unlikely to encourage the economically efficient use of and investment in this infrastructure. The information before the ACCC indicates that the scale of the costs of supplying wholesale ADSL services (and increased costs of Telstra managing its network) are likely to require a level of investment greater than the efficient level of investment required to provide a wholesale ADSL service. This is primarily because the deployment of a number of additional BRAS and IGR devices and other components appears to be unnecessary duplication where the wholesale ADSL service can otherwise currently be efficiently supplied using a lesser number of such devices.

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<sup>353</sup> Subsection 152AB(2) of the CCA.

<sup>354</sup> ACCC, July 2012 Issues Paper, p. 70.

<sup>355</sup> Subsection 152BCA(1)(b) of the CCA.

<sup>356</sup> Subsection 152BCA(1)(d) of the CCA.

While the BRAS and IGR devices have large capacities, each capable of provisioning large amounts of aggregated traffic, the ACCC is of the view that the deployment of additional devices is likely to lead to the under-utilisation of these devices. This would be an allocatively inefficient outcome relative to maintaining the status quo. Similarly the costs of additional deployment of these devices would likely lead to an increased cost of providing the service, and therefore a loss of technical efficiency. This would not be an economically efficient operation of the wholesale ADSL service.

That said, it may be possible, at least in theory, that some of the infrastructure required to provide wholesale ADSL transmission services to access seekers could later be used to interconnect to the NBN. However, the ACCC considers the prospect of such reconfiguration of network infrastructure to be highly speculative. Whether such a possible strategy is of interest to access seekers will depend on the commercial strategies of individual businesses. The ACCC considers that it is too uncertain to conclude that investment in wholesale ADSL POIs will likely be subsequently used to interconnect with the NBN at some point in the future.

The ACCC does not propose to revisit the Wholesale ADSL service description. Further, the ACCC does not propose to require a term in the draft FAD for Telstra to provide an ADSL service such that the access component may be provided separately from the backhaul component. It is likely that requiring such a term will encourage entry of transmission providers in addition to those transmission services provided by Telstra. However, due to the expected costs of undertaking modifications to Telstra's network as described above, such investment is unlikely to encourage the economically efficient use of and investment in this infrastructure.

The ACCC's consideration of these issues is based on Telstra's current network. At this point in time, the ACCC considers it may not be efficient to require Telstra to make the abovementioned investments given the progressive rollout of the NBN and the decommissioning of Telstra's copper network.

Thirdly, it is not necessarily in the interest of all persons who have rights to use the declared service to establish additional POIs.<sup>357</sup> The ACCC notes that it is not necessarily the view of access seekers to seek additional POIs. Further, some access seekers submitted that their utilisation of additional POIs would depend on the geographic location of any such POIs.

Fourthly, the ACCC considers that the required re-engineering of Telstra's network to accommodate additional POIs (or alternatively to enable access seekers to utilise competitive backhaul) would require significant investment by Telstra and is likely to require Telstra to extend or enhance certain facilities. The ACCC considers that the value to access seekers of such extensions or enhancement of capability may not be significant, based on the costs of re-engineering Telstra's network to accommodate these options.<sup>358</sup>

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<sup>357</sup> Subsection 152BCA(1)(c) of the CCA.

<sup>358</sup> Subsection 152BCA(1)(e) of the CCA.



Fifthly, there is no suggestion that the provision of additional POIs or allowing access seekers to utilise competitive backhaul would impact upon the safe and reliable operation of a carriage service, a telecommunications network, or a facility.

Finally, the ACCC does not currently take into account the supply of one or more other eligible services to be highly relevant to the issue of POIs.<sup>359</sup> The ACCC recognises the potential promotion of competition by ensuring access seekers can utilise competitive backhaul, including use of the declared domestic transmission capacity service. However, on balance, it is not appropriate to require Telstra to reconfigure its network to facilitate this option.

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<sup>359</sup> Subsection 152BCA(2) of the CCA.

## 10 Standard non-price terms and conditions

### 10.1 Overview

Access seekers and access providers are able to commercially negotiate NPTCs for the supply of wholesale ADSL services. However, the ACCC expressed its preliminary view in the July 2012 Issues Paper that it intends to include NPTCs in the wholesale ADSL FAD, as it is important to have a set of base terms in the event that commercial agreement cannot be reached. This creates certainty for the parties and is likely to promote competition by encouraging access seekers to invest in infrastructure in the relevant markets. This is also consistent with the approach taken by the ACCC in making FADs for other declared services.

The ACCC's general approach in setting NPTCs in FADs has been to address the key commercial terms of access that would facilitate the commercial supply of the service to occur, and to base these on the ACCC's *Model Non-Price Terms and Conditions Determination 2008* (2008 Model Terms).<sup>360</sup>

The ACCC considered that the most appropriate starting point for developing the NPTCs for wholesale ADSL FAD is the amended form of 2008 Model Terms that were adopted in the domestic transmission and capacity service (DTCS) FAD.<sup>361</sup> The DTCS FAD is the most recent FAD made by the ACCC and the NPTCs in that FAD reflect and address the industry concerns, as well as ACCC's consideration of those concerns, expressed in the most recent FAD inquiry prior to the wholesale ADSL FAD inquiry. However, the ACCC acknowledged that some differences in terms might be appropriate for reasons specific to the wholesale ADSL service.<sup>362</sup>

The ACCC's preliminary view in the July 2012 Issues Paper was to include the following schedules:

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

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<sup>360</sup> ACCC, *Model Non-Price Terms & Conditions Determination 2008*, 17 November 2008; ACCC, *Final Determination – Model Non-price Terms and Conditions*, November 2008. The 2008 Non-price Model Terms can be found on the ACCC's website at:

<http://www.accc.gov.au/content/index.phtml/itemId/849788>.

<sup>361</sup> ACCC, *Final Access Determination No. 1 Of 2012 (DTCS)*, 21 June 2012; ACCC, *Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement*, June 2012. The DTCS FAD and the explanatory statement are available on the ACCC website at:

<http://www.accc.gov.au/content/index.phtml/itemId/990533>.

<sup>362</sup> ACCC, July 2012 Issues Paper, p. 39.

- suspension and termination.

The above schedules were included in the wholesale ADSL IAD. Specific issues regarding each of the above schedules were raised and discussed in the July 2012 Issues Paper. The ACCC sought further submissions in relation to possible amendments to, and redrafting of, each of the above schedules.

In the July 2012 Issues Paper, the ACCC also considered issues relating to the following schedules:

- liability and indemnity
- ordering and provisioning
- changes to operating manuals
- network modernisation and upgrade.

These schedules were not included in the ADSL IAD as they did not appear to be relevant to the supply of the service at the time the IAD was made.<sup>363</sup> However, on the basis of submissions received since the IAD, the ACCC considered that including these additional schedules may be important to providing a base set of terms and conditions, creating certainty and promoting competition.

### **10.1.1 Summary of submissions**

Telstra made submissions that a number of schedules are unnecessary and should not be included in the FAD. These are terms relating to communications with end-users, liability and indemnity, network modernisation and upgrade, ordering and provisioning and changes to operating manuals.<sup>364</sup> Submissions from Optus, Herbert Geer and Macquarie Telecom, on the other hand, generally supported the inclusion of all of the schedules mentioned above.

### **10.1.2 ACCC draft view**

The ACCC has included NPTCs in the draft FAD, and the particular NPTCs that it has included are set out below. The ACCC recognises that certain terms could be covered by commercial agreements, but considers it important to specify a base set of terms in the event that a commercial agreement cannot be reached. The ACCC considers that this approach does not impede on the parties' freedom to negotiate their own terms of access and rely on those terms instead of the FAD.

The ACCC has included the following schedules in the draft FAD:

- billing and notification
- creditworthiness and security

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<sup>363</sup> ACCC, *Interim access determination for the wholesale ADSL service, Statement of Reasons*, February 2012, p. 17.

<sup>364</sup> Telstra, August 2012 non-price terms submission, pp. 68 & 71–73.

- general dispute resolution procedures
- confidentiality provisions
- communications with end-users
- suspension and termination.
- liability and indemnity
- network modernisation and upgrade
- changes to operating manuals.

As noted above, the terms in the draft FAD are based on those adopted in the DTCS FAD. The ACCC has largely maintained the drafting in the DTCS FAD for the purpose of the draft ADSL FAD. However, the ACCC has made some changes to the terms in the DTCS FAD for the purpose of the draft ADSL FAD where it considers appropriate. These changes are set out and explained in sections 10.2 to 10.11 below.

The DTCS FAD does not contain a schedule relating to changes to operating manuals, therefore the ACCC has adopted the relevant schedule in the 2008 Model Terms for the draft FAD.

The ACCC has not included terms relating to ordering and provisioning in the draft FAD for reasons set out in section 10.11 below.

## **10.2 Schedule 2 – Billing and notification**

Four issues were raised by the ACCC in its July 2012 Issues Paper in relation to the billing and notification provisions.<sup>365</sup>

Firstly, the timeframe for invoicing for previously uninvoiced charges, i.e. backbilling, under clause 2.4 of Schedule 2 of the DTCS FAD was not consistent with the timeframe for backbilling consumers in the *Telecommunications Consumer Protection Code (C628:2007)* (TCP Code) which was under review.<sup>366</sup> The ACCC sought submissions on whether this timeframe should be amended to be consistent with the TCP Code in the light of a proposed new code that might still have a different timeframe.

Secondly, the ACCC sought submissions on whether the timeframe for raising a billing dispute should be extended to be consistent with the Telecommunications Industry Ombudsman (TIO) timeframe for investigating consumer complaints (i.e. 24 months).

Thirdly, there was a lack of clarity regarding the term ‘new services’ in the billing and notification provisions and no maximum period within which each has to provide the other with information relevant with a dispute was specified.<sup>367</sup> The ACCC had made refinements to these terms in clauses 2.4 and 2.16 in the DTCS FAD attached to the July 2012 Issues

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<sup>365</sup> ACCC, July 2012 Issues Paper, pp. 41–42.

<sup>366</sup> The TCP Code is an industry-developed and self-regulatory code which sets the standards of conduct for telecommunications service providers.

<sup>367</sup> See clauses A.5(b)(ii) and A.17 of the 2008 Non-price Model Terms respectively.

Paper and sought submissions on whether further refinements are required to the relevant clauses.

Finally, the ACCC sought submissions on whether there is a drafting inconsistency between clauses 2.6 and 2.12 in the DTCS FAD regarding the right to withhold payment of disputed amount by access seekers and how redrafting of the terms should be undertaken if such inconsistency exists.

### 10.2.1 Summary of submissions

Macquarie Telecom, Optus, Herbert Geer and Telstra made submissions on whether the timeframe of backbilling in clause 2.4 of the DTCS FAD should be consistent with the timeframe for backbilling in the TCP Code.<sup>368</sup> Macquarie Telecom and Optus submitted that the backbilling period in clause 2.4 of the DTCS FAD should be made consistent with the backbilling period provided in the TCP Code.<sup>369</sup> Herbert Geer submitted that the obligations on access providers in respect of backbilling should be such as to allow access seekers to comply with their obligations with respect of backbilling under the TCP Code. Herbert Geer proposed to include a mechanism such as to make the allowed backbilling period in the FAD 60 days less than the backbilling period provided in the TCP Code.<sup>370</sup> On the other hand, Telstra did not consider there is any need for amending the backbilling period in clause 2.4 given that it is subject to clause 2.5 which requires parties to comply with any applicable industry standard made by ACMA.<sup>371</sup>

In relation to the timeframe for raising a billing dispute, Macquarie Telecom and Optus submitted that the timeframes should be consistent with the timeframe for a consumer to make a complaint to the TIO involving billing (i.e. 24 months).<sup>372</sup> Optus considered that this would allow parties to extract the relevant data to support the analysis of the case for dispute, which can be time consuming and complex.<sup>373</sup> Herbert Geer submitted that the current timeframe of six months should be extended to nine months, and that in the case where the billing dispute arises from a complaint of a consumer to the TIO, the Access Seeker should be allowed one month to raise a billing dispute after being notified by the TIO to allow the Access Seeker sufficient time to extra data relevant to the analysis of the dispute.<sup>374</sup>

Telstra submitted that the current timeframe for raising a billing dispute should not be extended beyond the six month period as this is neither necessary nor conducive to the timely resolution of billing disputes. Telstra rejected concerns with respect to the TIO complaint procedures and considered that the inability of an Access Seeker to raise a billing dispute

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<sup>368</sup> The newly proposed TCP Code (C628:2012) is now registered and clause 5.4 of the TCP Code provides for a backbilling period of 160 days from the day the relevant charge was incurred.

<sup>369</sup> Macquarie Telecom, August 2012 submission, pp. 15–16; Optus, August 2012 submission, p. 29.

<sup>370</sup> Herbert Geer, August 2012 submission, p. 18.

<sup>371</sup> Telstra, August 2012 non-price terms submission, p. 60.

<sup>372</sup> Macquarie Telecom, August 2012 submission, pp. 16; Optus, August 2012 submission, p. 29.

<sup>373</sup> Optus, August 2012 submission, p. 29.

<sup>374</sup> Herbert Geer, August 2012 submission, pp. 18–19.

with the Access Provider will not affect the Access Seeker's obligation to provide information relevant to a dispute to a TIO investigation.<sup>375</sup>

In regard to clauses 2.4 and 2.16, stakeholders did not propose any further amendments to these clauses.<sup>376</sup>

Macquarie Telecom submitted that there is a drafting inconsistency between clauses 2.6 and 2.12 in the DTCS FAD regarding the right of the Access Seeker to withhold payment and proposed that clause 2.6 be amended to be consistent with clause 2.12.<sup>377</sup> Herbert Geer and Optus submitted that the potential inconsistency could be resolved by making clear that clause 2.6 is subject to clause 2.12.<sup>378</sup> Telstra submitted that there is no drafting inconsistency as clause 2.6 is already expressed to be subject to clause 2.12 and that both clauses make clear that disputed charges may be withheld if a billing dispute notice is given to the Access Provider before the due date for payment.<sup>379</sup>

Telstra proposed some further changes to the terms of the DTCS FAD. It submitted that the definition for 'Charge' should be more narrowly defined to mean a charge set out in the FAD and that 'Billing Disputes' be confined to a dispute about an alleged inaccuracy, omission or error in a Charge in an invoice.<sup>380</sup> Telstra submitted that an Access Provider should not have to wait for more than 20 Business Days before taking action to recover outstanding payments from an Access Seeker.<sup>381</sup>

Telstra also submitted that the time periods for an Access Seeker to make an objection under clause 2.18 and to escalate the matter under clause 2.22 should be shortened to ensure timely resolution of billing disputes.<sup>382</sup> Last, Telstra submitted that clause 2.30 which deals with the application of penalty interests against the Access Provider should be deleted. In the event that it is retained, Telstra submitted that clause 2.30 should be limited in operation and a reciprocal sentence imposing penalty interests on the Access Seeker for lodging inappropriate billing disputes should be inserted.<sup>383</sup>

Optus further submitted that amendment should be made to clause 2.16 to allow Access Seekers 10 Business Days rather than 5 Business Days to provide relevant materials for a billing dispute.<sup>384</sup>

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<sup>375</sup> Telstra, August 2012 non-price terms submission, p. 60.

<sup>376</sup> Telstra, August 2012 non-price terms submission, p. 61; Macquarie Telecom, August 2012 submission, p. 16; Herbert Geer, August 2012 submission, p. 19; Optus, August 2012 submission, p. 29.

<sup>377</sup> Macquarie Telecom, August 2012 submission, pp. 16–17.

<sup>378</sup> Herbert Geer, August 2012 submission, p. 19; Optus, August 2012 submission, p. 30.

<sup>379</sup> Telstra, August 2012 non-price terms submission, p. 61.

<sup>380</sup> Ibid, pp. 58–59.

<sup>381</sup> Ibid, pp. 59–60.

<sup>382</sup> Ibid, pp. 86–88.

<sup>383</sup> Ibid, pp. 89–90.

<sup>384</sup> Optus, August 2012 submission, p. 30.

## 10.2.2 ACCC draft view

The ACCC has considered the submissions summarised above and taken into account the legislative criteria relevant to this issue, specifically:

- whether these terms will promote the long-term interests of end-users (LTIE)
- the legitimate business interests of a carrier or carriage service provider
- the interests of all persons who have rights to use the declared service
- economically efficient operation of a carriage service, a telecommunications network or a facility.<sup>385</sup>

Billing and notification terms, in particular the specification of timeframes for providing invoices and making payments will promote competition in the wholesale ADSL market. It will also encourage efficient investment in the infrastructure by which the wholesale ADSL service is supplied, and any other infrastructure by which the wholesale ADSL service is capable of being supplied.

Competition in the wholesale ADSL market and the relevant downstream market will be promoted by preventing unnecessary disruptions to business activities as a result of errors or ongoing disputes and assist in ensuring accurate and timely billing, allowing access seekers to bill end-users in a timely manner. Such terms also encourage efficient investment by promoting certainty for access providers and by reducing capital risks by providing assurance of how investment costs will be recovered. This certainty is also in the legitimate business interests of the access seeker and the access provider as it ensures access providers earn a normal commercial return on their investment with respect to the risk of not being paid amounts owing. It also ensures that an access provider benefits from the certainty of clear and timely billing dispute resolution processes.

The specific proposals made by stakeholders summarised above are considered in turn below.

First, the ACCC considers that the period for invoicing uninvoiced charges, i.e. backbilling period, in the draft FAD should be aligned with the backbilling period allowed under the newly registered TCP Code or any replacement Code in the future. The ACCC is of the view that this is sufficient to protect the interests of the Access Seekers such that they are not unduly exposed to backbilled charges which they will not be able to recover from their customers. The ACCC also considers that a shorter backbilling period than that provided in the TCP Code is not necessary. Given that clause 2.4 is subject to clause 2.5, the ACCC has amended clause 2.5 so that the backbilling period mirrors that in the TCP Code or any replacement Code in the future. The effect of this amendment is that the current backbilling period allowed would be 160 days consistent with the newly registered TCP Code.

Secondly, the ACCC does not consider that it is necessary to align the timeframe for raising a billing dispute with that allowed under the TIO procedures for a consumer to make a billing complaint to ensure that an Access Seeker has sufficient time to extra data relevant to the

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<sup>385</sup> Section 152BCA of the CCA.

analysis of the dispute. The ACCC recognises that there may be circumstances where a customer of the Access Seeker makes a complaint to the TIO regarding billing against the Access Seeker, which may give rise to a billing dispute between the Access Seeker and the Access Provider, and that this may arise after the six month period provided in clause 2.14. However, the ACCC is not aware of any evidence that such a situation has arisen, or that it results in significant or systemic issues such that it is necessary to extend the timeframe to 24 months. Therefore, at this stage the ACCC considers that the six month period provided for in clause 2.14 is sufficient for raising any billing dispute and that any longer period may unduly undermine the efficiency of the billing process and the timely resolution of any billing dispute. However, the ACCC welcomes further submissions and information on this issue in finalising the FAD.

Thirdly, the ACCC considers it is necessary to address the potential inconsistency between clauses 2.6 and 2.12 by amending clause 2.6 to clarify that the Access Seeker is entitled to withhold payment of disputed amount if a Billing Dispute Notice is provided to the Access Provider before the due date of the payment. This amendment clarifies that Access Seekers are only allowed to withhold payment of any disputed amount if a Billing Dispute Notice is provided to the Access Provider before the payment due date of the disputed amount on the invoice.<sup>386</sup>

The ACCC has considered Telstra's proposed changes to the definitions of 'Charge' and 'Billing Disputes' and is of the view that the narrower definitions for 'Charge' and 'Billing Dispute' as proposed by Telstra may unnecessarily restrict the application of these terms.<sup>387</sup> The ACCC also does not consider that the words 'relating to a Charge' in the definition of 'Billing Disputes' gives rise to any issues that warrant an amendment of the definition. Billing is a core element of the commercial dealings between the Access Seeker and the Access Provider and the billing dispute procedures have been devised so that any disputes regarding billing could be dealt with in a separate process from other disputes. It would undermine the purpose of having a distinct set of billing dispute procedures if the issues that can be dealt with under these procedures are unduly limited by a narrow definition of 'Billing Disputes'. Therefore, the ACCC does not intend to make any amendments to these definitions in the draft FAD.

The ACCC has also considered Telstra's other proposed amendments but has not adopted them in the draft FAD.

The ACCC considers that it is also important that the billing and notification terms do not create obligations that deter potential access seeker entry into the market. The current terms allow Access Seekers at least 20 Business Days before an Access Provider can take action to recover unpaid payments. The ACCC considers this to be a reasonable length of time for Access Seekers to identify and rectify any issues and the retention this 20 Business Day period to be necessary. The ACCC also considers that the timeframes for making an objection under clause 2.18 and for escalating billing disputes under clause 2.22 will allow

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<sup>386</sup> Subsection 152BCA(3) of the CCA.

<sup>387</sup> ACCC, *Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement*, June 2012, p. 49.



access seekers sufficient time to consider the merits of any dispute before undertaking any further action. The ACCC considers the current timeframes under these two clauses are reasonable and any shortening of the timeframes may unduly undermine the interests of the Access Seekers.

The rules and responsibilities around billing and dispute resolution provided in the draft FAD can reduce the duration of disputes and lead to more efficient and economical dispute resolution outcomes. To this end, clause 2.30 in its current form provides an incentive for Access Providers to produce accurate billing information and rectify errors in a timely manner. This will help to prevent unnecessary disruptions to the business activities of Access Seekers and other users of the wholesale ADSL service.

