



Australian
Competition &
Consumer
Commission

Fixed line services FAD inquiry:
Disclosure of report provided by
Telstra under the Building Block
Model Record Keeping Rule

Consultation paper

March 2014

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

First published by the ACCC 2014

© Commonwealth of Australia 2014

This work is copyright. In addition to any use permitted under the Copyright Act 1968, all material contained within this work is provided under a Creative Commons Attribution 3.0 Australia licence, with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logo
- any illustration, diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright, but which may be part of or contained within this publication.

The details of the relevant licence conditions are available on the Creative Commons website, as is the full legal code for the CC BY 3.0 AU licence.

Requests and inquiries concerning reproduction and rights should be addressed to the Director, Corporate Communications, ACCC, GPO Box 3131, Canberra ACT 2601, or publishing.unit@acc.gov.au

Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

Parties who wish to re-publish or otherwise use the information in this publication must check this information for currency and accuracy with the ACCC prior to publication. This should be done prior to each publication edition, as ACCC guidance and relevant transitional legislation frequently change. Such queries should be addressed to the Director Publishing, ACCC, GPO Box 3131, Canberra ACT 2601, or publishing.unit@acc.gov.au.

ISBN information as required

ACCC 01/2014_42355

www.accc.gov.au

Glossary

access seeker	Telecommunications companies that seek access to the declared service (that is, the right to use the declared service).
ADSL	Asymmetric Digital Subscriber Line. A technology for transmitting digital information at high data rates on existing copper phone lines. It is called asymmetric because the download and upload speeds are not symmetrical (that is, download is faster than upload).
BBM	Building Block Model
CCA	Competition and Consumer Act 2010
declared service	A service that the ACCC regulates under Part XIC of the CCA. Once declared, a service provider must supply the service to other parties in accordance with the standard access obligations and the terms and conditions set in the final access determination.
downstream	Further along the supply chain. For example, mandating access to network services can promote competition in downstream retail broadband services.
enduring bottleneck	A network element or facility that exhibits natural monopoly characteristics, and is essential in providing services to end-users in downstream markets.
FAD	Final Access Determination. The FAD is made by the ACCC and sets the terms and conditions (including prices) on which a service provider must supply a declared service.
fixed line services	Telecommunications services provided over fixed networks, such as Telstra's copper network and HFC networks. The 'declared fixed line services' are the six fixed line services declared in 2009 – the ULLS, LSS, WLR, LCS, PSTN OA and PSTN TA.
FLSM	Fixed Line Services Model
LSS	The declared Line Sharing Service. Allows access seekers to share the use of the copper line connecting consumers to the telephone exchange, allowing them to provide fixed internet services using their own equipment. An alternative provider provides the voice services.
PSTN	Public Switched Telephone Network. The telephone network that allows the public to make and receive telephone calls via switching and transmission facilities and utilising analogue and digital technologies.

PSTN OA	The declared PSTN Originating Access service. Allows a telephone call to be connected from the caller to a point of interconnection with another network.
PSTN TA	The declared PSTN terminating access service. Allows a telephone call to be carried from the point of interconnection to the party being called on another network.
RAF	The RAF is a Record Keeping Rule that specifies the information that carriers and CSPs are required to report on, how these reports are prepared and the timeframes associated with preparation and lodgement of reports to the ACCC.
ULLS	The declared Unconditioned Local Loop Service. Allows access seekers to use the copper line connecting end-users to the local telephone exchange, allowing them provide both fixed internet (broadband) and voice services using their own DSLAMs and other exchange equipment.
Wholesale ADSL	The declared Wholesale ADSL service. Allows access seekers to purchase a Wholesale ADSL product from Telstra and resell internet services to end-users.
WLR	The declared Wholesale Line Rental service. For a monthly 'per-user' charge, it allows access seekers to purchase a line rental service from Telstra, which includes access to the copper line and associated services (including a dial tone and telephone number) supplied using Telstra's equipment.

Contents

Glossary.....	iii
Introduction	1
Background.....	3
Material to be disclosed	5
Persons to whom material is to be disclosed	9
Terms and conditions on which material is to be disclosed	13
Disclosure notice under section 151BUA	15
Appendix A – information submitted by Telstra	16
Appendix B – Confidentiality undertaking.....	17

Introduction

On 11 July 2013, the ACCC commenced a combined public inquiry into making final access determinations (FADs) for the declared fixed line services and the wholesale ADSL service.¹ This inquiry is part of the overall review of the regulated fixed line services — the Fixed Services Review.

The declared fixed line services and the wholesale ADSL service are regulated wholesale services supplied by Telstra over its copper access network. They form an important input to downstream fixed telecommunications markets. However, these services are a relatively small proportion of Telstra's business – around 4.4 per cent of total revenue in 2012-13.² In addition, these services will gradually decline in use as the National Broadband Network (NBN) is rolled out.

In December 2013, the ACCC came to the preliminary view that Telstra's copper access network will remain an enduring bottleneck until the rollout of the NBN is complete.³ There will therefore be a continuing requirement for the ACCC to regulate legacy infrastructure during this period.

The FAD inquiry involves a pricing review in relation to these services. This paper discusses how the ACCC proposes to deal with certain information lodged by Telstra for the purposes of the pricing review.