Finally, in response to Optus' submission, the ACCC considers that the timeframe for the Access Seekers to provide relevant materials for a billing dispute under clause 2.16 should be maintained and does not consider that there is any evidence to warrant an extension of the timeframe.

### **10.3 Schedule 3 – Creditworthiness and security**

The main issue raised in the July 2012 Issues Paper for consultation is in relation to the circumstances under which security is required to be provided. The ACCC's view was that the obligation to provide security where reasonably required struck the right balance between the interests of the access provider and those of the access seeker.

#### **10.3.1 Summary of submissions**

Herbert Geer and Macquarie Telecom submitted that no further changes were required to the terms in the relevant schedules of the DTCS FAD in relation to creditworthiness and security.<sup>388</sup>

Optus submitted that the creditworthiness and security provisions allowed the access provider too much discretion to require security.<sup>389</sup> Optus argued that it would be reasonable to amend the provisions to include references to an access seeker's credit rating and/or if a "credit review event" had occurred to provide the access provider a basis for the belief there was an unacceptable risk that the access seeker was unable to pay all charges.<sup>390</sup>

Telstra proposed a number of amendments to the terms on creditworthiness and security contained in the DTCS FAD. Telstra proposed to make the supply of the service conditional upon the provision of Security, in order to mitigate the Access Provider's financial exposure and risk.<sup>391</sup> Telstra also submitted that the access provider should have the right to determine the amount and form of the security as long as it is reasonably necessary to protect the legitimate interests of the access provider and is reasonable in all circumstances.<sup>392</sup> Telstra

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<sup>388</sup> Macquarie Telecom, August 2012 submission, p.17; Herbert Geer, August 2012 submission, p. 21.

<sup>389</sup> Optus, August 2012 submission, p. 30.

<sup>390</sup> Ibid.

<sup>391</sup> Telstra, August 2012 non-price terms submission, p. 62.

<sup>392</sup> Ibid, p. 63.

also submitted that the access provider should be allowed to alter the security held by the access seeker under a number of circumstances.<sup>393</sup> Telstra sought to expand the definition of ongoing creditworthiness information (OCI) and allow the access provider the flexibility to determine what information is reasonably required to assess the access seeker's creditworthiness.<sup>394</sup> Further, Telstra considered that the requirement for access providers to sign a confidentiality undertaking for OCI is unnecessary and should be removed from the FAD, or only applied to third-parties if the obligation remains.<sup>395</sup>

### 10.3.2 ACCC draft view

The ACCC has considered the submissions summarised above and taken into account the legislative criteria relevant to this issue, specifically:

- whether these terms will promote the LTIE
- the legitimate business interests of a carrier or carriage service provider
- the interests of all persons who have rights to use the declared service.<sup>396</sup>

The ACCC considers that unnecessary or excessive creditworthiness information or security requirements could potentially delay or frustrate an access seeker's ability to acquire services and results in an obstacle to their ability to compete in the downstream market. On the other hand, the ACCC recognises that security requirements and creditworthiness information are important in reducing the financial risk for the access provider and in turn, promotes the economically efficient investment in infrastructure as the access provider would have greater assurance that it will recover the costs of its investment. The ACCC considers that the terms included in Schedule 3 of the draft FAD balance these competing considerations and promote the LTIE.

The specific proposals made by stakeholders summarised above are considered in turn below.

The ACCC has not adopted Telstra's proposed amendments in the draft FAD.

The ACCC does not consider it necessary to make the provision of security a precondition of supply of the service, to allow the access provider to determine the amount and form of the security, or to require the access seeker to alter the amount of security in additional circumstances as the ACCC believes that the access provider is afforded sufficient protection against the risk of not being paid by the access seekers under the current terms of the schedule. The ACCC considers that Telstra's proposed amendments extend the rights of the access provider beyond those necessary for the protection of its legitimate interests at the expense of the access seekers, and may impede on the access seekers' ability to acquire service and compete with the access provider in the downstream market. As such, the ACCC considers that these proposed amendments may undermine the LTIE.

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<sup>393</sup> Ibid, p. 64.

<sup>394</sup> Ibid, p. 65.

<sup>395</sup> Ibid, pp. 64–65.

<sup>396</sup> Section 152BCA of the CCA.

The ACCC also considers that it is necessary to ensure a confidentiality undertaking is given by persons having access to an access seeker's OCI to effectively protect the legitimate interests of the access seekers and does not consider it over-burdensome where there may be some overlap between the confidentiality provisions required by this schedule and the general dispute resolution procedures schedule.

The ACCC acknowledges Optus' submission that the current provisions provide the access provider with too much discretion to require security. However, as discussed above, ACCC is of the view that the current terms in the schedule strike the right balance between the interests of the access provider and the access seeker. The ACCC considers that this balance minimises access provider's risk without creating an unnecessary impediment to access seeker entry.

## **10.4 Schedule 4 – General dispute resolution procedures**

The issue raised in relation to general dispute resolution procedures is whether a timeframe should be included for which each party is required to provide relevant materials to the other party after the notification of a non-billing dispute. The ACCC considered this could provide additional clarity to the parties and sought submissions on the length of the timeframe.<sup>397</sup>

### **10.4.1 Summary of submissions**

All submissions received on this issue support the inclusion of a timeframe in clause 4.9. Optus submitted that a 10 Business Day timeframe would be reasonable.<sup>398</sup> Herbert Geer submitted that a reasonable timeframe would be three weeks or longer as the parties agree.<sup>399</sup> Macquarie Telecom likewise supported a timeframe of no more than 21 days unless agreed otherwise by parties.<sup>400</sup> Telstra submitted that any timeframe specified should be consistent with the timeframe in clause 4.4(a) for the possible resolution of the dispute by the parties' nominated manager. Telstra considered that allowing no more than five business days for the parties to provide the relevant information will ensure that the nominated managers receive all relevant information with sufficient time to consider them to ideally resolve the dispute within the specified 10 Business Day period under clause 4.4(b).<sup>401</sup>

Telstra made some further submissions on the terms of the general dispute resolution procedures. Telstra proposed to insert an additional sentence in clause 4.1 to the effect that the Access Seeker cannot initiate both a Non-Billing Dispute and a billing Dispute in relation to the same subject matter.<sup>402</sup> Telstra also proposed an amendment to clause 4.2 to allow the Access Provider, not an independent third party, to determine whether a Billing Dispute is in fact a non-billing Dispute.<sup>403</sup> Last, Telstra submitted that amendment should be made to

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<sup>397</sup> ACCC, July 2012 Issues Paper, p. 44.

<sup>398</sup> Optus, August 2012 submission, p. 31.

<sup>399</sup> Herbert Geer, August 2012 submission, p. 20.

<sup>400</sup> Macquarie Telecom, August 2012 submission, p. 17.

<sup>401</sup> Telstra, August 2012 non-price terms submission, p. 66.

<sup>402</sup> Ibid, p. 97.

<sup>403</sup> Ibid, pp. 97–98.

clause 4.3 requiring a party to include sufficient details when notifying the other party of a Non-Billing Dispute.<sup>404</sup>

Optus further submitted that ‘an independent third party’ in clause 4.2 is too open-ended and should be confined to certain specified types of persons or persons in certain designated roles.<sup>405</sup>

#### **10.4.2 ACCC draft view**

The ACCC has considered the submissions summarised above and taken into account the legislative criteria relevant to this issue, specifically:

- whether these terms will promote the LTIE
- the legitimate business interests of a carrier or carriage service provider
- the interests of all persons who have rights to use the declared service.<sup>406</sup>

The ACCC considers that the existence of defined and balanced dispute resolution procedures indirectly promotes the LTIE, as they reduce the time and expense of dispute resolution for all parties, promote regulatory certainty and encourage parties to confidently engage in commercial negotiations.

The ACCC considers that the terms in Schedule 4 of the draft FAD achieve a balance between the legitimate business interests of the access provider and those of the access seeker as the obligations and rights in the terms apply equally to both the access seekers and the access provider.

The specific proposals made by stakeholders summarised above are considered in turn below.

The ACCC agrees that it is necessary to include a specified timeframe for providing relevant materials for a billing dispute in clause 4.9 to provide greater clarity and certainty to parties.<sup>407</sup> The ACCC has considered the differing views presented in the submissions as to the length of the timeframe and has decided to adopt a 14 day timeframe in the draft FAD for the following reasons.

The ACCC acknowledges Telstra’s submission that a short timeframe, such as the five Business Day period suggested by Telstra, would allow the nominated managers to receive the information and consider them for the purpose of possibly reaching a resolution. However, the ACCC recognises that the general dispute resolution procedures are made up of a number of steps involving escalations of disputes. The procedures envisage that some disputes may be resolved very early, such as by the nominated managers, and some may not be resolved until a binding decision is issued by the Expert Committee.

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<sup>404</sup> Ibid, p. 98.

<sup>405</sup> Optus, August 2012 submission, p. 31.

<sup>406</sup> Section 152BCA of the CCA.

<sup>407</sup> Subsection 152BCA(3) of the CCA.

Clause 4.9 provides the only instance during the dispute resolution procedures where parties are required to furnish information to the other and the parties must provide any relevant information that they intend to rely. As such, the ACCC considers that the timeframe to be set under clause 4.9 should accommodate disputes which may not be resolved expeditiously and disputes which may require parties to undertake extensive gathering and analysis of information.

The ACCC recognises that both the timeliness of dispute resolution and having sufficient time to prepare and gather information for the purpose of a dispute are in the interests of both the access seeker and the access provider. The ACCC considers that a 14 day period strikes the right balance between the two considerations and allows a reasonable amount of time for the parties to provide the relevant information. To accommodate unusually complex disputes, the ACCC considers it necessary to make it possible for the parties to agree to extend this timeframe.

The ACCC does not consider it necessary to amend clause 4.3 requiring the parties to provide sufficient details when notifying a dispute to the other party. The ACCC considers that the qualification that a dispute must be initiated in good faith in clause 4.3 as currently drafted is sufficient. An additional requirement of providing sufficient details may be redundant and could potentially introduce confusion and/or disagreement over the exact degree of details required for the notification. This in turn may cause delay in engaging the dispute resolution procedures after notification and is not conducive to the timeliness resolution of disputes.

In response to Optus' submission in regards to clause 4.2, the ACCC considers that the current drafting of the clause is satisfactory. The ACCC had amended clause 4.2 to specify that the 'independent third party' may include an arbiter from the Australian Commercial Dispute Centre (ACDC) in the DTCS FAD. The ACCC does not consider that in the light of this amendment, the phrase 'independent third party' is too open-ended and does not consider any further amendment to the clause is necessary at this stage.

## **10.5 Schedule 5 – Confidentiality provisions**

In the July 2012 Issues Paper, the ACCC sought submissions on the practicality of destroying confidential information stored in back-up systems and the amendments that may be required in relation to this issue. The ACCC also sought submissions on whether any amendments of the schedule are required generally.

### **10.5.1 Summary of submissions**

Telstra submitted that clause 7 of the confidentiality undertaking in the annexure of the schedule, which deals with issue regarding the destruction of the confidential information, should be deleted as it does not reflect how businesses now store their information and compliance with the clause is impossible in practice.<sup>408</sup>

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<sup>408</sup> Telstra, August 2012 non-price terms submission, p. 67.

Likewise, Herbert Geer and Optus considered that destroying confidential information under the current wording of clause 7 would be impractical or costly.<sup>409</sup> Both Herbert Geer and Optus proposed to add a qualification in clause 7 such that the requirement to destroy confidential information does not apply to those information stored in IT backup systems that cannot be destroyed or deleted.<sup>410</sup>

Macquarie Telecom also considered that it might be impractical to destroy information stored in IT backup system. However, Macquarie Telecom considered that the current wording of clause 7 is sufficient to address this problem as the clause would not require the destruction of information stored in the IT backup system because such information is outside the control or custody of the employee.<sup>411</sup>

Optus further submitted that amendments should be made to clause 5.4 of the schedule to address the use of access provider's confidential information by the access seeker.<sup>412</sup>

Telstra also proposed some further amendments. Telstra proposed to narrow the definition of confidential information under clause 5.2 so that only information about the service supplied to the access seeker falls within the definition. Telstra further proposed to amend sub-clause 5.5(a) of the schedule to broaden the scope of disclosure of confidential information to personnel of the party to whom the confidential information is disclosed to.<sup>413</sup> Telstra also sought to include additional circumstances under clause 5.5 which would allow the disclosure of confidential information for the purpose of reporting to regulatory or government bodies.<sup>414</sup>

## 10.5.2 ACCC draft views

The ACCC has considered the submissions summarised above and taken into account the legislative criteria relevant to this issue, specifically:

- whether these terms will promote the LTIE
- the legitimate business interests of a carrier or carriage service provider
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service.<sup>415</sup>

The ACCC considers that the inclusion of confidentiality provisions is in the LTIE because it protects the confidential information of both access providers and access seekers and prevents this information from being used inappropriately. The ACCC considers that the terms in Schedule 5 of the draft FAD provide assurance that commercially sensitive information cannot be used to gain a competitive advantage to the detriment of the other

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<sup>409</sup> Herbert Geer, August 2012 submission, p. 21; Optus, August 2012 submission, p. 31.

<sup>410</sup> Ibid.

<sup>411</sup> Macquarie Telecom, August 2012 submission, p. 18.

<sup>412</sup> Optus, August 2012 submission, p. 32.

<sup>413</sup> Telstra, August 2012 non-price terms submission, p. 67 & 102.

<sup>414</sup> Ibid.

<sup>415</sup> Section 152BCA of the CCA.

party. As a result, parties are more likely to make efficient investment in infrastructure knowing that their confidential information is protected. This helps to protect the legitimate business interests of both the access seeker and the access provider.

The ACCC understands that the terms in Schedule 5 may require an access provider to develop systems to comply with the clauses. The ACCC considers that any costs associated with this development are not unreasonable given the necessity of protecting confidential information. The ACCC is of the view that the terms in Schedule 5 strike the right balance between imposing additional costs and protecting the interests of parties.

For the reasons that follow, the ACCC has responded to proposals raised in the submissions in relation to confidentiality in determining the terms of Schedule 5 of the draft FAD and made amendment where necessary, having regard to the legislative criteria mentioned above.

The ACCC is satisfied that all submissions received on clause 7 of the confidentiality undertaking contained in the annexure of the schedule indicate that destroying information stored in the IT backup system would be impossible, impractical or costly. Therefore, the ACCC considers that it would provide greater clarity and certainty to parties if the provision makes clear that information stored in the IT backup system which cannot be separately destroyed or deleted is not required to be destroyed under clause 7.<sup>416</sup> The ACCC has adopted this amendment in the draft FAD.

The ACCC has not adopted Telstra's other proposed amendments. The ACCC considers that it may undermine the legitimate interest of access seeker to unnecessarily narrow the definition of confidential information or to broaden the scope of the permitted use of the confidential information. The ACCC considers that the current terms of the schedule achieve the right balance as to what information should be protected and what limited use can be made of them. The ACCC also maintains that Telstra's proposed new sub-clauses 5.5(j) and (k) are unnecessary as the matters concerned are already covered under sub-clause 5.5(g).

The ACCC has considered the submission by Optus that clause 5.4 should also address the use of the confidential information of the access provider by the access seeker. The ACCC understands that although there may be circumstances under which the access seeker obtains confidential information of the access provider, the purpose of the schedule is predominantly to address the potential problem of a vertically integrated network access provider using commercially sensitive information obtained from the access seeker to its unfair competitive advantage in markets that it competes with the access seeker. However, the terms envisage that the access provider must use of these confidential information for the purpose of effectively providing access to the service under circumstances set out in clause 5.4. The ACCC does not consider there to be reciprocal situations under which the access seeker must make use of the confidential information of the access provider. Therefore, the ACCC does not consider it necessary to include additional provisions as proposed by Optus in the draft FAD.

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<sup>416</sup> Subsection 152BCA(3) of the CCA.

## 10.6 Schedule 6 – Suspension and termination

In the July 2012 Issues Paper the ACCC raised the issue of the lack of provisions dealing with the right of access seekers to terminate as a result of contractual breaches of the access provider and the scope of the access provider's entitlement to terminate. The ACCC considered that while these issues are important, it should be recognised that the suspension and termination provisions are means by which the access provider can protect its legitimate business interests in achieving a normal return on its investment, having regard to the relevant risks. The ACCC sought submissions on whether amendments to clause 6.2 of the schedule as drafted in the DTCS FAD are required to balance the interests of the access provider and those of the access seeker.<sup>417</sup>

### 10.6.1 Summary of submissions

Submissions were received from stakeholders suggesting various changes to clause 6.2 of the schedule.

Herbert Geer and Macquarie Telecom submitted that amendments should be made to sub-clause 6.2(b) of the schedule which allows suspension in the event that the access seeker's use of the facilities contravenes the law. Herbert Geer considered that the current wording is too broad and proposed to narrow the provision by making clear that only a Court can determine whether the use of the facilities contravenes the and the use of the facilities must be in connection with the service supplied by the access provider.<sup>418</sup> Likewise, Macquarie Telecom considered that only a competent authority could decide whether the access seeker's use of the facilities contravenes the law.<sup>419</sup>

Macquarie Telecom considered that as currently drafted, clause 6.3 makes it clear that sub-clause 6.2(a) does not apply to a billing dispute so there should be no concern that sub-clause 6.2(a) would enable a billing dispute to trigger service suspension or termination.<sup>420</sup> Optus proposed a slight change in wording in clause 6.3 to make clear that sub-clause 6.2(a) does not apply to 'any monies payable that are the subject' of a billing dispute.<sup>421</sup> Telstra proposed to amend clause 6.3 so that only validly notified billing disputes would be excluded from the operation of sub-clause 6.2(a).<sup>422</sup>

Herbert Geer further proposed a new clause providing the access seeker may terminate its acquisition of the service without penalty or charge on one month's written notice to the access provider.

Telstra also proposed the following additional amendments to the terms of the schedule:

- The inclusion of additional terms in clause 6.1 so that the failure to comply with certain creditworthiness and security obligations by the access seeker entitles the

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<sup>417</sup> ACCC, July 2012 Issues Paper, pp. 46–47.

<sup>418</sup> Herbert Geer, August 2012 submission, p. 23.

<sup>419</sup> Macquarie Telecom, August 2012 submission, p. 20.

<sup>420</sup> Ibid, p. 20.

<sup>421</sup> Optus, August 2012 submission, p. 32.

<sup>422</sup> Telstra, August 2012 non-price terms submission, p. 111.



access provider to immediately suspend the supply of a service.<sup>423</sup> Telstra considered that a right to immediate suspension under these circumstances is necessary to protect the legitimate business interests of the access provider.<sup>424</sup>

- The amendment of sub-clause 6.2(f) so that the right of suspension applies to any supply of service to the access seeker, and not just to services of the kind in respect of which the suspension event occurred, or a request for service made after the date of breach.<sup>425</sup>
- The amendment of clause 6.5 so that the access seeker should have complete remedial action under the remedy period, rather than just institute remedial action, within prescribed timeframe.<sup>426</sup>
- The inclusion of a new sub-clause 6.5(e), which would allow the access provider to immediately cease supply where an access seeker commits a material breach that is incapable of being remedied.<sup>427</sup>

Optus reiterated its submissions in response to the February 2012 Discussion Paper and proposed a number of additional amendments.<sup>428</sup> Notably, Optus submitted that events set out in clause 6.7(a) should not trigger immediate suspension of the supply of the service as they do not cause an imminent threat of harm.<sup>429</sup> Optus also submitted that the obligation of the access seeker to pay the access provider for the reasonable costs of suspension and reconnection should not be a precondition to reconnection following suspension under clause 6.2.<sup>430</sup>

### 10.6.2 ACCC draft view

The ACCC has considered the submissions summarised above and taken into account the legislative criteria relevant to this issue, specifically:

- whether these terms will promote the LTIE
- the legitimate business interests of a carrier or carriage service provider
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the economically efficient operation of a carriage service.<sup>431</sup>

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<sup>423</sup> Ibid, p. 69.

<sup>424</sup> Ibid.

<sup>425</sup> Ibid, p. 111.

<sup>426</sup> Ibid, p. 112.

<sup>427</sup> Ibid.

<sup>428</sup> Optus, August 2012 submission, p. 32–33.

<sup>429</sup> Ibid, p. 32.

<sup>430</sup> Ibid, p. 33.

<sup>431</sup> Section 152BCA of the CCA.

The ACCC considers that suspension and termination provisions, which set out clearly the circumstances under which the access provider may suspend or terminate services, whether notices are required under each circumstance and the required timeframes for notification and undertaking remedial actions to avoid suspension or termination, will assist in promoting competition and encouraging efficient investment in infrastructure. Such provisions will provide access seekers with the assurance that their services will not be indiscriminately suspended or terminated for trivial matters, and will reduce the occurrence of disruptions to services, thereby assisting the promotion of effective competition and the encouragement of efficient investment.

The particulars of such provisions are ultimately a balance between an access provider's legitimate interests in achieving a commercial return on its investment, having regard to the relevant commercial risks and an access seeker's legitimate interests in not having their services inappropriately disrupted. There are direct costs involved in circumstances where the access provider can recover its costs by providing a right for suspension if the access seeker fails to pay for the service it acquires or otherwise breaches its obligations under the FAD. The ACCC considers that the terms in Schedule 6 of the draft FAD balances these interests by providing different levels of suspension and termination rights to the access provider that are proportionate to the actions or events that trigger the suspension or termination. In turn, this will encourage and support the economically efficient operation of the wholesale ADSL service and associated networks of the access provider.