The ACCC uses a building block model (BBM) known as the Fixed Line Services Model (FLSM) to determine prices for the declared fixed line services and the wholesale ADSL service.⁴ In order to obtain the required inputs for the FLSM, the ACCC made the BBM Record Keeping Rule (BBM RKR) in August 2012. On 28 June 2013, the ACCC varied the [BBM RKR](#) to include information for the wholesale ADSL service.

On 13 September 2013, the ACCC issued a written information request to Telstra pursuant to Rule 15 of the BBM RKR.

On 25 November 2013, Telstra responded to the ACCC's request and lodged a report ('the report'). Telstra also provided further explanatory material to assist the ACCC's understanding of the report on 10 February 2014 ('other relevant material') The report and other relevant material (collectively 'the Telstra material') comprises both historical and forecast information about capital expenditure, operating expenditure and demand relating to the declared fixed line services.

¹ The declared fixed line services are the unconditioned local loop service (ULLS), line sharing service (LSS), wholesale line rental service (WLR), local carriage service (LCS), public switched telephone network originating access service (PSTN OA), and the public switched telephone network terminating access service (PSTN TA).

² Telstra, *TEM Public Report – FY13 FY*, August 2013, available at: <http://www.accc.gov.au/system/files/TEM%20Public%20Report%20-%20FY13%20Q4.PDF>; Telstra, Full Year 2013 Financial Results supporting materials, available at: <http://www.telstra.com.au/abouttelstra/download/document/2013-full-year-results-supporting-material.xls>.

³ ACCC, *Public inquiry into the fixed lined services declarations, Draft Report, December 2013*, p. vii.

⁴ ACCC, *Inquiry to make final access determinations for the declared fixed line services – final report, July 2011*, p. 130; ACCC, *Public inquiry to make a final access determination for the Wholesale ADSL service - final report, May 2013*, p. 6.

The ACCC generally considers that public inquiries such as the Fixed Services Review should be open and transparent. Interested parties should be given an opportunity to consider, review and comment on the material that is provided to and relied on by the ACCC in the course of the Fixed Services Review.

In order to facilitate this, under section 151BUA of the *Competition and Consumer Act 2010* ('CCA'), the ACCC may disclose the Telstra material to the public or to specified persons under specified terms and conditions. The ACCC must be satisfied that disclosure would be likely to promote competition in markets for listed services or would facilitate the operation of Parts XIB or XIC of the CCA.

However, in deciding to make such disclosures, the ACCC must also have regard to Telstra's legitimate commercial interests. Ultimately, this involves ensuring that there is an appropriate balance between:

- protecting information that, if disclosed, would harm Telstra's legitimate commercial interests; and
- promoting confidence in the robustness of the ACCC's regulatory processes by providing sufficient transparency over the basis for the ACCC's decisions.

This consultation paper outlines the factors that the ACCC intends to consider in deciding whether and how to disclose the Telstra material under section 151BUA of the CCA.

Interested parties are invited to provide submissions to the ACCC on whether and how the ACCC should disclose the Telstra material. The ACCC will consider submissions received by **5 pm on 17 April 2014**.

All submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by bookending the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC expects that claims for commercial-in-confidence status of information by parties will be limited in order to promote transparency and broad participation in this consultation process.

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 on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC's website.

The ACCC prefers to receive submissions in electronic form with searchable text in either PDF or Microsoft Word format.

Please email submissions by **5 pm on 17 April 2014** to:

jane.goldwater@acc.gov.au

cc: fixedservices@acc.gov.au

cc: annette.weier@acc.gov.au

If you have any questions concerning the consultation process, please contact Jane Goldwater, Director – Access Pricing and Financial Analysis, on (03) 9290-1493 or at the above email address.

Background

Building block model RKR

Under Part XIC of the CCA, the ACCC may make access determinations setting terms and conditions for access to a declared service.⁵ An access determination must include terms and conditions relating to price or a method of ascertaining price.⁶

To facilitate the operation of telecommunications-specific regulation, including Part XIC of the CCA, the ACCC has the power to make rules ("Record Keeping Rules" or "RKR") that require carriers or carriage service providers to keep or retain relevant records.⁷ An RKR may also require the carriers or carriage service providers to prepare reports based on these records and provide those reports to the ACCC.⁸

The ACCC uses a building block model (BBM) known as the Fixed Line Services Model (FLSM) to determine prices for the declared fixed line services in access determinations.⁹ To effectively implement the FLSM, the ACCC requires forecast and actual data from Telstra relating to operating expenditure, capital expenditure and demand.

Disclosure of a report by the ACCC

The ACCC may issue a notice to a carrier or carriage service provider under section 151BUA of the CCA stating that it intends to disclose a report or particular extracts of a report lodged by that carrier or carriage service provider (disclosure notice).¹⁰

The ACCC may only disclose the Telstra material if it is satisfied that the disclosure would be likely to:

- promote competition in markets for listed carriage services; or
- facilitate the operation of any of:
 - Parts XIB or XIC of the CCA
 - the *National Broadband Network Companies Act 2011* or regulations under that Act
 - Division 3 of Part 20 of the *Telecommunications Act 1997*
 - Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

The ACCC notes that information disclosure will be likely to promote competition where it is likely to improve conditions or the environment for competition by addressing information asymmetries. Disclosure will be likely to facilitate the operation of Parts XIB and XIC where it is likely to improve the quality and timeliness of

⁵ CCA s. 152BC(3).