The specific proposals made by stakeholders summarised above are considered in turn below.

The ACCC has considered the submissions by Herbert Geer and Macquarie Telecom regarding the wording of sub-clause 6.2(b). The ACCC is of the view that an amendment to clarify the meaning of the sub-clause and better reflect the purpose of the provision is necessary.<sup>432</sup> The ACCC has adopted Herbert Geer's suggested wording for the purpose of the draft FAD.

The ACCC has adopted Optus' proposed amendments to the wording of clause 6.3 to make clear that sub-clause 6.2(a) does not apply to monies that are the subject of a billing dispute. The ACCC considers that this would clarify the meaning of the clause.<sup>433</sup> The ACCC does not consider Telstra's proposed amendment to clause 6.3 to be necessary as the clause already makes clear that it only applies to billing dispute notified in accordance with the billing dispute procedures set out in the FAD.

The ACCC has considered Optus' submission in relation to clause 6.1 and does not consider that events in sub-clause 6.1(d) should require prior notification. These are events which trigger immediate termination of the service by notification. The ACCC considers that the gravity of these events is such that the access provider should be entitled to immediately suspend services without notification in order to protect its legitimate business interests. The

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<sup>432</sup> Subsection 152BCA(3) of the CCA.

<sup>433</sup> Ibid.

ACCC has also considered Optus' other submissions and does not consider it necessary to incorporate those proposed amendments.

The ACCC has considered Telstra's proposed amendments to clauses 6.1, 6.2(f), 6.5 and 6.6 and is of the view that these proposed amendments would significantly expand the right of the access provider to suspend and terminate services and impose significant costs and burdens on the access seeker. This would undermine the legitimate interests of the access seekers without being necessary to protect the legitimate interests of the access provider. Therefore, the ACCC has not adopted these proposed amendments in the draft FAD.

The ACCC has not adopted Herbert Geer's proposed new clause in relation to termination by the access seeker. As noted by Herbert Geer, the FAD sets out terms and conditions under which the access provider is obliged to provide the declared service. The ACCC considers that any terms regarding obligations on the access seeker in acquiring services should be left to commercial agreement.

## **10.7 Schedule 7 – Liability and indemnity**

The ACCC sought submissions on whether amendments to the liability and indemnity provisions as drafted in the DTCS FAD should be included in the wholesale ADSL FAD.

### **10.7.1 Summary of submissions**

Telstra submitted that a minimum liability cap of \$1 million should be included in clause 7.1 to ensure that the Access Provider can recover any losses caused by small acquirers.<sup>434</sup> Telstra also proposed to include an additional clause to address losses arising from the broadcast, use, transmission, communication or making available of any material.<sup>435</sup>

Telstra also submitted a proposed amendment to clause 7.12 in the DTCS FAD, so that an indemnifying party may, but is not required to, conduct the defence of a third party claim against an innocent party, upon receiving notice of that claim.<sup>436</sup> Telstra further proposed to include a new clause 7.13 to ensure that if an indemnifying party is given the conduct of the defence against a third party claim, the innocent party must provide all cooperation which the indemnifying party considers reasonably necessary to conduct the defence.<sup>437</sup>

Optus submitted that there is no reason to limit the scope of indemnity to injury or death of a party's representatives under clause 7.3 and amendment should be made to change 'a Representative of the other Party' to any person'.<sup>438</sup> Similarly, Optus proposed to extend indemnity to losses caused to property of any other person in clause 7.4.<sup>439</sup>

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<sup>434</sup> Telstra, August 2012 non-price terms submission, pp. 71–72.

<sup>435</sup> Ibid, p. 72.

<sup>436</sup> Ibid, p. 116.

<sup>437</sup> Ibid.

<sup>438</sup> Optus, August 2012 submission, p. 33.

<sup>439</sup> Ibid.

Optus also submitted that clauses 7.7 and 7.9 in the DTCS FAD address the same issue and proposed to delete clause 7.7 to avoid potential confusion or inconsistency.<sup>440</sup> If clause 7.7 is retained, Optus submitted that the first part of it should be amended for greater legal clarity and accuracy.<sup>441</sup>

Herbert Geer proposed to insert a new clause in the schedule to make clear that nothing in the schedule excludes or limits the Access Seekers' entitlement to damages under Part 5 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Telco (CPSS) Act).<sup>442</sup>

### 10.7.2 ACCC draft view

The ACCC has considered the submissions summarised above and taken into account the legislative criteria relevant to this issue, specifically:

- whether these terms will promote the LTIE
- the legitimate business interests of a carrier or carriage service provider
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service
- the economically efficient operation of a carriage service, a telecommunications network or a facility.<sup>443</sup>

The ACCC considers that the liability and indemnity provisions promote the economically efficient use of and investment in infrastructure by managing the allocation of capital risk between the parties. The ACCC also considers that the inclusion of liability and indemnity clauses will assist parties in their commercial negotiations regarding the management of liability and losses and thereby reducing barriers to entry and promoting competition.

The ACCC is of the view that the terms of Schedule 7 of the draft FAD will assist in protecting the legitimate interests of the access seeker and access provider equally as they are reciprocal terms. The current drafting of the terms are designed so as to not expose parties to excessive commercial risks by specifying appropriate limitation on the liability of parties, and that risks are appropriately apportioned between parties (e.g. by allowing parties to make repairs and compensate other). In the absence of these terms, parties could be made to carry risks of loss that are outside their control.

Although the liability and indemnity provisions do not contribute to the direct costs of supplying the wholesale ADSL service, the ACCC recognises that they may contribute to indirect costs. However, the ACCC considers that these provisions are necessary for the

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<sup>440</sup> Ibid, p. 34.

<sup>441</sup> Ibid.

<sup>442</sup> Herbert Geer, August 2012 submission, p. 24.

<sup>443</sup> Section 152BCA of the CCA.

reasons discussed above and the benefits of including these terms are likely to outweigh the additional costs it may impose on the parties.

The ACCC further considers that fair and certain liability and indemnity terms give parties incentive to operate their services and the relevant network and facilities in a safe and reliable manner to avoid causing losses or injuries which the parties will be liable for under these terms.

The specific proposals made by stakeholders summarised above are considered in turn below.

The ACCC has not accepted Telstra's proposed amendments to clause 7.1, as there are insufficient information currently available to the ACCC to specify liability caps in the FAD.<sup>444</sup> The ACCC has also considered Telstra's proposed amendment to clause 7.12 and new proposed clauses 7.6 and 7.13 and does not consider it necessary to include these in the draft FAD.

The ACCC has considered Optus' submissions in regard to clauses 7.3 and 7.4. The ACCC considers that extending liability of the indemnifying party to injuries or losses caused to any other person or property of any other person under in clauses 7.3 and 7.4 amendments would significantly expand the scope of liability of the indemnifying party. The ACCC considers this expansion to be unnecessary and would undermine the legitimate interests of the indemnifying party.

The ACCC does not agree with Optus' submission that clauses 7.7 and 7.9 address the same issue. Clause 7.7 clarifies the scope of clauses 7.3 and 7.4 and makes clear that a party will not be liable to indemnify the other party for any losses caused by any person other than itself and its representatives. Clause 7.9 creates a separate limitation on the indemnifying party's liability in the context of claims brought against the innocent party for losses caused by the indemnifying party. The clause allows the indemnifying party's liability to be reduced to the extent that the losses could have been excluded or reduced by the innocent party in its contract with person bringing the claim. Therefore, in so far as the issue in Optus' submission is concerned, the ACCC does not consider it necessary to amend clause 7.7 or clause 7.9.

The ACCC considers Herbert Geer's proposal, for clarification purposes, to include an additional clause providing that the schedule is not intended to exclude or limit the operation of Part 5 of the Telco (CPSS) Act has merit.<sup>445</sup> However, as the Telco (CPSS) Act does not distinguish between Access Seekers and Access Providers with respect to the right to contribution for damages, the ACCC considers it appropriate to make the new clause (clause 7.13) apply to both Access Seekers and Access Provider.

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<sup>444</sup> See ACCC, *Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement*, June 2012, p. 58.

<sup>445</sup> Subsection 152BCA(3) of the CCA.

## 10.8 Schedule 8 – Communications with end-users

The schedule for communications with end-users was not included in the DTCS FAD. The source of the schedule on which the ACCC sought submissions on was Schedule F of the 2008 Model Terms.

The ACCC sought submissions in its July 2012 Issues Paper on whether there is any ambiguity in the terms regarding marketing by the access provider to the access seeker's end-user. The ACCC also sought submissions on whether the record keeping requirement regarding access provider's communication with end-users imposes a cost burden on parties.

### 10.8.1 Summary of submissions

Herbert Geer submitted that that current drafting of sub-clause F.2(a) in the 2008 Model Terms could cause potential mischief that the clause was intended to prevent and that sub-clause F.3(a) does not help to prevent this. Herbert Geer proposed that sub-clause F.2(a) be amended so that the Access Provider can only communicate with the an Access Seeker's end-users through its retail business unit.<sup>446</sup>

Macquarie Telecom submitted that sub-clause F.2(a) is not uncertain and that it gives Access Provider a free hand to initiate contact with the Access Seeker's end-users as long as the contact is in relation to services that the Access Provider previously or currently provides to the end-user. Macquarie Telecom considered this to be unsatisfactory and sub-clause F.3(a) does not alleviate this concern.<sup>447</sup> Macquarie Telecom also proposed to amend sub-clause F.2(a) so that the Access Provider is only allowed to contact the Access Seeker's end-users through its retail business unit.<sup>448</sup> Telstra submitted that there is no ambiguity under sub-clause F.2(a) and did not provide other comment on this issue.<sup>449</sup>

Herbert Geer submitted that the record keeping requirement under clause F.4 needs to be viewed in the context of the fact that the obligation is not absolute. Herbert Geer did not consider that clause F.4 imposes any significant cost burden that requires any redrafting of the clause.<sup>450</sup> Macquarie Telecom considered that making and maintaining record of communication is a common and usual business practice and clause F.4 would not impose any significant costs additional to those incurred in standard business practice.<sup>451</sup> On the other hand, Optus reiterated its previous submission that it may be impractical and onerous for the Access provider to make and maintain a record of each communication it has with another party's end-user.

Telstra proposed to make an amendment to sub-clause F.2(e) to allow the Access Provider to communicate with an Access Seeker's end users not only *in* an Emergency, but also *in*

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<sup>446</sup> Herbert Geer, August 2012 submission, pp. 21–22.

<sup>447</sup> Macquarie Telecom, August 2012 submission, p. 19.

<sup>448</sup> *Ibid.*, p. 20.

<sup>449</sup> Telstra, August 2012 non-price terms submission, p. 68.

<sup>450</sup> Herbert Geer, August 2012 submission, p. 22.

<sup>451</sup> Macquarie Telecom, August 2012 submission, p. 19.

connection with an Emergency.<sup>452</sup> Telstra also proposed to insert an additional clause imposing a number of obligations on the Access Seekers in relation to an Emergency.<sup>453</sup> Telstra further proposed to insert a new sub-clause F.2(f) to allow the Access Provider to contact the Access Seeker's end-users if the Access Provider has a right to suspend or terminate the Access Seeker's service and specify the type of information that the Access Provider cannot communicate in such a case.<sup>454</sup> Telstra also submitted that this new sub-clause is necessary to ensure the continuity of supply of service to the end-user and that the Access Provider is not wrongly blamed when the Access Seeker's service is suspended or terminated.<sup>455</sup>

Telstra considered that sub-clauses F.3(a) and (b) should be amended so that the obligations under the sub-clauses only applies if the Access Provider is aware that the person initiating the communication is an end-user of an Access Seeker.<sup>456</sup> Telstra further proposed some clarifications in clauses F.6 and F.7. In relation to clause F.7, Telstra also considered that the obligation not to attribute blame to the other party should apply broadly rather than just where a party communicates with an end-user of either party.<sup>457</sup>

Last, Telstra proposed to insert a new clause in the schedule which requires the Access Seekers to ensure that any Reseller of the service does not do or omit to do anything, which if done or omitted by the Access Seekers, would constitute a breach of the FAD.<sup>458</sup>

### **10.8.2 ACCC draft view**

The ACCC has considered the submissions summarised above and taken into account the legislative criteria relevant to this issue, specifically:

- whether these terms will promote the LTIE
- the legitimate business interests of a carrier or carriage service provider
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the economically efficient operation of a carriage service, a telecommunications network or a facility.<sup>459</sup>

The terms relating to communications with end-users aim to ensure that all service providers represent themselves and their services fairly and accurately when dealing with end-users.

The terms in Schedule 8 of the draft FAD will assist in promoting competition because they provide assurance against inappropriate and misleading marketing that is detrimental to all

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<sup>452</sup> Telstra, August 2012 non-price terms submission, pp. 68 & 118.

<sup>453</sup> Ibid, pp. 68, 119.

<sup>454</sup> Ibid, pp. 68–69.

<sup>455</sup> Ibid.

<sup>456</sup> Ibid, p. 69.

<sup>457</sup> Ibid, p. 120.

<sup>458</sup> Ibid, p. 121.

<sup>459</sup> Section 152BCA of the CCA.

end-users. By providing that marketing can only be done fairly and transparently, both the access provider and the access seeker are more likely to engage in fair and meaningful competition such as by undertaking efficient investment in infrastructure in order to provide additional services, and goods and services of a higher quality.

The ACCC considers that the terms in Schedule 8 provide all parties an equal opportunity to win and retain customers, enabling to compete fairly and earn a commercial return on investment. For instance, the terms place limitations on access seekers to engage in misleading conduct or blame the access provider for faults or maintenance in the network, which ensure that the legitimate business interests and reputation of the access provider is protect.

The terms protect the legitimate business interests of the access seeker by providing that the access provider can only communicate with the access seeker's end-user in limited circumstances. This protection is important in the provision of wholesale ADSL service because the access provider is vertically integrated and may have an incentive to exploit its position as the network operator to its unfair advantage.

The ACCC does not consider that the provisions which deal with how the access provider can communicate with end-users may impose some additional costs of providing access to the service, but such costs are not overly burdensome.

The specific proposals made by stakeholders summarised above are considered in turn below.

The ACCC does not consider that there is ambiguity in the terms regarding the Access Provider marketing to the end-users of an Access Seeker. Clause F.2(a) allows the Access Provider to communicate and deal with the end-user of an Access Seeker in relation to goods and services that it currently supplies or previously supplied to the end-user. This is subject to an exception provided in clause F.3, which provides that if the end-user of an Access Seeker contacts the Access Provider in relation to goods or services supplied by the Access Seeker, the Access Provider is not allowed to take advantage of that contact and market any of its goods and services to the end-user. This includes goods and services that it currently supplies or previously supplied to the end-user. The ACCC does not consider that this prohibition is undermined by allowing the Access Provider to initiate contact with the end-user, as long as the contact is in relation to goods or services that the Access Provider currently supplies or previously supplied to the end-user.

On the other hand, the ACCC acknowledges the concerns expressed by Macquarie Telecom and Herbert Geer and has given careful considerations to their proposed amendments which are identical in substance. The ACCC does not consider that clause F.2(a) was intended to allow an Access Provider would communicate with the end-user through other than its retail business unit, which is the unit that directly deals with and provides goods and services to the end-user.<sup>460</sup> The overall objective of the Schedule is to promote fair and effective

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<sup>460</sup> See also Telstra, *Structural Separation Undertaking – given by Telstra Corporation Limited to the Australian Competition and Consumer Commission under section 577A of the Telecommunications Act 1997 dated 23 February 2012* (SSU), 23 February 2012, sub-clause 8.1(c) and (d).



competition by preventing the Access Provider from exploiting its vertically integrated status and engaging in inappropriate marketing. Given that the Access Seekers would not be able to communicate and deal with the end-users in any status other than a retailer of the goods and services, the ACCC considers that it would be consistent with the objective of the schedule to clarify in clause F.2(a) that the Access Provider could only communicate with the end-user of an Access Seeker through its retail business unit.<sup>461</sup> To the extent that the Access Provider needs to communicate with the end-user in relation to any wholesale operation, the ACCC considers that clause F.2(c) is adequate. The ACCC has included the relevant amendment in clause 8.2(a) of the draft FAD.

The ACCC considers that it is important to provide assurance that contact made by the Access Provider to end-users of the Access Seekers where permitted, is not being used for other purposes and records should be kept of the communications in each contact.<sup>462</sup> Although this may impose additional costs in providing the service, the ACCC does not consider that the record keeping obligation in clause F.4 is unduly onerous or that it will hinder the economically efficient operation of the wholesale ADSL service, given it only requires record to be kept where it is practicable to do so. The ACCC reiterates its view expressed in drafting the 2008 Model Terms that this means that communications should be recorded where, for instance, systems to record those communication are, or could readily be made available, such as all communications to or from the Access Provider's contact centres.

The ACCC considers that Telstra's proposed amendment to sub-clause F.2(e) clarifies when the access provider is allowed to communicate with the end-user in the event of an emergency and has adopted the proposed amendment. However, the ACCC considers that the additional proposed clause imposing certain obligations on the Access Seeker in connection with an Emergency is not necessary to protect the interests of the Access Provider or end-users.

The ACCC is not convinced by Telstra's argument that contact with end-users of an Access Seekers in the event of suspension or termination of the Access Seeker's service is necessary to ensure service continuity to end-users, or that the Access Provider is not wrongly blamed for such suspension or termination. It is arguable that the Access Seeker has a greater interest in ensuring service continuity to its end-users than the Access Provider and it is reasonable to expect that the Access Seeker would endeavour to ensure that any concern of potential suspension and termination would be communicated to its end-users appropriately. As noted in the final determination for the 2008 Model Terms, allowing some forms of contact from the Access Provider to the end-user under these circumstances could heighten incentives to more quickly suspend or terminate access services.<sup>463</sup> The ACCC does not consider that the restrictions in the proposed sub-clause would alleviate this concern.

The ACCC considers that Telstra's proposed amendments to sub-clauses F.3(a) and (c) would unnecessarily restrict the operation of the two sub-clauses and undermine the objectives sought to be achieved by imposing the obligations under clause F.3. It is the

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<sup>461</sup> Subsection 152BCA(3) of the CCA.

<sup>462</sup> ACCC, *Final Determination – Model Non-price Terms and Conditions*, November 2008, p. 29.

<sup>463</sup> *Ibid*, p. 30.

obligation of the Access Provider to make sure that it appropriately advises the end-user to discuss certain matters with the Access Seeker and/or does not engage in any form of marketing of the Access Provider's goods and services. To this end, the Access Provider should ascertain where necessary whether the end-user is initiating communication in relation to goods or services supplied by the Access Seeker. The ACCC does not consider that this step is onerous or burdensome. On the other hand, to include an additional qualification as proposed by Telstra could potentially make it possible for the Access Provider to circumvent the application of the obligations by deliberately not ascertaining the nature of the communication initiated by an end-user. This could undermine the objective of promoting fair and meaningful competition.

The ACCC agrees with Telstra's submissions that sub-clause F.6(b) should be amended to state that neither party may represent that there are no consequences for any end-user to sign an authority for transfer of their services. This is consistent with the in-principle position stated in the final determination for the 2008 Model Terms that services providers should make accurate representations when dealing with the end-users.<sup>464</sup>

The ACCC does not consider that Telstra's other amendments to clauses F.6 and F.7 are necessary. The ACCC also considers that the proposed new clause F.8 imposes a burden on the Access Seekers which is unnecessary to protect the legitimate interests of the Access Provider. The ACCC therefore does not consider it necessary to include these proposed amendments in the draft FAD.

## **10.9 Schedule 9 – Network modernisation and upgrade provisions**

The ACCC sought submissions on whether to include network modernisation and upgrade provisions and how the provisions should be drafted, taking into account any overlap with the terms in the SSU.

### **10.9.1 Summary of submissions**

Telstra submitted that terms relating to network modernisation and upgrade are not necessary as Telstra is already required to comply with the relevant obligations in the SSU.<sup>465</sup> Telstra considered that the inclusion of the schedule would lead to dual regulation and increased compliance costs with no discernible benefit to Access Seekers.<sup>466</sup>

On the other hand, Herbert Geer, Optus and Macquarie Telecom all supported the inclusion of terms relating to network modernisation and upgrade. Herbert Geer submitted that Telstra's commitments in the SSU are subject to the carve out 'except where the parties agree otherwise' and the schedule in the draft FAD should set a default position that is consistent with Telstra's commitments in the SSU, reinforcing those commitments. Herbert Geer

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<sup>464</sup> Ibid, p. 29.

<sup>465</sup> Telstra, August 2012 non-price terms submission, p. 73.