⁶ CCA s. 152BC(8).

⁷ CCA s. 151BU(1).

⁸ Ibid.

⁹ ACCC, Inquiry to make final access determinations for the declared fixed line services – final report, July 2011, p. 130.

¹⁰ CCA s. 151BUA(2).

Commission decisions and the timely implementation of the standard access obligations.

In deciding whether to issue a disclosure notice, the ACCC must have regard to the legitimate commercial interests of the carrier or carriage service provider that provided the report and any other matter it considers relevant.¹¹ The ACCC considers that the matters set out in this consultation paper are relevant to its decision on whether and how to disclose the Telstra material.

Before issuing a disclosure notice, the ACCC must also invite the carrier or carriage service provider concerned to make a submission on a draft of the disclosure notice, and consider any submission made by it within the time limit.¹²

The ACCC's preliminary view is that disclosure of the Telstra material would be likely to promote competition in markets for listed carriage services and facilitate the operation of Part XIC of the CCA. In particular, disclosing the Telstra material would promote transparency about the inputs to the FLSM and assist the ACCC in determining prices for the declared fixed line services. Greater transparency about the inputs and assumptions in the Telstra material will reduce information asymmetries and enable better informed submissions to the public inquiry. This will assist the ACCC in ensuring that the inputs to the FLSM reflect the efficient costs of supplying the fixed line services. This will assist the ACCC to set efficient prices and make final access determinations that are more likely to promote competition in markets for downstream services and facilitate the operation of the access regime in Part XIC of the CCA than would otherwise be the case if the Telstra material was not disclosed.

However, the ACCC also notes that the Telstra material may contain information that is commercially sensitive to Telstra. The ACCC will consider the potential harm that might be caused to Telstra's legitimate commercial interests by disclosure of such information, and consider whether it is possible to disclose the information in a way that minimises the potential harm to Telstra.

The ACCC must balance the benefits that would result from disclosure against any harm that might be caused to Telstra. This may involve imposing limitations on how the information should be disclosed in order to avoid harms that may be caused to Telstra's legitimate commercial interests.

General principles on the public disclosure of record-keeping rule information were considered by the ACCC in its report *Regulatory Principles for Public Disclosure of Record-Keeping Rule Information*.¹³

The ACCC considers options for limiting how the Telstra material is to be disclosed exist in relation to:

- the material to be disclosed
- the persons to whom the material is to be disclosed
- the terms and conditions on which the material is to be disclosed.

¹¹ Ibid s 151BUA(4).

¹² Ibid s 151BUA (5).

¹³ ACCC, *Regulatory Principles for Public Disclosure of Record-Keeping Rule Information*, January 2003.

Material to be disclosed

There are two options for specifying the material to be disclosed:

- specification of the entirety of the Telstra material for disclosure
- specification of parts of the Telstra material for disclosure.

In determining what material should be disclosed, there is a need to consider the following factors:

- the benefits of disclosure for the public inquiry process
- the characteristics of the information and thus the effect of disclosure on Telstra's legitimate commercial interests.

The ACCC notes that the most appropriate option for specifying the material disclosed may also depend on the persons to whom it will be disclosed and the terms and conditions of disclosure. For example, disclosure of more sensitive material might be balanced by stricter terms and conditions on the disclosure.

A high-level description of the Telstra material is set out in Appendix A.

Option 1: Disclosure of the entirety of the Telstra material

The ACCC considers that it should begin by considering whether the entirety of the Telstra material is suitable for disclosure. The principles of transparency and evidence-based decision-making would suggest that the whole report should be disclosed. Full disclosure would ensure that stakeholders are fully informed about the basis on which the ACCC is making its decision, and are in a better position to make submissions that enable the ACCC to assess the accuracy and reliability of information that has been provided.

However, the ACCC recognises that the Telstra material contains some information which may be commercially sensitive. Examples include:

- information pertaining to Telstra's intellectual property
- certain disaggregated market information which could provide competitors with a competitive advantage
- highly sensitive information in commercial agreements with other parties.

As some parts of the Telstra material are more sensitive than others, the ACCC considers that it should differentiate between parts of the Telstra material according to their commercial sensitivity when making decisions about whether and how it is to be disclosed.

Option 2: Disclosure of parts of the Telstra material

The ACCC has reviewed all of the Telstra material to identify parts of the material that may be commercially sensitive. Telstra has also provided the ACCC with a detailed outline of the sections of the report that it considers to be commercially sensitive and the harms that might result to Telstra from disclosure of those sections. The ACCC has had regard to Telstra's submission.

Information that is not commercially sensitive

The ACCC considers that some parts of the Telstra material are not commercially sensitive.