<sup>466</sup> Ibid.

considered paragraphs 10 to 14 of Schedule 4 of the SSU to be appropriate to be included in the draft FAD.<sup>467</sup>

Macquarie Telecom considered that the terms on network modernisation and upgrade should be based on relevant clauses in the SSU.<sup>468</sup> Optus submitted that the relevant provisions on network modernisation and upgrade in the SSU do not apply if the wholesale ADSL service is an active declared service and covered by an access determination or binding rules of conduct.<sup>469</sup> Optus submitted that the inclusion of the terms in the draft FAD would provide greater clarity to access seekers about Telstra's obligation but considered the provisions terms in the DTCS FAD need to be amended to ensure equivalence is achieved between Access Seekers and Telstra.<sup>470</sup>

### **10.9.2 ACCC draft view**

The ACCC has considered the submissions summarised above and taken into account the legislative criteria relevant to this issue, specifically:

- whether these terms will promote the LTIE
- the legitimate business interests of a carrier or carriage service provider
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the economically efficient operation of a carriage service, a telecommunications network or a facility.<sup>471</sup>

The ACCC considers it is necessary to include the network modernisation and upgrade provisions as they will promote competition and ensure ongoing any-to-any connectivity. The terms will assist in managing service disruptions and any associated consequences of disruptions which may impact on the availability or quality of services. They will also assist in improving the availability of reliable services to compete with other services.

The ACCC recognises that it is a legitimate business interest of the access provider to make network changes that are necessary to supply new or additional services or to improve the quality of existing services. The ACCC also recognises the legitimate interest of the access seeker in being informed of and consulted on planned upgrades. The ACCC considers that the terms in Schedule 9 of the draft FAD achieve the appropriate balance between these two interests.

The ACCC considers that the additional cost in providing information under the notification requirements will be minimal, as the access provider is likely to have access to the required information under the prescribed notice period. Further, the information provided under the

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<sup>467</sup> Herbert Geer, August 2012 submission, p. 25.

<sup>468</sup> Macquarie Telecom, August 2012 submission, p. 22.

<sup>469</sup> Optus, August 2012 submission, p. 35.

<sup>470</sup> Ibid. See also Optus, April 2012 submission, pp. 19–20.

<sup>471</sup> Section 152BCA of the CCA.

notification requirement will assist access seekers to make investment and planning decisions so that the economically efficient operation of the services they supply to end-user can be maintained as much as practicable.

The specific proposals made by stakeholders summarised above are considered in turn below.

The ACCC has incorporated the relevant terms on network modernisation and upgrade in the SSU<sup>472</sup>, which are same set of terms used in the DTCS FAD and previous FADs. The ACCC acknowledges Telstra's submission that it is already obliged to comply with the relevant terms of the SSU in relation to the provision of wholesale ADSL service. However, the ACCC is of the view that including these terms in the FAD would provide greater clarity to parties as to all of Telstra's obligations.<sup>473</sup> The ACCC has included a term to the effect that if Telstra has complied with its obligations in the SSU, it will be taken to have complied with these terms in the FAD. This will ensure that there is no dual regulation or increased compliance costs for Telstra.<sup>474</sup>

The ACCC has also considered the amendments made to these terms in the DTCS FAD. The ACCC has adopted the amendment made in the DTCS FAD to the timeframe for the Access Provider to provide an Individual Notification after having provided the General Notification for the purpose of the draft FAD. The ACCC considers that the timeframe provided in the terms of the SSU may be overly onerous on the access provider and the relaxed timeframe adopted in the DTCS FAD could facilitate commercial negotiation and would still provide access seekers with sufficient time to incorporate knowledge of any planned upgrade into their planning and investment decisions.

On the other hand, while the DTCS FAD specifically excluded the relevant terms on coordinated capital works program, the ACCC has included these terms in the draft FAD. The SSU includes terms on coordinated capital works program which specifically apply to the wholesale ADSL service. For the reasons set out above, the FAD should set out all of the Access Provider's obligations in relation to the provision of wholesale ADSL service if possible to provide clarity. Further, Telstra's obligations in the SSU in relation to coordinated capital works regarding wholesale ADSL will not apply if there is a term on this subject matter in an access determination. The ACCC has inserted a new clause 9.18 to take into account the fact that Telstra has complied with the initial obligation to submit a coordinated capital program forecast in the provision of wholesale ADSL service under the SSU.

## **10.10 Schedules 10 –Changes to operating manuals**

The ACCC did not form a preliminary view on whether to include terms on changes to operating manuals. The ACCC sought submissions on whether to include these provisions and the appropriate terms of these provisions.

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<sup>472</sup> Telstra, SSU, 23 February 2012, Schedule 4, paragraphs 10–14.

<sup>473</sup> Subsection 152BCA(3) of the CCA.

<sup>474</sup> Telstra, SSU, 23 February 2012, Schedule 4, paragraph 14(c).

### 10.10.1 Summary of submissions

Telstra submitted that it is unnecessary to include terms relating to operating manuals given the lack of historical disputes in respect of these provisions.<sup>475</sup>

Optus, Herbert Geer and Macquarie Telecom all supported the inclusion of terms relating to changes to operating manuals.

Herbert Geer and Optus also raised concerns regarding Access Provider's ability to unilaterally amend operating manuals.<sup>476</sup> Herbert Geer considered that in relation to changes to operating manuals, Schedule I of the 2008 Model Terms should be included.<sup>477</sup> Macquarie Telecom submitted that including the terms would provide Access Seekers with a safety net to ensure that minimum terms are available to them which may not be obtained through commercial negotiation.<sup>478</sup>

### 10.10.2 ACCC draft view

The ACCC has considered the submissions summarised above and taken into account the legislative criteria relevant to this issue, specifically:

- whether these terms will promote the LTIE
- the legitimate business interests of a carrier or carriage service provider
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- the economically efficient operation of a carriage service, a telecommunications network or a facility.<sup>479</sup>

The ACCC considers that including terms relating to the rights of the access provider to make changes to operating manuals help to promote the efficient use of an investment in infrastructure. This is because the provisions set out a clear process for an access provider to amend the operation manuals and alter its network without undue constraint from the access seeker. The provisions also require the access provider to give the access seeker sufficient notice regarding these changes to assist the access seeker in planning efficient investment in their own equipment. Importantly, the terms also give the access seeker right to dispute resolution procedures in the FAD if the access seeker considers the changes to be unreasonable or deprive them of a fundamental part of the bargain. The ACCC considers that the terms of Schedule 10 of the draft FAD achieves the right balance between these interests of the access seeker and the access provider.

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<sup>475</sup> Telstra, August 2012 non-price terms submission, p. 72.

<sup>476</sup> Optus, August 2012 submission, p. 34; Herbert Geer, August 2012 submission, p. 25.

<sup>477</sup> Herbert Geer, August 2012 submission, p. 25.

<sup>478</sup> Macquarie Telecom, August 2012 submission, p. 22.

<sup>479</sup> Section 152BCA of the CCA.

The ACCC also considers that the terms in Schedule 10 aid the operation and technical requirements necessary for the safe and reliable operation of a carriage service by allowing the access provider the ability to alter its operation in order to properly manage its network. This will also indirectly benefit access seekers by helping to ensure that the available network capability is efficiently utilised. The terms also provide opportunities for the access seekers to make changes that are necessary for the efficient operation and modification of its network.

For the above reasons and in response to the concerns raised by Herbert Geer, Optus and Macquarie Telecom in relation to the need to include terms relating to changes to operating manuals, the ACCC has included Schedule I of the 2008 Model Terms as Schedule 10 of the draft FAD, making relevant amendments so that they are specifically applicable to the wholesale ADSL service.

## **10.11 Ordering and Provisioning**

The ACCC acknowledged the importance of this schedule to the terms of access in the July 2012 Issues Paper, but did not form a view in relation to these provisions. The ACCC sought submissions on whether to include these provisions and the appropriate terms of these provisions, taking into account any overlap with similar terms in the SSU.

### **10.11.1 Summary of submissions**

Telstra submitted that it is unnecessary to include terms relating to ordering and provision as the concerns outlined in the July 2012 Issues Paper are already addressed by the relevant provisions of the SSU.<sup>480</sup> Telstra also considered that the FAD should not replicate the relevant SSU terms as it would lead to unnecessary dual regulation and increased compliance costs.<sup>481</sup>

Optus, Herbert Geer and Macquarie Telecom all supported the inclusion of terms relating to ordering and provisioning. Macquarie Telecom submitted that the relevant terms in the SSU provide an appropriate base on which to develop suitable terms with regard to ordering and provisioning for inclusion the FAD.<sup>482</sup>

Herbert Geer also considered the relevant terms in the SSU to be a foundation upon which the terms in the FAD could build on in relation to ordering and provisioning. Herbert Geer further submitted that terms relating to ordering and provisioning should preserve an Access Seeker's statutory entitlements, such as those under Part 5 of the Telco (CPSS) Act.<sup>483</sup> Optus considered that instead of replicating the relevant terms in the SSU, the FAD should include additional enforcement provisions which ensure that Telstra will comply with its SSU commitments.<sup>484</sup>

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<sup>480</sup> Telstra, August 2012 non-price terms submission, p. 72.

<sup>481</sup> Ibid.

<sup>482</sup> Macquarie Telecom, August 2012 submission, p. 22.

<sup>483</sup> Herbert Geer, August 2012 submission, pp. 24–25.

<sup>484</sup> Optus, August 2012 submission, p. 34.

### 10.11.2 ACCC draft view

The ACCC acknowledges the submissions by Herbert Geer, Optus and Macquarie Telecom that terms relating to ordering and provisioning should be included and the preference that such terms be based on the relevant terms in the SSU. However, the ACCC does not consider that any specific terms of the SSU should be incorporated into the draft FAD.

In the July 2012 Issues Paper, the ACCC discussed certain commitments made by Telstra in the SSU that were identified by stakeholders as being appropriate to include in the wholesale ADSL FAD. The commitments described were the overarching equivalence commitment,<sup>485</sup> the obligation relating to DSL upgrades<sup>486</sup> and the equivalence and transparency metrics relating to the wholesale ADSL service.<sup>487</sup>

The ACCC considered that replicating Telstra's existing commitments in the SSU in the FAD would provide greater clarity to parties and allow these obligations to be directly enforced by Access Seekers. However, the ACCC expressed concerns in relation to the inclusion of these specific terms in the FAD, such as impracticality of administration and their lack of relevance to ordering and provision.<sup>488</sup> The ACCC does not consider that the submissions by stakeholders addressed these concerns. At this stage, the ACCC does not consider that the three identified clauses of the SSU should be replicated in the FAD. Therefore, the ACCC has not included a schedule relating to ordering and provisioning in the draft FAD.

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<sup>485</sup> Telstra, SSU, 23 February 2012, Clause 9.

<sup>486</sup> Ibid, Clause 15.

<sup>487</sup> Ibid, Schedule 3.

<sup>488</sup> ACCC, July 2012 Issues Paper, p. 49.

## **11 Other issues**

### **11.1 Restrictions on resale**

The ACCC included a term in the IAD providing that the wholesale ADSL service can be acquired on the terms specified in the IAD for the purpose of resale, and that an access seeker is not required to notify the access provider when it acquires or seeks to acquire wholesale ADSL for supply to a reseller nor seek the access provider's consent to that resale arrangement. This was in response to industry concern over restrictions on the resale of the wholesale ADSL service imposed by commercial terms.

#### **11.1.1 ACCC preliminary view**

In the July 2012 Issues Paper, the ACCC expressed its preliminary view that contractual terms restricting resale may impede the development of competition in relevant wholesale markets. However, the ACCC noted its primary concern that restrictions on resale were not relied upon to restrict competition, but to ensure that the access provider's network and supply of its wholesale ADSL service were not compromised.<sup>489</sup> The ACCC indicated that it would further consult on this issue after making a draft FAD.

#### **11.1.2 Summary of submissions**

In its response to the July 2012 Issues Paper, Telstra reiterated its submissions to the February 2012 Discussion Paper that resellers should be subject to Telstra's terms and conditions of access to ensure that Telstra's network and the supply of the wholesale ADSL service are not compromised.<sup>490</sup> Telstra also outlined its current reseller clause and submitted that its wording should be adopted if the ACCC decides to include a reseller clause in the FAD.<sup>491</sup>

Optus also reiterated its submission to the February 2012 Discussion Paper in its response to the July 2012 Issues Paper that the FAD should include a term that the access seeker is not required to notify and obtain Telstra's approval before reselling Telstra's wholesale ADSL service to a third party.<sup>492</sup>

AAPT and Herbert Geer submitted in response to the February 2012 Discussion Paper that the terms in the IAD allowing the wholesale ADSL service to be acquired for resale are appropriate, are required to promote competition and should be included in the FAD.<sup>493</sup> Vocus also made similar submission in response to the February 2012 Discussion Paper.<sup>494</sup>

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<sup>489</sup> Ibid, p. 52.

<sup>490</sup> Telstra, August 2012 non-price terms submission, p. 74.

<sup>491</sup> Ibid, p. 75.

<sup>492</sup> Optus, August 2012 submission, p. 35.

<sup>493</sup> AAPT, April 2012 submission, p. 16; Herbert Geer, April 2012 submission, p. 23.

<sup>494</sup> Vocus, April 2012 submission, p. 5.



### **11.1.3 ACCC draft view**

The ACCC has considered submissions to both the February 2012 Discussion Paper and the July 2012 Issues Paper. The ACCC's view is that contractual terms restricting resale may impede the development of competition in the relevant resale market and would not be in the LTIE. The ACCC considers that the terms expressly allowing access seekers to supply the service to resellers without notifications to or consent from the access provider would be consistent with the legislative criteria.

The ACCC has considered Telstra's submissions and the standard reseller clause it provided. The ACCC considers that this clause is designed to ensure that the access provider's network is not compromised. The ACCC notes Telstra's submission that such a clause is not for the purpose of restricting competition, however, is not satisfied this clause would not have the likely effect of restricting competition.

A clause requiring access seekers to procure compliance from resellers and to ensure that resellers do not do or omit to do certain things exposes access seekers to liability for things potentially outside their control. The ACCC considers that this would impose significant risks and costs on the access seekers if they choose to supply the wholesale ADSL service to resellers, who also have the rights to use the declared service. The ACCC considers that a likely consequence is that the access seekers will be less willing to supply the service to reseller and this outcome is likely to have the effect of lessening competition in the wholesale market for ADSL service. The ACCC considers that such an outcome would not be in the LTIE.<sup>495</sup>

For the above reasons, the ACCC considers it necessary to adopt the same terms relating to resale services as set out in the IAD. These terms are contained in Schedule 11 of the draft FAD.

## **11.2 Business grade services**

The ACCC expressed its preliminary view in the July 2012 Issues Paper that no terms regarding the supply of business grade services are to be specifically included in the FAD.

Telstra reiterated its submission to the February 2012 Discussion Paper that no terms on business grade services should be included in the FAD. The ACCC did not receive any submissions that such terms should be included.

As such, the ACCC retains its preliminary view and has not included any terms relating to business grade services in the draft FAD.

## **11.3 Commencement and expiry of the FAD**

The commencement of the wholesale ADSL FAD cannot be earlier than the date of declaration, being 14 February 2012.<sup>496</sup> In specifying an expiry of the FAD, the ACCC must have regard to the principle that the expiry date should be the same as the expiry of the

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<sup>495</sup> Subsection 152BCA(1) of the CCA.

<sup>496</sup> Subsection 152BCF(4A) of the CCA.

declaration for that service, unless in the ACCC's opinion, there are circumstances that warrant a different expiry date.<sup>497</sup>

### 11.3.1 Summary of submissions

#### *Commencement date*

Telstra submitted that the FAD should not be backdated as there is no evidence that regulatory gaming has occurred and the recent DTCS FAD has not adopted backdating.<sup>498</sup> Telstra reiterated its submissions to the February 2012 Discussion Paper that the FAD should commence 21 days after the date on which it is published.<sup>499</sup>

On the other hand, Optus and Macquarie Telecom submitted that the FAD should be backdated to apply to the period covered by the IAD.<sup>500</sup> Optus considered that the assumptions used in the Retail Minus Retail Cost (RMRC) model adopted in the IAD have not been consulted on and if the ACCC decides to depart from the RMRC approach in the FAD (i.e. a cost-based approach), it would be appropriate to backdate.<sup>501</sup> Macquarie Telecom submitted that the process of bringing the wholesale ADSL service under the purview of the ACCC has already been subject to regulatory gaming and backdating would claw back some of the time that the access seekers have been denied access to the service on regulated terms.<sup>502</sup>

Herbert Geer reiterated its submissions to the February 2012 Discussion Paper that backdating to the date of declaration is appropriate.<sup>503</sup> Herbert Geer submitted in response to the February 2012 Discussion Paper that if the FAD price terms differ to the IAD terms, the FAD should commence on the date the service was declared.<sup>504</sup> Similarly, AAPT submitted that if the price based on efficient costs is significantly lower than the IAD prices, backdating should apply to prevent Telstra from retaining monopoly rents.<sup>505</sup>

#### *Expiry date*

Telstra reiterated its submission to the February 2012 Discussion Paper that an earlier expiry date of 31 July 2014 is warranted as it aligns with the expiry date of the FADs for the fixed line services.<sup>506</sup> Telstra submitted that in considering the option of setting a five year term with early review of the price terms, the ACCC must take into account the need for industry to have certainty and predictability.<sup>507</sup>

Optus initially proposed in response to the February 2012 Discussion Paper that the FAD has a shorter duration of three years.<sup>508</sup> However, Optus submitted in response to the July 2012

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<sup>497</sup> Subsection 152BCF(6) of the CCA.

<sup>498</sup> Telstra, August 2012 non-price terms submission, p. 74.

<sup>499</sup> Ibid, p. 75.

<sup>500</sup> Optus, August 2012 submission, p. 9; Macquarie Telecom, August 2012 submission, p. 2.

<sup>501</sup> Optus, August 2012 submission, p. 9.

<sup>502</sup> Macquarie Telecom, August 2012 submission, p. 2.

<sup>503</sup> Herbert Geer, August 2012 submission, p. 2.

<sup>504</sup> Herbert Geer, April 2012 submission, p. 31.

<sup>505</sup> AAPT, August 2012 submission, p. 10.

Issues Paper that it has no concern with the ACCC's option of setting a five year term and reviewing the price terms at an earlier stage, as long as the prices are regularly reviewed.<sup>509</sup>

Macquarie Telecom submitted in response to the February 2012 Discussion Paper that a two year period provides an appropriate balance between providing access seekers with regulatory certainty against the need to ensure that regulatory settings are relevant to market conditions. Macquarie Telecom also submitted that the price terms of the FAD should be reviewed no later than two years after they have been set.<sup>510</sup>

Herbert Geer and AAPT both submitted in response to the February 2012 Discussion Paper that the FAD should remain in force until the Designated Date specified in the SSU, i.e. 1 July 2018.<sup>511</sup>

### **11.3.2 ACCC draft view**

#### *Commencement date*

The ACCC proposes that the FAD will commence on publication.<sup>512</sup>

The ACCC retains its preliminary view expressed in the July 2012 Issues Paper that the FAD should not be backdated.<sup>513</sup> The ACCC does not consider there to be any factors present which indicate that such backdating should occur in the period of time while the IAD is in effect. For certainty, the ACCC notes that IAD pricing for the wholesale ADSL service will apply for the period of time prior to the commencement date of the wholesale ADSL FAD.

#### *Expiry date*

The ACCC's draft position is that the FAD should expire on 30 June 2014. This date is different from the expiry date of the declaration for the wholesale ADSL service of 13 February 2017. The ACCC considers this expiry date is necessary because it aligns the expiry of the wholesale ADSL FAD with the expiry of the current fixed line services FADs on 30 June 2014.

As outlined in this document, the ACCC proposes to apply a cost-based approach to determining price terms in the wholesale ADSL FAD using as the ACCC's Fixed Line Services Model (FLSM). Aligning the expiry date of the wholesale ADSL FAD with that of the fixed line services FADs would allow the wholesale ADSL prices to be reviewed and updated at the same time as the prices for the other declared fixed line services. This alignment will ensure consistency with the pricing approach used in setting the prices for the

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<sup>506</sup> Telstra, August 2012 non-price terms submission, p. 75.

<sup>507</sup> Ibid, p. 75.

<sup>508</sup> Optus, April 2012 submission, p. 24.

<sup>509</sup> Optus, August 2012 submission, p. 35.

<sup>510</sup> Macquarie Telecom, April 2012 submission, p. 8.

<sup>511</sup> Herbert Geer, April 2012 submission, p. 32; AAPT, April 2012 submission, p. 16.

<sup>512</sup> This will automatically revoke the wholesale ADSL IAD which is due to expire the day immediately before the day on which the wholesale ADSL FAD commences.

<sup>513</sup> ACCC, July 2012 Issues Paper, p. 7.

other declared fixed line services, which use many of the same network assets as wholesale ADSL. This will in turn reduce the risk of the access provider over- or under-recovering its cost of supplying the declared fixed line services.

## 12 Fixed principles provisions

Setting fixed principles provisions can promote regulatory certainty, including certainty over time about the framework used to estimate access prices. They may also provide greater price stability.

The ACCC's preliminary view is that the wholesale ADSL FAD should incorporate fixed principles provisions that are consistent with the fixed principles provisions for the other declared fixed line services for which price terms are estimated using the FLSM.

The ACCC proposes that the nominal termination date for the fixed principles provisions in the wholesale ADSL FAD should be 30 June 2021, the same expiry date as for the fixed principles provisions in the July 2011 FADs. The ACCC considers that this will give the industry sufficient certainty about the pricing framework for the wholesale ADSL service and that the pricing framework will be consistent with the pricing framework for the other fixed line services during this period.

The fixed principles provisions included in the draft FAD set out in some detail the framework for estimating prices in the next and subsequent regulatory periods.

As per the July 2011 FADs, the ACCC proposes to include a provision allowing it to modify or remove a fixed principles provision in certain specified circumstances. These circumstances are intended to be strictly limited. In considering whether to revise the provisions, the ACCC must be satisfied that: there is manifest or material error in the provisions; information on which a provision was based was false or misleading; or an amendment is necessary to avoid an unintended consequence.