First, the Telstra material contains some information that is already in the public domain. For example, some of the information is available in Telstra's annual reports or has been released to analysts or the media.¹⁴ Similarly, some of the information has been published (albeit in a slightly different form) by the ACCC under the accounting separation regime.¹⁵ Other information has been published by Telstra or by third parties on the Internet.¹⁶ Finally, some of the information relates to matters of public record, such as the legal and regulatory obligations that apply to Telstra. The ACCC considers that the disclosure of publicly available information cannot affect the commercial interests of Telstra, and therefore cannot be commercially sensitive.

Second, some of the Telstra material consists of information that is not specific to Telstra. For example, CPI estimates and the methodology by which they were derived by Telstra are included in the Telstra material. The ACCC considers that national economic factors are unlikely to be commercially sensitive information that could cause harm to Telstra's interests.

Third, disclosure of the general assumptions and the high-level approach used to prepare the Telstra material for lodgement to the ACCC is unlikely to reveal sensitive information about Telstra's operations or commercial intentions.

The ACCC considers that information that is not commercially sensitive should be disclosed to the public under any section 151BUA disclosure notice relating to the Telstra material. Given that there is little or no likelihood of harm to Telstra's legitimate commercial interests, the balance clearly tilts towards the public benefits of disclosure.

Commercially sensitive information

The ACCC considers that some parts of the Telstra material are commercially sensitive due to the characteristics of the information.

Telstra has submitted that there are four main categories of commercially sensitive data:

- Actual capital expenditure, operational expenditure and demand data – Disclosure would give Telstra's competitors greater insight into Telstra's expenditure patterns and areas of investment focus.
- Forecast capital expenditure, operational expenditure and demand data for 2013-14 and the next regulatory period – Disclosure would:
 - give Telstra's competitors greater insight into Telstra's expenditure patterns and areas of investment focus

¹⁴ See, for example, percentage changes to key product revenue on page 13 of the *Telstra Annual Report 2013* and the capital expenditure to sales ratio on page 12.

¹⁵ For example, see ACCC, *Current Cost Accounting Record Keeping and Reporting Rules Report - 2H 2012-13 and FY 2012-13*, <http://www.accc.gov.au/publications/current-cost-accounting-report-cca/current-cost-accounting-record-keeping-and-reporting-rules-report-2h-2012-13-and-fy-2012-13>

¹⁶ For example, information about the names of Telstra's databases is available here: http://www.wahlstrom.com.au/database_management.php

- provide highly confidential information about Telstra's commercial intentions to its competitors, undermining Telstra's ability to compete
- prejudice Telstra's position in commercial negotiations with suppliers, wholesale customers, and NBN Co
- cause confusion when compared to Telstra's publicly available data because of the different methods used for preparation of the data.
- Proprietary information – Disclosure could reveal proprietary information that would give competitors an unfair competitive advantage (for example, formulas for calculating demand forecasts).
- Fault data – Misuse could undermine confidence in Telstra's network and impact on contract renegotiations with NBN Co.¹⁷

In particular, Telstra submitted that public disclosure of commercially sensitive information would give its competitors unfair advantages, create a risk of misuse of the information, and reduce the likelihood that information providers will provide confidential information to the ACCC in future.¹⁸

Having reviewed the information in the Telstra material and considered Telstra's claims, the ACCC's preliminary view is that the four categories of information specified above are likely to be commercially sensitive to Telstra and could cause harm to Telstra's legitimate commercial interests if disclosed without restriction.

In particular, the ACCC considers that there is a risk of harm to Telstra's ability to compete with access seekers in downstream markets for voice and broadband services.

The ACCC accepts that there is some potential for confusion due to the different methods for preparation of BBM RKR data and Telstra's published financial statements, for example, due to the longer-range forecasts required by the BBM RKR. Any such confusion could have adverse effects on Telstra's share price and ASX reporting obligations if disclosed publicly.

However, the ACCC considers that the harm to Telstra from disclosure of commercially sensitive information could be mitigated by placing restrictions on the way in which the information is disclosed. Appropriate restrictions would allow the benefits of disclosure to be obtained without causing harm to Telstra's legitimate commercial interests.¹⁹ Subsection 151BUA(2)(d) of the CCA provides a way for the ACCC to impose restrictions on the persons to whom the information is disclosed, and to require those persons to comply with specified terms and conditions.

Conclusion

The ACCC considers that information that is publicly available should be disclosed. The ACCC also considers that the parts of the Telstra material relating to CPI forecasts and the general methodology used by Telstra to prepare its response to the BBM RKR should be disclosed. These parts of the Telstra material are referred to as 'public extracts' in the remainder of this discussion paper.

¹⁷ Confidentiality templates given to the ACCC by Telstra for the Telstra material on 25 February 2014.

¹⁸ Ibid.

¹⁹ The appropriate restrictions are discussed in the chapter on "Terms and conditions" below.

However, the ACCC considers that, in order to protect Telstra's legitimate commercial interests, the disclosure of actual and forecast capital expenditure, operational expenditure and demand data, proprietary information and information relating to faults should be limited to specified persons and subject to restrictions. These parts of the Telstra material are referred to as 'restricted extracts' in the remainder of this discussion paper.

Invitation to comment:

The ACCC invites stakeholders to make submissions on the ACCC's proposed approach to specifying the parts of the Telstra material for disclosure.

Persons to whom material is to be disclosed

There are three options for specifying the persons to whom material is to be disclosed:

- specification of the general public
- specification of classes of persons
- specification of individuals.

In determining the persons to whom the material is to be disclosed, there is a need to consider the following factors:

- the benefits for the public inquiry from disclosure to the person which assists the person to assist the ACCC by making submissions to the FAD inquiry and promotes understanding of the basis for the ACCC's decisions
- the potential risk of detriment to Telstra's legitimate commercial interests.

The ACCC notes that the most appropriate option for specifying the persons to whom material is to be disclosed will also depend on the material to be disclosed and the terms and conditions of disclosure.

Option 1: General public

The ACCC may disclose the Telstra material to the general public under section 151BUA(2)(c) of the CCA.

Disclosure to the general public would provide the greatest amount of transparency possible for the public inquiry. It would also ensure that all stakeholders with an interest in the pricing of regulated fixed line services are able to obtain access to the Telstra material and make submissions that may assist the ACCC.

The ACCC considers that parts of the Telstra material that are not commercially sensitive, that is, public extracts, should be disclosed to the general public to promote the transparency of the public inquiry into making final access determinations for the declared fixed line services and wholesale ADSL.

Option 2: Classes of persons

The ACCC may disclose the Telstra material to specified persons under section 151BUA(2)(d) of the CCA. The notice may specify a class of persons. The ACCC considers that disclosure of the parts of the Telstra material that are commercially sensitive should be limited to a specified class of persons.

As a starting point, the ACCC notes that the main purpose of the proposed disclosure is to inform stakeholders and enable them to make submissions that will assist the ACCC in determining prices for the fixed line services. In this way, disclosure will have the public benefits of promoting competition in markets for downstream services and facilitating the operation of Part XIC of the CCA.

The ACCC therefore considered how to identify stakeholders who could assist the ACCC in its task. The ACCC notes that the determination of prices using the FLSM is a complex and technical process, requiring substantial knowledge of the operations of a carrier and economic forecasting. The ACCC notes that the Telstra material contains

quantitative data as well as an explanation of the detailed methodology and assumptions on which that data has been derived using Telstra's internal systems. The ACCC considers that it would be valuable for stakeholders with expertise in forecasting and estimating the costs of operating telecommunications networks to comment on this data.

Access seekers

The ACCC considers that one class of persons likely to have the expertise to assist the ACCC in this process is the class comprised of access seekers.²⁰ Access seekers, being carriers or carriage service providers, are likely to have experience and knowledge of the costs of building and operating telecommunications networks. This experience and knowledge is likely to enable access seekers to review and critique the information in the Telstra material and to provide additional information that may assist the ACCC. Access seekers have also demonstrated their interest in participating in previous ACCC inquiries into the pricing of regulated services and making submissions on the economic models and inputs used to determine prices. In addition, access seekers are the persons whose interests could be most directly affected by the pricing of the fixed line services other than Telstra, and who should therefore have the opportunity to make well-informed submissions to the ACCC.

The ACCC proposes to incorporate the definition of 'access seeker' set out in section 152AG in Part XIC of the CCA. The ACCC considers that the use of this definition ensures consistency with the object and structure of Part XIC for the purposes of the public inquiry, as well as being well understood by the stakeholders.

However, the ACCC notes that access seekers are direct competitors of Telstra in downstream markets for fixed line services. There is therefore a risk that access seekers could use the information in the Telstra material, whether deliberately or inadvertently, to gain a competitive advantage in downstream markets. The ACCC considers that this has the potential to adversely affect Telstra's legitimate commercial interest in preserving its ability to compete in downstream markets.

In order to avoid this possibility, the ACCC proposes to limit the class of persons to those who truly require access to the Telstra material. Specifically, the ACCC considers that this class comprises employees of access seekers responsible for managing the regulatory or legal affairs of access seekers (regulatory/legal staff). The ACCC also considers that access seekers should be permitted to engage consultants with expertise in the telecommunications industry in order to assist with the preparation of submissions that may require complex economic analysis.

The ACCC has drafted the definition of the class of persons to include:

- A person who is employed:
 - at a service provider who, for the purposes of section 152AG of the CCA, is an access seeker; and
 - in a regulatory role or as an Australian legal practitioner to produce and provide submissions on behalf of that access seeker to the ACCC's public inquiry into making final access determinations for the declared fixed line services and the wholesale ADSL service that was commenced on 1 July 2013;

²⁰ Section 152AG of the CCA defines an 'access seeker' to be a service provider who makes, or proposes to make, a request for access or interconnection in relation to that service.

- A consultant or an adviser engaged by an access seeker referred to in the previous paragraph solely to assist in the production and provision of submissions to the inquiry.

To the extent that a member of a regulatory/legal team also has commercial or operational responsibilities relating to services delivered over the copper network, the ACCC considers that there may be a greater risk of adverse effects on Telstra's legitimate commercial interests due to the potential for commercially sensitive information to be used for commercial purposes. For this reason, the ACCC proposes to impose a specific restriction in the terms and conditions that limits the use of the restricted extracts to the preparation of submissions to the ACCC.