### 12.1 Proposed fixed principles provisions

The fixed principles provisions included in the draft FAD specify the framework for estimating prices for the wholesale ADSL service using a BBM approach. The following provisions have been included in the draft FAD.

#### *Initial RAB value*

The fixed principles provisions specify that the opening RAB value for the calculation of prices for the wholesale ADSL service is:

- (a) as per clause 6.5 of the FADs dated 20 July 2011 (as varied from time to time), rolled forward to 1 July 2012 in accordance with clause 6.7 of the FADs dated 20 July 2011; and
- (b) the asset class data equipment which is \$1,094,008,824 as at 1 July 2012 (in nominal terms).

The ACCC considers that locking in the RAB value will promote pricing certainty for both the access provider and access seekers. This proposed provision would ensure that the asset values used to estimate wholesale ADSL prices are the same as the asset values used to estimate prices for the other fixed line services, where the assets are shared.

### ***Initial tax asset value***

The provisions specify that the opening tax asset value for the calculation of prices for the wholesale ADSL service is:

- (a) as per clause 6.6 of the FADs dated 20 July 2011 (as varied from time to time), rolled forward to 1 July 2012 in accordance with clause 6.7 of the FADs dated 20 July 2011; and
- (b) the asset class data equipment which is \$1,086,735,207 as at 1 July 2012 (in nominal terms).

The ACCC considers that locking in the tax RAB value will promote pricing certainty for both the access provider and access seekers. This proposed provision would ensure that the asset values (for tax purposes) used to estimate wholesale ADSL prices are the same as the asset values (for tax purposes) used to estimate prices for the other fixed line services, where the assets are shared.

### ***Roll-forward mechanism***

After the opening RAB value and opening tax asset value have been set, they are 'locked in' and rolled forward each year to reflect forecast capital expenditure, depreciation and asset disposals.

The roll-forward mechanism involves calculating the closing RAB value for each year by taking that year's opening RAB and adding the forecast for capital expenditure incurred that year and subtracting depreciation and asset disposals for the year. The opening RAB value for any regulatory year (after 2012–13) is equal to the closing RAB value for the previous year.

In rolling forward land asset values, these values will be indexed by the Consumer Price Index (CPI) where it is available, or by the forecast for the CPI used in the Fixed Line Services Model (FLSM) where the actual CPI is not available, to account for appreciation over time in land values.

In rolling forward RAB values in nominal terms, that is, in the current dollars as at 1 July of the relevant year, any variables that are specified in real terms will be indexed by the actual Consumer Price Index (CPI) where it is available, or by the forecast for the CPI used in the Fixed Line Services Model (FLSM) where the actual CPI is not available, to convert them into nominal terms. Any variables that are specified in nominal terms will not be indexed, with the exception of land values as specified above.

### ***Components of the revenue requirement***

The ACCC considers that the fixed principles provisions should specify the components of the revenue requirement as these components form the 'building blocks' of the BBM approach. Specifying the 'building blocks' will lock in the BBM framework for setting prices and provide certainty about the way the ACCC will estimate prices for future regulatory periods.

The annual revenue requirement for each regulatory year will comprise:

- a return on the RAB calculated by multiplying the WACC by the opening RAB for that regulatory year
- a return of the RAB, that is regulatory depreciation, for that regulatory year
- operating expenditure forecast to be incurred in that regulatory year, and
- an allowance for tax liabilities.

### *Operating expenditure forecasts*

Under a BBM approach, forecast operating expenditures should reflect prudent and efficient costs. As noted in chapter 4, the ACCC intends to consult on varying the BBM record keeping rule (RKR) to obtain operating expenditure forecasts and supporting documentation from Telstra for future regulatory periods for the wholesale ADSL service (in addition to the other fixed line services). The fixed principles provisions specify that, in assessing the reasonableness of Telstra's operating expenditure forecasts, the ACCC will take into account:

- the access provider's level of operating expenditure in the previous regulatory period
- the reasons and evidence supporting changes to operating expenditure in the next regulatory period
- any relevant regulatory obligations or requirements applicable to providing the declared fixed line services, and
- any other matters relevant to whether forecasting operating expenditures reflect prudent and efficient costs.

### *Capital expenditure forecasts*

Under a BBM approach, forecast capital expenditures should reflect prudent and efficient costs. As noted in chapter 4, the ACCC intends to consult on varying the BBM RKR to obtain capital expenditure forecasts and supporting documentation from Telstra for future regulatory periods for the wholesale ADSL service. The fixed principles provisions specify that, in assessing the reasonableness of Telstra's capital expenditure forecasts, the ACCC will take into account:

- the access provider's level of capital expenditure in the previous regulatory period
- the reasons and evidence supporting changes to capital expenditure in the next regulatory period
- whether the access provider's asset management and planning framework reflects best practice
- any relevant regulatory obligations or requirements applicable to providing the declared fixed line services, and
- any other matters relevant to whether forecast capital expenditures reflect prudent and efficient costs.

### ***Demand forecasts***

The ACCC considers that a fixed principles provision that specifies the process for assessing the access provider's demand forecasts is appropriate. The ACCC will take into account any forecasts provided by the access provider and will consider whether the forecasts provided by the access provider:

- are based on an appropriate forecasting methodology
- are based on reasonable assumptions about the key drivers of demand
- utilise the best available information before the ACCC, including historical data that can identify trends in demand; and
- take into account current demand and economic conditions.

As noted in chapter 4, the ACCC intends to consult on varying the BBM RKR to obtain demand forecasts and supporting documentation from Telstra for future regulatory periods for the wholesale ADSL service.

### ***Weighted average cost of capital***

The fixed principles provisions specify that in calculating the weighted average cost of capital (WACC) used in the FLSM:

- A vanilla WACC is used to estimate the return on capital.
- The cost of equity is estimated using the Capital Asset Pricing Model.

The ACCC considers it is not appropriate to specify values for any of the WACC parameters in the fixed principles provisions.

### ***Tax liabilities***

The fixed principles provisions specify that the tax rate used in estimating tax liabilities in the FLSM will be set equal to the corporate tax rate specified in subsection 23(2) of the *Income Tax Rates Act 1986 (Cth)*.

### ***Cost allocation factors***

In relation to the cost allocation factors used to allocate the revenue requirement to particular services, including the wholesale ADSL service, the fixed principles provisions specify that:

- The allocation of the costs of operating the PSTN should reflect the relative usage of the network by various services.
- Direct costs should be attributed to the service.
- The cost allocation factors for shared costs should reflect causal relationships between supplying services and incurring costs.
- No cost should be allocated more than once to any service.



- The determination of cost allocation factors should reflect the principles above except where reliable information is not available to support the application of the principles.

## **12.2 Consideration of the legislated matters**

The ACCC considers that making fixed principles provisions will promote the LTIE by providing certainty about how the ACCC will estimate prices for the wholesale ADSL service after the end of the regulatory period. By adopting fixed principles provisions consistent with those included in the FADs for the other declared fixed line services that have prices estimated using the FLSM, the draft FAD will also provide certainty that the prices for the wholesale ADSL service will be estimated using the same framework as for the other declared fixed line services.

The fixed principles provisions included in the draft FAD specify the cost components (or ‘building blocks’) used to estimate the revenue requirement. These components determine the key elements of the pricing framework. Certainty over time in the pricing framework will assist industry participants in their business and investment planning and facilitate their capacity to compete in providing telecommunications services. The ACCC considers that this will promote the LTIE (s 152BCA(1)(a)), be consistent with the legitimate business interests of the access provider (s 152BCA(1)(b)), and promote the interests of all persons who have rights to use the declared service (s 152BCA(1)(c)).

By having the fixed principles provisions specify the cost components (or ‘building blocks’) used to estimate the revenue requirement, these will include the direct costs of providing access to the wholesale ADSL service (s 152BCA(1)(d)).

The cost components specified in the fixed principles provisions determine the key elements of the pricing framework. By ensuring that the access provider will be able to recover its efficient costs, these provisions will support expenditures on maintaining and improving the safe and reliable provision of services and operation of the network (s 152BCA(1)(f)). By ensuring the access provider will be able to recover its efficient investments in infrastructure used to provide the wholesale ADSL service, these provisions will support investments that underpin the safe and reliable provision of services and operation of the network. These provisions will thereby also promote the LTIE.

The ACCC considers that the fixed principles provisions included in the draft FAD will promote certainty about the way access prices will be determined over time. By ensuring the access provider will be able to recover its efficient costs, these provisions will support expenditures on providing services and operating the network efficiently (s 152BCA(1)(g)).

The fixed principles provisions included in the draft FAD also specify the initial values for the RAB and the tax asset value as at 1 July 2012. The ACCC considers that locking in these initial RAB values will contribute to continuity and predictability in moving from one regulatory period to the next. The ACCC considers revaluation of an existing RAB could create uncertainty for Telstra and access seekers. It could also result in price shocks and windfall gains or losses to industry participants. Further, the periodic revaluation of sunk assets could result in the access provider facing an unpredictable revenue stream that could deter efficient investment. The ACCC considers that this will promote the LTIE (s

152BCA(1)(a)), be consistent with the legitimate business interests of the access provider (s 152BCA(1)(b)), and promote the interests of all persons who have rights to use the declared service (s 152BCA(1)(c)).

The ACCC is of the view that the fixed principles provisions included in the draft FAD will not compromise the safe and reliable operation of any carriage service, telecommunications network or facility (s 152BCA(1)(f)).

The ACCC has had regard to the effect of the proposed fixed principles provisions on the supply of one or more other eligible services (s 152BCA(2)). By adopting fixed principles provisions consistent with those included in the FADs for the other declared fixed line services that have prices estimated using the FLSM, the draft FAD will provide certainty that the prices for the wholesale ADSL service will be estimated in a method consistent with the other services.

The ACCC considers that objective of achieving any-to-any connectivity is not relevant to the fixed principles provisions included in the draft FAD as they do not impact on connectivity between telecommunications networks.

The ACCC considers that criterion under 152BCA(1)(e)—the value of a party of extensions, or enhancement of capability, whose cost is borne by someone else—is not directly relevant to the fixed principles provisions included in the draft FAD.

## Appendix A: Wholesale ADSL Service description

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

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

### *Definitions*

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

In this Appendix:

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

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

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

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

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

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

## Appendix B: List of submissions received

Submissions received in response to February 2012 Discussion Paper
AAPT, Submission by AAPT Limited to ACCC Discussion Paper Public Inquiry to Make a Final Access Determination for the Wholesale ADSL Service dated February 2012, 5 April 2012. <b>(AAPT, April 2012 Submission)</b>
Herbert Geer, Inquiry to make a Final Access Determination for the Wholesale ADSL Service Discussion Paper, Submission by Herbert Geer Lawyers on behalf of: Adam Internet, iiNet Limited, Internode Pty Ltd, Primus Telecom, and TransACT Communications Pty Limited, 10 April 2012. <b>(Herbert Geer, April 2012 submission)</b>
Macquarie Telecom, Inquiry to make a final access determination for the wholesale ADSL service, 10 April 2012. <b>(Macquarie Telecom, April 2012 submission)</b>
Optus, Optus submission in response to the ACCC's Public Inquiry to make a Final Access Determination for the Wholesale ADSL Service (confidential version), April 2012. <b>(Optus, April 2012 submission)</b>
Telstra, Response to the Commission's Discussion Paper into the public inquiry to make a final access determination for the wholesale ADSL service (confidential version), 10 April 2012. <b>(Telstra, April 2012 submission)</b>
Vocus, Submission in relation to WDSL Final Access Determination, 10 April 2012. <b>(Vocus, April 2012 submission)</b>
Submissions received in response to July 2012 Issues Paper
AAPT, Submission by AAPT Limited (24 August 2012) in response to ACCC Public inquiry to make a final access determination for the wholesale ADSL service Issues Paper (a Second Discussion Paper) confidential version, 24 August 2012. <b>(AAPT, August 2012 submission)</b>
Competitive Carriers' Coalition Inc, WADSL Final Access Determination Discussion Paper Response, August 2012. <b>(CCC, August 2012 submission)</b>
Herbert Geer, Public inquiry to make a final access determination for the wholesale ADSL service Issues Paper (a second Discussion Paper), Submission by Herbert Geer Lawyers on behalf of: Adam Internet and iiNet Limited (confidential version), 24 August 2012. <b>(Herbert Geer, August 2012 submission)</b>
Attachment: Confidential attachment to Adam Internet submission, 24 August 2012.
Macquarie Telecom, Public Inquiry to Make a Final Access Determination for the Wholesale

ADSL Service, 24 August 2012. ( <b>Macquarie Telecom, August 2012 submission</b> )
Nextgen networks, Submission to ACCC Second Discussion Paper Final Access Determination (FAD) for the Wholesale ADSL Service (commercial-in-confidence version), August 2012. ( <b>Nextgen, August 2012 submission</b> )
Optus, Optus Submission in response to the ACCC's Issues Paper Public Inquiry to make a Final Access Determination for the Wholesale ADSL Service (confidential version), August 2012. ( <b>Optus, August 2012 submission</b> )
Attachment 1: [c-i-c] [c-i-c] (confidential), 24 August 2012.
Attachment 2: [c-i-c] [c-i-c] (confidential), 24 August 2012.
Attachment 3: [c-i-c] [c-i-c] (confidential), 24 August 2012.
Attachment 4: [c-i-c] [c-i-c] (confidential), 24 August 2012.
Telstra, Response to the Commission's Issues Paper (a second discussion paper) into the public inquiry to make a final access determination for the wholesale ADSL services: Executive Summary (confidential version), 24 August 2012. ( <b>Telstra, August 2012 executive summary</b> )
Telstra, Response to the Commission's Issues Paper (a second discussion paper) into the public inquiry to make a final access determination for the wholesale ADSL services: Pricing to Improve Customer Experience (confidential version), 24 August 2012. ( <b>Telstra, August 2012 pricing submission</b> )
Telstra, Response to the Commission's Issues Paper (a second discussion paper) into the public inquiry to make a final access determination for the wholesale ADSL services – Non-Price Terms (confidential version), 24 August 2012. ( <b>Telstra, August 2012 non-price terms submission</b> )
Frontier Economics (on behalf of Telstra), ADSL network congestion pricing and use of RMRC, A report prepared for King & Wood Mallesons (confidential version), August 2012. ( <b>Frontier Economics, August 2012 report for Telstra</b> )
Gautam Gowrisankaran & Jeffrey MacKie-Mason (on behalf of Telstra), Report on Efficient Pricing of ADSL Wholesale Services (confidential version), 23 August 2012. ( <b>Gowrisankaran and MacKie-Mason, August 2012 report for Telstra</b> )
Telstra, Statement of [c-i-c] [c-i-c] (confidential), 24 August 2012.
Telstra, The supply of ADSL services in Australia – additional material (confidential), 24 August 2012.

Telstra, Supplementary submission to the Commission’s Second Discussion paper in a public inquiry to make a Final Access Determination for the Wholesale ADSL service – Non-price terms (confidential version), 19 October 2012. <b>(Telstra, October 2012 submission)</b>
Submissions received in response to the October 2012 request for submissions on congestion in ADSL networks
AAPT, Submission by AAPT Limited (19 October 2012) in response to ACCC Open Letter seeking submissions on congestion on ADSL networks dated 5 September 2012 (confidential version), 19 October 2012. <b>(AAPT, October 2012 congestion submission)</b>
Herbert Geer, ACCC inquiry to make a final access determination for the wholesale ADSL service congestion on Telstra’s ADSL network, response by Herbert Geer lawyers on behalf of Adam Internet and iiNet (confidential version), 19 October 2012. <b>(Herbert Geer, October 2012 congestion submission)</b>
Macquarie Telecom, Public inquiry into making an access determination for wholesale ADSL – request for submission on congest in ADSL networks, 18 October 2012. <b>(Macquarie Telecom, October 2012 congestion submission)</b>
Optus, Optus Submission to ACCC in response to public inquiry into making an access determination for wholesale ADSL – congestion issues, October 2012. <b>(Optus, October 2012 congestion submission)</b>
Telstra, Response & Further Submission on ADSL Congestion (confidential version), 16 November 2012. <b>(Telstra, November 2012 congestion submission)</b>
Annexure 1: Top Hat Customer Announcement, 16 November 2012.
Gautam Gowrisankaran & Jeffrey MacKie-Mason, (on behalf of Telstra), Supplemental Report on Efficient Pricing of ADSL Wholesale Services (confidential), 3 December 2012. <b>(Gowrisankaran and MacKie-Mason, December 2012 report for Telstra)</b>
Frontier Economics (on behalf of Telstra), Response to submissions on wholesale ADSL pricing, A report prepared for King & Wood Mallesons (confidential version), December 2012. <b>(Frontier Economics, December 2012 report for Telstra)</b>
Submissions received in response to the ACCC’s information request
Telstra, WADSL FAD enquiry: Response to ACCC Questions (confidential), 10 September 2012. <b>(Telstra, September 2012 response to information request)</b>
Annexure: WADSL FAD enquiry: Response to ACCC Questions (confidential), 10 September 2012.

Telstra, Wholesale ADSL FAD inquiry – Request for Information, 19 October 2012.  
**(Telstra, October 2012 response to information request)**

Annexure 1: Wholesale ADSL FAD inquiry – Request for Information  
(confidential), 19 October 2012.

Attachment 1: Updated RMRC Calculation (confidential), 19 October 2012.

Attachment 2: Updated Retail Cost Calculation (confidential), 19 October 2012.

Attachment 3: ADSL Asset Register Data (confidential), 19 October 2012.

## Appendix C: Legislative framework for access determinations

The telecommunications access regime contained in Part XIC of the *Competition and Consumer Act 2010* (CCA) was amended with effect from 1 January 2011 by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*. The amendments replace the previous negotiate/arbitrate framework with a range of different access mechanisms, including up-front access determinations.

The new access regime enables the Australian Competition and Consumer Commission (ACCC) to set price and non-price terms in access determinations. The terms and conditions in an access determination will only apply where there are no commercially agreed terms and conditions between the access seekers and access provider. The access determinations create a benchmark which access seekers can fall back on while still allowing parties to negotiate different terms.

Access determinations can be interim or final. Where access determinations specify terms and conditions of access they must include terms and conditions relating to price (or a method of ascertaining a price) and may also contain non-price terms, although this is not compulsory.<sup>514</sup> Compliance with access determinations is a carrier licence condition and a service provider rule.<sup>515</sup> Access determinations do not apply to the extent they are inconsistent with various other instruments and agreements, including access agreements between parties.<sup>516</sup>

### Public inquiry

The access regime requires the ACCC to consider making access determinations for all declared services. For a newly declared service, the ACCC must commence a public inquiry into making an access determination within 30 days after the declaration is made.<sup>517</sup> The ACCC must make a final access determination (FAD) within 6 months of commencing a public inquiry. The ACCC can extend the time frame for making an FAD by up to 6 months.<sup>518</sup>

### Content of access determinations

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

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<sup>514</sup> Subsection 152BC(3) of the CCA.

<sup>515</sup> Sections 152BCO and 152BCP of the CCA.

<sup>516</sup> Section 152BCC of the CCA.

<sup>517</sup> Subsection 152BCI(1) of the CCA.

<sup>518</sup> Subsections 152BCK(2) and (3) of the CCA.



CCA and terms and conditions of access to a declared service. Access determinations can make different provisions with respect to different access providers or access seekers.<sup>519</sup>

## **Fixed principles provisions**

An access determination may contain a fixed principles provision, which allows a provision in an access determination to have an expiry date after the expiry date of the access determination.<sup>520</sup> Such a provision would allow the ACCC to ‘lock in’ a term so that it would be consistent across multiple access determinations.

## **Varying an access determination**

Section 152BCN allows the ACCC to vary or revoke an access determination. A fixed principles provision cannot be varied or removed unless the access determination sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.<sup>521</sup>

## **Commencement and expiry provisions**

Section 152BCF of the CCA sets out the commencement and expiry rules for access determinations. An access determination must have an expiry date.<sup>522</sup>

## **Legislative matters to consider when making an access determination**

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

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

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<sup>519</sup> Subsection 152BC(5) of the CCA.

<sup>520</sup> Section 152BCD of the CCA.

<sup>521</sup> Subsection 152BCN(4) of the CCA.

<sup>522</sup> Subsection 152BCF(5) of the CCA.

- the economically efficient operation of a carriage service, a telecommunications network or a facility.

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

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

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

The ACCC's initial views on how the legislated matters for consideration in section 152BCA should be interpreted for the access determination process are set out below.

### **Paragraph 152BCA(1)(a)**

The first criterion for the ACCC to consider when making an access determination is 'whether the determination will promote the LTIE of carriage services or of services supplied by means of carriage services'.

The ACCC has previously published a guideline explaining what it understands by the phrase 'LTIE' in the context of its declaration responsibilities.<sup>523</sup> This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for making an access determination for the wholesale ADSL service.

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

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.<sup>524</sup>

The ACCC also notes that the Australian Competition Tribunal (Tribunal) has offered guidance in its interpretation of the phrase 'LTIE' (in the context of access to subscription television services):

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

\*End users: "end users" include actual and potential [users of the service]...

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<sup>523</sup> ACCC, *Telecommunications services – Declaration provisions: A guide to the declaration provisions of Part XIC of the Trade Practices Act*, July 1999, in particular pp. 31–38.

<sup>524</sup> *Ibid.*, p. 33.

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

\*Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.<sup>525</sup>

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

- promoting competition in markets for carriage services and services supplied by means of carriage services
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in:
  - the infrastructure by which listed carriage services are supplied, and
  - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.<sup>526</sup>

### ***Promoting competition***

In assessing whether particular terms and conditions will promote competition, the ACCC will analyse the relevant markets to which the declared service is an input and consider whether the terms set in those markets remove obstacles to end users gaining access to carriage services and services supplied by means of carriage services.<sup>527</sup>

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

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

### ***Any-to-any connectivity***

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end user who is supplied with a carriage service that involves communication between end users is able to communicate, by means of that service, with each other end user who is supplied with the same service or a similar service. This must be

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<sup>525</sup> *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

<sup>526</sup> Subsection 152AB(2) of the CCA.

<sup>527</sup> Subsection 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] ACompT 3 at [92]; *Telstra Corporation Limited* [2006] ACompT 4 at [97] & [149].

the case whether or not the end users are connected to the same telecommunications network.<sup>528</sup>

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

### ***Efficient use of and investment in infrastructure***

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

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
  - the technology that is in use, available or likely to become available
  - whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and
  - the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks;
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the NBN) by which services are, or are likely to become, capable of being supplied, and
- the risks involved in making that investment.<sup>529</sup>

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

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

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

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<sup>528</sup> Subsection 152AB(8) of the CCA.

<sup>529</sup> Subsections 152AB(6) and (7A) of the CCA.

...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.<sup>530</sup>

...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.<sup>531</sup>

...access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.<sup>532</sup>

### **Paragraph 152BCA(1)(b)**

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

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment.<sup>533</sup> The ACCC is of the view that the concept of ‘legitimate business interests’ in relation to FADs should be interpreted in a similar manner, consistent with the phrase ‘legitimate commercial interests’ used elsewhere in Part XIC of the CCA.

For completeness, the ACCC notes that it would be in the access provider’s legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.<sup>534</sup>

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.<sup>535</sup>

### **Paragraph 152BCA(1)(c)**

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

The ACCC considers that this criterion requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.<sup>536</sup> The access seekers’ interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete with the access provider in the provision of retail services.<sup>537</sup>

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<sup>530</sup> Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [159].

<sup>531</sup> *ibid.* at [164].

<sup>532</sup> *ibid.*

<sup>533</sup> ACCC, *Resolution of telecommunications access disputes—a guide (revised)*, March 2004, p. 56.

<sup>534</sup> ACCC, *Access pricing principles—telecommunications*, July 1997, p. 9).

<sup>535</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [89].

<sup>536</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [91].

<sup>537</sup> *Ibid.*

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

The ACCC considers that this class of persons has an interest in being able to compete for the custom of end users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.<sup>538</sup>

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

### **Paragraph 152BCA(1)(d)**

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

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

The ACCC interprets this criterion, and the use of the term ‘direct costs’, as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal’s approach in an undertaking decision.<sup>539</sup> A contribution to such apportioned costs can also be supported by other criteria.

However, the criterion does not extend to compensation for loss of any ‘monopoly profit’ that occurs as a result of increased competition.<sup>540</sup>

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs criterion ‘is concerned with ensuring that the costs of providing the service are recovered.’<sup>541</sup> The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.<sup>542</sup>

### **Paragraph 152BCA(1)(e)**

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

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<sup>538</sup> Ibid.

<sup>539</sup> Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

<sup>540</sup> See The Parliament of the Commonwealth of Australia, *Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum*, p. 43: [T]he ‘direct’ costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

<sup>541</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [92].

<sup>542</sup> Ibid, at [139].

In the 1997 Access Pricing Principles, the ACCC stated:

This criterion requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.<sup>543</sup>

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

### **Paragraph 152BCA(1)(f)**

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

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

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

...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.<sup>544</sup>

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

### **Paragraph 152BCA(1)(g)**

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

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.<sup>545</sup>

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

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<sup>543</sup> ACCC, *Access Pricing Principles – Telecommunications, a guide*, July 1997, p. 11.

<sup>544</sup> ACCC, *Final Determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

<sup>545</sup> ACCC, *Resolution of telecommunications access disputes—a guide (revised)*, March 2004, p. 57.

- retail services provided by access seekers using the access provider's services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.<sup>546</sup>

### **Subsection 152BCA(2)**

Subsection 152BCA(2) of the CCA provides that, in making an access determination that applies to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,<sup>547</sup> take into account:

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

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in making an access determination, does not consider the declared service in isolation, but also considers other relevant services.<sup>548</sup> As an example, the Explanatory Memorandum states:

...when specifying the access price for a declared service which is supplied by an access provider over a particular network or facility, the ACCC can take into account not only the access provider's costs and revenues associated with the declared service, but also the costs and revenues associated with other services supplied over that network or facility.<sup>549</sup>

### **Subsection 152BCA(3)**

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

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<sup>546</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [94]–[95].

<sup>547</sup> 'Eligible service' has the same meaning as in section 152AL of the CCA.

<sup>548</sup> The Parliament of the Commonwealth of Australia, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, Explanatory Memorandum*, p. 178.

<sup>549</sup> *Ibid.*



## Appendix D: Description of retail-minus methodology and estimated prices

Details on the ACCC's consideration of how it could implement a retail-minus approach for estimating wholesale ADSL service prices are set out in this attachment. The prices estimated from the ACCC's retail-minus model are also included.

The ACCC had regard to this information in reaching its position on the appropriate pricing methodology for this draft report.

### *Background*

A retail-minus methodology determines access prices by deducting the access provider's estimated retail costs from the retail price for the relevant retail service.

Following the declaration of wholesale ADSL in February 2012, the ACCC made an Interim Access Determination (IAD). This IAD established price terms using a retail-minus model based on Telstra's initial model with certain adjustments by the ACCC. The RMRC methodology was considered appropriate as it could be applied relatively quickly.<sup>550</sup>

### *Telstra model*

For the purposes of this FAD inquiry, the ACCC issued two requests for information (RFIs) to Telstra (on 10 August and 27 September 2012), seeking updated information that was needed to estimate prices using a retail-minus model. In response to these RFIs, Telstra provided updated retail-minus calculations (which included minor changes to the model) on 19 October 2012. The main changes to the model (Telstra model) are modifications to the:

- number and types of charges included in calculating the reference retail price<sup>551</sup>
- type of ADSL SIOs included in calculating the reference retail price
- types of costs included in calculating the retail costs
- manner in which the wholesale connection and miscellaneous costs are calculated.

The Telstra model is based on the model used for the wholesale ADSL IAD. Details on the main inputs to the Telstra model are provided below.

### *Reference retail ADSL price*

The Telstra model uses a reference retail ADSL price of [c-i-c] [c-i-c] which comprises: a retail early termination charge (ETC) of [c-i-c] [c-i-c], a connection charge of [c-i-c] [c-i-c], excess usage charges of [c-i-c] [c-i-c] and retail discounts offered by Telstra to its retail end-users.

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<sup>550</sup> ACCC, *Interim access determination for the wholesale ADSL service, Statement of Reasons*, February 2012, p. 10.

<sup>551</sup> The Telstra model captures a wider range of retail ADSL plans than the IAD model and would lead to a reference retail ADSL price that is more reflective of the average price.

In calculating the reference retail price, the Telstra model includes standalone and bundled ADSL plans from BigPond and Telstra Business Broadband (TBB) for a total of [c-i-c] [c-i-c] retail ADSL SIOs. Further, for [c-i-c] [c-i-c] in the Telstra model, Telstra could not identify the actual price of the ADSL plans these SIOs are on because they are on legacy systems. Telstra used a proxy price (based on ARPU of BigPond ADSL SMEs) for these SIOs.

The Telstra model captures a wider range of retail ADSL plans than used in the IAD model and the calculated reference retail ADSL price is more reflective of the average price incurred by a Telstra retail ADSL end-user. Only ADSL plans capable of reaching ADSL2+ speeds (assumed to be 20 Mbps) were included in the IAD model. The Telstra model includes lower speed plans.

The IAD model included standalone and bundled ADSL plans from TBB and BigPond. Both the Telstra model and the IAD model also explicitly stated that they include TBB ADSL plans.

The Telstra model and IAD model both include grandfathered ADSL plans, although the Telstra model captures a larger range and number of grandfathered plans because it captures all ADSL plans and not only ADSL plans capable of 20 Mbps.

A material number of customers, [c-i-c] [c-i-c], remain on 'grandfathered' plans. Grandfathered plans are typically lower in nominal cost and offer relatively small download limits, compared to Telstra's currently available retail plans. They may also be limited to slower (potential) data rates than the current ADSL2+ plans. This can represent a high effective price for the product.

#### *Retail costs*

The average retail ADSL cost in the Telstra model is [c-i-c] [c-i-c] per SIO.

The Telstra model includes three additional retail costs that were not included in the IAD model: 'IT Management and support', 'managed customer services' and 'materials management'.

The ACCC attempted to verify Telstra's estimate of retail costs by conducting an analysis of alternative measures of retail costs using RAF and TEM information. The ACCC found that different methods are used in calculating retail costs in the Telstra model, the RAF and the TEM. The retail costs obtained from these alternative data sources are not directly comparable. However, because of data limitations with the RAF and TEM information on retail costs, the ACCC considered Telstra's estimates were reasonable.

#### *Wholesale connection and miscellaneous charges*

The Telstra model uses actual revenues from wholesale connection and miscellaneous charges. In contrast, the IAD model assumed all wholesale customers incurred each charge. The Telstra model figures are therefore more reflective of the actual revenues received by Telstra. The Telstra model also captures a more complete range of miscellaneous costs than the IAD model.

### *Calculation of the AGVC charge*

The Telstra model adopted a different method of calculating the AGVC charge than used in the IAD model. The main difference is which component in the AGVC charge calculation is held constant:

$$AGVC\ charge = AGVC\ price * forecast\ average\ AGVC\ usage$$

The ‘AGVC charge’ is defined as the average monthly charge per SIO while the ‘AGVC price’ is defined as the average monthly charge per Mbps. Forecast average AGVC usage is Telstra’s forecast of average AGVC usage per SIO.

The Telstra model calculates the ‘AGVC charge’ from the ‘AGVC price’ that is calculated on the basis of a Telstra assumption about the appropriate allocation of cost recovery from port and AGVC charges. In contrast, in the IAD model, the ACCC set an ‘AGVC charge’ per SIO at the same level as the ‘AGVC charge’ used in Telstra’s SSU model (from November 2011).

### *ACCC model*

The ACCC model differs from the Telstra model in three main ways:

- It uses Telstra’s 2011-12 annual report average revenue per user (ARPU) for retail fixed broadband (including hardware) as the reference retail ADSL price, instead of the weighted average of Telstra’s retail ADSL plan prices.
- There is a nominal pre-tax WACC of 7.48 per cent, instead of the 12.22 per cent WACC used in the Telstra model.
- AGVC charges are calculated using the method from the IAD model, which holds the ‘AGVC charge’ per SIO at [c-i-c] [c-i-c].

### *Annual report ARPU*

The ACCC considers that using Telstra’s annual report fixed retail broadband ARPU as the reference retail ADSL price is more appropriate than using the weighted average of Telstra’s retail ADSL plan prices. The ARPU is based on independently audited information, is publicly disclosed and uses all revenues from broadband services, including discounts. The ARPU reported in Telstra’s annual report of \$53.64 for 2011-12 is lower than the reference retail ADSL price of [c-i-c] [c-i-c] estimated by Telstra.

On balance the ACCC considers that Telstra’s ARPU is a more transparent and direct measure of the average yield from Telstra’s retail ADSL services than the averaged retail price calculated by Telstra for its Telstra model.

### *Weighted Average Cost of Capital*

The ACCC model uses a nominal pre-tax WACC of 7.48 per cent. This is equivalent to the updated WACC used in estimating the cost-based prices—see section 6.1 in the main body of this paper.

### *AGVC charge*

The ACCC model uses the AGVC calculation method used in the wholesale ADSL IAD rather than the AGVC calculation method in the Telstra model. The IAD approach leads to a stable AGVC charge over the regulatory period while Telstra's approach results in an increasing AGVC charge over the regulatory period. This ACCC considers a stable AGVC charge is likely to promote industry certainty.

### *Estimated retail-minus prices*

The table below compares the prices estimated using the Telstra model and ACCC model with the proposed FAD cost-based prices.

**Table: Estimated retail-minus prices using Telstra and ACCC models**

	<b>Proposed FAD prices (\$)</b>	<b>Telstra model (\$)</b>	<b>ACCC model (\$)</b>
<b>Port price Zone 1</b>	24.56	[c-i-c]	25.27
<b>Port price – Zone 2/3</b>	29.81		30.44
<b>AGVC/VLAN (per Mbps)</b>	36.08	[c-i-c]	34.81

## Appendix E: Draft final access determination



### Draft Final Access Determination No. X of 2013 (WDSL)

#### *Competition and Consumer Act 2010*

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The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes this final access determination under section 152BCG of the *Competition and Consumer Act 2010*.

Date of determination: [Insert date] 2013

## 1. Application

- 1.1 This instrument sets out a final access determination in respect of the declared service ('the Service') specified in the table:

Declared service	Expiry of declaration	Title of f access determination	Applicable schedules
Wholesale ADSL	13 February 2017	Final Access Determination No. X of 2013 (WADSL)	1-12

Note:

- From 1 January 2011:
  - a carrier licence held by a carrier is subject to a condition that the carrier must comply with any access determinations that are applicable to the carrier; and
  - a carriage service provider must comply with any access determinations that are applicable to the provider.
- An Access Provider and Access Seeker may enter into an Access Agreement relating to a declared service. Access Agreements prevail over inconsistent access determinations: section 152BCC of the *Competition and Consumer Act 2010*.
- The declared service that is subject to this final access determination is commonly referred to as a wholesale ADSL service or WADSL.

## 2. Definitions and interpretation

- 2.1 Schedule 1 applies to the interpretation of this instrument. The Schedules form part of this instrument.

## 3. Commencement and duration

- 3.1 This final access determination commences on [Insert date] 2013.
- 3.2 Unless sooner revoked, this final access determination remains in force up until and including 30 June 2014.

Note:

- An access determination may come into force on a day which is earlier than the day the determination is made: subsections 152BCF(1) and 152BCF(2) of the *Competition and Consumer Act 2010*.
- An interim access determination is revoked when the final access determination comes into force: subsection 152BCF(9A) of the *Competition and Consumer Act 2010*.

## 4. Terms and conditions of access

- 4.1 If a carrier or carriage service provider is required to comply with any or all of the standard access obligations as defined in the *Competition and Consumer Act 2010* in respect of the declared service, the carrier or carriage service provider must comply with those obligations on the terms and conditions set out in this clause 4.

Note: The terms and conditions in a final access determination apply only to those terms and conditions where terms and conditions on that matter in an Access Agreement cannot be reached, no special access undertaking is in operation setting out terms and conditions on that matter and no binding rules of conduct have been made setting out terms and conditions on that matter: section 152AY of the *Competition and Consumer Act 2010*.

4.2 If the carrier or carriage service provider is required to supply the declared service to a service provider, the carrier or carriage service provider must supply the service:

- (a) at the price specified in Schedule 1; and
- (b) on the non-price terms and conditions specified in Schedules 2–12.

4.3 This clause 4 is subject to clause 5.

## **5. Application of Standard Access Obligations to operators of non-dominant networks**

5.1 A carrier or carriage service provider other than Telstra Corporation Limited is not required to comply with any or all of the standard access obligations as defined in the *Competition and Consumer Act 2010* in respect of the Service.

Note:

1. An access determination may:
  - provide that any or all of the standard access obligations are not applicable to a carrier or carriage service provider (either unconditionally or subject to conditions or limitations); or
  - restrict or limit the application to a carrier or carriage service provider of any or all of the standard access obligations: section s 152BC(3)(h) and (i) of the *Competition and Consumer Act 2010*.

## **6. Fixed principles provisions**

6.1 This clause 6 sets out fixed principles provisions that apply to the FAD contained in this document.

6.2 The FAD contained in this document must not be varied so as to alter or remove any of the fixed principles provisions in this clause 6 except when the ACCC is satisfied that:

- (a) there is a manifest and material error in these fixed principles provisions;
- (b) any information on which these fixed principles provisions was based was false or misleading in a material respect; or
- (c) such amendment or adjustment is necessary or desirable to avoid an unintended consequence of these fixed principles provisions.

6.3 The below fixed principles provisions come into force on [insert date] 2013.

6.4 The nominal termination date for the fixed principles provisions is 30 June 2021.

6.5A The opening regulatory asset base (RAB) for the calculation of prices for the Wholesale ADSL service is:

- (a) as per clause 6.5 of the FADs dated 20 July 2011 (as varied from time to time), rolled forward to 1 July 2012 in accordance with clause 6.7 of the FADs dated 20 July 2011; and
- (b) the asset class data equipment which is \$1,094,008,824 as at 1 July 2012 (in nominal terms).

6.6A The opening tax asset value for the calculation of prices for the Wholesale ADSL service is:

- (a) as per clause 6.6 of the FADs dated 20 July 2011 (as varied from time to time), rolled forward to 1 July 2012 in accordance with clause 6.7 of the FADs dated 20 July 2011; and
- (b) the asset class data equipment which is \$1,086,735,207 as at 1 July 2012 (in nominal terms).

6.7 Roll-forward mechanism

- (a) The RAB is to be rolled forward each year according to the formula below:

$$RAB_{t+1} = RAB_t + capex_t - depreciation_t - asset\ disposals_t$$

where  $RAB_{t+1}$  = opening RAB for the next regulatory year

$RAB_t$  = opening RAB for the current year

$capex_t$  = forecast capital expenditure during the current year

$depreciation_t$  = regulatory depreciation during the current year

$asset\ disposals_t$  = asset disposals during the current year

- (b) Land asset values will be indexed by the Consumer Price Index (CPI) where it is available or by the forecast for the CPI used in the Fixed Line Services Model (FLSM) where actual CPI is not available. This will account for appreciation over time in land values.
- (c) To roll forward RAB values in nominal terms, any variables that are specified in real terms will be indexed by the actual CPI where it is available or by the forecast for the CPI used in the FLSM where the actual CPI is not available.
- (d) Any variables that are specified in nominal terms will not be indexed, with the exception of land values as specified above.
- (e) In these fixed principles provisions 'the FLSM' means the FLSM as it may be varied from time to time or similar model used by the ACCC for the calculation of prices for the relevant declared services.

6.8 The annual revenue requirement for each regulatory period will comprise:

- (a) a return on the RAB calculated by multiplying the Weighted Average Cost of Capital (WACC) by the opening RAB for the regulatory year;
- (b) a return of the RAB, that is regulatory depreciation, for that regulatory year;
- (c) operating expenditure forecast to be incurred in that regulatory year; and
- (d) an allowance for tax liabilities.



- 6.9 Under a building block model (BBM) approach, forecast operating expenditures should reflect prudent and efficient costs. The following matters are relevant to whether forecast operating expenditures reflect prudent and efficient costs:
- (a) the access provider's level of operating expenditure in the previous regulatory period;
  - (b) reasons for proposed changes to operating expenditure from one regulatory period to the next regulatory period;
  - (c) any relevant regulatory obligations, or changes to such obligations, applicable to providing the relevant declared fixed line services; and
  - (d) any other matters relevant to whether forecast operating expenditures reflect prudent and efficient costs.
- 6.10 Under a BBM approach, forecast capital expenditures should reflect prudent and efficient costs. The following matters are relevant to whether capital expenditure forecasts reflect prudent and efficient costs:
- (a) the access provider's level of capital expenditure in the previous regulatory period;
  - (b) reasons for proposed changes to capital expenditure from one regulatory period to the next regulatory period;
  - (c) whether the access provider's asset management and planning framework reflects best practice;
  - (d) any relevant regulatory obligations, or changes to such obligations, applicable to providing the relevant declared fixed line services; and
  - (e) any other matters relevant to whether forecast capital expenditures reflect prudent and efficient costs.
- 6.11 Demand forecasts should:
- (a) be based on an appropriate forecasting methodology;
  - (b) be based on reasonable assumptions about the key drivers of demand;
  - (c) be determined utilising the best available information before the ACCC, including historical data that can identify trends in demand; and
  - (d) be determined taking into account current demand and economic conditions.
- 6.12 Weighted average cost of capital
- (a) A vanilla WACC is used to estimate the return on capital.
  - (b) The cost of equity is estimated using the Capital Asset Pricing Model.
- 6.13 Tax liabilities
- (a) The tax rate used in estimating tax liabilities in the FLSM will be set equal to the corporate tax rate specified in subsection 23(2) of the *Income Tax Rates Act 1986 (Cth)* as amended from time to time.
- 6.14 Cost allocation factors
- (a) The allocation of the costs of operating the PSTN should reflect the relative usage of the network by various services.

- (b) Direct costs should be attributed to the service to which they relate.  
The cost allocation factors for shared costs should reflect causal relationships between supplying services and incurring costs.
- (c) No cost should be allocated more than once to any service
- (d) The determination of cost allocation factors should reflect the principles in 6.14 (a) – (c) above except where reliable information is not available to support the application of the principles.

6.15 The matters set out in the fixed principles provisions at clauses 6.7 – 6.14 inclusive are subject to assessment, calculation, implementation and/or application, as relevant, by the ACCC in making interim and final access determinations for the relevant declared services.

## INDEX TO SCHEDULES

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90	Network modernisation and upgrade
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## **Schedule 1 – Price terms**

1.1. The price for wholesale ADSL for the period 14 February 2012 until the date of the commencement of the wholesale ADSL FAD are:

1.1.1. The connection charge for a Service is:

<b>Connection type</b>	<b>Charge per connection</b>
Completed Type A Transfer standard Transfer Request via LOLO/LOLIG	\$22.50
Completed Type B Transfer standard Transfer Request via LOLO/LOLIG	\$80.00
All other completed installation or transfer requests	\$80.00

1.1.2. The monthly charge per end user access for a Service is:

<b>Applicable Geographic Area</b>	<b>Charge per port per month</b>
Zone 1	\$25.40
Zone 2+3	\$30.80

1.1.3. The monthly charge per Aggregating Virtual Circuit (where the IGR and ATM charging POP is in the same state) is to be calculated by multiplying the AGVC size and the following rate:

<b>Period</b>	<b>Rate per Mbps per month</b>
Up to 30 June 2012	\$45.50
From 1 July 2012	\$33.65

1.1.4. The monthly charge per DSL Virtual LAN is to be calculated by multiplying the Subscribed Data Speed and the following rate:

<b>Period</b>	<b>Rate per Mbps per month</b>
Up to 30 June 2012	\$45.50
From 1 July 2012	\$33.65

1.1.5. The charge for early termination of a Service is:

<b>Circumstance</b>	<b>Charge per termination</b>
Where the Service is connected for 6 months or longer	\$0
Where the service is connected for less than 6 months	\$50.00

1.1.6. The charges specified above are exclusive of GST.

1.1.7. For the avoidance of doubt, this Schedule applies only to the Service and does not specify prices for Aggregating Virtual Circuit or DSL Virtual LAN that is supplied other than in the supply of the Service.

1.2. The price for wholesale ADSL for the period of the commencement of the wholesale ADSL FAD until 30 June 2014 are as follows:

1.2.1. The connection charge for a Service is:

<b>Connection type</b>	<b>Charge per connection</b>
Completed Type A Transfer standard Transfer Request via LOLO/LOLIG	\$22.50
Completed Type B Transfer standard Transfer Request via LOLO/LOLIG	\$80.00
All other completed installation or transfer requests	\$80.00

1.2.2. The monthly charge per end user access for a Service is:

<b>Applicable Geographic Area</b>	<b>Charge per port per month</b>
Zone 1	\$24.56
Zone 2+3	\$29.81

1.2.3. The monthly charge per Aggregating Virtual Circuit (where the IGR and ATM charging POP is in the same state) is to be calculated by multiplying the AGVC size and the following rate:

<b>Rate per Mbps per month</b>
\$36.08

1.2.4. The monthly charge per DSL Virtual LAN is to be calculated by multiplying the Subscribed Data Speed and the following rate:

<b>Rate per Mbps per month</b>
\$36.08

1.2.5. The charge for early termination of a Service is:

<b>Circumstance</b>	<b>Charge per termination</b>
Where the Service is connected for 6 months or longer	\$0
Where the service is connected for less than 6 months	\$50.00

1.2.6. The charges specified in this Schedule are exclusive of GST.

1.2.7. For the avoidance of doubt, this Schedule applies only to the Service and does not specify prices for Aggregating Virtual Circuit or DSL Virtual LAN that is supplied other than in the supply of the Service.

## Schedule 2 – Billing and Notifications

- 2.1 The Access Seeker's liability to pay Charges for the Service to the Access Provider arises at the time the Service is supplied by the Access Provider to the Access Seeker, unless the parties agree otherwise.
- 2.2 The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 2.
- 2.3 The Access Provider must provide the Access Seeker with an invoice each month in respect of Charges payable for the Service unless the parties agree otherwise.
- 2.4 The Access Provider is entitled to invoice the Access Seeker for previously uninvoiced Charges or Charges which were understated in a previous invoice, provided that:
- (a) the Charges to be retrospectively invoiced can be reasonably substantiated to the Access Seeker by the Access Provider; and
  - (b) subject to clause 2.5, no more than six Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld).
- 2.5 The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the Telecommunications Act 1997 (Cth) (Standard) and the provisions of any applicable industry code registered pursuant to Part 6 of the Telecommunications Act 1997 (Cth) (Code) in relation to billing. Where the effect of a Standard or Code is that an Access Seeker is not permitted to invoice its customers for charges that are older than a specified number of days, weeks or months (the Backbilling Period), the Access Provider must not invoice the Access Seeker for a Charge which was incurred by the Access Seeker's customers that, as at the date the invoice is issued, is older than the Backbilling Period.
- 2.6 Subject to clause 2.12,
- (a) an invoice is payable in full 30 Calendar Days after the date the invoice was issued or such other date as agreed between the parties.
  - (b) The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider.
  - (c) All amounts owing and unpaid after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day authorised dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5 percent.

- 2.7 In addition to charging interest in accordance with clause 2.6 or exercising any other rights the Access Provider has at law or under this FAD, where an amount is outstanding and remains unpaid for more than 20 Business Days after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this FAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.
- 2.8 Unless the parties otherwise agree, there is no setting-off (i.e. netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise the administration and financial costs, the parties must consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.
- 2.9 The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice. Nothing in this clause 2.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
- 2.10 If the Access Seeker believes a Billing Dispute exists, it may invoke the Billing Dispute Procedures by providing written notice to the Access Provider (Billing Dispute Notice). A Billing Dispute must be initiated only in good faith.
- 2.11 Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal or regulatory proceedings in relation to any Billing Dispute.
- 2.12 If a Billing Dispute Notice is given to the Access Provider by the due date for payment of the invoice containing the Charge which is being disputed, the Access Seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved. Otherwise, the Access Seeker must pay the invoice in full in accordance with this FAD (but subject to the outcome of the Billing Dispute Procedures).
- 2.13 Except where payment is withheld in accordance with clause 2.12, the Access Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.
- 2.14 A Billing Dispute Notice must be given to the Access Provider in relation to a Charge within six Months of the invoice for the Charge being issued in accordance with 2.6.
- 2.15
- (a) The Access Provider must acknowledge receipt of a Billing Dispute Notice within two Business Days by providing the Access Seeker with a reference number.



(b) Within five Business Days of acknowledging a Billing Dispute Notice under clause 2.15(a), the Access Provider must, by written notice to the Access Seeker:

(i) accept the Billing Dispute Notice; or

(ii) reject the Billing Dispute Notice if the Access Provider reasonably considers that:

A. the subject matter of the Billing Dispute Notice is already being dealt with in another dispute;

B. the Billing Dispute Notice was not submitted in good faith;  
or

C. the Billing Dispute Notice is incomplete or contains inaccurate information.

(c) If the Access Provider fails to accept or reject the Billing Dispute Notice within five Business Days of acknowledging the Billing Dispute Notice under clause 2.15(a), the Access Provider is taken to have accepted the Billing Dispute Notice.

2.16 The Access Seeker must, as early as practicable and in any case within five Business Days after the Access Provider acknowledges a Billing Dispute Notice, provide to the other party any further relevant information or materials (which was not originally provided with the Billing Dispute Notice) on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

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

2.17 The Access Provider must try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of accepting a Billing Dispute Notice under clause 2.15 (or longer period if agreed by the parties), by notifying the Access Seeker in writing of its proposed resolution of a Billing Dispute. That notice must:

(a) explain the Access Provider's proposed resolution (including providing copies where necessary of all information relied upon in coming to that proposed resolution); and

(b) set out any action to be taken by:

(i) the Access Provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or

(ii) the Access Seeker (e.g. payment of the disputed Charge).

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

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

(a) what part(s) of the proposed resolution it objects to;

(b) the reasons for objection;

(c) what amount it will continue to withhold payment of (if applicable); and

(d) any additional information to support its objection.

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

(e) provide a revised proposed resolution (Revised Proposed Resolution in this Schedule 2); or

(f) confirm its proposed resolution.

2.19 Any:

(a) withdrawal, adjustment or refund of the disputed Charge by the Access Provider; or

(b) payment of the disputed Charge by the Access Seeker (as the case may be),

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

Provider may include that withdrawal, adjustment or refund in the invoice following the first invoice notwithstanding that this may occur more than one Month after the Access Provider's notice of its proposed resolution or Revised Proposed Resolution.

- 2.20 Where the Access Provider is to refund a disputed Charge, the Access Provider must pay interest (at the rate set out in clause 2.6) on any refund. Interest accrues daily from the date on which each relevant amount to be refunded was paid to the Access Provider, until the date the refund is paid.
- 2.21 Where the Access Seeker is to pay a disputed Charge, the Access Seeker must pay interest (at the rate set out in clause 2.6) on the amount to be paid. Interest accrues daily from the date on which each relevant amount was originally due to be paid to the Access Provider, until the date the amount is paid.
- 2.22 If
- (a) the Access Provider has not proposed a resolution according to clause 2.17 or within the timeframe specified in clause 2.17, or
  - (b) if the Access Seeker having first submitted an objection under clause 2.18 is not satisfied with the Access Provider's Revised Proposed Resolution, or the Access Provider's confirmed proposed resolution, within the timeframes specified in clause 2.18,
- the Access Seeker may escalate the matter under clause 2.23. If the Access Seeker does not do so within 15 Business Days after the time period stated in clause 2.17 or after being notified of the Access Provider's Revised Proposed Resolution under clause 2.18(e) or confirmed proposed resolution under clause 2.18(f) (or a longer period if agreed by the parties), the Access Seeker is deemed to have accepted the Access Provider's proposed resolution made under clause 2.17 or Revised Proposed Resolution under clause 2.18(e) or confirmed proposed solution under clause 2.18(f) and clauses 2.20 and 2.21 apply.
- 2.23 If the Access Seeker wishes to escalate a Billing Dispute, the Access Seeker must give the Access Provider a written notice:
- (a) stating why it does not agree with the Access Provider's Revised Proposed Resolution or confirmed proposed resolution; and
  - (b) seeking escalation of the Billing Dispute.
- 2.24 A notice under clause 2.23 must be submitted to the nominated billing manager for the Access Provider, who must discuss how best to resolve the Billing Dispute with the Access Seeker's nominated counterpart. If the parties are unable to resolve the Billing Dispute within five Business Days of notice being given under clause 2.23 (or such longer period as agreed between the parties) the Billing Dispute must be escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart who must meet in an effort to resolve the Billing Dispute.

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

## **Schedule 3 – Creditworthiness and security**

3.1 Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide to the Access Provider and maintain, on terms and conditions reasonably required by the Access Provider and subject to clause 3.2, the Security (as be determined having regard to clause 3.3 and as may be varied pursuant to clause 3.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.

3.2

(a) The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the Security specified in clause 3.1 for a period of six Months following (but not including) the date on which the last of the following occurs:

- (i) cessation of supply of the Service under this FAD, and
- (ii) payment of all outstanding amounts under this FAD.

(b) Notwithstanding clause 3.2(a), the Access Provider has no obligation to release the Security if, at the date the Access Provider would otherwise be required to release the Security under clause 3.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.

3.3 The Security (including any varied Security) may only be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services, and be of an amount and in a form which is reasonable in all the circumstances. As a statement of general principle the amount of any Security is calculated by reference to:

- (a) the aggregate value of all Services likely to be provided to the Access Seeker under this FAD over a reasonable period; or
- (b) the value of amounts invoiced in respect of the Service but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).

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

3.4 Examples of appropriate forms of Security, having regard to the factors referred to in clause 3.3, may include without limitation:

- (a) fixed and floating charges;

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

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

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

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

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

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

the Access Seeker must provide that altered Security within 20 Business Days of being notified by the Access Provider in writing of that requirement.

- 3.6 The Access Seeker may from time to time request the Access Provider to consent (in writing) to a decrease in the required Security and/or alteration of the form of the Security. The Access Provider must, within 15 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors referred to in clause 3.3). The Access Provider may request, and the Access Seeker must promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 3.6.
- 3.7 If the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 3, the Access Seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the Access Provider and that there has been no material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider. If there has been a material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider, the Access Seeker must disclose the nature and effect of the change to the Access Provider at the time the information is provided.
- 3.8 For the purposes of this Schedule 3, **Ongoing Creditworthiness Information** means:
- (a) a copy of the Access Seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);
  - (b) a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker must co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the Access Seeker's creditworthiness. To that end, the Access Seeker agrees to procure written consents (as required under the *Privacy Act 1988 (Cth)*) from such of its Principals as is reasonably necessary in the circumstances to enable the Access Provider to:
    - (i) obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;
    - (ii) disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and
    - (iii) obtain and use a consumer credit report;

(c) a letter, signed by the company secretary or duly authorised officer of the Access Seeker, stating that the Access Seeker is not insolvent and not under any external administration (as defined in the *Corporations Act 2001* (Cth)) or under any similar form of administration under any laws applicable to it in any jurisdiction; and

(d) the Access Seeker's credit rating, if any has been assigned to it.

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

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

(a) an event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) of the Access Seeker and the Access Seeker must provide that altered Security within 15 Business Days after the end of the period set out clause 3.5; or

(b) breach of a material term or condition of this FAD.

Any disputes arising out of or in connection with Schedule 3 must be dealt with in accordance with the procedures in Schedule 4. Notwithstanding that a dispute arising out of or in connection with Schedule 3 has been referred to the procedures in Schedule 4 and has not yet been determined, nothing in this clause 3.10 or Schedule 4 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 6.



## **Schedule 4 – General dispute resolution procedures**

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

- (c) after a period of five Business Days after the mediation is terminated as referred to in paragraph (b), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise) either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.
- 4.6 A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:
- (a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 4.5; or
  - (b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable).
- 4.7 Each party must continue to fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 4 are pending.
- 4.8 All communications between the parties during the course of a Non-Billing Dispute are made on a without prejudice and confidential basis.
- 4.9 Each party must, as early as practicable, and in any case within 14 Calendar Days unless a longer period is agreed between the parties, after the notification of a Non-Billing Dispute pursuant to clause 4.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).
- 4.10 Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 4.4(b):
- (a) any agreement must include:
    - (i) a statement of the disputed matters in the Non-Billing Dispute; and
    - (ii) the procedure to be followed during the mediation, and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;
  - (b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the

provisions of this clause 4.10. In the event of any inconsistency between them, the provisions of this clause 4.10 prevail;

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

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

- (a) The terms of reference of the Expert Committee are as agreed by the parties. If the terms of reference are not agreed within five Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee is deemed to be terminated.
- (b) An Expert Committee acts as an expert and not as an arbitrator.
- (c) The parties are each represented on the Expert Committee by one appointee.
- (d) The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 4.10(d)(i), (ii) and (iii).

- (e) Each party must be given an equal opportunity to present its submissions and make representations to the Expert Committee.
- (f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.
- (g) Unless the parties agree otherwise the parties must ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.
- (h) If the dispute is not resolved within the timeframe referred to in clause 4.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
- (i) The Expert Committee has the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.
- (j) The Expert Committee must give written reasons for its decision.
- (k) A decision of the Expert Committee is final and binding on the parties except in the case of manifest error or a mistake of law.
- (l) Each party must bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties must each bear half the costs of the independent member of the Expert Committee.

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

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

## Schedule 5 – Confidentiality provisions

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

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

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

- (a) protect the confidentiality of the other party's Confidential Information; or

(b) enforce its rights in relation to its Confidential Information.

5.7 Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction or disclosure.

5.8 Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the Disclosing Party that the Confidential Information is or will be correct.

5.9 Each party acknowledges that a breach of this Schedule 5 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this Schedule 5.

5.10 If:

(a) the Access Provider has the right to suspend or cease the supply of the Service under:

(i) Schedule 6 due to a payment breach

(ii) under clause 6.7; or

(b) after suspension or cessation of supply of the Service under this FAD, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment

then the Access Provider may do one or both of the following:

(a) notify and exchange information about the Access Seeker (including the Access Seeker's Confidential Information) with any credit reporting agency or the Access Provider's collection agent; and

(b) without limiting clause 5.10, disclose to a credit reporting agency:

(i) the defaults made by the Access Seeker to the Access Provider; and

(ii) the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD





## Annexure 1 of Schedule 5

### Confidentiality undertaking form

*[Amend where necessary]*

#### CONFIDENTIALITY UNDERTAKING

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

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

- (a) any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:
  - (i) the person to whom disclosure is proposed to be made (**the person**) is notified in writing to [Provider] and [Provider] has approved the person as a person who may receive the Confidential Information, which approval shall not be unreasonably withheld;
  - (ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [Provider]; and
  - (iii) a signed undertaking of the person has already been served on [Provider];
- (b) if required to do so by law; and
- (c) any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(a) for the Approved Purpose.

6 I will establish and maintain security measures to safeguard the Confidential Information that is in my possession from unauthorised access, use, copying, reproduction or disclosure and use the same degree of care as a prudent person in my position would use to protect that person's confidential information.

7 Except as required by law and subject to paragraph 10 below, within a reasonable time after whichever of the following first occurs:

- (a) termination of this Undertaking;
- (b) my ceasing to be employed or retained by [undertaking company] (provided that I continue to have access to the Confidential Information at that time); or
- (c) my ceasing to be working for [undertaking company] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [undertaking company]);

I will destroy or deliver to [Provider] the Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the Confidential Information in my possession, custody, power or control other than electronic records stored in IT backup system that cannot be separately destroyed or deleted.

8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:

- (a) which is in the public domain; or
- (b) which has been obtained by me otherwise than from [Provider] in relation to this Undertaking;

provided that the information is in the public domain and/or has been obtained by me by reason of, or in circumstances which do not involve any breach of a confidentiality undertaking or a breach of any other obligation of confidence in favour of [Provider] or by any other unlawful means, of which I am aware.

9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that [Provider] may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to [Provider] at law or in equity.

10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to [Provider] of the Confidential Information pursuant to paragraph 7 above.

Signed: \_\_\_\_\_ Dated: \_\_\_\_\_

Print name: \_\_\_\_\_

## **ATTACHMENT 1**

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

**ATTACHMENT 2**

**[Approved purpose(s)]**

## Schedule 6 – Suspension and termination

6.1. The Access Provider may immediately suspend the supply of a Service or access to the Access Provider's Network, provided it notifies the Access Seeker where practicable and provides the Access Seeker with as much notice as is reasonably practicable:

- (a) during an Emergency; or
- (b) where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider's Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency;
- (c) where, in the reasonable opinion of the Access Provider, the Access Seeker's Network or equipment adversely affects or threatens to affect the normal operation of the Access Provider's Network or access to the Access Provider's Network or equipment (including for the avoidance of doubt, where the Access Seeker has delivered Prohibited Traffic onto the Access Provider's Network);
- (d) where an event set out in clauses 6.8(a) to (i) occurs;

and is entitled to continue such suspension until (as the case requires) the relevant event or circumstance giving rise to the suspension has been remedied.

6.2. If:

- (a) the Access Seeker has failed to pay monies payable under this FAD;
- (b) a Court determines that (and the decision is not subject to an appeal) the Access Seeker's use of:
  - a. its Facilities in connection with any Service supplied to it by the Access Provider;
  - b. the Access Provider's Facilities or Network; or
  - c. any Service supplied to it by the Access Providers,

is in contravention of any law; or

(c) the Access Seeker breaches a material obligation under this FAD

**(Suspension Event)** and:

- (d) as soon as reasonably practicable after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:

- (i) citing this clause;
- (ii) specifying the Suspension Event that has occurred;
- (iii) requiring the Access Seeker to institute remedial action (if any) in respect of that event; and
- (iv) specifying the action which may follow due to a failure to comply with the notice,

**(Suspension Notice)** and:

- (e) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 6.2, the **Remedy Period**),

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

- (f) refuse to provide the Access Seeker with the Service:
  - (i) of the kind in respect of which the Suspension Event has occurred; and
  - (ii) a request for which is made by the Access Seeker after the date of the breach,

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

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

6.3. For the avoidance of doubt, subclause 6.2(a) does not apply to any monies payable that are the subject of a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.

6.4. In the case of a suspension pursuant to clause 6.2, the Access Provider must reconnect the Access Seeker to the Access Provider's Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider must do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.

6.5. If:

- (a) an Access Seeker ceases to be a carrier or carriage service provider; or
- (b) an Access Seeker ceases to carry on business for a period of more than 10 consecutive Business Days or
- (c) in the case of an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or

- (d) an Access Seeker breaches a material obligation under this FAD, and:
  - a. that breach materially impairs or is likely to materially impair the ability of the Access Provider to deliver Listed Carriage Services to its customers; and
  - b. the Access Provider has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and
  - c. the Access Seeker fails to institute remedial action as specified in the Breach Notice within 10 Business Days after receiving the Breach Notice (in this clause 6.5, the **Remedy Period**),
- (e) the supply of the Service(s) to the Access Seeker has been suspended pursuant to the terms and conditions of this FAD for a period of three months or more,

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

6.6. A party must not give the other party both a Suspension Notice under clause 6.2 and a Breach Notice under clause 6.5 in respect of:

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

except:

- (c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 6.2 in respect of a Suspension Event and the Suspension Event has not been rectified by the Access Seeker within the relevant Remedy Period specified in clause 6.2; and
- (d) where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 6.5(d)(ii), the time period for the purposes of clause 6.5(d)(ii) will be 20 Business Days from the expiry of the time available to remedy the Suspension Event.

6.7. For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 6.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause 6.5.

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



- (a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other party; or
- (b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other party; or
- (c) a holder of an encumbrance takes possession of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or
- (d) the other party is or is likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
- (e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or
- (f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of three Months; or
- (g) the other party breaches any of the terms of any of its loans, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to the supply of the Service under this FAD; or
- (h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
- (i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

6.9. The cessation of the operation of this FAD:

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

Without prejudice to the parties' rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. In the

event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD.

## Schedule 7 – Liability and indemnity

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

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

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

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

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

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

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

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

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

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

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

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

7.13 Nothing in this Schedule 7 excludes or limits a Party's entitlement to damages under Part 5 of the *Telecommunications (Consumer Protection and Service standards) Act 1999*.

## Schedule 8 – Communications with end-users

- 8.1 The access provider may communicate and deal with an access seeker's end-users as expressly provided in clauses 8.2 to 8.4 and as otherwise permitted by law.
- 8.2 Subject to clause 8.3, the access provider may communicate and deal with the access seeker's end-users:
- (a) in relation to goods and services which the access provider currently supplies or previously supplied to the end-user provided that the Access Provider only communicates and deals through its Retail Business Unit;
  - (b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;
  - (c) where the access provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;
  - (d) in a manner or in circumstances agreed by the parties; or
  - (e) in or in connection with an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property.
- 8.3 If:
- (a) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access seeker, the access provider must advise the end-user that they should discuss any matter concerning the access seeker's goods and/or services with the access seeker and must not engage in any form of marketing or discussion of the access provider's goods and/or services;
  - (b) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access provider, the access provider may engage in any form of marketing or discussion of the access provider's goods and/or services; and
  - (c) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access provider and the access seeker, the access provider must advise the end-user that they should discuss any matter concerning the access seeker's goods and/or services, with the access seeker, but may otherwise engage in any form of marketing or discussion of the access provider's goods and/or services.

- 8.4 Where a party communicates with the end-user of the other party, that first mentioned party must, where practicable, make and maintain records of that communication with the other party's end-user in circumstances where that communication discusses anything concerning the other party's goods or services with the end-user. For the avoidance of doubt, the obligation in this paragraph does not include a requirement to provide such records to the other party (however such a requirement may arise pursuant to any dispute resolution procedure).
- 8.5 For the purposes of clauses 8.2 to 8.4, a “**communication**” shall include any form of communication, including without limitation telephone discussions and correspondence.
- 8.6 Neither party may represent that:
- (a) it has any special relationship with or special arrangements with the other party;
  - (b) there are no consequences for an end-user when an end-user signs an authority to transfer their accounts or services;
  - (c) a Service has any characteristics or functionality other than as specified in a relevant standard form of agreement or the service description for the Service or in any specifications, collateral or brochures published in relation to the Service; or
  - (d) the other party participates in the provision of the first mentioned party's services, provided that a party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other party.
- 8.7 Where a party communicates with an end-user of either party, the first mentioned party shall ensure that it does not attribute to the other party:
- (a) blame for a Fault or other circumstance; or
  - (b) the need for maintenance of a Network; or
  - (c) the suspension of a Service,
- provided that this requirement does not require a party to engage in unethical, misleading or deceptive conduct.
- 8.8 This Schedule 8 shall be subject to any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to communications or dealings with end-users.

## **Schedule 9 – Network modernisation and upgrade**

### *Notice to be provided where Access Provider undertakes a Major Network Modernisation and Upgrade*

- 9.1 Except were the parties agree otherwise, the Access Provider may make a Major Network Modernisation and Upgrade by:
- (a) providing the Access Seeker with notices in writing in accordance with clauses 9.2 and 9.4 (**General Notification**) and clauses 9.3 and 9.5 (**Individual Notification**); and
  - (b) consulting with the Access Seeker, and negotiating in good faith, any reasonable concerns of the Access Seeker, in relation to the Major Network Modernisation and Upgrade.

This clause 9.1 does not apply to an Emergency Network Modernisation and Upgrade.

- 9.2 The period of notices given under a General Notification provided by the Access Provider to the Access Seeker:
- (a) must be an Equivalent Period of Notice; and
  - (b) in any event, must not be less than 30 weeks before the Major Network Modernisation and Upgrade is scheduled to take effect.
- 9.3 An Individual Notification must be provided by the Access Provider to the Access Seeker as soon as practicable after the General Notification, taking account of all the circumstances of the Major Network Modernisation and Upgrade.

### *Information to be provided in the notices*

- 9.4 A General Notification must include information on:
- (a) the ESA affected by the proposed Major Network Modernisation and Upgrade;
  - (b) the distribution area affected by the proposed Major Network Modernisation and Upgrade; and
  - (c) a general description of the proposed Major Network Modernisation and Upgrade, including the indicative timing for the implementation of the Major Network Modernisation and Upgrade.
- 9.5 An Individual Notification must include the following information in addition to the information provided in the relevant General Notification:
- (a) the anticipated commencement date for implementing the Major Network Modernisation and Upgrade;

- (b) details of the Access Seeker's activated Services, or Services in the process of being activated at the date of the notice, that are likely to be affected by the Major Network Modernisation and Upgrade;
  - (c) the likely action required by the Access Seeker as a result of the Major Network Modernisation and Upgrade (including the possible impact of the Major Network Modernisation and Upgrade upon the Access Seeker's Wholesale ADSL Services); and
  - (d) details of who the Access Seeker may contact to obtain further information about the Major Network Modernisation and Upgrade.
- 9.6 An Individual Notification only needs to be given where a Service has been activated or the Access Provider is in the process of activating a service as at the date of the Individual Notification, and:
- (a) the Major Network Modernisation and Upgrade will require the Access Seeker to take particular action in order to continue to use the Service; or
  - (b) the Major Network Modernisation and Upgrade will result in the Service no longer being supplied.
- 9.7 Where the Access Provider has provided the Access Seeker with an Individual Notification, the Access Provider must provide the Access Seeker with:
- (a) updates about the Major Network Modernisation and Upgrade covered by the notice, including:
    - (i) any update or change to the information provided in the Individual Notification;
    - (ii) any new information available at the time of the update about:
      1. Services provided by the Access Provider in the relevant ESA that may be available to the Access Seeker;
      2. how the Access Seeker may be impacted by the Major Network Modernisation and Upgrade; and
      3. what steps the Access Seeker will be required to take to facilitate the Major Network Modernisation and Upgrade; and
  - (b) weekly reports about the anticipated cutover dates for the Access Seeker's affected Services, beginning no less than five weeks prior to the anticipated commencement date for the Major Network Modernisation and Upgrade.
- 9.8 The updates referred to in subclause 9.7(a) must be provided regularly (which is not required to be any more frequently than Monthly) after the Individual Notification.



*Emergency Network Modernisation and Upgrade*

- 9.9 In the event of an Emergency, the Access Provider may conduct an Emergency Network Modernisation and Upgrade, and
- (a) must use its best endeavours to provide the Access Seeker with an Individual Notification prior to the Emergency Network Modernisation and Upgrade being implemented; or
  - (b) where it is not practicable for prior notice to be given, the Access Provider must provide the Access Seeker with an Individual Notification as soon as reasonably practicable after the Emergency Network Modernisation and Upgrade is implemented.

*Coordinated Capital Works Program*

9.10 The Access Provider must provide the Access Seeker with a written three year Coordinated Capital Works Program forecast in accordance with clause 9.11 of this schedule 14 Calendar Days from the date this Schedule takes effect (**Coordinated Capital Works Program Forecast**).

9.11 The Coordinated Capital Works Program Forecast will:

- (a) be for the three year period commencing on the date the forecast is provided;
  - (b) describe generally the Access Provider's indicative investment plans (as at the date of the forecast) for its Coordinated Capital Works Program over the next three years;
  - (c) include an evaluation of the impact that the Access Provider's indicative investment plans may have on individual ESAs and Distribution Areas; and
  - (d) specify anticipated timeframes for implementation.
- 9.12 The Access Provider must update the Coordinated Capital Works Program Forecast (and provide the update forecasts in writing to the Access Seeker) regularly, at not less than six month intervals.
- 9.13 At the same time as the Access Provider provides a Coordinated Capital Works Program Forecast under clause 9.10 of this Schedule, the Access Provider must provide a copy of the Coordinated Capital Works Program Forecast to the ACCC.
- 9.14 The Access Provider must provide a written Coordinated Capital Works Program schedule to the Access Seeker by giving notice not less than 12 months before the anticipated commencement date of the Coordinated Capital Works Program in accordance with clause 9.15 of this Schedule (**Coordinated Capital Works Program Schedule**).

- 9.15 The Access Provider must provide the Coordinated Capital Works Program Schedule and make its best endeavours to identify:
- (a) the ESAs and Distribution Areas affected;
  - (b) the Access Provider's plan for the Coordinated Capital Works Program for each ESA;
  - (c) the Access Seeker's Services in that Exchange that will be affected and the expected impact of the Coordinated Capital Works Program on the Access Seeker's Services; and
  - (d) the anticipated timeframe for implementation of the Coordinated Capital Works Program.
- 9.16 At the same time as the Access Provider provides a Coordinated Capital Works Program Schedule under clause 9.15 of this Schedule, the Access Provider must provide a copy of the Coordinated Capital Works Program Schedule to the ACCC.
- 9.17 For the avoidance of doubt, the Access Provider must also comply with clauses 9.1 to 9.8 of this Schedule when complying with clauses 9.10 to 9.16 of this Schedule.

9.18 The Access Provider is taken to have complied with clause 9.10 if it has complied with subparagraph 11.1(a) in Schedule 4 of the Structural Separation Undertaking.

*Negotiations in good faith*

- 9.19 Except where the parties agree otherwise, the Access Provider must not commence implementation of a Major Network Modernisation and Upgrade unless:
- (a) it complies with clauses 9.1 to 9.8; and
  - (b) it has consulted with the Access Seeker and has negotiated in good faith, and addressed the reasonable concerns of the Access Seeker in relation to the Major Network Modernisation and Upgrade.
- 9.20 Except where the parties agree otherwise, the Access Provider must not commence the implementation of a Coordinated Capital Works Program unless:
- (c) it complies with clauses 9.14 to 9.16 of this Schedule; and
  - (d) it has consulted with the Access Seeker and has negotiated in good faith, and addressed the reasonable concerns of the Access Seeker in relation to the Coordinated Capital Works Program.
- 9.21 Notwithstanding any continuing negotiations between the Access Provider and the Access Seeker pursuant to clauses 9.1, 9.19 and 9.20, if the Access

Provider has complied with this Schedule 9, a Major Network Modernisation and Upgrade may proceed within a reasonable time period, taking account of all the circumstances, after an Individual Notification has been issued, unless both parties agree otherwise.

- 9.22 In attempting to reach a mutually acceptable resolution in relation to a variation under clauses 9.1, 9.19 and 9.20, the parties must recognise any need that the Access Provider may have to ensure that the specifications for the Services which the Access Providers supplies to more than one of its customers need to be consistent (including, without limitation having regard to the incorporation by the Access Provider of any relevant international standards).

*Dispute Resolution*

- 9.23 If a dispute arises in relation to a Major Network Modernisation and Upgrade, then the matter may be resolved in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD.

*Miscellaneous*

- 9.24 A requirement for the Access Provider to provide information in written form includes provision of that information in electronic form.
- 9.25 Any information provided by the Access Provider in electronic form must be in a text-searchable and readable format.

## **Schedule 10 – Changes to operating manuals**

- 10.1 Operational documents concerning the Service may be amended:
- (a) by the Access provider from time to time to implement or reflect a change to its standard processes, subject to:
    - (i) giving 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and a market-up copy of the proposed new operational document that clearly identifies all amendments; and
    - (ii) allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and giving reasonable consideration to any comments which the Access Seeker has made on the proposed amendments; and
  - (b) otherwise, by agreement of the parties.
- 10.2 Upon completion of the process set out in clause 10.1, the Access Provider must give the Access Seeker a copy of the new operational document.
- 10.3 Where operational documents concerning the Service are amended in accordance with clause 10.1 and the Access Seeker believes that the amendments:
- (a) are unreasonable; or
  - (b) deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;

the Access Seeker may seek to have the matter resolved in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD.

## **Schedule 11 – Resale Services**

11.1 The Access Seeker can acquire a Service for the purpose of supplying to a Reseller.

11.2 The Access Seeker is not required to:

- (a) notify the Access Provider when the Access Seeker acquires, or seeks to acquire, a Service for the purpose of supplying a Reseller; and/or
- (b) obtain the Access Provider's consent to that supply.

## Schedule 12 – Definitions and Interpretation

### *Interpretation*

In this FAD, unless the contrary intention appears:

- (a) the singular includes the plural and vice versa;
- (b) the words "including" and "include" mean "including, but not limited to"; and
- (c) terms defined in the CCA or the *Telecommunications Act 1997* have the same meaning.

### *Definitions*

“**ACCC**” means the Australian Competition and Consumer Commission;

“**Access Agreement**” has the same meaning as given to that term in section 152BE of the CCA;

“**Access Provider**” has the same meaning as given to that term in subsection 152AR(2) of the CCA;

“**Access Seeker**” has the same meaning as given to that term in section 152AG of the CCA;

“**ACDC**” means the Australian Commercial Disputes Centre Limited;

“**ACDC Guidelines**” means the mediation guidelines of the ACDC in force from time to time;

“**ACMA**” means the Australian Communications and Media Authority;

“**ADSL enabled exchange list**” means the ADSL enabled exchange list available on the Telstra Wholesale website<sup>1</sup> as at 11 February 2013. A copy is published on the ACCC’s website.

“**Billing Dispute**” means a dispute relating to a Charge or an invoice issued by the Access Provider to the Access Seeker;

“**Billing Dispute Notice**” means a notice given pursuant to clause 2.10;

“**Billing Dispute Procedures**” means the procedures set out in clauses 2.10 to 2.29;

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<sup>1</sup> <http://www.telstrawholesale.com.au/download/document/access-broadband-adsl-en-ex.xls>.

“**Business Day**” means any day other than Saturday or Sunday or a day which is a gazetted public holiday in the place concerned;

“**Calendar Day**” means a day reckoned from midnight to midnight;

“**Calendar Month**” means a period commencing at the beginning of any day of a named month and ending:

- (a) at the end of the day before the corresponding day of the next named month; or
- (b) if there is no such corresponding day – at the end of the next named month;

“**Carriage Service**” has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth);

“**CCA**” means the *Competition and Consumer Act 2010* (Cth);

“**Charge**” means a charge for the supply of the Service;

“**Confidential Information**” means all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form and whether coming into existence before or after the commencement of this FAD) relating to or developed in connection with or in support of the Service supplied under this FAD (the “**first mentioned party**”) but does not include:

- (a) information which is or becomes part of the public domain (other than through any breach of this FAD);
- (b) information rightfully received by the other party from a third person without a duty of confidentiality being owed by the other party to the third person, except where the other party has knowledge that the third person has obtained that information either directly or indirectly as a result of a breach of any duty of confidence owed to the first mentioned party; or
- (c) information which has been independently developed or obtained by the other party; or
- (d) information about Services supplied by the Access Provider (including where that information is generated by the Access Provider) that has been aggregated with other information of a similar or related nature, such that the Access Seeker cannot be identified by the information or any part of it.

“**Coordinated Capital Works Program**” means a planned Major Network Modernisation and Upgrade with respect to the Service that extends across more than one ESA but does not include an Emergency Network Modernisation and Upgrade.

**“Disclosing Party”** has the meaning set out in clause 5.5 in Schedule 5 of this FAD;

**“Distribution Area”** has the same meaning as in the Network Deployment Rules.

**“Emergency”** means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war-like action) which:

- (a) endangers or threatens to endanger the safety or health of persons; or
- (b) destroys or damages, or threatens to destroy or damage property,

being an emergency which requires a significant and co-ordinated response;

**“Emergency Network Modernisation and Upgrade”** means a Major Network Modernisation and Upgrade that is required and is reasonably necessary and a proportionate response to address an Emergency’

**“Equivalent Period of Notice”** means a period of notice commencing at the time that the Access Provider has approved and allocated the capital expenditure or otherwise approved and made a decision to commit to a Major Network Modernisation and Upgrade;

**“ESA”** means a geographic area generally serviced by a single Exchange;

**“Event”** means an act, omission or event relating to or arising out of this FAD or part of this FAD;

**“Exp[ ]”** means the mathematical exponential function;

**“Exchange”** means a building in which telephone switching or other equipment of an Access Provider or Access Seeker has been installed for use in connection with a telecommunications network;

**“Expert Committee”** means a committee established under clause 4.11;

**“FAD”** means this Final Access Determination for the Wholesale ADSL Service;

**“Fault”** means:

- (a) a failure in the normal operation of a Network or in the delivery of the Service; or
- (b) any issue as to the availability or quality of the Service supplied to an end-user via the Access Seeker, notified by the end-user to the Access Seeker’s help desk,

that has been reasonably assessed by the Access Provider as being the Access Provider’s responsibility to repair;

**“General Notification”** has the meaning set out in clause 9.1 of Schedule 9;



**“Individual Notification”** has the meaning set out in clause 9.1 of Schedule 9;

**“Initiating Notice”** has the meaning as set out in clause 4.11 of Schedule 4;

**“Indemnifying Party”** means the Party giving an indemnity under this FAD;

**“Innocent Party”** means the Party receiving the benefit of an indemnity under this FAD;

**“Liability”** (of a party) means any liability of that party (whether in contract, in tort, under statute or in any other way and whether due to negligence, wilful or deliberate breach or any other cause) under or in relation to this FAD, or part of this FAD or in relation to any Event or series of related Events;

**“Listed Carriage Service”** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth);

**“Loss”** includes liability, loss, damage, costs, charges or expenses (including legal costs);

**“Major Network Modernisation and Upgrade”** means a modernisation or upgrade that:

- (a) involves the installation of the Access Provider’s customer access modules closer to end-users than an Exchange;
- (b) requires the removal/relocation of the Service provided from Exchanges and the establishment of a new POI (or relocation of an existing POI) for the Service; or
- (c) results in a Service no longer being supplied or adversely affects the quality of that Service (or any services supplied by an Access Seeker to their end-users using the Service), but does not mean, or include, an Emergency Network Modernisation Upgrade or an NBN related upgrade;

**“Month”** means a Calendar Month;

**“Network”** of a party, means that party’s system, or series of systems, that carries, or is capable of carrying communications by means of guided or unguided electromagnetic energy;

**“Network Deployment Rules”** means the industry code entitled “ACIF C559:2005 Unconditioned Local Loop Service – Network Deployment Rules” registered by the ACMA under section 117 of the *Telecommunications Act 1997* (Cth) and as amended from time to time.

**“Non-Billing Dispute”** means a dispute other than a Billing Dispute;

**“Ongoing Creditworthiness Information”** has the meaning as set out in clause 3.8 of Schedule 3 of this FAD;

**“Party”** means a party to this FAD;

**“People”** of a party, means each of that party’s directors, officers, employees, agents, contractors, advisers and representatives but does not include that party’s end-users or the other party;

**“POI”** means point of interconnection and is a location for the interconnection of networks;

**“Prohibited Traffic”** means traffic offered across a point of interconnection for which there is no agreement between the Access Provider and the Access Seeker that the Access Provider will carry such traffic or provide a related service to the Access Seeker;

**“Representative”** of a Party means each of that party’s directors, officers, employees, agents, contractors, advisers and representatives, but does not include that Party’s end-users or the other Party;

**“Reseller”** means a person that acquires the Service, or a service derived from the Service, from an Access Seeker, for the purpose of reselling, or transforming and then selling, a service to end-users.

**“Retail Business Unit”** has the same meaning given to that term in Schedule 1 of Telstra’s Structural Separation Undertaking;

**“Security Deposit”** means any sum of money deposited by the Access Seeker with the Access Provider, from time to time, for the purposes of fulfilling in whole or in part the requirement under this FAD that the Access Seeker provide Security to the Access Provider;

**“Security”** means the amount and form of security required to be provided to the Access Provider in respect of the provision by the Access Provider of the Wholesale ADSL Service under Schedule 3’

**“Service”** means the Wholesale ADSL Service.

**“Suspension Event”** has the meaning set out in clause 6.2 of Schedule 6;

**“Suspension Notice”** has the meaning set out in clause 6.2 of Schedule 6;

**“Structural Separation Undertaking”** means:

- (a) an undertaking given by Telstra under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which comes into force in accordance with section 577AB, and any amendment to that undertaking which comes into force in accordance with subsection 577B(6); and
- (b) a migration plan approved by the ACCC under Subdivision B of Division 2 of Part 33 of the *Telecommunications Act 1997* (Cth) which, pursuant to subsection 577BE(5), forms part of the undertaking referred to in paragraph (a), and any

amendment to that plan which is approved by the ACCC in accordance with section 577BF,

and includes all binding schedules, annexures and attachments to such documents;

**“Wholesale ADSL Service”** means the wholesale asymmetric digital subscriber service declared under subsection 152AL(3) of the CCA.

**“Zone 1”** means the Zone of that name (as it stood on 11 February 2013) on the ADSL enabled exchange list that Telstra maintains for the purpose of calculating monthly end-user access charges for a Service, and for the avoidance of doubt includes Zone 1(a).

**“Zone 2+3”** means the amalgam of the zones names Zone 2 and Zone 3 (as they stood on 11 February 2013) on the ADSL enabled exchange list that Telstra maintains for the purpose of calculating monthly end-user access charges for a Service.