To further protect Telstra's legitimate commercial interests, the ACCC also proposes to impose terms and conditions on the disclosure of the Telstra material.

Persons other than access seekers

Other than access seekers, the ACCC considers that persons who may have an interest in obtaining access to the Telstra material include persons who are or will be engaged in commercial negotiations with Telstra. In particular, the ACCC has identified two classes of such persons:

- Potential suppliers or contractors to Telstra
- NBN Co and its related bodies corporate.

The ACCC notes that the BBM RKR requires Telstra to lodge information regarding internal guidelines relating to the tendering or contracting out of capital expenditure projects.²¹ In addition, the Telstra material contains forecasts about Telstra's expenditure over the next regulatory period. The ACCC considers that such information could be used by potential suppliers or contractors to Telstra's detriment.

Similarly, the ACCC notes that the historical costs and forecasts in the Telstra material, and data on the incidence and causes of faults on Telstra's network, could be used in a manner detrimental to Telstra in its ongoing negotiations with NBN Co in relation to the NBN. The condition and costs of operating the network are likely to be factors in the renegotiation of the Definitive Agreements between Telstra and NBN Co. These agreements were estimated to have a net present value of approximately \$11 billion when signed in June 2011.

For these reasons, the ACCC does not consider that restricted extracts should be made available to these persons. To provide certainty and avoid the possibility of misuse of this disclosure notice, the ACCC therefore proposes to specifically exclude employees of NBN Co and its related bodies corporate from the class of persons to whom the restricted extracts will be disclosed, and to include only those carriers or carriage service providers who are access seekers in relation to the fixed line services and wholesale ADSL.

The ACCC notes that there may be other classes of persons who may be interested in making submissions on the pricing aspects of FADs to the public inquiry, and therefore seek access to the commercially sensitive parts of the Telstra material. For example, this might include academics, consumer groups or government departments. The ACCC invites persons falling within such classes to make a submission on this discussion paper identifying themselves and the relevant class. The submission should include reasons why the benefits for the public inquiry from that class of

²¹ BBM RKR, rule 9(e).

persons having access to the restricted extracts would outweigh the risk of any commercial harm to Telstra from the access.

Option 3: Individuals

Alternatively, the ACCC may specify individuals under paragraph 151BUA(2)(d) of the CCA.

The ACCC considers that this is not a desirable option because it would impose a burden on stakeholders to provide the ACCC with the names of individuals responsible for making submissions at the start of the inquiry. As these individuals may change during the period of the inquiry, this option might prevent stakeholders from accessing and providing submissions on the Telstra material that would assist the ACCC in its inquiry.

Conclusion

The ACCC's preliminary view is that the portion of the Telstra material that falls within the public extracts should be disclosed to the public.

The ACCC considers that the restricted extracts should be disclosed exclusively to the legal or regulatory teams of access seekers, and consultants engaged by access seekers, on terms and conditions that will protect Telstra's legitimate commercial interests. The ACCC considers that this is an appropriate balance between the public interest in disclosure of the information and Telstra's legitimate commercial interests.

The ACCC considers that persons employed by organisations that are or may be engaging in commercial negotiations with Telstra in the future, but are not access seekers in relation to the fixed line services and wholesale ADSL service, should not have access to the restricted information. For this reason, the ACCC intends to exclude employees of NBN Co and related bodies corporate from the class of persons.

Invitation to comment:

The ACCC invites submissions from stakeholders on the ACCC's proposed approach to specifying the persons to whom the Telstra material should be disclosed.

Terms and conditions on which material is to be disclosed

There are a wide range of terms and conditions on which material may be disclosed, including:

- limitations on the use of the material
- limitations on further disclosure
- requirements for handling of the material.

In determining what terms and conditions should be applied, there is a need to consider the following factors:

- the consequences for the public inquiry process
- the effect on Telstra's legitimate commercial interests.

The ACCC notes that the most appropriate option for specifying terms and conditions will also depend on the material disclosed and the persons to whom it will be disclosed.

Confidentiality obligations

As discussed above, the ACCC considers that disclosure of the restricted extracts could be made in a way that would minimise the potential harm to Telstra's legitimate commercial interests that would otherwise be caused by the disclosure.

The ACCC considers that imposing terms and conditions under subsection 151BUA(2)(d) requiring execution of a confidentiality undertaking prior to the disclosure of the restricted extracts would allow for disclosure while providing protection for Telstra's legitimate commercial interests. It is proposed in the draft undertaking in Appendix B that Telstra would be able to take court action to enforce the confidentiality undertaking, for example, by obtaining an injunction against a breach of the undertaking.

The ACCC also proposes to impose a term and condition on recipients of disclosure that they must comply with the confidentiality undertaking. The ACCC notes that failure to comply with such terms and conditions is a criminal offence punishable on conviction by a fine of up to 100 penalty units.²²

The ACCC considers that the following limitations should apply:

- The use of the information in the Telstra material should be limited to the purpose of providing input and submissions to the current public inquiry on pricing of the declared fixed line services and wholesale ADSL.
- The further disclosure of the Telstra material to persons who do not fall within the specified class of persons should be prohibited, except that the disclosure of conclusions or recommendations based on the Telstra material may be made in order to obtain executive and board approval for making submissions to the ACCC.

²² CCA, subs. 151BUA(11).

- The Telstra material and all material derived from the Telstra material should be clearly marked confidential, security measures should be taken at all times, and the information should be destroyed or returned to Telstra at the conclusion of the public inquiry.
- For submissions to the ACCC, any confidential information used from the Telstra material should be redacted from public versions and marked as confidential to Telstra in confidential versions.

Inspection and purchase

Subsection 151BUA(8) of the CCA states that the ACCC must make the material specified in its disclosure notice available for inspection and purchase.

The ACCC proposes to make the public extracts of the Telstra material available for inspection by appointment at the Melbourne offices of the ACCC during standard business hours, and \$1 per page for purchase of a physical copy. The ACCC also proposes to make the public extracts available for inspection and purchase on its website at no charge.

The ACCC proposes to make the restricted extracts of the Telstra material available for purchase electronically at no charge, upon lodgement by the recipient of a copy of the signed confidentiality undertaking with the ACCC. A copy should also be provided to Telstra.

Electronic copies may include a copy of the Excel spreadsheet containing the FLSM model and the relevant level of data from the extracts.

Conclusion

The ACCC's preliminary view is that extracts of the Telstra material should be disclosed according to their commercial sensitivity:

- Parts of the material that are not commercially sensitive (public extracts) should be disclosed to the public. Physical purchase will incur a cost, while electronic inspection and purchase will be at no charge.
- Parts of the material whose commercial sensitivity can be mitigated through the use of terms and conditions (restricted extracts) should be disclosed only to legal and regulatory employees or consultants of access seekers, subject to terms and conditions set out in a confidentiality undertaking. The ACCC proposes to require execution of the draft undertaking set out in Appendix B.
- Parts of the material that are highly commercially sensitive should not be disclosed.

Invitation to comment:

The ACCC invites submissions from Telstra and other stakeholders on the ACCC's proposed approach to specifying terms and conditions on which disclosure will be made, including the draft undertaking set out in Appendix B.

Disclosure notice under section 151BUA

As described above, the ACCC's preliminary view is that public extracts should be disclosed to the public, while restricted extracts should only be disclosed to the legal or regulatory teams of access seekers, and consultants engaged by access seekers, under confidentiality undertakings. The ACCC considers that this is an appropriate balance between the public interest in disclosure of the information and Telstra's legitimate commercial interests.

The ACCC therefore proposes to give a notice to Telstra under subsection 151BUA(2) of the CCA specifying that it intends to disclose extracts from the Telstra material in this way.

The ACCC must give a draft of the disclosure notice to Telstra and invite Telstra to make a submission on the draft within a period of at least 28 days.²³ The ACCC gave the draft to Telstra on 19 March 2014 and specified that it would consider submissions made by 17 April 2014.

The ACCC will accept submissions on the matters discussed in this paper until 17 April 2014.

Following consideration of Telstra's submission and other relevant submissions, the ACCC will make a decision on whether and how to disclose the Telstra material or extracts from the Telstra material.

If the ACCC decides to disclose the Telstra material or extracts from the Telstra material, it will issue Telstra with a final disclosure notice and publish the notice on the ACCC website. The material will be available after a period of at least 28 days after Telstra is given the final disclosure notice.

²³ CCA, subs.151BUA(6).

Appendix A – information submitted by Telstra

The report submitted by Telstra complies with the requirements specified for requests under Rule 15 of the BBM RKR. However, it does not include a comparison of actual and forecast Operating Expenditure, Capital Expenditure and Demand for 2013-14 because the data was not yet available.

In addition, Telstra has provided other relevant material requested by the ACCC on 17 January 2014. This comprises:

- In relation to Operating Expenditure:
 - operating expenditure forecasts in terms of costs relevant to the FLSM asset classes for Telstra Wholesale, unattributable costs and the Service Operations line of business
 - evidence to support the view that recent levels of the key drivers of aggregate operating expenditure form the best basis on which to forecast operating expenditure for the forecast period.
 - how the key drivers of aggregate operating expenditure and future levels of operating expenditure are forecast to be impacted by the NBN rollout over the forecast period.
- In relation to Operating Expenditure for the 'LSS Equipment' asset class:
 - the data used to estimate the operating expenditure forecasts for the 'LSS Equipment' FLSM asset class, disaggregated by each 'line item' in the RAF
 - for each of the three largest RAF 'line items' making up the total 'LSS Equipment' operating expenditure, a disaggregation of the components of the 'line items', if available, and how they have been allocated. In addition:
 - information on whether costs are direct, attributable or unattributable, and
 - for attributable and unattributable costs, information on how the costs were allocated (e.g. what drivers are used).
- In relation to Operating Expenditure, an explanation of the approach in the explanatory statement compared with the information provided by Telstra's Chief Financial Officer and Chief Executive Officer in Telstra's 2013 financial year analyst briefing on productivity improvements.
- In relation to Capital Expenditure:
 - For the nine most significant capital expenditure programs, a breakdown of total capital expenditure by driver for each year of the forecast period.
 - Steps and calculations to demonstrate how Telstra has mapped the expenditure forecasts from the initial project code to the final 'FLSM asset class' format.
- In relation to Demand:
 - an historical comparison of past period forecasts to actual outcomes for the services, based on the forecasts used by Telstra for the purposes of its corporate planning, for each of the service categories listed in Table C4 of the BBM RKR for the 2010-11 to 2012-13 years.

Appendix B – Confidentiality undertaking

CONFIDENTIALITY UNDERTAKING

IN FAVOUR OF

TELSTRA CORPORATION LIMITED (ACN 051 775 556)

I, **[NAME]**..... of

[COMPANY/ORGANISATION NAME] (**xxx**)

undertake to Telstra Corporation Limited (ACN 051 775 556) (**Telstra**) that:

1. Subject to the terms of this Undertaking, I will keep confidential at all times the information and material that is specified in Schedule 1 to the Notice issued to Telstra by the Australian Competition and Consumer Commission (ACCC) pursuant to subsection 151BUA(2)(d) of the *Competition and Consumer Act 2010* (Cth) (CCA) on **[date]** (**Confidential Information**).
2. I acknowledge that:
 - (a) this Undertaking is given by me to Telstra in consideration for the Confidential Information being made available to me for the Approved Purpose (as defined in paragraph 3 below);
 - (b) all intellectual property in (or in any part of) the Confidential Information is and will remain owned by Telstra; and
 - (c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent, officer or member of **[xxx]**, or any person engaged by **[xxx]** for the Approved Purpose in relation to the Confidential Information, except as expressly provided in this Undertaking.
3. I will only use the Confidential Information for the purposes of making submissions on behalf of **[xxx]** to the ACCC's public inquiry into making final access determinations for the declared fixed line services and the wholesale ADSL service that was commenced on 1 July 2013 (**Fixed Line Services FAD Inquiry**) (**the Approved Purpose**).

4. To the extent that any submission or other document is submitted to the ACCC or given to any person by me or [xxx] as permitted by this Undertaking and which contains any Confidential Information, I will:
- (a) clearly mark that document as a confidential submission or confidential document containing the Confidential Information and that is subject to this Undertaking; and
 - (b) clearly identify the Confidential Information within the submission or document;
 - (c) comply with any reasonable request or direction from the ACCC or Telstra regarding the Confidential Information.
5. I will not disclose any of the Confidential Information to any other person save for disclosure to:
- (a) any person who:
 - (i) is a person for the purposes of paragraph 2 of the Notice issued to Telstra by the ACCC pursuant to subsection 151BUA(2)(d) of the CCA on [date]; and
 - (ii) has signed a confidentiality undertaking in the form of this Undertaking or another form acceptable to the ACCC and Telstra for the Approved Purpose; and
 - (iii) has served a copy of the signed undertaking on the ACCC and Telstra;
 - (b) any secretarial, administrative and support staff who perform purely administrative tasks and who assist me or any person referred to in paragraph 6(a) for the Approved Purpose; and
 - (c) other persons, if required to do so by law, but then only:
 - (i) if I notify the ACCC and Telstra of that request within 7 days of receiving the request;
 - (ii) to the person(s) to whom I am obliged to provide the Confidential Information;
 - (iii) to the extent necessary as required by law; and
 - (iv) if I notify the recipient of the confidential information that the information is confidential and is subject of this Undertaking to Telstra.

6. I may disclose any recommendations that I may form which are based on the Confidential Information to the executive management or the Board of [xxx], for the purposes of obtaining approval to provide a submission to the ACCC in relation to the Fixed Line Services FAD Inquiry, provided that the Confidential Information cannot be identified or derived from those recommendations.
7. I will establish and maintain security measures to safeguard the Confidential Information from unauthorised access, use, copying, reproduction or disclosure and will protect the Confidential Information using the same degree of care as a prudent person would use to protect their own confidential information.
8. Except as required by law, within 14 days after whichever of the following first occurs:
- (a) the conclusion of the Fixed Line Services FAD Inquiry; or
 - (b) my ceasing to be employed or retained by, an officer, a member or a representative of [xxx]; or
 - (c) my ceasing to work for or represent [xxx] in respect of the Approved Purpose,

I will destroy or deliver to Telstra 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 systems that cannot be destroyed or deleted.

9. Nothing in this Undertaking shall impose an obligation upon me in respect of information:
- (a) that is in the public domain; or
 - (b) that has been obtained by me otherwise than from:
 - (i) the ACCC;
 - (ii) Telstra;
 - (iii) another person who has signed a confidentiality undertaking; or
 - (iv) another person who has an obligation of confidence in relation to the Confidential Information (or any part of it),

provided that the information has not been obtained by me by reason of, or in circumstances involving, any breach of this Undertaking, any other confidentiality undertaking in favour of Telstra for the Approved Purpose, or by any other unlawful means.

10. I acknowledge that damages are not to be a sufficient remedy for any breach of this Undertaking and that Telstra is 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 Telstra at law or in equity.
11. The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to Telstra of the Confidential Information pursuant to paragraph 8 above.
12. I acknowledge that this Undertaking is governed by the law in force in the State of New South Wales and I agree to submit to the non-exclusive jurisdiction of the court of that place.

Signed:

Name:

Dated:

Witness signature:

Witness name: