



Australian  
Competition &  
Consumer  
Commission

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

**Final Report**

**May 2013**

**Public version**



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## Quick guide to the ACCC's decision

Many consumers and businesses buy broadband services from internet service providers to use the internet from their homes, offices and workplaces. Many of these internet service providers buy wholesale broadband services from Telstra so they can on-sell the services using Telstra's copper network. Internet service providers that buy wholesale broadband services from Telstra are known as 'access seekers'.

Our [fact sheet](#) contains further information about wholesale broadband services.

In this decision, we have set some of the prices and conditions that will be included in contracts between Telstra and access seekers if they cannot agree on prices and conditions.

We have not made any decisions about the retail prices that Telstra and other internet service providers charge consumers and businesses for broadband services, as we do not have the power to set these prices.

This guide is written for people who want a short, non-technical summary of our decision and want to know who the decision applies to and how we made the decision. If you would like to know more about particular parts of the decision, this guide tells you where to find it in the report.

### What has the ACCC decided?

We have decided the prices that Telstra will charge access seekers for wholesale broadband services when they cannot agree on the price. We have also decided some conditions that will apply to the supply of wholesale broadband services when Telstra and access seekers cannot agree.

The prices and conditions described in this report will be available to access seekers across Australia.

Telstra asked us not to require it to offer the prices and conditions in this decision in all areas of Australia. Telstra said there is already enough competition in some areas, mainly in capital cities. We decided that not offering these prices and conditions in some areas would make it harder for access seekers to sell to businesses that have office locations across Australia. This part of the decision is explained in chapter 6 of this report.

### Wholesale broadband prices

The prices access seekers must pay Telstra for wholesale broadband services, if they cannot agree on a price with Telstra, are listed in the Executive Summary in this report. The prices will apply until 30 June 2014.

The prices are lower than the interim prices that we set in February 2012 because we received further information about Telstra's costs of supplying wholesale broadband services during our public inquiry. The prices are also much lower than the prices Telstra has previously sought from a number of access seekers.

### Important conditions that Telstra can place on access-seekers buying wholesale broadband services

We have decided the most important conditions Telstra can place on access seekers that buy wholesale broadband services from it when Telstra and the access seeker cannot come to an agreement about them. These conditions deal with the way that access seekers are billed for services, how payments and credit must be provided, when the supply of services will be suspended or ended, and how any disputes will be resolved. These conditions are explained in detail in chapter 9 of this report.

## **How does the ACCC's decision affect consumers and businesses?**

We work to promote competition in retail markets so that consumers and businesses are free to choose their internet service provider and the most appropriate plan for them, based on price and product features. Where there is effective competition, internet service providers that set their prices too high, or do not offer the types of products that consumers want, will lose customers to other competing internet service providers who do offer lower prices or the products that consumers want.

The price Telstra charges for wholesale broadband services is one component of the retail price that internet service providers charge consumers and businesses for broadband services. Ensuring access seekers can buy wholesale broadband services for reasonable prices and conditions allows access seekers to compete effectively against each other and Telstra. Without these prices and conditions, access seekers might not be able to price their products competitively or tailor their services and plans to meet consumer and business needs.

## **How did the ACCC make its decision?**

We calculated the prices for wholesale broadband services by working out Telstra's costs of supplying wholesale broadband services. These prices will allow Telstra to earn enough to meet its costs of supplying the services and also ensure that access seekers do not pay more than they should. This will increase competition in retail markets for broadband services and increase consumers' choice of well-priced plans. Chapters 3 and 4 of the report explain how we worked out Telstra's costs of supplying wholesale broadband services.

## **Do these prices and conditions apply to other companies that sell wholesale broadband services?**

No, the prices and conditions in this decision only apply to Telstra.

Other smaller companies that sell wholesale broadband services to access seekers will be competing with Telstra. If these smaller companies try to charge too much for wholesale broadband services, or set unreasonable conditions, access seekers can choose to buy wholesale broadband services from Telstra. The reasons for this part of the decision are explained in chapter 6 of this report.

## **Will Telstra have to change the way it currently supplies wholesale broadband services?**

No, we have decided not to require Telstra to sell different types of wholesale broadband services.

Some access seekers asked us to require Telstra to sell them a wholesale 'Naked DSL' service. Naked DSL is a broadband service that can be supplied when a consumer or business does not want a telephone service at their home or office. We have decided not to require Telstra to sell wholesale 'Naked DSL' services. Telstra does not currently sell retail 'Naked DSL' products using its copper network and it would need to change its systems to be able to offer these services. The reasons for this part of the decision are explained in chapter 7 of this report.

Some access seekers asked us to require Telstra to sell them a type of wholesale broadband service that would allow them to connect at different places in Telstra's network. We have decided not to do this as Telstra would have to change the way it currently supplies wholesale broadband services and we were not convinced that the costs of doing so are justified. Chapter 8 of this report explains our reasons for this part of the decision.

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## List of abbreviations and acronyms

2008 Model Terms

*Model Non-Price Terms & Conditions  
Determination 2008*

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
CAN	customer access network
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>
FLSM	fixed line services model
GB	gigabyte
HFC	hybrid fibre-coaxial
HHI	Herfindahl-Hirschman Index
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
March 2013 Draft Report	<i>ACCC Public inquiry to make a final access determination for the wholesale ADSL service, Draft Report, March 2013</i>
Mbps	megabits per second
NBN	National Broadband Network
NPTCs	non-price terms and conditions
POI	point of interconnection
POP	point of presence
PSTN	public switched telephone network
PSTN OTA	PSTN originating and terminating access
RAB	regulatory asset base

RAF	regulatory accounting framework
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
Telco Act	<i>Telecommunications Act 1997</i>
TEM	Telstra Economic Model
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 final report and the attached final access determination (FAD) mark the conclusion 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* (CCA).

The Unconditioned Local Loop Service (ULLS), Line Sharing Service (LSS) and wholesale ADSL service can all be used by access seekers to supply retail broadband services. The main difference between these services is that, unlike the ULLS and LSS, access seekers purchasing the wholesale ADSL service do not have to deploy their own DSLAMs<sup>1</sup> in Telstra exchange buildings. The wholesale ADSL service is supplied using Telstra's network and equipment.

More information on the wholesale ADSL service is contained in the ACCC's consumer fact sheet on the wholesale ADSL service.<sup>2</sup>

As at December 2012 Telstra had approximately 761,000 wholesale ADSL services in operation (SIOs),<sup>3</sup> compared with around 1.24 million ULLS SIOs and 659,000 LSS SIOs.<sup>4</sup> Wholesale ADSL SIOs have been declining in recent years (approximately 12 per cent per annum although that trend has slowed in the latest data), in part due to a move to ULLS-based services (which have been growing at around 17 per cent per annum).

The attached FAD provides 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.

The ACCC's decision is based on its own analysis and consultation on the wholesale ADSL FAD with stakeholders, in accordance with the relevant requirements set out in Part XIC of the CCA.

This report explains the ACCC's reasons for making the price and non-price terms and conditions contained in the wholesale ADSL FAD.

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

The table below shows the final prices that will apply from 29 May 2013, the date of the ACCC's decision to make this FAD. The FAD incorporates the interim prices (included in the ACCC's interim access determination (IAD)) that applied from 14 February 2012 until the date of this determination. The draft FAD prices included in the ACCC's March 2013 Draft Report, are shown for comparison. The ACCC has decided not to backdate the FAD prices;

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<sup>1</sup> Digital Subscriber Line Access Multiplexers.

<sup>2</sup> The consumer fact sheet is available on the ACCC's website at the following link: <http://transition.accc.gov.au/content/index.phtml?itemId=1114851>.

<sup>3</sup> Telstra, *Telstra Corporation Limited Financial Results for the Half Year ended 31 December 2012*, 7 February 2013.

<sup>4</sup> ACCC, *Snapshot of Telstra's customer access network as at December 2012*, available at: <http://transition.accc.gov.au/content/index.phtml/itemId/853523>.

the significant amount of time taken to finalise the FAD reflects the volume and complexity of the issues that were required to be addressed.

### FAD prices for wholesale ADSL and interim prices

	<b>Final FAD prices</b>	Draft FAD prices	IAD prices (also included in the FAD)	
	<b>29 May 2013 to 30 June 2014</b>		1 July 2012 to 28 May 2013	14 February 2012 to 30 June 2012
<b>Port price – Zone 1</b>	<b>\$24.44</b>	\$24.56	\$25.40	\$25.40
<b>Port price – Zone 2/3</b>	<b>\$29.66</b>	\$29.81	\$30.80	\$30.80
<b>AGVC/VLAN<sup>5</sup> (per Mbps)</b>	<b>\$32.31</b>	\$36.08	\$33.65	\$45.50

The final cost-based prices for the wholesale ADSL are marginally lower than the retail-minus prices included in the IAD. The FAD prices are also lower than the draft FAD prices, for two reasons:

- The AGVC charge is lower due to revised AGVC usage figures that now account for all types of AGVC traffic on the network (as discussed in section 3.2.5).
- The weighted average cost of capital (WACC) has fallen, reflecting current market data. As a result, the nominal vanilla WACC decreased from 6.58 per cent to 6.33 per cent.

Prices for wholesale ADSL for 2013-14 have been determined using a cost-based pricing methodology. While there are a number of different pricing methodologies that could have been used to estimate wholesale ADSL prices for the FAD, the ACCC has concluded that in these circumstances, a cost-based pricing approach will best promote the long-term interests of end-users. An important consideration in reaching this conclusion is that the ACCC had already developed a cost-based model for estimating the costs of supplying fixed line services, following extensive consultation with industry.

The ACCC considers that adopting the same cost-based approach for estimating prices for the wholesale ADSL service 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

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<sup>5</sup> Aggregating Virtual Circuit/Virtual Local Area Network.

access provider to recoup its estimated efficient 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.

The ACCC has amended and updated its 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>6</sup> The details of the amendments made to the FLSM are discussed in chapter 3 of this report.

The ACCC has included fixed principles provisions in the FAD that specify the framework for estimating prices for the wholesale ADSL service using the FLSM. With a nominal termination date of 30 June 2021, the fixed principles provisions will provide stakeholders with certainty and predictability across regulatory periods and promote consistency in pricing the fixed line services.

The ACCC has not included price terms in this FAD that address network congestion, as advocated by Telstra. 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 is more likely to encourage 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.

***For the next regulatory period, the ACCC will estimate prices for the wholesale ADSL service at the same time as it estimates prices for the other declared fixed line services.***

The FAD expires on 30 June 2014. The ACCC must conduct an inquiry into making new FADs for the other fixed line services that are declared at that time, including a review of cost-based prices for these services.<sup>7</sup> This inquiry will also review the wholesale ADSL FAD. 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.

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<sup>6</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).

<sup>7</sup> The fixed line services that are presently declared (until 31 July 2014) are ULLS, LSS, PSTN OTA, LCS and WLR.

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

The ACCC has decided to not include terms and conditions in the FAD that limit the application of the FAD to certain geographic areas. Telstra submitted that the ACCC should give effect to geographic exemptions in Exchange Service Areas (ESAs) that satisfied a threshold test for competition. Telstra initially proposed that regulated terms and conditions would not apply in ESAs where Telstra's three largest competitors are present. Telstra's second proposed test included additional criteria relating to market concentration levels and the presence of Large Pair Gain Systems (LPGS).

After reviewing the information before it, the ACCC has decided, on balance, that granting geographic exemptions would not promote the long-term interests of end-users, the interests of access seekers or the efficient use of or investment in 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 large pair gain systems) that reduce the contestability of those market segments by access seekers.

In addition, investment in DSLAM infrastructure by access seekers has slowed significantly prior to regulation and the ACCC expects that this trend will continue with or without giving effect to geographic exemptions. The benefits of self-supplying wholesale ADSL services mean that, where it is efficient to do so, access seekers are likely to continue to use and invest in their own equipment. However, the slowing of investment suggests that the majority of efficient investment has already occurred. Further, the rollout of the NBN may have introduced uncertainty about the expected payback periods of new investment.

***The FAD does not apply to wholesale ADSL service providers other than Telstra.***

The ACCC has decided to include terms and conditions in the FAD that effectively exempt non-Telstra providers of wholesale ADSL from having to comply with the Standard Access Obligations (SAOs) and price and non-price terms and conditions of the FAD. The ACCC considers that this decision will promote competition and the long-term interests of end-users and is consistent with the legitimate business interests of non-Telstra providers.

The ACCC has concluded that, on balance, there are unlikely to be significant benefits from giving effect to carrier-specific exemptions for non-Telstra service providers, as they 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 has also concluded that imposing regulated terms and conditions on non-Telstra providers could require access seekers with DSLAM infrastructure, that do not currently offer a wholesale ADSL service, to undertake significant investment in billing and provisioning systems to provide a wholesale ADSL service, without a business case that provides a commercial risk-adjusted rate of return.

***The FAD does not require Telstra to alter its network configuration for supplying ADSL services.***

The ACCC has decided not to include terms in the FAD that would have the effect of requiring Telstra to alter its current ADSL product configuration. That is, the FAD does not require Telstra to:

- offer a fully unbundled or hybrid unbundled wholesale ADSL service; or
- deploy additional points of interconnection and/or separate the local access component from the backhaul transmission component.

Potential benefits from altering Telstra's current ADSL product configuration would be outweighed by the significant costs associated with re-engineering Telstra's ADSL network and deploying additional network components. Terms and conditions requiring Telstra to incur such costs would generate inefficiencies in both the level of investment and the use of existing network infrastructure. This would not promote the long-term interests of end-users.

***The FAD includes a base set of important non-price terms and conditions.***

The ACCC has included in this FAD a base set of important non-price terms and conditions. These non-price terms and conditions will apply when an access seeker is seeking to buy the wholesale ADSL service from Telstra and an agreement on non-price terms and conditions between the two parties cannot be reached. These conditions deal with the way that access seekers are billed for services, liability and indemnity, communication with end-users, how payments and credit must be provided, when the supply of services will be suspended or ended, and general dispute resolution procedures.

The ACCC has noted Telstra's request for a holistic review of the standard non-price terms and conditions as part of the fixed line services FAD inquiry in 2014. The ACCC will consider further whether to conduct a holistic review when it commences the next FAD inquiry.

# 1 Introduction

The Australian Competition and Consumer Commission (ACCC) has made a final access determination (FAD) for the declared wholesale asymmetric digital subscriber line (ADSL) service. This Final Report explains the terms of the FAD and the basis on which these terms were made.

## 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. As the operator of the CAN, Telstra is the dominant access provider of ADSL services at the wholesale level.

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>8</sup> The declaration will expire on 13 February 2017. The service description for wholesale ADSL can be found in **Appendix A**.

## 1.2 Public inquiry process

The ACCC commenced a public inquiry into making the FAD on 14 February 2012 and released its first discussion paper on this date (**February 2012 Discussion Paper**).<sup>9</sup> On 6 July 2012 the ACCC released a further discussion paper for consultation (**July 2012 Issues Paper**), followed by an open letter on network congestion on 5 September 2012.<sup>10</sup> The ACCC also sought additional information from Telstra between August and September 2012.<sup>11</sup>

Following the commencement of the public inquiry, the ACCC extended the six month decision making period to 13 February 2013. After additional consultation, delayed submissions and considering the complexity of the issues, the ACCC further extended the decision making period to 13 August 2013. The ACCC also extended the expiry date of the interim access determination (IAD) up until the time that the ACCC made a FAD for wholesale ADSL.<sup>12</sup>

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<sup>8</sup> ACCC, *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final decision*, February 2012.

<sup>9</sup> ACCC, *Public inquiry to make a final access determination for the wholesale ADSL service, Discussion Paper*, February 2012.

<sup>10</sup> ACCC, *Public inquiry to make a final access determination for the wholesale ADSL service, Issues Paper (a Second Discussion paper)*, July 2012; and ACCC, *Open Letter, Public inquiry into making an access determination for wholesale ADSL – request for submissions on congestion in ADSL networks*, September 2012.

<sup>11</sup> The ACCC's requests for further information are available on the ACCC's website: <http://transition.acc.gov.au/content/index.phtml/itemId/1032830>.

<sup>12</sup> The notices of extension are available on the ACCC's website: <http://transition.acc.gov.au/content/index.phtml/itemId/1032830>.

### 1.3 Draft final access determination

On 12 March 2013 the ACCC released a draft FAD and published a Draft Report (**March 2013 Draft Report**).<sup>13</sup> On 3 April 2013 Herbert Geer (on behalf of iiNet) raised concerns regarding iiNet's ability to respond to the March 2013 Draft Report.<sup>14</sup> In particular, Herbert Geer was concerned that relevant pricing data had not been disclosed during this inquiry, therefore impacting iiNet's ability to properly evaluate the March 2013 Draft Report.

Herbert Geer requested that the ACCC hold a hearing under section 501 of the *Telecommunications Act 1997* (Telco Act) as part of this inquiry. Alternatively, Herbert Geer submitted that the ACCC should release Telstra's Regulatory Accounting Framework (RAF) Record Keeping Rules (RKR) reports, which were considered by the ACCC in determining the draft FAD prices.

The ACCC has considered these requests. Firstly, the ACCC does not consider that it would be able to disclose Telstra's wholesale ADSL asset register information to iiNet in a private hearing. Secondly, this information was not provided to the ACCC under the RAF RKR and therefore cannot be disclosed pursuant to section 151BUAB of the *Competition and Consumer Act 2010* (CCA). The ACCC also considers that disclosure of the general RAF RKR data will not, in these circumstances, facilitate the operation of the wholesale ADSL FAD inquiry nor will it contribute to promoting competition in the market for listed services.

The ACCC has therefore decided against iiNet's requests to hold a private hearing or to release certain reports under the RAF RKR.

The ACCC acknowledges iiNet's concerns about its ability to respond to the March 2013 Draft Report on the wholesale ADSL final access determination. The need to provide a transparent and effective consultation process that allows interested parties to effectively and independently scrutinise the ACCC's reasons is an issue that the ACCC takes seriously. Transparency must, however, be balanced against the access provider's legitimate interests in protecting its commercially sensitive information.

The ACCC is currently considering some practical options to deal with the issue of access to confidential data in the context of the upcoming review of the fixed line services, which will commence later this year. In considering the options, the ACCC will explore how to best balance the need for transparency and effective consultation with relevant parties' legitimate interests in protecting commercially sensitive information.

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<sup>13</sup> ACCC, *Public inquiry to make a final access determination for the wholesale ADSL service, Draft Report*, March 2013.

<sup>14</sup> Herbert Geer, Letter to the ACCC, 3 April 2013. 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 final report), are available in Appendix B.

## 2 Assessment Approach

The ACCC undertook a systematic approach in making this FAD. In determining the terms and conditions and requirements that are specified in this FAD, the ACCC has taken into account the matters that the *Competition and Consumer Act 2010* (CCA) requires the ACCC to take into account:

- whether the determination will promote the long-term interests of end-users (LTIE) of carriage services or services supplied by means of carriage services through:
  - promotion of 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 infrastructure by which the service is supplied
- the legitimate business interests of a carrier or carriage service provider (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.<sup>15</sup>

If a carrier or CSP who supplies, or is capable of supplying, the declared service supplies one or more other eligible services, as provided for by the CCA, the ACCC has taken into account (as relevant):

- the characteristics of those other eligible services and
- the costs associated with those other eligible services and
- the revenues associated with those other eligible services
- the demand for those other eligible services.<sup>16</sup>

The ACCC has also taken into account other matters it thinks relevant on a case by case basis.<sup>17</sup>

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<sup>15</sup> Section 152AB and subsection 152BCA(1) of the CCA.

<sup>16</sup> Subsections 152BCA(2) of the CCA.

<sup>17</sup> Subsection 152AB(3) of the CCA.



This chapter discusses the approach the ACCC applied in taking into account these matters to assess and determine each of the terms and conditions in this FAD. Generally, the ACCC considers a term or condition will promote the interests of end-users if they will 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.

It is important to recognise that not all of the matters listed above have been relevant to the assessment approach that the ACCC applied to each term and condition in this FAD. For example, the ACCC considers that the objective of promoting any-to-any connectivity (to which the ACCC must have regard for the purposes of determining whether the FAD promotes the LTIE), is not relevant to the issues raised in making this FAD.

It is also important to recognise that the ACCC considers that the assessment approach applied to each term and condition in this FAD, as outlined in this chapter, is appropriate in the circumstances of this FAD. However, the ACCC may reconsider its assessment approach in light of differing circumstances in any future consideration of these categories of terms and conditions.

This chapter is to be read together with the ACCC's specific analysis in each of the chapters that follow that deal with each category of the terms and conditions in this FAD in detail.

## 2.1 Price terms and conditions

To determine the price terms and conditions to be included in this FAD, the ACCC had to first assess whether it should apply a cost-based or a retail-minus methodology to determine prices. This involved assessing which of these two methodologies would be more likely to:

- provide incentives that encourage efficient use of and investment in the infrastructure used in supplying the wholesale ADSL service by providing a direct estimate of the efficient costs of supplying the wholesale ADSL service as a basis for setting prices;<sup>18</sup>
- provide access seekers with reasonable price terms for the provision of downstream broadband services,<sup>19</sup> thereby promoting efficient investment and competition in downstream markets and providing efficient pricing signals for market entry;<sup>20</sup>
- be in the legitimate business interests of the access provider by adequately compensating them for and allowing them to recover the efficient costs of providing the wholesale ADSL service over time (including a commercial rate of return, and 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);<sup>21</sup>

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<sup>18</sup> Subsection 152BCA(1)(d) of the CCA.

<sup>19</sup> Subsection 152BCA(1)(c) of the CCA.

<sup>20</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>21</sup> Subsections 152BCA(1)(f) and 152BCA(1)(b) of the CCA.

- 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),<sup>22</sup> to reduce the risk of Telstra over- or under-recovering its costs of supplying the declared fixed line services;<sup>23</sup>
- be more transparent and provide better regulatory certainty for both the access provider and access seekers about the way in which the ACCC will set prices over time;<sup>24</sup>
- avoid resulting in prices that may reflect monopoly profits, which in a vertically integrated industry, may be used by the access provider to undercut its retail competitors;<sup>25</sup> and
- to the extent appropriate in circumstances where there is significant congestion on the network, be a pricing methodology that may be effective in leading to prices at the retail level that effectively address any significant congestion.

The ACCC also had to assess the particular price structures that should be adopted in order to determine prices. This involved assessing whether:

- the LTIE, encouraging greater efficiency in the use of network capacity and promoting efficient investments in expanding network capacity, would be best served by a price structure that is based on a fixed port charge and a capacity-based Aggregating Virtual Circuit (AGVC) charge;
- the prevailing geographic zone price structure should be maintained; and
- connection and ancillary charges should be specified in this FAD.

The ACCC's analysis of the price terms and conditions that have been included in this FAD is discussed in detail in chapters 3, 4 and 5.

## 2.2 Fixed principles provisions

In determining whether to include fixed principles provisions in this FAD, the ACCC assessed whether or not 'locking in' the adopted pricing methodology beyond the current regulatory period will promote the LTIE.

This involved assessing:

- whether a particular fixed principle provision would be likely to promote certainty and predictability over time in the pricing framework to assist industry participants in their business and investment planning and facilitate their capacity to compete in providing telecommunications services;<sup>26</sup> and
- whether a particular fixed principle provision being consistent with any equivalent fixed principle provision (that has been included in the FADs for the other declared

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<sup>22</sup> Subsection 152BCA(2) of the CCA.

<sup>23</sup> Subsections 152BCA(1)(b) and 152BCA(1)(g) of the CCA.

<sup>24</sup> Subsections 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

<sup>25</sup> Subsections 152BCA(1)(a); 152BCA(1)(c) and 152BCA(1)(d) of the CCA.

<sup>26</sup> Section 152AB(2) and subsections 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

fixed line services) might impact whether an access provider would be likely to continue to recover its efficient costs of supplying its declared fixed services and avoid over- or under-recovery of its efficient costs.<sup>27</sup>

The ACCC's analysis regarding fixed principles provisions is discussed in detail in chapter 11.

## **2.3 Scope of the application of the standard access obligations**

### **2.3.1 Geographic exemptions**

In the circumstances of this FAD, determining whether to include terms and conditions giving effect to geographic exemptions in the wholesale ADSL FAD raised two key questions:

- Are there geographic segments of the market that are sufficiently competitive to mean that de-regulation would promote the LTIE?
- Would de-regulating some geographic segments of the market for wholesale ADSL services promote, on balance, competition, efficient use of and investment in infrastructure, and the LTIE in the ADSL market?

Addressing these questions involved assessing the likely effect of geographic exemptions on:

- competition within the national market, given the need for national coverage and the limitations on the substitutability of ULLS/LSS<sup>28</sup> where Large Pair Gain Systems are present;<sup>29</sup>
- the incentives for continued use of existing Digital Subscriber Line Access Multiplexer (DSLAM) and associated infrastructure, given the benefits of self-supply;<sup>30</sup> and
- the incentives for further economically efficient investment in DSLAM and associated infrastructure, given existing investment trends and the ongoing rollout of the NBN.<sup>31</sup>

The ACCC's analysis regarding geographic exemptions is discussed in detail in chapter 6.

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<sup>27</sup> Subsections 152BCA(1)(a) and 152BCA(1)(d) of the CCA.

<sup>28</sup> Unconditioned Local Loop Service/Line Sharing Service.

<sup>29</sup> Subsections 152BCA(1)(a) and 152AB(2)(c) of the CCA.

<sup>30</sup> Subsections 152BCA(1)(a) and 152AB(2)(e) of the CCA.

<sup>31</sup> Subsections 152BCA(1)(a) and 152AB(2)(e) of the CCA.

### 2.3.2 Carrier-specific exemptions

Determining whether to give effect to carrier-specific exemptions for non-Telstra providers raised two key questions:

- Does Telstra's provision of the service sufficiently constrain the behaviour of non-Telstra providers of wholesale ADSL?
- Would the application of the standard access obligations harm non-Telstra providers' ability to compete with Telstra for the supply of wholesale ADSL services?

Addressing these questions involved assessing the likely effect of carrier-specific exemptions on:

- minimising inefficient investment in billing and provisioning systems that enable the sale of wholesale ADSL to third parties;<sup>32</sup> and
- promoting competition by allowing non-Telstra providers to differentiate wholesale ADSL offerings.<sup>33</sup>

The ACCC's analysis regarding carrier-specific exemptions is discussed in detail in chapter 6.

## 2.4 Standard non-price terms and conditions

To determine the standard non-price terms and conditions (NPTCs) to be included in the FAD, the ACCC used the amended version of the 2008 Model Terms set out in the Domestic Transmission Capacity Service (DTCS) FAD as a starting point. The 2008 Model Terms encompass a number of schedules of terms and conditions that cover a wide range of areas that concern the dealings between the access provider and the access seekers.

The ACCC subsequently included or amended terms and conditions taking into account the matters specified in subsection 152BCA(1) of the CCA which it considered were relevant. Determining whether a term or condition should be included or amended involved assessing:

- whether the effect of the term or condition and the purpose it seeks to achieve would likely promote competition and encourage efficient investment in the network infrastructure and therefore promote the LTIE.<sup>34</sup> For example, the billing and notification schedule is intended to encourage timely and accurate billing and provides a resolution process for billing disputes so that parties do not immediately have to resort to court actions. These terms and condition would have the likely effect of preventing unnecessary disruptions to business activities and providing assurance to the access provider of how investment costs will be recovered, thereby promoting competition and encouraging efficient investment in the network infrastructure;
- the effect of the schedule on the legitimate business interests of the access provider against those of the access seeker, having regard to whether the term or condition would enhance the interest of one party but impose costs or burden on the other, and

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<sup>32</sup> Subsections 152BCA(1)(a), 152BCA(1)(b) and 152AB(2)(e) of the CCA.

<sup>33</sup> Subsections 152BCA(1)(a) and 152AB(2)(c) of the CCA.

<sup>34</sup> Subsection 152BCA(1)(a) of the CCA.

the flow on effects that may have on retail prices and the diversity of ADSL services that may be provided. For instance, a term or condition that impedes the ability of the access seeker to compete with the access provider not only undermines the interests of the access seeker but also the LTIE.

It should be noted that some of the terms and conditions included in the FAD concern matters which the Structural Separation Undertaking (SSU) is also concerned with. Specifically, these are the terms and conditions that relate to network modernisation and upgrades, equivalence and transparency commitment of Telstra in the provision of wholesale ADSL service, the equivalence and transparency metrics, and obligations in relation to DSL upgrades. In determining whether these terms should be included in this FAD, the ACCC has taken into account the interaction between the FAD and the SSU and that the FAD should not prevent Telstra from complying with its obligations under the SSU.<sup>35</sup>

The ACCC's analysis of the standard NPTCs that have been included in this FAD is discussed in detail in chapter 9.

## 2.5 Unbundling and Points of Interconnection

The ACCC considered whether it was appropriate to include additional non-price terms in the FAD, taking into account the matters specified in subsection 152BCA(1) of the CCA which it considered were relevant. The ACCC considered whether the FAD should include terms that had the effect of:

- requiring Telstra to supply a fully unbundled or hybrid unbundled wholesale ADSL service; or
- requiring the deployment of additional points of interconnection (POIs) and/or requiring provision of the wholesale ADSL service such that the local access component is provided separately from the backhaul transmission component.

Determining whether these terms should be included or amended involved assessing:

- whether the effect of the terms would likely promote competition and encourage efficient investment in the network infrastructure and therefore promote the LTIE.<sup>36</sup> For example, the ACCC assessed whether unbundling was likely to improve the ability for access seekers to compete with Telstra and the flow on effects that unbundling may have on retail prices and the diversity of ADSL services; and
- the effect of the potential terms on the legitimate business interests of Telstra against those of access seekers, having regard to whether these terms would enhance the interests of access seekers but impose costs or burden on Telstra. For both POIs and unbundling, the ACCC assessed whether the interests of Telstra and access seekers were served by the costs and changes to Telstra's network, which would be required to give effect to such terms.

The ACCC's analysis of unbundling and POIs are discussed in detail in chapters 7 and 8, respectively.

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<sup>35</sup> Section 152ER of the CCA and section 152BCA(3) of the CCA.

<sup>36</sup> Subsection 152BCA(1)(a) 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>37</sup> This section discusses the price terms 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 were outlined in chapter 2. In reaching a final view on the price terms and conditions for the wholesale ADSL FAD, the ACCC had regard to these matters. The ACCC’s specific analysis of how the price terms and conditions included in this FAD meet the relevant legislative criteria is contained in several of the ‘ACCC final view’ sections in the following chapters.

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<sup>37</sup> Subsection 152BC(8) of the CCA.

## **3 Choice of pricing methodology and implementation**

This chapter sets out the ACCC's reasons for its final decision to adopt a cost-based pricing methodology in determining the price terms for the wholesale ADSL FAD. This is followed by a discussion of the implementation of the cost-based methodology to estimate prices. Further details on the implementation of the pricing methodology are available in appendices C and D.

### **3.1 Choice of pricing methodology**

This section begins by summarising the ACCC's view on the choice of pricing methodology in the March 2013 Draft Report. This is followed by a summary of submissions received and the ACCC's final view on the pricing methodology.

#### **3.1.1 March 2013 Draft Report view**

In the March 2013 Draft Report, the ACCC considered two potential pricing methodologies for wholesale ADSL: a cost-based approach and a retail-minus approach. The ACCC recognised that both methodologies had certain advantages and drawbacks.<sup>38</sup> The ACCC noted that the Fixed Line Services Model (FLSM), which was initially developed to estimate prices for other fixed line services, already provided much of the information needed to estimate cost-based prices for wholesale ADSL. Further, the ACCC noted that a cost-based approach would provide a number of benefits, including an estimate of the efficient costs of supplying the service, allowing an access provider to recover its efficient costs and investment costs (over time), consistency of pricing approach with other declared fixed line services, and regulatory certainty for industry. However, the ACCC noted that the retail-minus approach had two advantages over the cost-based approach: it is less information intensive, and it can be used to address immediate competition concerns. The ACCC's draft view was that a cost-based approach would, on balance, best meet the long-term interests of end-users (LTIE) and the other legislative criteria to which it must have regard.

The ACCC also had regard to submissions received from industry that related network congestion to the choice of pricing methodology for the wholesale ADSL FAD. In particular, Telstra submitted that the retail-minus approach is better suited to managing congestion than cost-based pricing.

The ACCC considered 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 congestion occurs). The ACCC noted that Telstra's (and other service providers') current retail ADSL offerings appeared to encourage greater use of data rather than seeking to manage data growth or congestion. The ACCC also considered that Telstra's proposal to increase the wholesale ADSL price may put access seekers at a competitive disadvantage to Telstra in the retail market because Telstra Retail customers would not face the same incentive to reduce their demand. Furthermore, this approach would not necessarily make a significant contribution to managing network congestion, given that wholesale ADSL end-

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<sup>38</sup> See discussion in section 3.6 of the March 2013 Draft Report.

users only account for approximately 25 per cent of services in operation (SIOs) on Telstra's ADSL network.

The ACCC's draft view was that the FAD should not contain price terms that attempt to address network congestion issues. However, the ACCC noted that, 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.

### **3.1.2 Summary of submissions**

The following subsections summarise the submissions received from industry in response to the March 2013 Draft Report.

#### ***Choice of pricing methodology***

Macquarie Telecom submitted that it welcomed the ACCC's draft decision to adopt a cost-based methodology, and specifically the FLSM, for setting price terms for the wholesale ADSL FAD.<sup>39</sup> Macquarie Telecom submitted that a cost-based methodology was appropriate for reasons including: consistency with the pricing methodology used for other declared fixed line services (and industry best practice); promoting the efficient supply of access services by ensuring that the access provider's costs are recovered; providing more regulatory certainty compared to the retail-minus approach (including by locking in the value of the initial Regulatory Asset Base (RAB)); and leveraging the ACCC's investment in the development of the FLSM as well as industry's collective general support for the FLSM.<sup>40</sup>

Telstra considered that a retail-minus methodology should be used to estimate prices for wholesale ADSL. In support of its view, Telstra submitted that: retail-minus is relatively inexpensive and simple to implement; 'the effort required to accurately identify the correct cost-based price is significant'; retail-minus would ensure that sufficient margins are maintained between retail and wholesale prices to encourage the efficient entry of firms into the market; and that the 'substantial risks' of setting an incorrect price level are much greater when setting a cost-based price relative to retail-minus.<sup>41</sup> Further, Telstra submitted that the ACCC's concerns about the retail-minus methodology—relating to monopoly profits and Telstra's ability to influence the estimated 'retail price'—were misplaced.<sup>42</sup> Telstra stated that the level of effective competition in the market for ADSL services would ensure that monopoly profits would be competed away and that it was 'highly unlikely that Telstra would be able to influence the 'retail price''.<sup>43</sup>

Telstra stated that cost-based pricing can discourage investment and submitted that retail-minus pricing 'would encourage investment more efficiently [than cost-based pricing] by signalling demand for additional investment'.<sup>44</sup> Telstra submitted that the FLSM is not suited to a service with rapidly growing demand. It stated that, because the revenue requirement is

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<sup>39</sup> Macquarie Telecom, April 2013 submission, pp. 2-3.

<sup>40</sup> Macquarie Telecom, April 2013 submission, pp. 2-3.

<sup>41</sup> Telstra, April 2013 submission, pp. 15-16.

<sup>42</sup> Telstra, April 2013 submission, p. 16.

<sup>43</sup> Telstra, April 2013 submission, p. 16.

<sup>44</sup> Telstra, April 2013 submission, p. 14.



set *ex ante* in a building block model (BBM), if demand grows faster than forecast the wholesale price will have been set too low to recover the revenue required.<sup>45</sup>

AAPT submitted that it supported the ACCC's draft decision to use a BBM to determine wholesale ADSL prices because this approach will best promote the LTIE relative to other potential pricing approaches.<sup>46</sup>

Herbert Geer (on behalf of iiNet) supported the ACCC's decision to use a BBM to estimate prices for wholesale ADSL, but submitted that it was concerned that the ACCC's application of the methodology 'allows Telstra to over-recover its investment'.<sup>47</sup> It submitted that this would result in 'excessive' wholesale ADSL charges that 'will impede competition and are contrary to the LTIE'.<sup>48</sup>

Optus submitted that, although it welcomed the ACCC's decision to use the FLSM to set prices for wholesale ADSL, it had some 'significant concerns' with the ACCC's implementation of the price modelling.<sup>49</sup> Optus stated that it was generally accepted that setting access prices based on efficient costs promotes the LTIE and the legitimate commercial interests of access providers.<sup>50</sup> However, it submitted that the adoption of an appropriate methodology 'is only the first step' and that appropriate cost inputs and modelling assumptions were also required for regulated prices to promote the LTIE.<sup>51</sup>

### ***Network congestion***

Macquarie Telecom submitted that it strongly supported the ACCC's draft decision to not include price terms in the wholesale ADSL FAD that account for the effect of network congestion.<sup>52</sup> Macquarie Telecom reiterated its views that the ACCC should not have entertained Telstra's claims for including price terms that account for network congestion.<sup>53</sup> Macquarie stated that it was concerned that the ACCC had left open the possibility that it might consider congestion pricing in future FAD inquiries if Telstra were to implement retail pricing structures which actively managed congestion.<sup>54</sup>

Telstra submitted that the ACCC's proposed prices were 'set at a level sufficient to support existing usage and prevent a greater level of congestion' during the period of the wholesale ADSL FAD.<sup>55</sup> However, it submitted that in the longer term a cost-based methodology would constrain its ability to continue to manage congestion and provide a better quality experience to all end-users of its ADSL services.<sup>56</sup> Telstra stated that a retail-minus approach would ensure that retail and wholesale prices managed congestion to the same extent.<sup>57</sup>

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<sup>45</sup> Telstra, April 2013 submission, p. 16.

<sup>46</sup> AAPT, April 2013 submission, p. 3.

<sup>47</sup> Herbert Geer, April 2013 submission, p. 5.

<sup>48</sup> Herbert Geer, April 2013 submission, p. 5.

<sup>49</sup> Optus, April 2013 submission, p. 3.

<sup>50</sup> Optus, April 2013 submission, p. 3.

<sup>51</sup> Optus, April 2013 submission, p. 3.

<sup>52</sup> Macquarie Telecom, April 2013 submission, p. 3.

<sup>53</sup> Macquarie Telecom, April 2013 submission, p. 3.

<sup>54</sup> Macquarie Telecom, April 2013 submission, p. 3.

<sup>55</sup> Telstra, April 2013 submission, p. 9.

<sup>56</sup> Telstra, April 2013 submission, p. 9.

<sup>57</sup> Telstra, April 2013 submission, p. 9.

Telstra reiterated its previous submissions relating to the value that retail customers placed on a better broadband experience and the tools and instruments available to Telstra to manage congestion (price, investment and technical measures).<sup>58</sup> Telstra identified some technical measures it had undertaken such as voluntary trials with retail customers and a ‘sophisticated reporting mechanism to identify high volume users on congested DSLAMs’.<sup>59</sup>

Telstra reiterated its submissions that, contrary to the ACCC’s views in the March 2013 Draft Report, its retail broadband prices helped to address congestion through increasing marginal prices.<sup>60</sup> Telstra submitted that: it does not sell broadband plans by gigabyte (GB); consumers face higher prices for higher data use; it does not offer an unlimited usage plan; **Telstra c-i-c** [Telstra c-i-c]; there is no guarantee that demand would diminish if plans applied constant average prices per GB; and unmetered content ‘is not the content that is demanded at peak times’ and therefore is not contributing to network congestion.<sup>61</sup> In support of this submission, Telstra submitted a consultant’s report from Frontier Economics. The report stated that ‘changing the structure of prices in a dramatic way is likely to have highly unpredictable effects on total network usage’ and that ‘it is not possible to conclude that Telstra’s pricing encourages relatively high network use and therefore traffic on its network’.<sup>62</sup> Frontier Economics submitted that the structure of Telstra’s plans cannot be said to encourage network congestion.<sup>63</sup>

Telstra reiterated its views that a cost-based methodology is not designed to manage congestion as effectively as retail-minus because it sets prices based on production costs which may be lower than socially optimal costs.<sup>64</sup> Telstra stated that the retail-minus approach had a number of advantages over cost-based pricing for managing congestion, including its responsiveness to changes in demand and prices, ‘utility in the prevention of price squeezes’ and the prevention of ‘free riding’ by access seekers on Telstra’s efforts to manage congestion.<sup>65</sup> Frontier Economics’ report also made similar points.<sup>66</sup>

AAPT submitted that it supported the ACCC’s draft decision to reject the implementation of congestion pricing in the draft FAD’s price terms.<sup>67</sup> It stated that implementing congestion pricing would ‘certainly create anti-competitive outcomes’ and that ‘it is unlikely to ever be appropriate to implement congestion pricing at the wholesale level’ because congestion issues ‘are already being adequately accounted for’.<sup>68</sup>

### 3.1.3 ACCC final view

The ACCC’s final views on the choice of pricing methodology and network congestion are described in this section.

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<sup>58</sup> Telstra, April 2013 submission, pp. 10-11.

<sup>59</sup> Telstra, April 2013 submission, p. 11.

<sup>60</sup> Telstra, April 2013 submission, p. 11.

<sup>61</sup> Telstra, April 2013 submission, pp. 11-13.

<sup>62</sup> Frontier Economics, April 2013 submission, p. 7 and p. 9.

<sup>63</sup> Frontier Economics, April 2013 submission, p. 10.

<sup>64</sup> Telstra, April 2013 submission, pp. 13-14.

<sup>65</sup> Telstra, April 2013 submission, pp. 14-15.

<sup>66</sup> Frontier Economics, April 2013 submission, p. 11.

<sup>67</sup> AAPT, April 2013 submission, p. 2.

<sup>68</sup> AAPT, April 2013 submission, p. 3.

### *Choice of pricing methodology*

The ACCC has had regard to the submissions received in response to the March 2013 Draft Report and maintains its view that prices for the wholesale ADSL FAD should be estimated using a cost-based methodology. Telstra's submission reiterated a number of its previous views in favour of the retail-minus approach, while other submissions were generally supportive of the use of a cost-based methodology. Some submissions raised issues with the ACCC's implementation of the methodology: these are addressed in section 3.2 below.

The ACCC has noted that the retail-minus approach has certain advantages when compared to the cost-based approach:

- Retail-minus is usually less information intensive than a cost-based approach and therefore can 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 ACCC also considers that retail-minus has a number of limitations, including a greater risk of setting prices that do not reflect costs because retail-minus does not directly estimate the costs of providing the service. The retail-minus methodology could also build into wholesale ADSL prices any monopoly profits that are included in retail ADSL prices, which could impact efficiency and competition in downstream markets. The ACCC does not agree with Telstra's submissions that these concerns are not significant.

The ACCC does not agree with Telstra's submission that the FLSM is not suited to estimating prices for a service with rapidly growing demand. The ACCC has interpreted Telstra's statement on 'demand' as referring to growth in wholesale ADSL throughput as opposed to wholesale ADSL SIOs (which have been declining in recent years). The price structure for wholesale ADSL, based on the revenue requirement from the FLSM, includes a usage-based AGVC/VLAN<sup>69</sup> charge. Therefore, any increase in usage at peak times is likely to lead to an increase in AGVC purchases by access seekers which will yield extra revenue. In addition, under a cost-based pricing approach Telstra will be able to recover a return on and return of capital for any investments it makes to address congestion on its network.

The ACCC recognises that there are challenges in estimating cost-based prices as outlined in section 3.6 of the March 2013 Draft Report:

- 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-

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<sup>69</sup> Aggregating Virtual Circuit/Virtual Local Area Network.

based wholesale ADSL prices is already available. Furthermore, the FLSM already provides a basis for allocating costs to different services.

The ACCC considers that there are a number of advantages of a cost-based methodology, relative to retail-minus, having regard to the legislated matters:

- 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.<sup>70</sup> 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<sup>71</sup> and thereby promote competition in downstream markets.<sup>72</sup>
- The cost-based approach ensures the access provider is adequately compensated for the costs of providing the wholesale ADSL service over time.<sup>73</sup> The estimated revenue requirement allows the access provider to recoup an estimate of its efficiently incurred costs, including a commercial rate of return. Use of a cost-based approach 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.<sup>74</sup>
- A cost-based price directly provides for the recovery (over time) of the costs of the access provider's investments.<sup>75</sup> The incentive to invest is strengthened by setting the regulated price to allow the access provider to recover the cost of its investment.<sup>76</sup>
- 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.<sup>77</sup> This is likely to reduce the risk of Telstra over- or under-recovering its costs of supplying the declared fixed line services.<sup>78</sup> This will promote the efficient operation of wholesale ADSL and other carriage services.<sup>79</sup>
- 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.<sup>80</sup> This certainty may promote efficient investment and competition in the markets for carriage services.<sup>81</sup>

The ACCC has also considered how the retail-minus approach may address the legislated matters, relative to the cost-based methodology:

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<sup>70</sup> Subsection 152BCA(1)(d) of the CCA.

<sup>71</sup> Subsection 152BCA(1)(c) of the CCA.

<sup>72</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>73</sup> Subsection 152BCA(1)(b) of the CCA.

<sup>74</sup> Subsection 152BCA(1)(f) of the CCA.

<sup>75</sup> Subsection 152BCA(1)(b) of the CCA.

<sup>76</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>77</sup> Subsection 152BCA(2) of the CCA.

<sup>78</sup> Subsection 152BCA(1)(b) of the CCA.

<sup>79</sup> Subsection 152BCA(1)(g) of the CCA.

<sup>80</sup> Subsections 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

<sup>81</sup> Subsection 152BCA(1)(a) of the CCA.

- 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. Prices that do not reflect the efficient costs of supplying a service are expected to result in less efficient use of and investment in the infrastructure used in supplying that service (i.e., the wholesale ADSL service).<sup>82</sup>
- Prices based on a retail-minus approach may be able to address immediate competition concerns. However, the retail-minus approach would build into wholesale ADSL prices any monopoly profits that are included in retail ADSL prices. In a vertically integrated industry, the access provider can also use any monopoly profits in countering the retail price offers of its downstream competitors (that is leverage the profits made at the wholesale level to undercut its retail competitors).<sup>83</sup>
- A retail-minus approach can meet the legitimate business interests of the access provider in that prices will allow the access provider to recover its costs of supplying wholesale ADSL services (including, at least, its direct costs).<sup>84</sup> 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.<sup>85</sup>
- 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 regarding the cost-based approach).<sup>86</sup>

Therefore, the ACCC maintains its view that, on balance, 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.

The ACCC acknowledges Optus' submission that the implementation, as well the choice, of the pricing methodology is important in determining whether the estimated prices are efficient and meet the statutory criteria. The ACCC considers that it has scrutinised the inputs into the model in sufficient detail and that the estimated cost-based prices are reasonable. The ACCC's implementation of the pricing methodology is discussed in more detail in section 3.2.

### ***Network congestion***

The ACCC's draft view regarding network congestion was that unless Telstra's retail end-users on the ADSL network faced price signals related to their usage when the network is congested, then any attempts to implement a price measure to address congestion for wholesale ADSL would likely be ineffective and negatively impact competition.<sup>87</sup>

The ACCC has noted that current retail ADSL offerings appeared to encourage greater use of data rather than seeking to manage data growth or congestion (for example, the implied 'cost

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<sup>82</sup> Subsections 152BCA(1)(a), 152BCA(1)(d) and 152BCA(1)(g) of the CCA

<sup>83</sup> Subsections 152BCA(1)(a), 152BCA(1)(c) and 152BCA(1)(d) of the CCA

<sup>84</sup> Subsection 152BCA(1)(b) of the CCA.

<sup>85</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>86</sup> Subsection 152BCA(1)(c) of the CCA.

<sup>87</sup> Subsection 152BCA(1)(a) of the CCA.

per gigabyte' of retail plans substantially decreases as the data allowances for retail plans increase, as well as plans offering significant amounts of unmetered content). The ACCC was not advocating, however, for any particular retail pricing scheme to reduce total usage on Telstra's ADSL network. As noted in Frontier Economics' report, the effect on total usage would depend on the details of any alternative pricing scheme that was implemented.

If there are concerns regarding congestion on the ADSL network, the ACCC notes that there are likely to be retail pricing structures that more effectively address data growth and congestion than the structures currently in place. The ACCC notes recent comments in a speech at the 2013 Comms Day summit by Telstra's Group Managing Director for Innovation, Products and Marketing, Kate McKenzie, regarding time-of-day pricing.<sup>88</sup> This speech recognised that 'a relatively small number of people, using a relatively small number of applications at relatively concentrated times of the day, will increasingly determine the total and peak load on the network' and that investment demands could 'be avoided by using pricing to at least partially smooth demand over the day'.<sup>89</sup>

The ACCC notes that Telstra has not provided any evidence to support its statement that 'unmetered content is not the content that is demanded at peak times'.<sup>90</sup> It appears that a significant amount of real time entertainment content—a type of traffic which has grown strongly, according to Telstra<sup>91</sup>—is offered to Telstra's retail ADSL end-users on an unmetered basis. Further, as noted by Frontier Economics, 'there will be strong incentive to use (zero-priced) data' for end-users.<sup>92</sup>

Additionally, the evidence presented by Telstra, and relied upon by Frontier Economics in its analysis of Telstra's retail price structures, on the distribution of customers on different plans appears to be older data (from Telstra's retail-minus model) that was submitted prior to the ACCC's clarifications and corrections of this data. The analysis only appears to consider a subset of residential ADSL plans, and does not consider the distribution of SIOs on business and in particular residential bundled plans with different usage limits. The ACCC notes that data supplied in response to the ACCC's August 2012 information request to Telstra suggests that [Telstra c-i-c] [Telstra c-i-c].<sup>93</sup>

Telstra submitted that cost-based pricing may not result in the efficient use of or investment in infrastructure when there are congestible networks.<sup>94</sup> 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 (e.g. more efficient use of the network) 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.<sup>95</sup>

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<sup>88</sup> Communications Day, *Telstra to industry: take a fresh look at smart pricing*, 9 April 2013.

<sup>89</sup> Communications Day, *Telstra to industry: take a fresh look at smart pricing*, 9 April 2013, p. 1.

<sup>90</sup> Telstra, April 2013 submission, p. 13.

<sup>91</sup> Telstra, July 2012 submission, p. 9.

<sup>92</sup> Frontier Economics, April 2013 submission, p. 6.

<sup>93</sup> Frontier Economics, April 2013 submission, p. 4.

<sup>94</sup> Telstra, August 2012 pricing submission, p. 14.

<sup>95</sup> Subsections 152BCA(1)(a), 152BCA(1)(d) and 152BCA(1)(g) of the CCA.

Telstra also 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>96</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.<sup>97</sup>

The ACCC has noted Telstra’s submission that a retail-minus methodology is better suited to managing congestion than cost-based pricing.<sup>98</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, as noted in the March 2013 Draft Report, there may be significant complexities in determining the best way to implement any resulting changes for wholesale ADSL, which would likely require consideration and consultation.<sup>99</sup> The ACCC does not consider that retail-minus would necessarily be a better approach in these circumstances.

In addition, the ACCC notes that the costs of any additional investment in expanding network capacity to reduce congestion would not be reflected directly in a wholesale price estimated using the retail-minus methodology. 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.

The ACCC’s final view, having had regard to the submissions received on network congestion, is that the wholesale ADSL FAD should not contain price terms that attempt to address network congestion issues. As noted in the March 2013 Draft Report, 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.

## **3.2 Implementation of the cost-based pricing methodology**

This section contains subsections describing the ACCC’s implementation of the cost-based pricing methodology. Each subsection contains a summary of the ACCC’s view in the March 2013 Draft Report, a summary of submissions received, and the ACCC’s final view on the implementation of the cost-based methodology for the wholesale ADSL FAD.

### **3.2.1 Establishing assets used to supply wholesale ADSL**

#### *March 2013 Draft Report view*

The ACCC requested that Telstra provide a list of assets used to supply wholesale ADSL. After analysing Telstra’s asset register, the ACCC identified a number of assets—such as Digital Subscriber Line Access Multiplexers (DSLAMs), Broadband Remote Access Servers (BRASs), Internet Gateway Routers (IGRs) and other data equipment—that needed to be

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<sup>96</sup> Telstra, August 2012 pricing submission, p. 14.

<sup>97</sup> Subsection 152BCA(1)(b) of the CCA.

<sup>98</sup> Telstra, April 2013 submission, pp. 14-15.

<sup>99</sup> ACCC, March 2013 Draft Report, p. 25.

added to the previous (July 2011) version of the FLSM to enable the estimation of prices for the wholesale ADSL service.

The ACCC decided to add all of these assets to one new asset class in the FLSM called 'Data Equipment'.<sup>100</sup> The ACCC determined that the 'Data Equipment' asset class's Regulatory Asset Base (RAB) value and tax asset value were \$1.094 billion and \$1.087 billion, respectively, as at 1 July 2012. The ACCC noted that costs were allocated to wholesale ADSL from the FLSM's Core asset classes only because costs associated with the Customer Access Network (CAN), such as access line costs, are to be recovered from the Public Switched Telephone Network (PSTN) voice service operating on the same line as the wholesale ADSL service.

### *Summary of submissions*

Herbert Geer submitted that the ACCC had not provided a reasonable level of granularity in its draft report or model to enable access seekers to scrutinise and assess the reasonableness of the model's results.<sup>101</sup> It stated that the ACCC had failed to explain what assets, or nature of assets, it had concluded should be added to the FLSM to enable the estimation of prices for wholesale ADSL and that the ACCC's proposed RAB value for the 'Data Equipment' asset class was 'significant'.<sup>102</sup>

Herbert Geer submitted that Telstra had refused its request for access to Telstra's wholesale ADSL asset register and that Telstra was the only other party with access to data that was fundamentally vital to a proper assessment of the ACCC's application of the cost-based pricing methodology.<sup>103</sup> It stated that this lack of transparency is unacceptable in the FAD process given the importance of wholesale ADSL to competition in telecommunications markets and its impact on the interests of access seekers.<sup>104</sup>

Optus stated that there was no evidence that 'Telstra's RAF cost inputs had been investigated to identify and exclude inefficient costs.'<sup>105</sup> Optus stated that it recognised that an analysis of the efficiency of Telstra's costs 'may not be practical' in the current FAD process.<sup>106</sup> As an alternative, Optus submitted that the ACCC should compare the FLSM's outputs to efficient comparators, and it could be inferred from any inconsistencies (between the FLSM's outputs and the efficient comparators) that the costs incurred were above the prudent level.<sup>107</sup>

Optus submitted that the ACCC had 'already artificially uplifted the RAB by \$911 million to maintain ULLS pricing stability' and that it was concerned that the ACCC was 'again proposing a RAB adjustment that results in stable access prices, rather than examining whether the RAB adjustment reflects efficient and prudent actual costs'.<sup>108</sup> Based on its own

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<sup>100</sup> However, the ACCC noted that these assets corresponded to three different asset classes in the Regulatory Accounting Framework (RAF) Record Keeping Rule (RKR): 'Data Equipment', 'Switching Equipment – Local' and 'Pair Gain Systems'.

<sup>101</sup> Herbert Geer, April 2013 submission, p. 5.

<sup>102</sup> Herbert Geer, April 2013 submission, p. 5.

<sup>103</sup> Herbert Geer, April 2013 submission, p. 5.

<sup>104</sup> Herbert Geer, April 2013 submission, p. 5.

<sup>105</sup> Optus, April 2013 submission, p. 5.

<sup>106</sup> Optus, April 2013 submission, p. 6.

<sup>107</sup> Optus, April 2013 submission, p. 6.

<sup>108</sup> Optus, April 2013 submission, p. 6.



DSLAM costs and data on the number of DSLAMs, BRASs and IGRs in Telstra's network, Optus submitted that the implied cost for the 'Data Equipment' asset class in the FLSM 'may be above the efficient level'.<sup>109</sup> Optus submitted, based on this analysis, that the competitive cost to supply ADSL is around [c-i-c] [c-i-c] of the level implied by the FLSM, and that the initial RAB for 'Data Equipment' in the FLSM should be multiplied by this proportion.

### *ACCC final view*

The ACCC confirms its view that the assets it identified as being used to supply wholesale ADSL in the March 2013 Draft Report are appropriate. These assets include: DSLAMs (and associated housing, racks and ADSL line cards); BRASs; IGRs; switches; servers; routers; and associated software. The ACCC also maintains its view that these assets should all be allocated to a single asset class, 'Data Equipment', in the FLSM for the reasons outlined in the March 2013 Draft Report.<sup>110</sup> The 'Data Equipment' asset class's Regulatory Asset Base (RAB) value and tax asset value are \$1.094 billion and \$1.087 billion, respectively, as at 1 July 2012. Further, the ACCC has maintained the RAB and tax asset values for all other asset classes in the FLSM. In reaching its final view, the ACCC has taken into account the submissions received. The ACCC's response to Optus' submission on the appropriate value of the RAB for the 'Data Equipment' asset class is contained in section C.1 of appendix C. The ACCC has responded to Herbert Geer's submissions regarding access to data in section 1.3.

## **3.2.2 Capital expenditure**

### *March 2013 Draft Report view*

The ACCC considered that the capital expenditure forecasts from the July 2011 FADs should be retained for all 'shared' asset classes in the FLSM. For the 'Data Equipment' asset class, Telstra did not provide the capital expenditure forecasts requested by the ACCC. Therefore, the ACCC estimated capital expenditure forecasts for this asset class by assuming that capital expenditure would grow by [c-i-c] [c-i-c] per annum, in nominal terms, from the most recent year of actual capital expenditure data available (2011-12). The ACCC noted that this assumed growth rate was used in the July 2011 fixed line services FADs. The ACCC deflated the (nominal) capital expenditure figures provided by Telstra for the 2010, 2011 and 2012 financial years to (real) 1 July 2009 dollars using a simple average of the Australian Bureau of Statistics' (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. Using this methodology, the ACCC forecast that capital expenditure for the 'Data Equipment' asset class in 2013-14 would be [c-i-c] [c-i-c], in 1 July 2009 dollars.

### *Summary of submissions*

Macquarie Telecom submitted that, although it supported the ACCC's decision to estimate its own capital expenditure forecasts given Telstra's failure to provide forecasts, the ACCC's

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<sup>109</sup> Optus, April 2013 submission, p. 9.

<sup>110</sup> ACCC, March 2013 Draft Report, pp. 35-36.

capital expenditure forecasts for the ‘Data Equipment’ asset class may be ‘too generous’.<sup>111</sup> Macquarie submitted that Telstra has very little incentive to make any investment in its copper network given that it is being decommissioned.<sup>112</sup> Macquarie considered that a decline in nominal capital expenditure for the ‘Data Equipment’ asset class would be a ‘more likely scenario’ than the ACCC’s approach in the draft decision which resulted in a decline in real capital expenditure.<sup>113</sup>

Herbert Geer submitted that the actual and forecast capital expenditure values for 2011-12 to 2013-14 for the ‘Data Equipment’ asset class were ‘significant’.<sup>114</sup>

Optus submitted that Telstra’s ‘claimed inability’ to provide forecasts to the ACCC is ‘unconvincing’, given that Telstra is a publicly listed company that regularly provides updates to its shareholders regarding expectations for revenue, profit and expenditure.<sup>115</sup> Optus stated that forecasts of capital and operating expenditure would also be required by Telstra for internal budgeting and planning purposes.<sup>116</sup> On this basis, Optus submitted that ‘the ACCC is entitled to draw the inference that Telstra’s withholding of forecast data is a strategic practice, which it is repeating due to the ACCC’s preferential assumptions in the FLSM’.<sup>117</sup> Optus submitted that the ACCC should consider issuing a section 155 notice to Telstra to gain access to Telstra’s internal forecasts and that the ACCC should ‘take a firm approach with Telstra and adopt ‘low end’ forecasts’ to encourage Telstra to provide the ACCC with its forecasts.<sup>118</sup>

Optus submitted that the ACCC’s approach to forecasting capital expenditure, using projections based on historic data, ‘does not appear reasonable’.<sup>119</sup> Optus submitted this approach was criticised during the 2011 fixed line services FADs inquiry; it stated that the same criticisms applied in the current inquiry, meaning that the forecasts were ‘unrealistically high’.<sup>120</sup> Optus submitted that it was unlikely that historic levels of capital expenditure would be maintained, given the deployment of the National Broadband Network (NBN), and that the ACCC had accepted that other operators are less likely to deploy DSLAMs given the deployment of the NBN.<sup>121</sup> Optus stated that Telstra’s public statements—including its upgrade of 2,000 sites to ADSL2+ and its commitment to reduce capital expenditure to 12-13 per cent of sales—were evidence that nominal capital expenditure was likely to decrease and that future expenditure would be mobile-related or driven by compliance with Telstra’s NBN agreement.<sup>122</sup>

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<sup>111</sup> Macquarie Telecom, April 2013 submission, p. 4.

<sup>112</sup> Macquarie Telecom, April 2013 submission, p. 4.

<sup>113</sup> Macquarie Telecom, April 2013 submission, p. 4.

<sup>114</sup> Herbert Geer, April 2013 submission, p. 5.

<sup>115</sup> Optus, April 2013 submission, p. 16.

<sup>116</sup> Optus, April 2013 submission, p. 16.

<sup>117</sup> Optus, April 2013 submission, p. 16.

<sup>118</sup> Optus, April 2013 submission, p. 16.

<sup>119</sup> Optus, April 2013 submission, p. 16.

<sup>120</sup> Optus, April 2013 submission, p. 16.

<sup>121</sup> Optus, April 2013 submission, p. 17.

<sup>122</sup> Optus, April 2013 submission, p. 17.

### *ACCC final view*

The ACCC notes that a number of submissions to the March 2013 Draft Report were critical of Telstra's failure to provide capital expenditure forecasts to the ACCC. The ACCC intends to vary the BBM RKR to ensure that data required to estimate prices for wholesale ADSL, including capital expenditure and operating expenditure, will be collected under the BBM RKR for future FAD inquiries (see section 3.2.8 on the BBM RKR below). For the purposes of the current wholesale ADSL FAD, the ACCC has used its own capital expenditure forecasts.

The ACCC considers that, in the absence of specific Telstra forecasts, the use of historic data to estimate forecasts provides a reasonable indicator of the expenditure required for the period of the current wholesale ADSL FAD (the ACCC's reasons are discussed in more detail in sections C.2 and C.3.2 of appendix C). The ACCC recognises that the incentives to invest further in DSLAMs, and other copper-specific infrastructure, may be reduced due to the rollout of the NBN (as discussed in section 6.1.4). In response to submissions that questioned the assumptions used to estimate capital expenditure forecasts in the March 2013 Draft Report, the ACCC has examined Telstra's recent capital expenditure, as reported in Telstra's wholesale ADSL asset register, in more detail. The findings of the ACCC's analysis are discussed in section C.2 of appendix C. On the basis of its findings, the ACCC considers that it has insufficient evidence to depart from the capital expenditure forecasts used for the 'Data Equipment' asset class in the March 2013 Draft Report.

The ACCC's final view is to maintain the capital expenditure forecasts used in the March 2013 Draft Report.

The ACCC notes Telstra's comments (as quoted by Optus) that Telstra's capital expenditure in the coming years may be largely driven by investment in its mobile network and its commitments under the Definitive Agreements with NBN Co. The ACCC's response to this issue is discussed in more detail in section 3.2.6 below.

### **3.2.3 Depreciation and asset lives**

#### *March 2013 Draft Report view*

The ACCC considered that the asset lives and depreciation schedules from the July 2011 FADs should be retained for all 'shared' asset classes in the FLSM. For the 'Data Equipment' asset class, the ACCC estimated asset lives using a similar methodology to the methodology used in the July 2011 FADs: total asset lives were estimated from the Analysys model and remaining asset lives (as at 1 July 2009) were estimated by applying the undepreciated proportion of the asset value from the RAF to the estimated total asset life. The resulting estimated total asset life for 'Data Equipment' was 6 years and the estimated remaining asset life was [c-i-c] [c-i-c].

### *Summary of submissions*

Telstra stated that table 8.2.3 in the FLSM contains ‘depreciated tax values’ that are hard coded, rather than calculated values, for the 2012-13 and 2013-14 years.<sup>123</sup>

### *ACCC final view*

The ACCC notes that Telstra’s submission relating to ‘hard coding’ of values in table 8.2.3 relates to a decision made by the ACCC in the July 2011 FADs. In the July 2011 FADs, the ACCC decided to use a trend level of regulatory depreciation for the ‘Pair Gain Systems’ and ‘Switching Equipment – Local’ asset classes.<sup>124</sup> The ACCC considers that this adjustment should be retained for the current wholesale ADSL FAD.

The ACCC confirms its view from the March 2013 Draft Report that the appropriate total asset life for the ‘Data Equipment’ asset class is 6 years and the appropriate remaining asset life, as at 30 June 2009, is [c-i-c] [c-i-c].

## **3.2.4 Operating expenditure**

### *March 2013 Draft Report view*

The ACCC considered that the operating expenditure forecasts from the July 2011 FADs should be retained for all ‘shared’ asset classes in the FLSM. The ACCC estimated operating expenditure forecasts for the ‘Data Equipment’ asset class using a similar methodology to that adopted in the July 2011 FADs. A five-year average of RAF operating expenditure data (in real terms, with the nominal data deflated using the same index as for capital expenditure) was calculated and an 80 per cent mark-up for indirect operating expenditure was applied. The ACCC made two adjustments to the methodology. First, some operating expenditure from the RAF’s ‘Pair Gain Systems’ and ‘Switching Equipment – Local’ asset classes was re-classified to the combined ‘Data Equipment’ asset class (consistent with the re-classification of assets in the RAB). Second, the ACCC adjusted the operating expenditure figures to reflect the fact that not all of the ‘Data Equipment’ operating expenditure in the RAF relates to assets used to supply the wholesale ADSL service. Using this methodology, the ACCC forecast that operating expenditure for the ‘Data Equipment’ asset class in 2013-14 would be [c-i-c] [c-i-c], in 1 July 2009 dollars.

### *Summary of submissions*

Macquarie Telecom submitted that the ACCC’s forecasts for operating expenditure, in the absence of a forecast provided by Telstra, may be ‘too generous’.<sup>125</sup> Macquarie submitted that the 80 per cent mark-up for indirect operating expenditure appeared to be ‘particularly generous’.<sup>126</sup> Additionally, it submitted that Telstra’s future operating expenditure would likely be lower than past operating expenditure given that Telstra’s copper network is being

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<sup>123</sup> Telstra, April 2013 submission, p. 18.

<sup>124</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services: final report*, July 2011, p. 77.

<sup>125</sup> Macquarie Telecom, April 2013 submission, p. 4.

<sup>126</sup> Macquarie Telecom, April 2013 submission, p. 4.

decommissioned, which meant that Telstra ‘has every incentive to limit its operating expenditure on this network and in particular maintenance expenditure’.<sup>127</sup>

Optus’ submission raised similar concerns in relation to operating expenditure as it did for capital expenditure (see summary of Optus’ submission in section 3.2.2).

### *ACCC final view*

The ACCC notes that it did not receive any submissions that specifically addressed the methodology used to estimate direct operating expenditure for the ‘Data Equipment’ asset class in the March 2013 Draft Report. While Macquarie Telecom submitted that the ACCC’s use of an 80 per cent mark-up for indirect operating expenditure was ‘generous’, the ACCC notes that it did not receive any submissions proposing alternative methods of estimating the mark-up. Therefore, the ACCC decided to review the mark-up for indirect operating expenditure using more up-to-date data.<sup>128</sup>

The ACCC noted in the July 2011 FADs that estimates of the mark-up range from Analysys’ 60 per cent to 104 per cent in Telstra’s TEA (Telstra Efficient Access) model.<sup>129</sup> Using RAF data and the methodology for calculating the mark-up described in the Analysys model’s documentation,<sup>130</sup> the ACCC estimates that the average mark-up was around 76 per cent over the five years to 2011-12. The ACCC notes that the mark-up ranges from 58.2 per cent to 86.5 per cent over this five year period, and it has been relatively close to 80 per cent in most years. On the basis of the range of mark-up estimates considered in the July 2011 FADs, the use of an 80 per cent mark-up in the July 2011 FADs, and the ACCC’s analysis using more recent RAF data, the ACCC considers that a mark-up of 80 per cent for indirect operating expenditure is appropriate.

The ACCC has also had regard to Macquarie Telecom’s submission that Telstra’s incentives to maintain its copper network in the future may be limited, given that the network is being decommissioned. However, the ACCC considers that any such incentives are less likely to affect the ‘Data Equipment’ asset class—the only asset class in the FLSM for which new operating expenditure forecasts have been estimated for the wholesale ADSL FAD—given the nature of many of the assets in this asset class (e.g. routers). The ACCC will reconsider the operating expenditure forecasts for all asset classes in the inquiry to make the next FADs for wholesale ADSL and the fixed line services (should these services be re-declared).

The ACCC’s final view is that the operating expenditure forecasts used in the March 2013 Draft Report are appropriate.

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<sup>127</sup> Macquarie Telecom, April 2013 submission, p. 4.

<sup>128</sup> The ACCC used RAF data for 2010-11 and 2011-12 in this analysis; this data was not available at the time of the July 2011 FADs for the fixed line services.

<sup>129</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services: final report*, July 2011, p. 86.

<sup>130</sup> The Analysys model’s documentation is available on the ACCC’s website: <http://transition.acc.gov.au/content/index.phtml/itemId/889281>.

### 3.2.5 Demand

#### *March 2013 Draft Report view*

After analysing data on recent trends in wholesale ADSL, retail ADSL, Unconditioned Local Loop Service (ULLS) and Line Sharing Service (LSS) SIOs, the ACCC forecast that wholesale ADSL SIOs would decline by 5 per cent in both 2012-13 and 2013-14. The ACCC forecast usage (in Megabits per second (Mbps) per SIO) for 2013-14 using an arithmetic progression of the available usage per SIO data for June 2011 and June 2012 across ADSL customers on Telstra's ADSL network (including both wholesale and retail ADSL customers).

#### *Summary of submissions*

Macquarie Telecom submitted that it was concerned that Telstra had been unable to provide demand forecasts for wholesale ADSL.<sup>131</sup> It submitted that the ACCC's SIO forecasts in estimating draft FAD prices may be 'too pessimistic'.<sup>132</sup>

Telstra stated that the ACCC had used inconsistent sources of demand for forecasting usage (in Mbps per SIO) in the FLSM.<sup>133</sup> Telstra submitted that the ACCC had used data relating to Telstra Retail for 2010-11 but had used an average of total wholesale and retail ADSL usage for 2011-12. Further, Telstra submitted that it appeared that the ACCC had used SIO figures from Telstra's response to the ACCC's August 2012 request for information, but usage figures from Telstra's Telstra Economic Model (TEM) report for the June 2012 quarter.<sup>134</sup>

Telstra submitted that [Telstra c-i-c] [Telstra c-i-c].<sup>135</sup> Telstra stated '[i]t appears that the FLSM accounts for this as it has unitised AGVC/VLAN costs using AGVC/VLAN usage that wholesale customers face a separate charge for'.<sup>136</sup>

Optus submitted that 'it is unreasonable for the ACCC to accept Telstra's claims that it does not have accurate forecasts of data usage for the next few years' and that '[s]uch a claim is counter to basic corporate governance'.<sup>137</sup> In the absence of usage forecasts from Telstra, Optus submitted that the ACCC is not using appropriate forecasts of usage per SIO which was resulting in an 'unrealistic per Mbps rate' for AGVC.<sup>138</sup> Optus submitted that it was unclear what time period the 'average usage per SIO' figure was being calculated over, although 'one interpretation' was that it is usage calculated over a 12 month period.<sup>139</sup> Optus submitted that: the ACCC had erred in focusing on average usage per SIO when AGVC is a peak charge; and the ACCC should use Telstra's own stated growth rates of peak traffic rather than its own forecasts.<sup>140</sup>

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<sup>131</sup> Macquarie Telecom, April 2013 submission, p. 5.

<sup>132</sup> Macquarie Telecom, April 2013 submission, p. 5.

<sup>133</sup> Telstra, April 2013 submission, p. 17.

<sup>134</sup> Telstra, April 2013 submission, p. 17.

<sup>135</sup> Telstra, April 2013 submission, p. 18.

<sup>136</sup> Telstra, April 2013 submission, p. 18.

<sup>137</sup> Optus, April 2013 submission, p. 17.

<sup>138</sup> Optus, April 2013 submission, p. 11.

<sup>139</sup> Optus, April 2013 submission, p. 12.

<sup>140</sup> Optus, April 2013 submission, p. 12.

### *ACCC final view*

The following sections contain the ACCC's final demand forecasts for wholesale ADSL SIOs and usage (in Mbps per SIO) on Telstra's ADSL network.

#### *Usage forecasts*

The ACCC recognises that, because access seekers purchase AGVC/VLAN capacity to cater for peak usage, it would be inappropriate to set the AGVC charge based on a measure of usage that did not reflect peak usage. However, the ACCC considers that its estimates of 'usage' (in Mbps per SIO) used to calculate the AGVC/VLAN charge already reflect 'peak usage'. The ACCC used the term 'usage' in the March 2013 Draft Report because the figure relating to Mbps in Telstra's TEM reports is reported as 'Usage'. However, the ACCC has confirmed that this figure represents AGVC/VLAN and therefore already reflects peak usage. Accordingly, the ACCC has not altered the 'usage' figures using the method proposed by Optus.

Further, the ACCC does not consider it appropriate to use Optus' proposed growth rate of [c-i-c] [c-i-c] per annum—based on Telstra's stated growth rate in usage per SIO—to forecast AGVC per SIO for 2012-13 and 2013-14. First, the ACCC notes that this figure is based on Telstra Retail's AGVC per SIO whereas the ACCC's forecasts are for AGVC per SIO for all users of Telstra's ADSL network: that is, both Telstra's wholesale and retail customers. Second, the ACCC considers that Telstra's stated average growth rate of [c-i-c] [c-i-c] per annum may exceed the growth in usage on Telstra's ADSL network over more recent periods (when compared with available data sources). The ACCC has reached this view by examining both TEM data<sup>141</sup> and the full period of data available in figure 3 of Telstra's submission to the July 2012 Issues Paper.

The ACCC therefore maintains its view that its forecasting methodology for AGVC per SIO—an arithmetic progression of the data points for June 2011 and June 2012, and use of a mid-point of starting and ending values for each financial year—is appropriate.

The ACCC sought further information from Telstra, regarding AGVC/VLAN usage by Telstra's wholesale customers and Telstra Retail as at June 2011 and June 2012, in a letter on 19 April 2013. Based on the data provided by Telstra in response to this information request, the ACCC has amended the figures used in its 'usage per SIO' calculations. This data reflects two minor changes. First, the updated data includes peak usage by all of Telstra's retail and wholesale customers (including AGVC/VLAN usage where wholesale customers do not face a separate charge for this usage). Second, the updated data includes actual data on wholesale ADSL usage per SIO as at June 2011: the ACCC did not previously have consistent data available for this. The ACCC considers that use of this data addresses Telstra's concerns in relation to the use of inconsistent sources of demand data. Section 4.1.3 describes the ACCC's calculation of the AGVC price using these usage figures.

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<sup>141</sup> Using the four quarters of TEM data available for the 2012 calendar year.

### *SIO forecasts*

The ACCC recognises that there was a relatively small decline of around 6,000 wholesale ADSL SIOs reported in Telstra's financial results for the half year to December 2012.<sup>142</sup> However, as noted in the March 2013 Draft Report, over a period of five years to June 2012 there was an average decline of approximately 12 per cent per annum in wholesale ADSL SIOs. The ACCC considers that it is not appropriate to place excessive weight on a single data point—which is for a six-month period—in estimating future forecasts (as proposed by Macquarie Telecom). Therefore, the ACCC maintains its view that a forecast decline in wholesale ADSL SIOs of 5 per cent per annum is appropriate for 2012-13 and 2013-14.

### **3.2.6 Cost allocation factors**

#### *March 2013 Draft Report view*

The ACCC used a similar approach to estimating cost allocation factors as the approach used in the July 2011 FADs. The ACCC used cost allocation factors for wholesale ADSL derived either from the Analysys model (for six asset classes) or from a 'revenue share' method (for four asset classes) to calculate the initial cost allocation factors in the FLSM.

With the exception of the cost allocation factor for 'Transmission Equipment', the ACCC adjusted all initial cost allocation factors by the change in wholesale ADSL SIOs between 2008-09 (as forecast in the Analysys model) and the relevant year in the model. The ACCC noted that this methodology would effectively hold fairly constant the share of costs allocated to each unit of the service (i.e., each wholesale ADSL SIO). 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. The ACCC noted that this adjustment effectively mirrored the adjustment made to the 'Transmission Equipment' cost allocation factor for the PSTN OTA service in the July 2011 FADs.

#### *Summary of submissions*

Telstra submitted that the FLSM incorrectly allocates assets such as DSLAMs to services other than DSL despite the fact that these assets are used exclusively to provide DSL.<sup>143</sup> Telstra submitted that a more appropriate method would be to allocate DSLAM assets exclusively to DSL and then apply an appropriate cost allocation factor for these assets (for example, the ratio of wholesale DSL SIOs to the total of wholesale and retail DSL SIOs).<sup>144</sup>

Optus submitted that the cost allocation factors from the Analysys model may not accurately portray the cost drivers of capital and operating expenditure given Telstra's investment commitments under its agreements with NBN Co.<sup>145</sup> Optus submitted that the ACCC should 'investigate in greater detail how costs are allocated to NBN-related projects and WADSL-related projects' given that Telstra has publicly stated that its expenditure will be driven by

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<sup>142</sup> Telstra, *Telstra Corporation Limited Financial Results for the Half Year ended 31 December 2012*, 7 February 2013. When annualised, this represents a decline of less than 2 per cent.

<sup>143</sup> Telstra, April 2013 submission, p. 18.

<sup>144</sup> Telstra, April 2013 submission, p. 18.

<sup>145</sup> Optus, April 2013 submission, p. 17.



its agreements with NBN Co and investment in its mobile network.<sup>146</sup> Optus submitted that there is ‘little doubt that information exists at this granular level given public announcements by Telstra’, and that the ACCC should use its statutory powers to force Telstra to provide the data if it failed to supply it voluntarily.<sup>147</sup>

Optus submitted that the ACCC should adjust the cost allocation factors for ‘Switching Equipment – Local’ and ‘Switching Equipment – Trunk’ obtained from the Analysys model to prevent the ‘double counting’ of costs for land and building assets.<sup>148</sup> Based on its analysis of the costs in the Analysys model, disaggregated into core assets, Optus stated that building assets are allocated to the ‘Switching Equipment – Local’ and ‘Switching Equipment – Trunk’ asset classes and were used to calculate the cost allocation factors for these asset classes. Optus submitted that, due to the inclusion of land and building assets in separate asset classes in the FLSM, the costs of building-related assets should be excluded from the calculation of the cost allocation factors for switching equipment.<sup>149</sup>

### ***ACCC final view***

A number of submissions queried the cost allocation factors used by the ACCC in estimating draft FAD prices for wholesale ADSL. These submissions related to: the allocation of DSLAM costs to services other than DSL services (Telstra); the adjustment of cost allocation factors for payments received by Telstra under the Definitive Agreements (Optus); and the adjustment of Analysys cost allocation factors to remove buildings costs (Optus). The ACCC’s responses to these issues are contained in section C.3 of appendix C. On the basis of its further analysis on these issues, the ACCC’s final view is to maintain the cost allocation factors from the March 2013 Draft Report for the current wholesale ADSL FAD.

The ACCC notes that both issues raised by Optus in its submission—payments to Telstra under the Definitive Agreements and buildings costs in the Analysys model—relate not just to wholesale ADSL, but also to a number of the other fixed line services in the FLSM. Therefore, the ACCC considers it more appropriate to review these matters holistically as part of the inquiry to make the next FADs to determine whether—and how—the FLSM should be altered to account for these matters.

### **3.2.7 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>150</sup>

The vanilla WACC is calculated as follows:

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<sup>146</sup> Optus, April 2013 submission, p. 18.

<sup>147</sup> Optus, April 2013 submission, p. 18.

<sup>148</sup> Optus, April 2013 submission, p. 21.

<sup>149</sup> Optus, April 2013 submission, p. 22.

<sup>150</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services, Final Report*, July 2011, p. 183 (clause 6.12).

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

where  $D$  = the value of debt

$E$  = the market value of equity

$V$  = the market value of equity and debt

$E[Kd]$  = the required/expected return on debt<sup>151</sup>

$E[Ke]$  = the required/expected return on equity<sup>152</sup>

### ***March 2013 Draft Report view***

The ACCC considered that the WACC parameters, and estimation methodologies, used in the July 2011 FADs remained appropriate for estimating prices for the draft FAD for wholesale ADSL. The ACCC updated three WACC parameters—the risk free rate, debt risk premium and debt issuance costs—because these parameters are estimated using specific point in time observations of market data. The ACCC stated that it intended to update these parameters prior to its final decision for the wholesale ADSL FAD. The resulting nominal vanilla WACC used to estimate the draft FAD prices was 6.58 per cent.

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

Telstra submitted that the Weighted Average Cost of Capital (WACC) used to determine the draft FAD prices was understated.<sup>153</sup> Telstra submitted that the ACCC's use of a 6 per cent Market Risk Premium (MRP) 'would seem a low estimation and is not necessarily a reflection of market conditions'.<sup>154</sup> It stated that current estimates of the market-implied MRP were above 6 per cent and that the Australian Energy Regulator (AER) made a MRP determination of 6.5 per cent in its 2009 WACC review.

### ***ACCC final view***

The ACCC maintains its view that the use of a vanilla WACC is appropriate. The ACCC also maintains its view that the WACC parameters, and estimation methodologies, used in the March 2013 Draft Report are appropriate.

The ACCC does not agree with Telstra's submission that the MRP of 6 per cent used in the March 2013 Draft Report is too low (based on estimates of the market implied MRP). The ACCC notes that a number of recent decisions by the AER have used an MRP of 6 per

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<sup>151</sup> Where  $E[Kd] = \text{risk free rate} + \text{debt risk premium} + \text{debt issuance costs}$

<sup>152</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)

<sup>153</sup> Telstra, April 2013 submission, p. 17.

<sup>154</sup> Telstra, April 2013 submission, p. 17.

cent.<sup>155</sup> In its recent final decision on SP AusNet’s 2013-17 gas access arrangement, the AER adopted an MRP of 6 per cent after taking into account evidence such as: historic excess returns; forward looking MRP estimates; academic research on the predictability of returns; survey evidence; consultant advice; recent decisions by the Australian Competition Tribunal; and recent decisions by other Australian regulators.<sup>156</sup> Based on this evidence, the ACCC considers that an MRP of 6 per cent is appropriate.

The ACCC notes that no submissions were received on the ACCC’s methodology for estimating the risk free rate, debt risk premium (DRP) and debt issuance costs in the March 2013 Draft Report. Therefore, the ACCC has used the same methodologies to update these parameters as those used in the March 2013 Draft Report.

The ACCC updated its expected inflation forecasts using a 10-year geometric average of the short term inflation forecasts published by the Reserve Bank of Australia (RBA)<sup>157</sup> and the midpoint of the RBA’s inflation target range (2.5 per cent). This resulted in an expected inflation figure of 2.47 per cent.

#### *Risk free rate*

The ACCC estimated the risk free rate using 10 year Commonwealth Government Securities (CGS) bonds<sup>158</sup>: this yielded an estimated nominal risk free rate of 3.19 per cent estimated over a 20 day averaging period from 23 April 2013 to 21 May 2013. Using the estimated nominal risk free rate and expected inflation, the real risk free rate is 0.70 per cent.

#### *Debt risk premium*

Using the same 20 day averaging period as for the risk free rate, from 23 April 2013 to 21 May 2013, the ACCC has calculated an updated DRP using a simple average of three Telstra bonds,<sup>159</sup> as shown in table 3.1. This resulted in a nominal DRP of 1.47 per cent.

**Table 3.1: Estimate of the DRP**

	<b>EI2917587 Corp</b>	<b>EJ19493167 Corp</b>	<b>EI9022241 Corp</b>	<b>Simple average</b>
Nominal bond yield	4.37%	4.74%	4.88%	<b>4.66%</b>
Nominal risk-free rate	3.19%	3.19%	3.19%	<b>3.19%</b>
Nominal debt risk premium	1.17%	1.54%	1.69%	<b>1.47%</b>

#### *Debt issuance costs*

The ACCC has also maintained its decision from the March 2013 Draft Report to allow debt issuance costs to be recovered through an adjustment to the WACC. The ACCC has updated

<sup>155</sup> AER, *Access arrangement final decision – SPI Networks (Gas) Pty Ltd 2013–17: Part 1*, March 2013; AER, *APT Petroleum Pipeline Pty Ltd – Access arrangement final decision Roma to Brisbane Pipeline 2012–13 to 2016–17*, August 2012.

<sup>156</sup> AER, *Access arrangement final decision – SPI Networks (Gas) Pty Ltd 2013–17: Part 1*, March 2013, pp. 29-30.

<sup>157</sup> RBA, *Statement on monetary policy*, 10 May 2013, p. 62.

<sup>158</sup> Bloomberg ticker: C12710Y Index.

<sup>159</sup> Bloomberg tickers: EI2917587 Corp, EJ19493167 Corp and EI9022241 Corp.

its estimate of debt issuance costs, using the Allen Consulting Group's methodology,<sup>160</sup> and its final view is that an allowance for debt issuance costs of 7.4 basis points is appropriate.

*ACCC final view*

The ACCC's final view on the WACC is shown in table 3.2 below.

**Table 3.2: Estimates of the vanilla WACC and WACC parameters**

WACC parameter	Wholesale ADSL draft decision (March 2013)	Wholesale ADSL final decision (July 2013)
Nominal risk free rate	3.44%	3.19%
Expected inflation	2.55%	2.47%
Real risk free rate	0.87%	0.70%
Nominal debt risk premium	1.47%	1.47%
Debt issuance costs	0.074%	0.074%
Nominal market risk premium	6%	6%
Equity beta	0.7	0.7
Debt gearing	40%	40%
Gamma	0.45	0.45
Equity issuance costs	0%	0%
<b>Nominal vanilla WACC</b>	<b>6.58%</b>	<b>6.33%</b>
<i>Real vanilla WACC</i>	3.93%	3.76%

### 3.2.8 Proposed amendments to the BBM record keeping rule

*March 2013 Draft Report view*

The ACCC noted that Telstra had cooperated with the ACCC by providing some expenditure and demand information relating to wholesale ADSL following information requests by the ACCC. However, it noted that these and a number of other model inputs would be required to estimate wholesale ADSL prices in future regulatory periods. Therefore, the ACCC announced its intention to consult on varying the existing BBM record keeping rule, after the release of the FAD for wholesale ADSL, to require Telstra to provide this data for future regulatory periods.

*Summary of submissions*

Macquarie Telecom submitted that it supported the ACCC's draft decision to amend the BBM RKR to capture relevant information for the wholesale ADSL service, and noted that it had raised this matter during consultation on the BBM RKR in 2012.<sup>161</sup> Macquarie submitted that a BBM RKR is 'particularly important given that Telstra has evidently ignored the

<sup>160</sup> The Allen Consulting Group, *Debt and Equity Raising Transaction Costs, Final Report*, December 2004.

<sup>161</sup> Macquarie Telecom, April 2013 submission, p. 5.

ACCC's requests for forecast data' relating to a number of model inputs for wholesale ADSL.<sup>162</sup>

Telstra submitted that it was prepared to cooperate in providing the information the ACCC requires; however, it noted that [Telstra c-i-c] [Telstra c-i-c].<sup>163</sup>

Optus submitted that it supported the ACCC's proposal to adopt the BBM RKR for wholesale ADSL; however, it noted that the forecast data would not be available for the purposes of the wholesale ADSL FAD inquiry.<sup>164</sup> Optus submitted that the ACCC had announced an intention to obtain forecasts for expenditure data in 2010 but it had 'failed to implement such changes' to date.<sup>165</sup>

### *ACCC final view*

The ACCC confirms that it intends to vary the BBM RKR to obtain the data needed to estimate prices for wholesale ADSL in the FLSM. The ACCC considers that the information to be collected under the BBM RKR will assist with the estimation of access prices in the FLSM in future FAD inquiries.

## **3.2.9 Other issues**

### *Summary of submissions*

Optus submitted that 'the total revenue required by Telstra under the amended FLSM should equal the total revenue of the original FLSM plus the allowance for WADSL' in order for the FLSM to ensure consistency and minimise the risk of over- or under-recovery of costs.<sup>166</sup> Optus submitted that if any joint or common costs flowed from wholesale ADSL to other services in the FLSM there should be a corresponding adjustment so that total revenue does not change.<sup>167</sup> Optus submitted that the revenue requirement for the fixed line services other than wholesale ADSL in the FLSM had declined by \$31 million in real terms for 2013-14; it stated that the revenue requirement for wholesale ADSL should be decreased by this amount to ensure that Telstra does not over-recover its total revenue requirement.

### *ACCC final view*

The ACCC considers that Optus' proposed adjustment to the revenue requirement for wholesale ADSL, based on the change in the total revenue requirement for other services in the FLSM, is not appropriate. The ACCC considers that the main cause of the difference in total revenue requirement in the FLSM—a small change in the WACC used in the March 2013 version of the FLSM (compared to the July 2011 version)—should not affect the revenue requirements and prices estimated for the declared fixed line services in the July 2011 FADs. The ACCC considers that updating the WACC for the purposes of a separate decision—the wholesale ADSL FAD—should not retrospectively affect the revenue, or

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<sup>162</sup> Macquarie Telecom, April 2013 submission, p. 5.

<sup>163</sup> Telstra, April 2013 submission, p. 19.

<sup>164</sup> Optus, April 2013 submission, p. 16.

<sup>165</sup> Optus, April 2013 submission, p. 16.

<sup>166</sup> Optus, April 2013 submission, p. 20.

<sup>167</sup> Optus, April 2013 submission, p. 20.

prices, determined for the purposes of the fixed line services FADs. The ACCC's reasons for this decision are described in more detail in section C.4 of appendix C.

## 4 Price structures

In the March 2013 Draft Report, the ACCC outlined its draft views on three key price structure and price issues for wholesale ADSL:

- port and AGVC/VLAN components
- geographic pricing, and
- ancillary charges.

This chapter contains the ACCC's final view on these issues for this FAD. In forming its views on the price structure, the ACCC has had regard to the long-term interests of end-users (LTIE) and other relevant legislative criteria.

### 4.1 Price structure – 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>168</sup>

This section sets out the ACCC's final view on the port and AGVC price structure for this wholesale ADSL FAD.

#### 4.1.1 March 2013 Draft Report view

The ACCC's draft view was to maintain the use of the port and AGVC pricing structure in the draft FAD. The ACCC considered that a fixed port charge and a capacity-based AGVC charge recognised that the supply of wholesale ADSL involves fixed costs and costs that vary (over time) with data usage.

The ACCC proposed to use the price relativities from the Interim Access Determination (IAD) price model to allocate the per SIO revenue requirement for wholesale ADSL between a port charge and an AGVC charge (per SIO). This was because the ACCC considered that detailed cost information that would enable the allocation of costs to the different components of the service was not available and may not be feasible to obtain. The ACCC noted that it may review the allocation between port and AGVC prices in the future, should further information become available.

To convert the AGVC proportion of the per SIO revenue requirement into a per Megabit per second (Mbps) price for AGVC, the ACCC proposed to use an approach similar to the approach used in the IAD. That is, the monthly AGVC per SIO charge (revenue requirement) and a forecast of usage (in Mbps) per SIO were used to determine an AGVC price per Mbps.

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<sup>168</sup> An AGVC is technically only used to support customers on older Asynchronous Transfer Mode (ATM) protocol Digital Subscriber Line Access Multiplexers (DSLAMs). Customers on new Ethernet protocol DSLAMs require an Ethernet AGVC equivalent—a Virtual Local Area Network (VLAN). The final access determination for wholesale ADSL sets the same price for the AGVC and VLAN products.

In forecasting usage per SIO, the ACCC used forecast AGVC usage per *average* ADSL SIO (which includes both Telstra retail and wholesale usage per SIO), rather than Telstra retail ADSL usage per SIO (which was used in determining IAD prices). The ACCC considered that this was appropriate because the Fixed Line Services Model (FLSM) sets prices based on average AGVC costs which need to account for Telstra retail and wholesale customers.

#### 4.1.2 Summary of submissions

Telstra submitted that the price level in the draft FAD establishes sufficient price relativities to those for comparative National Broadband Network (NBN) services: it submitted that this would maintain the incentive for migration to the NBN.<sup>169</sup>

Telstra submitted that [Telstra c-i-c] [Telstra c-i-c].<sup>170</sup> Telstra stated ‘[i]t appears that the FLSM accounts for this as it has unitised AGVC/VLAN costs using AGVC/VLAN usage that wholesale customers face a separate charge for’.<sup>171</sup>

Optus submitted that the ‘proposed [wholesale ADSL] rates are inconsistent with the competitive price of supply’ because it is significantly higher than the prices of Optus’ wholesale ADSL product, NBN Co’s AVC and CVC services<sup>172</sup>, and New Zealand’s regulated bitstream services.<sup>173</sup>

Optus stated that the ACCC ‘has failed to request [Telstra to] provide adequate information to allow proper allocations’ between port and AGVC charges despite claiming that ‘ideally costs should be allocated on a cost causation basis’.<sup>174</sup> Optus submitted that costs should be allocated to port and AGVC using cost causation principles. It devised allocations which resulted in a port charge of \$19.17 and AGVC charge of \$65.32 per Mbps.<sup>175</sup> Optus further submitted that a port charge of \$19 ‘does not appear reasonable given Telstra’s scale’ and requires further adjustment because Optus can offer a wholesale ADSL service at [c-i-c] [c-i-c].<sup>176</sup>

Optus submitted that ‘the proposal to maintain the ratio between port and AGVC masks the actual extreme price implied by the FLSM’.<sup>177</sup> Optus submitted that, if the AGVC charge reflected Telstra’s actual costs, it would suggest that ‘Telstra is much more inefficient than competitive carriers’ and therefore ‘[wholesale ADSL] access and backhaul should be separated to allow competition in the backhaul segment’.<sup>178</sup>

Optus submitted that the proposed AGVC charge ‘is inconsistent with real world comparators’ and the efficient cost of supply because it is significantly higher than NBN Co’s CVC prices and what [c-i-c] [c-i-c].<sup>179</sup> Optus stated that assumptions with regard to

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<sup>169</sup> Telstra, April 2013 submission, p. 18.

<sup>170</sup> Telstra, April 2013 submission, p. 18.

<sup>171</sup> Telstra, April 2013 submission, p. 18.

<sup>172</sup> Access Virtual Circuit and Connectivity Virtual Circuit.

<sup>173</sup> Optus, April 2013 submission, pp. 6-8.

<sup>174</sup> Optus, April 2013 submission, p. 8.

<sup>175</sup> Optus, April 2013 submission, p. 8.

<sup>176</sup> Optus, April 2013 submission, pp. 8-9.

<sup>177</sup> Optus, April 2013 submission, p. 10.

<sup>178</sup> Optus, April 2013 submission, p. 11.

<sup>179</sup> Optus, April 2013 submission, p. 10.



peak Mbps throughput per SIO have significant impacts on the calculation of the AGVC per Mbps charge.<sup>180</sup> Optus submitted that ‘it would be preferable to set the AGVC as a total charge per SIO’ if the ACCC considered that there was ‘insufficient information to correct the approach proposed in the FAD Draft Report’.<sup>181</sup> It stated that ‘an incorrect Mbps charge, based on significant under-estimation of the peak throughput required, will result in a significant over-recovery by Telstra’ which would not be in the LTIE.<sup>182</sup>

In its supplementary submission, Optus submitted that ‘benchmarking provides a useful check’ if the ACCC’s estimated prices reflect efficient ADSL costs.<sup>183</sup> It compared the ACCC’s proposed port charge against wholesale ADSL prices from New Zealand and ten selected European countries. Optus submitted that the ACCC’s port charge was significantly higher than both the average European rate and the highest European rate.<sup>184</sup> It submitted that ‘such a wide difference does not appear to be reasonable’ because the port charge only reflects equipment prices at the exchange.<sup>185</sup>

Herbert Geer (on behalf of iiNet) submitted that the proposed port and AGVC charges ‘are significantly higher than comparable costs incurred by iiNet in providing broadband services on its own network and using competitive backhaul’.<sup>186</sup> It submitted that this made it ‘difficult to accept’ that the proposed charges reflect Telstra’s actual efficient costs of providing the service.<sup>187</sup>

Herbert Geer submitted that the ACCC should have regard to the benchmarking of transmission costs including NBN Co’s CVC and the Domestic Transmission Capacity Service (DTCS).<sup>188</sup> It stated that the ACCC should consider applying the DTCS FAD rates to AGVC because: the DTCS rates were subject to significantly more scrutiny than was being applied to AGVC costs; it would be relatively simple to apply; and it would have a greater chance of meeting the legislative criteria. Herbert Geer stated that the application of the DTCS FAD rates to AGVC had been considered in an article by Richard Chirgwin on ‘The Register’; it noted that this method resulted ‘in a significantly lower AGVC charge than the ACCC’s currently proposed pricing relativity method’.<sup>189</sup>

Herbert Geer submitted its own estimated AGVC rate of \$29 per Mbps per month—based on the ACCC’s DTCS FAD pricing calculator and a number of assumptions regarding distance, data rate and locations—for New South Wales.<sup>190</sup> It also quoted alternative estimates from the article in the ‘The Register’ of an AGVC charge of \$28.87 or \$35.50, depending on the assumptions adopted for the metropolitan and regional split.<sup>191</sup>

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<sup>180</sup> Optus, April 2013 submission, p. 12.

<sup>181</sup> Optus, April 2013 submission, p. 13.

<sup>182</sup> Optus, April 2013 submission, p. 13.

<sup>183</sup> Optus, April 2013 supplementary submission, p. 1.

<sup>184</sup> Optus, April 2013 supplementary submission, p. 2.

<sup>185</sup> Optus, April 2013 supplementary submission, p. 2.

<sup>186</sup> Herbert Geer, April 2013 submission, p. 5.

<sup>187</sup> Herbert Geer, April 2013 submission, p. 5.

<sup>188</sup> Herbert Geer, April 2013 submission, p. 6.

<sup>189</sup> Herbert Geer, April 2013 submission, p. 6.

<sup>190</sup> Herbert Geer, April 2013 submission, p. 9.

<sup>191</sup> Herbert Geer, April 2013 submission, p. 9.

Macquarie Telecom submitted that, although it supported the ACCC's draft decision to use a port and AGVC price structure, it disagreed with the ACCC's methodology for estimating the AGVC charge.<sup>192</sup> Macquarie stated that it was concerned by the ACCC's adoption of the IAD relativities as the basis for setting the port and AGVC price because it 'necessarily brings-forward a range of fundamental concerns' relating to the IAD's use of a retail-minus methodology.<sup>193</sup> Macquarie submitted that it was concerned by: the ACCC's acceptance of Telstra's view that it may not be feasible to obtain the required cost information; and the absence of any commitment from the ACCC to formally seek this information.<sup>194</sup>

AAPT submitted that the wholesale ADSL prices specified in the draft FAD are too high and do not reflect pricing 'based on efficient costs of providing wholesale ADSL services'.<sup>195</sup> Based on its own costs for provisioning DSL and backhaul services, AAPT submitted that port prices of \$20–\$21 (in both metro and non-metro areas) and AGVC prices of \$25 would 'better reflect efficient costs' and promote the LTIE.<sup>196</sup>

### 4.1.3 ACCC final view

The ACCC confirms its use of the port and AGVC pricing structure for the wholesale ADSL FAD. The ACCC notes that submissions did not oppose this pricing structure, which involves a fixed charge and a capacity-based charge. The ACCC considers that the port and AGVC price structure recognises that the supply of wholesale ADSL involves fixed costs as well as costs that vary (over time) with data usage (i.e., greater network capacity is needed to meet demand for data). Furthermore, the ACCC considers that 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. The ACCC considers that this price structure will promote the LTIE by providing price signals that encourage greater efficiency in the use of network capacity and promote efficient investments in expanding network capacity.<sup>197</sup>

The ACCC has had regard to Optus' submission that it would be preferable to set the AGVC charge as a total charge per SIO if the ACCC deemed that it had insufficient information to set an AGVC charge per Mbps using peak usage. The ACCC is confident that the AGVC usage data available to the ACCC is sufficient for the purposes of the FAD. The ACCC also considers that a per-SIO AGVC charge may not provide sufficient price signals regarding network usage. In the ACCC's view, Optus' proposed price structure would be unlikely to promote the efficient use of the network because there would be no specific usage-based charge for wholesale ADSL that would provide price signals regarding the use of network capacity.<sup>198</sup>

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<sup>192</sup> Macquarie Telecom, April 2013 submission, p. 5.

<sup>193</sup> Macquarie Telecom, April 2013 submission, p. 5.

<sup>194</sup> Macquarie Telecom, April 2013 submission, p. 5.

<sup>195</sup> AAPT, April 2013 submission, p. 3.

<sup>196</sup> AAPT, April 2013 submission, p. 3.

<sup>197</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>198</sup> Subsection 152BCA(1)(a) of the CCA.

The ACCC's final view is therefore to maintain the use of the port and AGVC pricing structure for this FAD with a fixed port charge (per SIO) and an AGVC/VLAN charge (per Mbps).

### *Level of port and AGVC charges*

The ACCC has estimated wholesale ADSL prices using the FLSM—a building block model (BBM) that accounts explicitly for the costs faced by Telstra in supplying services (including wholesale ADSL). The FLSM was used to estimate prices in the July 2011 Final Report for the fixed line services FADs.<sup>199</sup> The ACCC considered in the July 2011 Final Report that a BBM estimates prices that reflect efficient costs. The ACCC considers that the FLSM will also provide an appropriate basis for estimating prices for wholesale ADSL that reflect an estimate of the efficient costs of supplying the service.<sup>200</sup>

The ACCC notes that submissions stated that the draft wholesale ADSL FAD prices were: too high; did not reflect efficient costs of supply; and were inconsistent with the costs incurred by other providers of wholesale ADSL services. These submissions were supported by the following:

- access seekers submitting their own costs of supplying wholesale ADSL<sup>201</sup>
- comparisons between the ACCC's proposed prices against wholesale prices in other countries<sup>202</sup>
- comparisons of the ACCC's proposed AGVC price against services such as NBN Co's CVC.

Each of these points is addressed below.

Firstly, while alternative estimates of port and AGVC prices were offered in submissions, the ACCC notes that access seekers have not submitted detailed cost information on their costs of supplying (wholesale or retail) ADSL. Therefore it is not possible for the ACCC to undertake a meaningful comparison of the cost inputs between Telstra and alternative operators.

Given the differences between Telstra's ADSL network and access seekers' ULLS-based DSL networks (e.g. in geographic scope), it is not clear how comparable the submitted cost estimates are with the costs faced by Telstra. Telstra supplies wholesale ADSL in a wide geographic footprint, including areas that would typically be expected to have higher costs of supply. The ACCC notes that Telstra supplies ADSL in 2817 Exchange Service Areas (ESAs)<sup>203</sup> many of which—52.3 per cent or 1473 ESAs—are located in ULLS Band 4

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<sup>199</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services: final report*, July 2011.

<sup>200</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>201</sup> AAPT, April 2013 submission, p. 3; Optus, April 2013 submission, p. 7.

<sup>202</sup> Optus compared the proposed Telstra wholesale ADSL prices against services from NBN Co, New Zealand and its own wholesale ADSL service in its March 2013 submission. In its March 2013 supplementary submission, Optus compared the proposed Telstra wholesale ADSL prices against regulated wholesale ADSL (Wholesale Bitstream Access) services from New Zealand and 10 selected European countries.

<sup>203</sup> Telstra, *ADSL Enabled Exchanges*, 23 April 2013, available at: <http://telstrawholesale.com/products/broadband/adsl/adsl-reports-plans/index.htm>.

(remote) areas. ULLS-based DSL networks operate in less than 600 ESAs and the vast majority—**[CAN RKR c-i-c] [CAN RKR c-i-c]**—of these ESAs are metropolitan and CBD (Bands 1 and 2) ESAs.<sup>204</sup> The larger geographic footprint means that Telstra's ADSL network involves longer transmission links and less scale in servicing regional and rural areas, than ULLS-based DSL networks in metropolitan areas. In addition, higher operating expenditure may be required (per SIO) in regional areas in order to support the dispersed exchange facilities.

The ACCC must have regard to the direct costs involved in supplying the wholesale ADSL service, as well as the efficient use of and investment in infrastructure.<sup>205</sup> The ACCC considers that, at this stage, it has insufficient evidence to depart from its view that the FLSM provides a framework for estimating prices that reflect Telstra's direct costs and a reasonable estimate of the efficient costs of supplying the wholesale ADSL service.

Secondly, the ACCC considers that there are a number of reasons that may explain why the costs of supply of Telstra's wholesale ADSL may differ from other bitstream services.

The ACCC notes that Optus' submission was made with reference to New Zealand's regulated bitstream services. The ACCC considers that differences in network architecture and cost structure mean that the services (and the associated price structures) are not readily comparable. In particular, the ACCC notes the following differences:

- Network architecture—The NZ Unbundled Bitstream Access (UBA) service (and Chorus' network architecture) involves handover to access seekers at the 'parent node' level (the first switch after the DSLAM).<sup>206</sup> Telstra's wholesale ADSL service has interconnection further back into the network: that is, at certain exchanges in most of Australia's capital cities. Telstra's wholesale ADSL service therefore involves the use of additional core network assets (for example, BRASs) and additional functionality.<sup>207</sup>
- Geography and distance—Transport/transmission distances are likely to be a material driver of costs for an ADSL/bitstream service. Australia is a much larger country than New Zealand; additionally, traffic for Telstra's wholesale ADSL service is transported to handover points in capital cities. The ACCC considers that both of these factors are likely to mean that the costs of Telstra's wholesale ADSL service are higher than the UBA service in New Zealand. WIK-Consult, in its report for the New Zealand Commerce Commission (NZCC), stated that 'the more dispersed the (level

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<sup>204</sup> Access seekers, such as Optus and AAPT, use the ULLS to supply ADSL services.

<sup>205</sup> Subsection 152BCA(1)(d) of the CCA; Subsection 152BCA(1)(a) of the CCA.

<sup>206</sup> NZCC, *Unbundled Bitstream Access Service Price Review – Draft Determination*, December 2012, p. 21, available at: <http://www.comcom.govt.nz/uba-benchmarking-review/>.

<sup>207</sup> For example, the UBA service description states that 'The Access Seeker is to fulfil any authentication, authorisation, and addressing functions for the service provided to the End User'. NZCC, *Standard Terms Determination for Chorus' Unbundled Bitstream Access Service – Schedule 1: UBA Service Description*, p. 6, available at: <http://www.comcom.govt.nz/uba-benchmarking-review/>. The ACCC notes that the wholesale ADSL service provided by Telstra includes these functions.

1) nodes are the higher the cost is (especially due to increased trenching requirements)',<sup>208</sup>

More generally, the ACCC considers that Telstra's wholesale ADSL service differs to the other bitstream services in the following respects:

- As noted above, comparisons with services in other countries may be problematic because they do not account for the differences in network architectures and geographic areas. Many of the comparisons provided in submissions relate to small European countries with far higher population densities than Australia.
- There are different pricing methodologies used in other jurisdictions. More than half of the prices in Optus' international comparison were estimated using forward-looking cost methodologies.<sup>209</sup> The FLSM's BBM methodology uses Telstra's actual (and forecast) costs to estimate wholesale ADSL prices in this FAD. The ACCC notes that this methodology was adopted by the ACCC (with the support of industry) for setting fixed line access prices after a contentious history of estimating forward-looking prices based on TSLRIC.<sup>210</sup> Therefore, to the extent that Telstra's actual costs differ from international comparators—as well as the assessment of forward-looking costs made by these jurisdictions—these will not be direct comparisons.

As stated in the March 2013 Draft Report, the ACCC does not consider that it is reasonable to expect the price levels between 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 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 network and the NBN.

### ***Allocating costs between port and AGVC components***

The FLSM calculates a per SIO revenue requirement for wholesale ADSL. This revenue requirement then needs to be allocated to port and AGVC charges.

The ACCC has reviewed the appropriate level of the AGVC price relative to the per SIO port charge. The ACCC maintains its view that ideally the AGVC and port charges should reflect the costs of providing each component of the service. However, the ACCC notes that it still does not have robust cost information that would allow it to allocate costs to the port and AGVC components on a cost-based basis.

In response to the March 2013 Draft Report, Optus submitted that the FLSM and the Analysys model could be used to derive port and AGVC charges on a 'cost causation'

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<sup>208</sup> WIK-Consult, *Comments to the bitstream price benchmarking cost methodology – Study for the Commerce Commission New Zealand*, October 2012, p. 16, available at: <http://www.comcom.govt.nz/uba-benchmarking-review/>.

<sup>209</sup> Optus compared the ACCC's proposed wholesale ADSL prices against wholesale ADSL prices from New Zealand and ten selected European countries in its supplementary submission to the March 2013 Draft Report.

<sup>210</sup> Total Service Long Run Incremental Cost (TSLRIC) pricing was used by the ACCC to determine access prices for certain services (e.g. ULLS) prior to the July 2011 fixed line services FADs; for information on its historical use by the ACCC see: ACCC, *Review of the 1997 telecommunications access pricing principles for fixed line services: Draft Report*, September 2010.

basis.<sup>211</sup> Using its own methodology, Optus submitted that the data equipment asset group, the switching equipment: local exchange asset group and a proportion of network land and building costs<sup>212</sup> should be allocated to the port charge.<sup>213</sup> It stated that ‘all other’ asset groups in the Analysys model should be allocated to AGVC.

The ACCC notes, however, that Optus has not provided detailed reasoning to support the application of its ‘cost causation’ approach. The Analysys model, for example, does not determine port and AGVC by allocating certain costs/assets to different pricing constructs. Furthermore, it is not clear from Optus’ analysis as to why certain assets such as IGRs (that would form part of the Data Equipment asset class) would be entirely allocated to the port charge when the AGVC charge involves purchasing capacity at the port of the IGR.<sup>214</sup>

The ACCC notes that Telstra has previously submitted that:

- The AGVC and VLAN charges are a pricing construct.<sup>215</sup>
- All parts of the ADSL network are necessary for the provision of Telstra’s wholesale ADSL service, and the AGVC/VLAN charging components ‘do not provide access to a specific part of the Telstra ADSL network, nor do they provide the carriage of DSL traffic over a defined network part’.<sup>216</sup>

In addition, the ACCC notes that the price structure and balance of charges from the IAD were supported by a number of previous submissions to the wholesale ADSL FAD inquiry.<sup>217</sup>

The ACCC is not closed to considering cost-based approaches to determining how to allocate the wholesale ADSL revenue requirement (per SIO) between port and AGVC. However, given the relatively limited information available, the ACCC considers that a cost-based method to allocate costs between port and AGVC components is not appropriate at this time.

For the purposes of this wholesale ADSL FAD, the ACCC confirms the use the price relativities from the IAD model to allocate the per SIO revenue requirement between a port and an AGVC charge. This allocation is based on Telstra’s previously stated attribution of revenue between the two pricing components. The 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 in the forthcoming FAD inquiries for wholesale ADSL and other declared fixed line services, should further information become available.

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<sup>211</sup> Optus, April 2013 submission, pp. 23-24.

<sup>212</sup> Based on the ‘percentage of total building costs [footnote removed] that are within local exchange asset group out of total building costs in the AM Model’.

<sup>213</sup> Optus, April 2013 submission, p. 23.

<sup>214</sup> Telstra, November 2012 congestion submission, p. 10.

<sup>215</sup> Telstra, October 2012 submission, p. 10.

<sup>216</sup> Telstra, October 2012 submission, p. 10.

<sup>217</sup> Telstra, April 2012 submission, p. 24; Optus, April 2012 submission, p. 13.

### *Determining the per Mbps AGVC price*

The wholesale ADSL FAD sets a per Mbps price for AGVC, rather than the per SIO output from the FLSM. The ACCC's final view is to maintain its approach from the March 2013 Draft Report for converting the AGVC proportion of the per SIO revenue requirement into a per Mbps price for AGVC. That is, the monthly AGVC per SIO charge (a portion of the total per SIO revenue requirement) and a forecast of usage (in Mbps) per SIO are used to determine an AGVC price per Mbps.

The ACCC still considers that ideally Telstra would have provided AGVC usage forecasts for the ACCC to assess. In the absence of such information, the ACCC confirms its approach in the March 2013 Draft Report. However, as discussed in section 3.2.5, the ACCC has derived revised forecasts for AGVC usage (based on additional data). This results in an average per SIO peak usage forecast for 2013-14 of [c-i-c] [c-i-c] Mbps.

The ACCC also confirms its use of AGVC usage per average ADSL SIO (which includes both Telstra retail and wholesale peak usage per SIO). The cost-based FLSM sets prices based on average AGVC usage (Telstra retail and wholesale) and therefore the average ADSL usage per SIO across all users is required.

Using this approach, the ACCC has determined an AGVC price of \$32.31 per Mbps for this wholesale ADSL FAD.

The ACCC has had regard to Optus' submission that the ACCC has erred in its use of average usage for calculating the AGVC charge per Mbps because the 'AGVC is a peak charge' and that peak throughput per SIO should be used.<sup>218</sup> However, as addressed in section 3.2.5 above, the estimates of 'usage' (in Mbps per SIO) used to calculate the AGVC/VLAN charge already do reflect 'peak usage'. Therefore, no further adjustment is required to convert these figures to 'peak usage'. The ACCC has also had regard to a confidential letter provided by Optus on 8 May 2013 which provided further information on issues raised by Optus in its submission, including issues regarding peak throughput.

The ACCC has considered Herbert Geer's submission that the DTCS rates should be considered in setting the per Mbps AGVC charge.<sup>219</sup>

Firstly, the ACCC notes that AGVC and DTCS are not identical services. AGVC aggregates traffic from all of an access seeker's SIOs (in a given State) from across the ADSL network at a POI in the related central business district (CBD). DTCS relates to an uncontended point to point service on a specific network route. The ACCC notes that a number of different assets are used to provision AGVC compared to the DTCS. AGVC includes costs relating to switching, routing and joint and common costs in addition to the costs of transmission.

Secondly, the ACCC's approach to setting wholesale ADSL prices is to use the cost-based FLSM which estimates prices based on Telstra's actual (and forecast) costs. This model includes all aspects of the network used to supply wholesale ADSL (and other services), including the transmission equipment, routing equipment, DSLAMs etc, and allocates these costs to the service according to certain allocation factors. On the other hand, the DTCS FAD

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<sup>218</sup> Optus, April 2013 submission, p. 12.

<sup>219</sup> Herbert Geer, April 2013 submission, p. 6.

calculator is based on benchmarking against domestic prices of DTCS products in competitive areas and on competitive routes.<sup>220</sup>

Given the differences between the two pricing approaches, caution must be taken when comparing the AGVC and DTCS. Under one approach, prices are derived from a comprehensive network cost model that allocates costs between many services; the other estimates prices for a specific type of service based on a detailed benchmarking approach. Aside from the differences between the services themselves, the ACCC would not expect that prices derived using these very different methods would be directly comparable.

As noted above, the ACCC has derived the price by allocating to AGVC part of the total wholesale ADSL revenue requirement (per SIO) based on existing price relativities. The ACCC notes that should this approach be maintained in future FADs, the pricing mechanism will allow for the AGVC price to decrease over time as traffic on the network increases (all else remaining constant) to reflect the economies of scale relating to AGVC-type services.

## **4.2 Pricing structure – geographic**

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 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.

This section sets out the ACCC’s final view on the geographic pricing structure for the wholesale ADSL service in this FAD.

### **4.2.1 March 2013 Draft Report view**

The ACCC’s draft view was to maintain the two zone pricing structure and set geographically-differentiated prices in the FAD using the price relativities from the IAD.<sup>221</sup>

The ACCC noted that there were likely to be material cost differences in supplying wholesale ADSL in different geographic regions. However, in the absence of specific cost information, the ACCC considered that a zone pricing structure appears to provide a reasonable approximation of ESAs where the costs of supplying broadband are relatively higher.

The ACCC considered that maintaining the price relativities applied in the IAD would recognise the geographic cost differences and be appropriate given the absence of robust alternative information on geographic costs of supplying wholesale ADSL.<sup>222</sup>

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<sup>220</sup> ACCC, *Final access determination for the domestic transmission capacity service, explanatory statement*, June 2012, p. 7.

<sup>221</sup> ACCC, March 2013 Draft Report, p. 65.

<sup>222</sup> ACCC, March 2013 Draft Report, pp. 65-66.



#### 4.2.2 Summary of submissions

Telstra submitted that it supported the ACCC's price structure in the draft FAD. Telstra submitted that this price structure recognised that supplying wholesale ADSL services to Zones 2 and 3 is costlier due to factors such as lower population densities and longer distances.<sup>223</sup> Telstra stated that it had previously provided evidence on how costs vary between different geographic zones, in its submission to the ACCC's April 2011 Discussion Paper for the fixed line services FADs, and that it would be likely to update that evidence as part of the 2014 FAD inquiry.

The City of Whittlesea submitted that changes in land use in urban fringe areas was resulting in pricing discrepancies for ADSL services that were supplied using the wholesale ADSL service. First, it submitted that the wholesale ADSL 'zones' were historically established and that there was no fair mechanism for reviewing zones despite land in some zones becoming urbanised through population growth and additional infrastructure.<sup>224</sup> The City of Whittlesea submitted that a review mechanism, with ACCC oversight, should be established for wholesale ADSL zones to 'guard against Telstra using the existing wholesale ADSL zones established historically to obtain additional revenue despite changes in land use'.<sup>225</sup>

Second, the City of Whittlesea submitted that the zoning for local telephone calls was independent of the wholesale ADSL zones and that this resulted in some residences paying 'a premium' for their broadband service because they received a 'regional' rate for ADSL and a 'metro' rate for local telephony.<sup>226</sup> It submitted that the ACCC should establish a consistent relationship between broadband and telephony zone pricing in each suburb. That is, if a telephone charging zone is 'metro' ('rural or regional') then the ESA would be zone 1 (zone 2 or 3) for wholesale ADSL.<sup>227</sup>

#### 4.2.3 ACCC final view

The ACCC remains of the view that there are likely to be material cost differences in supplying wholesale ADSL in different geographic locations for reasons outlined in the March 2013 Draft Report. However, the cost information available to the ACCC (and used to estimate cost-based prices) continues to be at an aggregate level (i.e. not disaggregated by geographic areas). Information previously provided by Telstra regarding how costs vary between regions relates to other services (e.g. PSTN OTA).<sup>228</sup> However, the ACCC considers that it is unable to use this information to set geographically differentiated prices for wholesale ADSL.<sup>229</sup> The ACCC will consider any new evidence on how costs vary between geographic areas, should such evidence be submitted during the next FAD inquiry.

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<sup>223</sup> Telstra, April 2013 submission, p. 18.

<sup>224</sup> City of Whittlesea, April 2013 submission, p. 2.

<sup>225</sup> City of Whittlesea, April 2013 submission, p. 2.

<sup>226</sup> City of Whittlesea, April 2013 submission, p. 2.

<sup>227</sup> City of Whittlesea, April 2013 submission, p. 2.

<sup>228</sup> Telstra, *Public inquiry to make Final Access Determinations for the declared fixed line services, Part A of Telstra's response to the Commission's discussion paper*, June 2011, pp. 65-71, available at: <http://transition.accc.gov.au/content/index.phtml/itemId/991349>.

<sup>229</sup> For example, the geographic areas that the services are provided differs: Telstra stated in its June 2011 submission (p. 67) that '[t]he majority of call charge areas (CCAs) are made up of rural/remote exchanges only' in relation to PSTN OTA. This has implications for the transmission lengths and the switching

The ACCC considers that although specific evidence on cost differentials of supplying wholesale ADSL between urban and rural/regional areas remains unavailable, it would be inappropriate to dismiss these cost differences as insignificant. The ACCC has also recognised that supply costs vary across different geographic areas and has estimated geographically differentiated pricing in the context of other declared services (i.e. past pricing decisions on the ULLS and DTCS). Therefore, for this FAD, the ACCC considers that Telstra's zone construct provides an approximation of ESAs where the costs of supplying broadband are relatively higher.

The ACCC has considered the City of Whittlesea's submission for a review mechanism to update the designation of wholesale ADSL zones. The ACCC sees merit in the concept of including such a mechanism in the FAD. However, the ACCC considers that any reclassification of ESAs into different zones is likely to be quite complex. Reclassification may require the consideration of a range of different indicators within an ESA. The ACCC notes that it did not propose, or consult on, any alternative classifications of ESAs into different zones in the draft FAD.

The ACCC has also had regard to the City of Whittlesea's submission for more consistency in the classification of geographic areas across different services. The ACCC notes that there may be a number of issues relevant to the classification of wholesale ADSL zones, which may include the classification of call services, the classification of related ULLS Bands, and changes in population density and other cost drivers.

Given the complexity of these issues, the ACCC considers that it is not appropriate to implement a mechanism to reclassify ESAs between wholesale ADSL zones in the wholesale ADSL FAD at this stage. The ACCC will consider, and consult on, the price structures for the declared fixed line services, including wholesale ADSL, again in the forthcoming FAD inquiries for those services, and consider any new and relevant information that is submitted to the inquiry.

In the absence of robust cost information, the ACCC's final view is to continue to set geographically differentiated port prices in the FAD using the price relativities from the draft FAD. These relativities result in a Zone 1 port charge of \$24.44 and a Zone 2/3 port charge of \$29.66. The ACCC considers that maintaining the price relativities applied in the IAD will recognise the geographic cost differences of supply. The ACCC considers that this is appropriate given the absence of detailed alternative information on geographic costs of supplying wholesale ADSL.

The ACCC considers that maintaining the geographic zone pricing structure for wholesale ADSL port prices will have efficiency benefits. The zone pricing structure more closely aligns wholesale ADSL prices with the underlying costs of supply (subject to the available information about geographic differences in the costs of supplying the service) which will create incentives for more efficient use of and investment in the infrastructure used to supply wholesale ADSL services.<sup>230</sup> Efficient investment in network assets will support the

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equipment assets used for PSTN OTA, however it does not appear readily comparable with wholesale ADSL.

<sup>230</sup> Subsection 152BCA(1)(a) of the CCA.

provision of services that meet the needs of access seekers in relation to service quality and availability.<sup>231</sup>

### **4.3 Connection and ancillary charges**

Telstra levies a range of ancillary charges associated with the supply of wholesale ADSL services (e.g. connection and early termination charges). This section sets out the ACCC's final view on these charges for the wholesale ADSL service in this FAD.

#### **4.3.1 March 2013 Draft Report view**

The ACCC's draft view was to set prices for a key subset of ancillary charges associated with the supply of wholesale ADSL, namely connection charges and an early termination charge (ETC). The ACCC proposed to reconsider the scope of regulated charges associated with the supply of wholesale ADSL and the other declared services during its inquiry to make new FADs to apply from 1 July 2014.

The draft FAD included prices for three categories of wholesale connection charges:

- 'Type A Transfer'— e.g. 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 ETC was defined as 'a one off charge that is imposed on cancellation of a service.'<sup>232</sup> The draft FAD proposed to maintain Telstra's \$50.00 ETC where the service is connected for less than six months, and to specify that no ETC applied where a service is connected for six months or longer.

In setting the proposed connection charges and ETC, the ACCC proposed to maintain them at their existing levels in the wholesale ADSL IAD and to reconsider them (alongside other ancillary charges) during the next FAD inquiry. In addition, the ACCC proposed to not set speed upgrade charges in this FAD.

#### **4.3.2 Summary of submissions**

Telstra agreed with the ACCC's decision to only set prices for the key ancillary charges—connection charges and ETC—and retain the prices set in the IAD.<sup>233</sup> Telstra also agreed that estimating 'prices for all possible ancillary charges would lead to a substantially increased regulatory burden'.<sup>234</sup>

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<sup>231</sup> Subsection 152BCA(1)(c) of the CCA.

<sup>232</sup> ACCC, March 2013 Draft Report, p. 66.

<sup>233</sup> Telstra, April 2013 submission, p. 19.

<sup>234</sup> Telstra, April 2013 submission, p. 19.

Herbert Geer noted that ‘an appropriate issue for the ACCC to consider is whether the ETC charge should be applicable to services that are migrated to the NBN’.<sup>235</sup> Herbert Geer submitted that this ‘issue should be raised by the ACCC in the...next FAD inquiry’.<sup>236</sup>

### **4.3.3 ACCC final view**

The ACCC confirms its draft view to set prices for a key subset of ancillary charges—the connection charges and ETC—for reasons outlined in the March 2013 Draft Report.<sup>237</sup> In particular, the ACCC notes connection charges are faced by all access seekers in connecting new end-users. As noted in the March 2013 Draft Report, the ACCC is aware that there may be competition implications arising from the ETC (specifically during migration to the NBN) which may warrant further consideration. The ACCC will reconsider the scope of regulated charges associated with the supply of wholesale ADSL and the other declared fixed line services during its inquiry to make new FADs to apply from 1 July 2014.

The ACCC notes that it did not receive any submissions on the proposed level of the connection charges or ETC in the March 2013 Draft Report. The ACCC also did not receive any further information on the underlying costs that these charges recover. Therefore, the ACCC’s final view is to maintain the connection charges and ETC at their existing levels in the wholesale ADSL IAD and to reconsider them during the next FAD inquiry. These charges are shown in tables 5.2 and 5.3. In addition, the ACCC maintains its draft view that speed upgrade charges should not be set in this FAD.

The ACCC considers that the connection and ancillary charges in this FAD will promote the LTIE and allow the access provider to recover the direct costs of providing those services.<sup>238</sup> 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.<sup>239</sup>

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<sup>235</sup> Herbert Geer, April 2013 submission, p. 9.

<sup>236</sup> Herbert Geer, April 2013 submission, p. 9.

<sup>237</sup> ACCC, March 2013 Draft Report, pp. 68-70.

<sup>238</sup> Subsections 152BCA(1)(a) and 152BCA(1)(d) of the CCA.

<sup>239</sup> Subsection 152BCA(1)(c).

## 5 Wholesale ADSL FAD prices

Table 5.1 sets out the final 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 Chapters 3 and 4. These prices will apply from the commencement of the FAD until 30 June 2014.

**Table 5.1: FAD prices for wholesale ADSL (monthly charges) (incl. draft and IAD prices)**

	<b>Final FAD prices</b>	Draft FAD prices	IAD prices (also included in the FAD)	
	<b>29 May 2013 to 30 June 2014</b>		1 July 2012 to 28 May 2013	14 February 2012 to 30 June 2012
<b>Port price – Zone 1</b>	<b>\$24.44</b>	\$24.56	\$25.40	\$25.40
<b>Port price – Zone 2/3</b>	<b>\$29.66</b>	\$29.81	\$30.80	\$30.80
<b>AGVC/VLAN<sup>240</sup> (per Mbps)</b>	<b>\$32.31</b>	\$36.08	\$33.65	\$45.50

The ACCC has included the following connection and ancillary charges in the FAD, based on the considerations set out in section 4.3 of this report.

**Table 5.2: FAD connection charges**

<b>Connection type</b>	<b>Charge per connection</b>
<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<sup>241</sup></b>	<b>\$80.00</b>
<b>All other completed installation or transfer requests</b>	<b>\$80.00</b>

<sup>240</sup> Aggregating Virtual Circuit/Virtual Local Area Network.

<sup>241</sup> LOLO – LinxOnLine Ordering; LOLIG – business-to-business ordering of end-user accesses.

**Table 5.3: FAD early termination charges**

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

## 5.1 Differences between the draft FAD prices and FAD prices

The FAD prices for the wholesale ADSL service differ from the draft prices set out in the March 2013 Draft Report. The main reasons for the shift in prices for the service are:

- The FAD price for AGVC has decreased since the draft prices released in March. This is due to a revised AGVC usage figure that now includes all types of AGVC traffic (as discussed in section 3.2.5).
- The ACCC updated three Weighted Average Cost of Capital (WACC) parameters—the risk free rate, debt risk premium and debt issuance costs—because these parameters are estimated using specific point in time observations of market data. As a result, the nominal vanilla WACC decreased from 6.58 per cent to 6.33 per cent.

## 5.2 Summary of submissions

In response to the draft prices in the March 2013 Draft Report, the ACCC received a number of submissions regarding the draft prices in the FAD.

Herbert Geer submitted that the wholesale ADSL prices are excessive and ‘will impede competition and are contrary to the LTIE’.<sup>242</sup>

Optus has submitted that the FAD prices do not ‘promote competition or ensure that Telstra recovers only its *legitimate* costs’.<sup>243</sup> Optus submitted that prices for wholesale ADSL had ‘largely remained stable notwithstanding a material change in the underlying cost methodology’ and that the ACCC had ‘placed too much emphasis on price stability over other components of the LTIE’.<sup>244</sup>

Optus submitted that the ACCC’s ‘proposed pricing does not enable competition using regulated services’.<sup>245</sup> It stated that the cost of wholesale ADSL is ‘significantly greater than the costs of competitive providers to supply an equivalent service using ULLS’ and that ‘Telstra has consistently failed the equivalence test for ULLS in the ACCC imputation tests’.<sup>246</sup>

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<sup>242</sup> Herbert Geer, April 2013 submission, p. 5.

<sup>243</sup> Optus, April 2013 Submission, p. 15.

<sup>244</sup> Optus, April 2013 submission, p. 3.

<sup>245</sup> Optus, April 2013 submission, p. 13.

<sup>246</sup> Optus, April 2013 submission, p. 13.

Optus stated that it had analysed Telstra's current retail ADSL plans and tested whether access seekers could use the wholesale ADSL service to replicate these plans.<sup>247</sup> Optus submitted that 'it is not possible to offer an equivalent service using the [wholesale ADSL] service' despite assuming conservative cost estimates and lower quality of service.<sup>248</sup> Optus stated that this 'undermines' claims by the ACCC that the declaration of wholesale ADSL would promote competition in the industry.<sup>249</sup>

Optus submitted that the ACCC's proposed prices risked 'imposing the current market structure into the NBN world'.<sup>250</sup> Optus stated that '[f]ailure to allow access seekers to compete against Telstra allows Telstra to gain significant first-mover advantage by maintaining its current subscriber base on the NBN'.<sup>251</sup>

### 5.3 ACCC final view

The ACCC has had regard to the submissions made by parties regarding the draft FAD prices, both regarding the calculation methodology and the overall price levels. The ACCC has responded to the submissions on methodology and implementation of the cost-based prices in the previous chapters. This section considers submissions made regarding the prices themselves and how they may address the legislated matters to which the ACCC must have regard in making an FAD.

The ACCC does not accept Optus' submission that the ACCC has placed too much emphasis on price stability over the other components of the long-term interests of end-users (LTIE). In determining the FAD prices, price stability was not an overt objective of the ACCC. The ACCC has sought to implement a pricing approach for wholesale ADSL that:

- results in prices that reflect a reasonable estimate of the efficient costs of providing wholesale ADSL, such that both efficiency and competition will be promoted (alongside the other matters to which the ACCC must have regard, including the interests of the access provider and access seekers); and
- is consistent with the cost-based approach using the Fixed Line Services Model (FLSM) for the July 2011 fixed line services FADs, in particular to reduce the risk of Telstra over- or under-recovering the costs of supplying wholesale ADSL and the other declared fixed line services.

While some aspects of the pricing approach have retained existing *relativities* in the current FAD prices, the overall price levels for the wholesale ADSL service have not been determined with the explicit intention of maintaining price stability.

The ACCC considers that Optus' analysis regarding the replication of Telstra's retail plans is unlikely to be an accurate indicator of how the regulated services can enable competition with Telstra. The ACCC notes the following:

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<sup>247</sup> Optus, April 2013 submission, p. 14.

<sup>248</sup> Optus, April 2013 submission, p. 14.

<sup>249</sup> Optus, April 2013 submission, p. 14.

<sup>250</sup> Optus, April 2013 submission, p. 15.

<sup>251</sup> Optus, April 2013 submission, p. 15.

- The cost of replication using wholesale ADSL may be overstated because the analysis potentially overstates the AGVC usage costs. The ACCC is unable to have confidence in Optus' statement that access seekers would face negative margins if they replicated Telstra's retail broadband offerings using wholesale ADSL.
  - The ACCC considers that the peak usage throughput assumptions adopted by Optus—ranging from 0.09 Mbps to 8.66 Mbps—appears to be unrealistically high. By way of comparison, the ACCC notes that the public TEM report for the six months to June 2012 indicates that average AGVC usage per SIO on wholesale ADSL services was approximately 0.1076 Mbps (85,140 Mbps/791,055 SIOs).<sup>252</sup>
  - The AGVC usage cost is a significant component in Optus' analysis—ranging from 6 per cent to 86 per cent of the total cost over 24 months, across the 8 plans—of the total cost of replicating Telstra's retail ADSL plans using wholesale ADSL in Optus' analysis. Therefore, the high usage assumptions will have a substantial effect on Optus' cost estimates.
- Other access seekers are able to offer retail ADSL plans, using wholesale ADSL as an input, with significantly higher data allowances (and, by implication, higher monthly AGVC usage under Optus' framework) at a much lower cost. The ACCC notes that iPrimus offers a retail ADSL service—supplied using wholesale ADSL and with an unlimited data allowance—and a fixed voice service for \$139.90 per month in Zone 1.<sup>253</sup> This figure is significantly lower than the monthly cost of replicating Telstra's 200GB and 500GB retail ADSL plans that was set out in Optus' submission.
- The ACCC notes that access seekers compete with Telstra and other market participants on both price and non-price terms. The ACCC considers that measuring competitiveness and competition based solely on replicating Telstra's retail offers—without considering product differentiation (e.g. customer service, or offering unmetered content (such as iiNet's Freezone)) and innovation (e.g. new products)—would only provide a partial assessment of whether access seekers can compete with Telstra using regulated services.
- The ULLS equivalence test referred to by Optus is not directly relevant to the provision of retail services using wholesale ADSL; access seekers acquiring the ULLS will not also acquire wholesale ADSL to supply services to the same end-user. In any case, the ACCC has previously stated that 'a negative margin [in the imputation tests], on its own, is not sufficient to determine whether anti-competitive behaviour is occurring'.<sup>254</sup> The ACCC noted that negative margins may arise due to

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<sup>252</sup> Telstra, *TEM Public Report – FY12 H2 final*, available at: <http://transition.accc.gov.au/content/index.phtml/itemId/1082349>.

<sup>253</sup> iPrimus offers an ADSL service in Zone 1 with an unlimited data quota (supplied using wholesale ADSL) for a price of \$109.95 ('No Worries Unlimited Data (Zone 1)') and combines this with iPrimus' retail line rental of \$29.95 ('iPrimus Value') for a total monthly price of \$139.90.

<sup>254</sup> ACCC, *Accounting Separation of Telstra: imputation testing and non-price terms and conditions report for the December quarter 2012*, March 2012, p. 1.



‘an increase in competition that drives down retail prices’ or increases in costs that had ‘reasonable explanations’.<sup>255</sup>

For these reasons, the ACCC disagrees with Optus’ submission that access seekers are unable to compete with Telstra using the wholesale ADSL service.

The ACCC also does not agree with access seekers’ submissions that the prices included in the FAD will impede competition and not promote the LTIE. Firstly, the ACCC’s decision to declare the wholesale ADSL service, and introduce regulated pricing in the IAD, resulted in lower costs of supply for a majority of access seekers currently acquiring wholesale ADSL services from Telstra. As such, regulation of wholesale ADSL has already improved access seekers’ ability to compete with Telstra in downstream markets using the wholesale ADSL service.

Secondly, the ACCC has adopted a detailed cost-based pricing approach that seeks to estimate prices based on the efficient costs of providing the wholesale ADSL service. Estimating prices based on the actual and forecast costs incurred by Telstra in supplying the service will facilitate access seekers’ ability to provide competitive services in retail markets, as well allowing the access provider to recoup its efficiently incurred costs (including a commercial return on its investment).<sup>256</sup> This will, in turn, promote the LTIE.

With regard to Optus’ submissions regarding competition during migration to the NBN, the ACCC considers that promoting competition is an important objective during this period however this objective must also be balanced against other factors, including efficiency and legitimate interests of parties (e.g. to be able to recover their costs).<sup>257</sup>

The ACCC considers that the prices included in this FAD for the wholesale ADSL service are appropriate and reasonable, having regard to the matters included in section 152BCA of the *Competition and Consumer Act 2010* (CCA). To obtain the prices included in this FAD, the ACCC used its Fixed Line Services Model (FLSM) to derive prices based on an estimate of the efficient costs of providing the declared fixed line services.<sup>258</sup> 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.<sup>259</sup> The ACCC considers that the prices included in this FAD are a reasonable estimate of the efficient costs of supplying wholesale ADSL services: this will promote competition in the markets for carriage services, thereby promoting the LTIE.<sup>260</sup>

The ACCC has identified and included the direct costs of providing access to wholesale ADSL in the FLSM.<sup>261</sup> The cost allocation factors used in the FLSM allocate directly attributable costs to the wholesale ADSL service. For costs that cannot be directly attributed

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<sup>255</sup> ACCC, *Accounting Separation of Telstra: imputation testing and non-price terms and conditions report for the December quarter 2012*, March 2012, p. 1.

<sup>256</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>257</sup> Subsection 152BCA(1)(a) of the CCA; Subsection 152BCA(1)(b) of the CCA; Subsection 152BCA(1)(c) of the CCA.

<sup>258</sup> Subsection 152BCA(1)(d) of the CCA.

<sup>259</sup> Subsection 152BCA(1)(f) of the CCA.

<sup>260</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>261</sup> Subsection 152BCA(1)(d) of the CCA.

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. 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 other declared fixed line services.<sup>262</sup> 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 (such as the Wholesale Line Rental service and other PSTN services).

Setting access prices for wholesale ADSL that are based on an estimate of efficient costs will facilitate access seekers' ability to provide competitive services in retail markets and encourage the efficient operation of carriage services on the access provider's network.<sup>263</sup> Moreover, prices that are based on efficient costs 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.<sup>264</sup>

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<sup>262</sup> Subsection 152BCA(2) of the CCA.

<sup>263</sup> Subsections 152BCA(1)(a), 152BCA(1)(c) and 152BCA(1)(g) of the CCA.

<sup>264</sup> Subsections 152BCA(1)(a) and 152BCA(1)(b) of the CCA.

## **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
- other issues, and
- fixed principles provisions.

The matters that the ACCC must take into account when making an FAD were discussed in chapter 2. In reaching a final view on the price terms and conditions for the wholesale ADSL FAD, the ACCC had regard to these matters. The ACCC's specific analysis of how the price terms and conditions included in this FAD meet the relevant legislative criteria is contained in several of the 'ACCC final view' sections in the following chapters.

## 6 Scope 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 *Competition and Consumer Act 2010* (CCA). The category A standard access obligations (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>265</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>266</sup> Exempting certain carriers or CSPs from complying with the SAOs is equivalent to de-regulating those carriers and CSPs, subject to any conditions and limitations in the FAD.

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>267</sup>

### 6.1 Geographic exemptions

#### 6.1.1 Background

The ACCC has previously considered submissions by Telstra for exemptions from compliance with the SAOs (that is, exemptions from regulation) in Exchange Service Areas (ESAs) where there is competitor-installed equipment.<sup>268</sup> The ACCC’s previous consideration of geographic exemptions related to other declared fixed line services.<sup>269</sup> Telstra’s main argument in support of such exemptions is that ESAs where Telstra’s competitors have their own exchange equipment are competitive. It follows that, if the access

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<sup>265</sup> Section 152AR of the CCA.

<sup>266</sup> Paragraphs 152BC(3)(h) and (i) of the CCA.

<sup>267</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*, sections 152BC(3)(h) and (i).

<sup>268</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>269</sup> The fixed line services are ULLS, LSS, WLR, LCS, PSTN OA and PSTN TA. The ACCC last considered the appropriateness of geographic exemptions during its 2011 ‘inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services’.

provider is already subject to competitive constraint, then ‘the price and other terms and conditions of supply available in the market can already be considered to be competitive.’<sup>270</sup>

Deciding whether to grant geographic exemptions for wholesale ADSL requires the ACCC to answer two questions. First, are there geographic segments of the market that are sufficiently competitive to mean that de-regulation would promote the long-term interests of end-users (LTIE)? Second, would de-regulating some geographic segments of the market for wholesale ADSL services promote competition, efficient use of and investment in infrastructure, and the LTIE in the ADSL market as a whole?

In response to the ACCC’s February 2012 Discussion Paper, Telstra submitted that the ACCC should include terms and conditions in the wholesale ADSL FAD that remove any obligation to comply with the SAOs and the FAD in ESAs where there is a minimum presence of Optus, iiNet, TPG and Telstra Digital Subscriber Line Access Multiplexers<sup>271</sup> (DSLAMs).<sup>272</sup> That is, Telstra proposed that the appropriate geographic segment for assessment was the ESA and that the appropriate threshold for determining whether the ESA was competitive was whether there is a minimum presence of Optus, iiNet, TPG and Telstra DSLAMs in an ESA.

Telstra’s submission indicated that, at the time, 289 ESAs (‘the 289 ESAs’) satisfied its proposed criteria for geographic exemptions. In effect, Telstra submitted that the supply of wholesale ADSL services in the 289 ESAs should not be regulated on the grounds that the 289 ESAs met its proposed threshold for being assessed as competitive.

In the July 2012 Issues Paper, the ACCC indicated that it would use the ESA, or groupings of ESAs, as a basis for considering exemptions. However, the ACCC also stated that assessing the level of competition on this basis is separate to a consideration of the impact that a proposed exemption would have on the national market as a whole.<sup>273</sup>

### **6.1.2 March 2013 Draft Report view**

For the reasons set out in the March 2013 Draft Report,<sup>274</sup> the ACCC 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 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.

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<sup>270</sup> ACCC, July 2012 Issues Paper, p. 12.

<sup>271</sup> A DSLAM is a telephone network device normally located in a telephone exchange that links many customer DSL connections (copper wires) to a core IP network via a backhaul system.

<sup>272</sup> Telstra, August 2012 non-price terms submission, pp. 19-20 & 75.

<sup>273</sup> ACCC, July 2012 Issues Paper, p. 12.

<sup>274</sup> ACCC, March 2013 Draft Report, pp. 84-87.

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

In the March 2013 Draft Report,<sup>275</sup> the ACCC considered that the national wholesale and retail markets for fixed line broadband services are the relevant markets for considering whether to grant geographic exemptions in this FAD.

The ACCC noted in its March 2013 Draft Report 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. However, the ACCC also noted evidence that Telstra has a higher combined wholesale and retail ADSL market share in the 289 ESAs than any of the access seekers in those ESAs. Further, in regard to the resale supply of wholesale ADSL services, Telstra is the dominant provider.

The ACCC considered that Telstra is likely to retain its dominant position in supplying wholesale ADSL services because, for certain segments of the market, there are commercial barriers that reduce the contestability of those market segments by access seekers.

The ACCC considered that access seekers' smaller DSLAM footprints (compared with Telstra) meant that access seekers are unable to provide their wholesale customers with wholesale ADSL services on a national basis. Several access seekers submitted that many potential purchasers of wholesale ADSL services require national coverage so that they can supply their retail customers, specifically business and government customers that have operations in metropolitan and regional areas across Australia.

In addition, the ACCC noted submissions that there are significant incremental costs to sourcing wholesale ADSL services from multiple suppliers. The ACCC considered that this would reduce the ability of access seekers with DSLAM networks to compete with Telstra in supplying wholesale ADSL services to a significant segment of the wholesale market.

Taking these considerations into account, the ACCC reached the view that a decision to give effect to geographic exemptions was not likely to promote competition or the LTIE.<sup>276</sup>

### ***Large pair gain systems***

The presence of Large Pair Gain Systems<sup>277</sup> (LPGS) means that a significant segment of the wholesale and retail market cannot be addressed by non-Telstra suppliers of wholesale ADSL services or by access seekers using ULLS/LSS and their own DSLAMs.<sup>278</sup> This is because the economics do not support competitive entry at roadside cabinets – there are relatively few services that can be supplied from where the copper pairs terminate and relatively high costs to install a competitor DSLAM. Telstra's cabinets do not support competitor equipment and hence a competitor would have to build a separate cabinet and power source adjacent to the Telstra cabinet. As a result, the presence of LPGS reduces the substitutability of ULLS/LSS for wholesale ADSL. The ACCC considered that 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

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<sup>275</sup> ACCC, March 2013 Draft Report, p 78.

<sup>276</sup> ACCC, March 2013 Draft Report, p. 87.

<sup>277</sup> LPGS generally connect a number of copper pairs to roadside cabinets connected back to the exchange by optical fibre. End-users connected to LPGS can get ADSL services over Telstra's network, provided the LPGS cabinet is ADSL-enabled and a port is available.

<sup>278</sup> ACCC, March 2013 Draft Report, pp. 84-85.

retail customers on lines affected by LPGS. The ACCC reached the view that the presence of LPGS reduces the scope for competition within the 289 ESAs and consequently limits the ability of non-Telstra wholesale ADSL providers to constrain the pricing and terms and conditions of supply of Telstra's wholesale ADSL services in ESAs where there are LPGS.

Due to the technological impediment created by LPGS, access seekers are unable to offer 'on-net' retail products (that is, products supplied using ULLS/LSS and their own equipment) to end-users on lines affected by LPGS. Access seekers can only compete for these customers by supplying 'off-net' retail products (that is, products supplied using the wholesale ADSL service as an input). The ACCC considered, therefore, that giving effect to geographic exemptions has the potential to reduce the competitiveness of access seeker 'off-net' retail products with Telstra's retail products, for end-users affected by LPGS, since the regulated wholesale ADSL price would not apply in exempt ESAs.<sup>279</sup>

Taking these considerations into account, the ACCC reached the view that giving effect to geographic exemptions has the potential to negatively impact on retail competition in ESAs where there are LPGS.

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

The ACCC considered that access seekers obtain significant benefits from self-supplying wholesale ADSL services and that regulated access to Telstra's wholesale ADSL services does not remove these benefits. Therefore, as noted in its March 2013 Draft Report, the ACCC considered that the availability of a regulated wholesale ADSL service is unlikely to lead to the inefficient decommissioning or disposal of access seeker DSLAMs and that giving effect to geographic exemptions is unlikely to change access seekers' incentives to make efficient use of their own infrastructure.<sup>280</sup>

The ACCC noted that the expansion of the combined non-Telstra DSLAM footprint has slowed. Potential reasons identified in the March 2013 Draft Report were that the rollout of the NBN may have reduced the payback period for DSLAM investments; and that the expected commercial returns from further DSLAM investments falls as the footprint expands (because access seekers are more likely to install DSLAMs in the more profitable ESAs before expanding their DSLAM footprint to less profitable ESAs).<sup>281</sup>

The ACCC further noted that these trends commenced and predominantly existed during a period where wholesale ADSL was unregulated. The ACCC concluded that granting exemptions in certain ESAs was unlikely to alter these trends and therefore that a decision to give effect to geographic exemptions would be unlikely to promote efficient investment in access seeker infrastructure.

In addition, the ACCC was of the view that Telstra will invest where it can make a reasonable return on its investment. The ACCC considered that the proposed regulated prices, being based on estimates of Telstra's efficient costs of supplying wholesale ADSL services, would mean Telstra will have an incentive to invest in infrastructure where it is efficient to do so. Therefore, the ACCC considered that a decision to give effect to

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<sup>279</sup> ACCC, March 2013 Draft Report, pp. 87-89.

<sup>280</sup> ACCC, March 2013 Draft Report, pp. 89-91.

<sup>281</sup> ACCC, March 2013 Draft Report, p. 90.

geographic exemptions would not further encourage Telstra to invest in infrastructure efficiently.<sup>282</sup>

### 6.1.3 Summary of submissions

Submissions received in response to the ACCC's February 2012 Discussion Paper and July 2012 Issues Paper are summarised in the ACCC's March 2013 Draft Report. The ACCC has taken these submissions into account in reaching its final view on the issue of geographic exemptions.

Following the release of its March 2013 Draft Report, the ACCC received further submissions from stakeholders. The ACCC has also taken these submissions into account in reaching its final view on the issue of geographic exemptions.

Broadly, submissions to the March 2013 Draft Report indicated that access seekers support the ACCC's proposal to not make terms and conditions that give effect to geographic exemptions.<sup>283</sup>

Telstra submitted that it has concerns with the ACCC's proposal to not give effect to geographic exemptions. Telstra submitted that the 289 ESAs it identified in its August 2012 submission are 'clearly effectively competitive', noting that Telstra is not the largest supplier of retail DSL services in [Telstra c-i-c] [Telstra c-i-c] of them, and that there are other groups of ESAs in which the degree of competition is greater than the 289 ESAs.<sup>284</sup>

Telstra also submitted that the Herfindahl-Hirschman Index (HHI) is a widely used tool for the assessment of competitiveness in a market. Telstra submitted analysis using this measure, highlighting the distribution of HHI scores across the 289 ESAs.<sup>285</sup>

Telstra stated that the ACCC has not articulated why the concerns it raised in the wholesale ADSL draft decision 'reduce effective competition within these ESAs to such an extent that granting an exemption would not be in the LTIE'.<sup>286</sup> Telstra also submitted that the ACCC should also place weight on the 'potential benefits of more efficient investment in infrastructure flowing from an exemption being granted'.<sup>287</sup>

Telstra proposed that the ACCC should adopt a 'clear, overarching set of criteria or assessment framework' for assessing whether an ESA is competitive. It stated that the ACCC has provided little guidance on the appropriate threshold for granting an exemption in any ESA (or group of ESAs). Telstra stated that the ACCC had not considered other ESAs or groups of ESAs other than the 289 ESAs.<sup>288</sup>

Telstra submitted that it had identified 167 ESAs when the following, stricter criteria than that used to identify the 289 ESAs is applied:

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<sup>282</sup> ACCC, March 2013 Draft Report, p. 91.

<sup>283</sup> AAPT, April 2013 submission, p. 2.; Macquarie Telecom, April 2013 submission, p. 4.; Herbert Geer, April 2013 submission, pp. 2 & 10-11.

<sup>284</sup> Telstra, April 2013 submission, pp. 20 & 24.

<sup>285</sup> Telstra, April 2013 submission, pp. 23-24.

<sup>286</sup> Telstra, April 2013 submission, p. 20.

<sup>287</sup> Telstra, April 2013 submission, p. 23.

<sup>288</sup> Telstra, April 2013 submission, pp. 20-22.



- Optus, iiNet and TPG (at a minimum) have a competitive DSLAM presence
- the minimum combined market share for ULLS and LSS-based services is [c-i-c] [c-i-c]
- the maximum proportion of lines served by LPGS is [c-i-c] [c-i-c] and
- the maximum HHI score is 2500.<sup>289</sup>

#### 6.1.4 ACCC final view

The ACCC confirms its decision to not make terms and conditions that give effect to geographic exemptions in the wholesale ADSL FAD.

The ACCC notes Telstra's submission on the distribution of HHI scores within the 289 ESAs.<sup>290</sup> The HHI is one of several tools, along with market shares and concentration ratios, that the ACCC uses as a measure of market concentration.<sup>291</sup> Consequently, in reaching its decision on whether to grant geographic exemptions, the ACCC has considered a number of indicators of the level of competition and the key factors influencing the contestability of certain market segments.

Based on submissions and the ACCC's analysis of market structure and the state of competition, the ACCC has concluded that Telstra remains the dominant supplier of wholesale ADSL services in the national market. This is because, for certain segments of the market, there are commercial and technical barriers that reduce the contestability of those market segments by access seekers. The main barriers are:

- Access seekers' inability to provide their wholesale customers with the national coverage that they often require, due to their smaller DSLAM footprints, reduces their scope to compete with Telstra in supplying wholesale ADSL services to a significant segment of the wholesale market. Their ability to compete with Telstra for this segment of the market (that requires national coverage) is further reduced by the significant incremental costs of sourcing wholesale ADSL services from multiple suppliers.
- The presence of LPGS means that a significant proportion of end-users are not addressable by access seekers with ULLS/LSS and their own DSLAM infrastructure. For these end-users, Telstra's wholesale ADSL is the only input that can be used by access seekers to compete with Telstra for retail DSL customers and for wholesale ADSL customers on lines affected by LPGS.

Taking into account these factors that impede competition, Telstra may have the ability and incentive to leverage its dominant position in the supply of wholesale ADSL services to discourage competitive conduct. For this reason the ACCC has concluded that giving effect

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<sup>289</sup> Telstra, April 2013 submission, pp. 21 & 27-28.

<sup>290</sup> Telstra, April 2013 submission, p. 24.

<sup>291</sup> ACCC, Merger guidelines, November 2008, pp. 36-38. The ACCC notes that, in the context of merger review assessments, the ACCC typically uses an HHI of 2000 as a 'preliminary indicator' of a market concentration that indicates a closer inspection of competition is necessary.

to geographic exemptions is unlikely to promote competition and could result in a lessening in competition.<sup>292</sup>

The ACCC has considered Telstra's submission that the ACCC should reconsider the design of a threshold for assessing competition in individual ESAs. In doing so, the ACCC has been mindful that some market segments can only be supplied efficiently when there is national coverage. The ACCC has also noted that Telstra submitted that it markets its retail ADSL offers on a national basis.<sup>293</sup>

The ACCC has concluded that the assessment of the impact on competition must take a national perspective in addition to considering the level of competition in a particular ESA or group of ESAs. Taking into account the circumstances discussed above, the ACCC considers that de-regulating some geographic segments of the market for wholesale ADSL services—even if individual geographic market segments can be described as 'competitive'—would have adverse implications for competition and the LTIE.<sup>294</sup> Conversely, the presence of a regulated wholesale ADSL service is likely to allow access seekers, that supply wholesale ADSL services to other access seekers, to offer national coverage by combining services supplied using ULLS/LSS and their own DSLAMs with wholesale ADSL services purchased from Telstra and on-sold to their wholesale customers. The presence of a regulated wholesale ADSL service can therefore promote competition in wholesale and retail ADSL markets and the LTIE.<sup>295</sup>

The ACCC's view is further supported by its conclusion that giving effect to geographic exemptions is unlikely to further encourage efficient investment in competitive infrastructure or reduce incentives to make efficient use of existing infrastructure, as discussed below. In regard to the efficient use of infrastructure, the ACCC maintains its view 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 has concluded that the availability of a regulated wholesale ADSL service is unlikely to lead to the inefficient decommissioning or disposal of access seeker DSLAMs. The ACCC considers that access seekers will continue to have an incentive to use their infrastructure efficiently.<sup>296</sup>

The ACCC has noted Telstra's submission that the ACCC's analysis of the likely impacts of granting exemptions on DSLAM investment was limited to 'competitive' ESAs in which significant competitive investments have already been made.<sup>297</sup> In fact, the ACCC's analysis of recent DSLAM investment in its March 2013 Draft Report included the entire access seeker DSLAM footprint, including those ESAs outside of the 289 ESAs.

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.

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<sup>292</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>293</sup> Telstra, April 2013 submission, p. 16.

<sup>294</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>295</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>296</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>297</sup> Telstra, April 2013 submission, pp. 25-26.

The ACCC maintains its view that the general slowing of access seeker investment suggests that the majority of efficient access seeker investments in DSLAM infrastructure have already occurred. The ACCC considers that access seekers have weaker incentives to further expand and deepen the DSLAM footprint as the expected commercial returns from further DSLAM investments falls as the footprint expands 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 it is likely to have created some uncertainty about the expected payback periods on further DSLAM investments.

As these trends commenced significantly prior to wholesale ADSL becoming a declared service, the ACCC remains of the view that these trends will continue regardless of whether or not the SAOs apply in certain 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.<sup>298</sup>

In the ACCC's view, Telstra will invest where it can make a reasonable return on its investment. As the prices in the FAD will allow Telstra to recover its efficient costs of providing the wholesale ADSL service, the ACCC has concluded that where the SAOs apply, Telstra will continue to have an incentive to invest in infrastructure where it is efficient to do so.<sup>299</sup>

The approach framework adopted by the ACCC in assessing terms and conditions that give effect to geographic exemptions against the LTIE and the other relevant legislative matters is discussed in chapter 2.

## **6.2 Carrier-specific exemptions**

Once a service is declared, an access provider supplying the declared service to itself or to another person must also supply the service, upon request, to access seekers that supply services to end-users, in accordance with the SAOs set out in section 152AR of the CCA. 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>300</sup>

The ACCC has included a term in the FAD exempting all non-Telstra access providers from the SAOs<sup>301</sup> on the grounds that they are already sufficiently constrained by competition from Telstra.

The framework adopted by the ACCC in assessing terms and conditions that give effect to carrier-specific exemptions is discussed in chapter 2.

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<sup>298</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>299</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>300</sup> Subsection 152AR(2) of the CCA.

<sup>301</sup> Subsection 152BC(3)(h) of the CCA.

### **6.2.1 March 2013 Draft Report view**

As discussed in the March 2013 Draft Report, the ACCC decided that giving effect to carrier-specific exemptions would promote the LTIE and competition in wholesale and retail ADSL markets, and would encourage efficient use of and investment in infrastructure.<sup>302</sup>

The ACCC considered that Telstra is the dominant provider of wholesale ADSL services. Further, certain barriers to competition (namely, the presence of LPGS and customer requirements for national coverage—discussed in the first part of this chapter) would reduce the competitiveness of non-Telstra access providers (that is, access seekers who supply wholesale ADSL services using ULLS/LSS and their own DSLAMs). Consequently the ACCC considered that Telstra was likely to remain the dominant provider of wholesale ADSL services.

Because of Telstra's dominant position in the wholesale ADSL market, the ACCC considered 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 also considered that applying the SAOs to non-Telstra suppliers could reduce access seekers' incentives to invest in infrastructure, or implement innovations, for the supply of wholesale ADSL services. The ACCC was of the view that this would have detrimental impacts on competition in wholesale and retail ADSL markets and on efficient use of and investment in infrastructure.

The ACCC noted that it had not been provided with any evidence that non-Telstra wholesale ADSL service providers are engaging in anti-competitive behaviour.

### **6.2.2 Summary of submissions**

Submissions received in response to the ACCC's February 2012 Discussion Paper and July 2012 Issues Paper are summarised in the ACCC's March 2013 Draft Report. The ACCC has taken these submissions into account in reaching its final view on the issue of carrier-specific exemptions.

Following the release of its March 2013 Draft Report, the ACCC received further submissions from stakeholders. The ACCC has also taken these submissions into account in reaching its final view on the issue of carrier-specific exemptions.

Access seeker submissions indicated support for the ACCC's proposal to make terms and conditions that give effect to carrier-specific exemptions.<sup>303</sup>

Telstra's submission reiterated the views expressed in its earlier submissions that where the SAOs apply to the supply of wholesale ADSL services in particular geographic areas, they should apply to all access providers,<sup>304</sup> including access seekers who supply wholesale ADSL services using ULLS/LSS and their own DSLAMs.

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<sup>302</sup> ACCC, March 2013 Draft Report, pp. 93-95.

<sup>303</sup> AAPT, April 2013 submission, p. 2; Macquarie Telecom, April 2013 submission, p. 6; Herbert Geer, April 2013 submission, pp. 2 & 11.

<sup>304</sup> Telstra, April 2013 submission, p. 28.

Telstra submitted that in the areas where access seekers have installed DSLAM-based infrastructure, the market for ADSL services exhibits different characteristics and outcomes, when compared to those areas where access seekers have not installed competitive infrastructure.<sup>305</sup>

Telstra also submitted that the ACCC's view—that imposing terms and conditions on non-Telstra providers of wholesale ADSL may harm their ability to develop and innovate different offerings—could also be applied to Telstra.<sup>306</sup>

Telstra added that requiring non-Telstra providers to comply with the SAOs and the FAD terms and conditions would not be unduly onerous, as any products that were sufficiently differentiated from Telstra's wholesale ADSL offering may not be covered by the wholesale ADSL service description.<sup>307</sup>

### **6.2.3 ACCC final view**

The ACCC confirms its decision to include terms and conditions in the wholesale FAD that give effect to carrier-specific exemptions.

The ACCC has concluded that many owners of competitive DSLAM infrastructure do not currently have the capability to offer a wholesale ADSL service and would have to undertake significant investment in billing and provisioning systems to comply with the SAOs. Giving effect to carrier-specific exemptions will, in the ACCC's view, be likely to ensure that access seekers with their own DSLAMs, but without existing wholesale customers, are not required to undertake significant investments without a business case that provides a commercial risk-adjusted rate of return.<sup>308</sup> For this reason, the ACCC considers that giving effect to carrier-specific exemptions is likely to encourage efficient investment in infrastructure.<sup>309</sup>

The incremental costs of acquiring wholesale ADSL services from multiple providers and Telstra's significantly larger network coverage give Telstra a competitive advantage in the wholesale ADSL market for particular customer segments. In addition, non-Telstra access providers are unable to supply wholesale ADSL services on lines affected by LPGS.

As a result, non-Telstra access providers seek to attract wholesale customers by differentiating their wholesale ADSL product offerings in order to offset factors that reduce their ability to compete with Telstra. The ACCC considers that giving effect to carrier-specific exemptions is likely to allow non-Telstra access providers the flexibility to differentiate their product offerings from those of Telstra in order to compete for wholesale customers. The ACCC has concluded that giving effect to carrier-specific exemptions is likely to promote competition.<sup>310</sup>

Finally, the ACCC is of the view that Telstra's pricing of wholesale ADSL constrains the prices that can be charged by non-Telstra wholesale ADSL providers as it is the dominant supplier of wholesale ADSL services to third parties. The regulated price for the wholesale

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<sup>305</sup> Telstra, April 2013 submission, p. 29.

<sup>306</sup> Telstra, April 2013 submission, p. 29.

<sup>307</sup> Telstra, April 2013 submission, p. 29.

<sup>308</sup> ACCC, March 2013 Draft Report, p. 98.

<sup>309</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>310</sup> Subsection 152AB(2)(c) of the CCA.

ADSL service will be an indirect constraint on pricing by non-Telstra providers. Therefore giving effect to carrier-specific exemptions is likely to promote competition and the LTIE.<sup>311</sup>

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<sup>311</sup> Subsections 152AB(2)(c) and 152BCA(1)(a) of the CCA.

## 7 Bundling with PSTN services

During the wholesale ADSL declaration inquiry, access seekers submitted that the service description should state that access seekers are allowed to purchase unbundled wholesale ADSL, without the need for a Public Switched Telephone Network (PSTN) service. The ACCC considered that this issue could be appropriately dealt with through the FAD inquiry, rather than the declaration inquiry.<sup>312</sup>

Telstra currently supplies wholesale and retail ADSL services only where there is an underlying PSTN service on the line (referred to as bundling). This precludes access seekers from using Telstra's wholesale ADSL service to provide naked ADSL services to retail customers.<sup>313</sup>

However, access seekers can supply naked ADSL services by purchasing the Unconditioned Local Loop Service (ULLS) and using their own Digital Subscriber Line Access Multiplexer (DSLAM) equipment. Alternatively, access seekers can acquire naked wholesale ADSL from an access provider other than Telstra.

### 7.1 March 2013 Draft Report view

The ACCC decided not to require Telstra to offer a fully unbundled or hybrid unbundled wholesale ADSL service for several reasons.<sup>314</sup> The ACCC accepted that the existence of an underlying PSTN service on the customer's line is a technical requirement of the way Telstra currently provides ADSL, both wholesale and retail. The ACCC considered the costs associated with full unbundling are likely to be high and would need to be recovered through any regulated access charge, significantly diminishing or eliminating any retail price advantage for access seekers.<sup>315</sup>

Further, the ACCC considered that it may be inefficient to require Telstra to make such an investment based on the high costs and the limited contestable customer base for naked wholesale ADSL. The ACCC also considered that full unbundling may affect the reliable operation of Telstra's current network, resulting in an increase in line faults and service assurance costs.<sup>316</sup>

Similarly, the ACCC considered that the costs to implement a hybrid service are likely to be the same, if not higher than, a bundled service. The ACCC thought that this would limit the ability of access seekers to compete with Telstra at the retail level. The ACCC also considered it would be inefficient to require Telstra to offer a hybrid service as it would not

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<sup>312</sup> ACCC, *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final Decision*, February 2012, p. 13.

<sup>313</sup> Naked ADSL refers to a standalone ADSL service on the local loop, which is supplied without an associated PSTN service or dial tone. It allows consumers to acquire ADSL without a fixed line voice service.

<sup>314</sup> Full unbundling would involve an access provider offering a wholesale ADSL service on a stand-alone basis. Hybrid unbundling would involve the provision of a stripped back line rental product in conjunction with the wholesale ADSL service.

<sup>315</sup> ACCC, March 2013 Draft Report, pp. 106-112.

<sup>316</sup> ACCC, March 2013 Draft Report, pp. 106-112.

bypass PSTN infrastructure required to provide a full service product, it is not highly demanded by access seekers, and it is likely to attract a limited contestable customer base.<sup>317</sup>

## 7.2 Summary of submissions

AAPT, Herbert Geer (on behalf of iiNet), Macquarie Telecom and Optus disagreed with the ACCC's draft decision on bundling. AAPT submitted that naked ADSL could provide cost savings to end-users and would allow AAPT to provide new and novel value-added services to meet growing demand.<sup>318</sup> Similarly, Macquarie Telecom submitted that unbundling would provide access seekers with flexibility to meet the diverse needs and preferences of end-users.<sup>319</sup>

Herbert Geer submitted that the ACCC did not give proper weight to the positive factors of unbundling.<sup>320</sup> Herbert Geer considered that unbundling would increase consumer choice, promote competition and provide a cheaper service option.<sup>321</sup> Optus considered that the ACCC should not accept Telstra's claims regarding the costs of unbundling.<sup>322</sup> Optus submitted that consumers may save \$6 per month if Telstra were required to supply an unbundled wholesale ADSL.<sup>323</sup>

Telstra agreed with the ACCC's draft decision. It reiterated that forced unbundling would require Telstra to develop and provide a new service, which would necessitate significant and costly changes to its systems and processes.<sup>324</sup> Telstra noted that a requirement to provide an unbundled service would also increase line faults and ongoing costs of service assurance.<sup>325</sup> Telstra also considered that the demand for a naked ADSL service is likely to be limited.<sup>326</sup>

## 7.3 ACCC final view

The approach adopted by the ACCC in assessing whether to include a term requiring Telstra to offer a fully unbundled or hybrid unbundled wholesale ADSL service is outlined in chapter 2. Based on the reasons below, the ACCC has not inserted such terms in the FAD. In the absence of an unbundling term, the FAD prices for wholesale ADSL only apply in circumstances where there is an active PSTN voice product on the end-user's line.

This view is based on an assessment of information available to the ACCC at this time. As foreshadowed in the March 2013 Draft Report, the ACCC may reconsider this issue should relevant circumstances change in the future. One such example could be if Telstra commenced supplying fully unbundled or hybrid unbundled ADSL services. Further, notwithstanding this decision, the ACCC maintains the position that its powers are broad

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<sup>317</sup> Ibid.

<sup>318</sup> AAPT, April 2013 submission, p. 4.

<sup>319</sup> Macquarie Telecom, April 2013 submission, p. 6.

<sup>320</sup> Herbert Geer, April 2013 submission, pp. 2 and 12.

<sup>321</sup> Herbert Geer, April 2013 submission, p. 12.

<sup>322</sup> Optus, April 2013 submission, pp. 22-24.

<sup>323</sup> Optus, April 2013 submission, p. 24.

<sup>324</sup> Telstra, April 2013 submission, p. 30.

<sup>325</sup> Telstra, April 2013 submission, p. 31.

<sup>326</sup> Telstra, April 2013 submission, p. 32.



enough to include a term in an FAD, requiring an access provider to offer a fully unbundled or hybrid unbundled service.

The ACCC considers that unbundling has the potential to provide positive benefits, such as promoting competition in the form of lower prices and greater diversity of services for end-users. However, at this point in time, the ACCC considers that the potential benefits of unbundling are outweighed by the following factors.

Firstly, the ACCC accepts that the existence of an underlying PSTN service on a line is a technical requirement of the way Telstra currently supplies its ADSL services. The ACCC considers that it would be in Telstra's legitimate business interests to recover the costs to modify its network to accommodate a fully or hybrid unbundled service. The ACCC also considers that these costs are likely to be recovered through any access charge for such a service.<sup>327</sup>

The costs to implement a fully unbundled service are likely to include capital costs, ongoing service assurance costs and the cost of providing the line for the service. Telstra submitted that a requirement to supply an unbundled ADSL service would involve capital costs of [c-i-c] [c-i-c] associated with upgrades and modifications to [c-i-c] [c-i-c] systems and processes.<sup>328</sup> The ACCC considers it is not unreasonable that Telstra seek to recover its capital costs, which would involve costs to modify its operational and business support systems. These costs are likely to be high and will involve testing and the costs associated with obtaining and developing the expertise required to upgrade PSTN legacy systems.

The ACCC maintains its view that access seekers may face higher service assurance charges for a fully unbundled service. The ACCC accepts that a fully unbundled service may result in an increase in line faults and may lessen Telstra's ability to deploy certain testing methods to diagnose and locate faults.

The ACCC also considers that a fully unbundled service would involve costs associated with providing access to the copper line, which would involve some level of infrastructure and service between that provided with ULLS and Wholesale Line Rental (WLR). The ACCC also maintains the view that a line rental contribution for a naked ADSL service may fall between the regulated access charge for ULLS and WLR.

Consistent with the March 2013 Draft Report, the ACCC considers that the cost of acquiring a fully unbundled ADSL service via Telstra's naked ADSL inputs is likely to be higher than the current costs of providing naked ADSL over ULLS. The ACCC considers the cost of providing a fully unbundled service would need to take into account the cost of lines in regional areas, including the cost of ULLS in band 4.

As outlined in the March 2013 Draft Report, the ACCC considers that regional areas (bands 3 and 4) are likely to represent the majority of the contestable customer base for naked wholesale ADSL, as end-users in many metropolitan areas already have access to naked ADSL services. The ACCC also considers the take-up rates in regional areas may be less than those where naked ADSL is already available, as Telstra's naked ADSL inputs are likely to be less competitive than ADSL provided over ULLS in metropolitan areas. Taking

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<sup>327</sup> Paragraphs 152BCA(1)(b) and (d).

<sup>328</sup> Telstra, August 2012 non-price terms submission, pp. 34-36.

these factors into account, the ACCC considers there would be a small difference between the retail cost of a fully unbundled and bundled wholesale ADSL service.

Regarding hybrid unbundling, the ACCC maintains the view that Telstra would seek to recover the direct costs of providing a hybrid product. This is likely to include the costs to pre-provisioning limited functionality and adjustment of Telstra's operational systems and processes to accommodate a hybrid service.<sup>329</sup> The ACCC's assessment, which was acknowledged by stakeholder submissions, is that the cost of a hybrid unbundled service is likely to be the same, if not higher than, a bundled wholesale ADSL service.<sup>330</sup>

Secondly, the ACCC maintains the view that the above costs are likely to be passed onto end-users as part of any regulated access charge to the service, substantially diminishing or eliminating the retail cost differential between a bundled and unbundled service. The ACCC considers that this limited differential is unlikely to improve the incentive or ability of access seekers to compete with Telstra through price, particularly in regional areas.<sup>331</sup> The ACCC considers that this limited retail cost differential will also affect the ability of access seekers to compete with Telstra through the delivery of new and innovative naked ADSL services.<sup>332</sup> Therefore, at this time, requiring Telstra to offer a fully or hybrid unbundled service is unlikely to deliver some of the key benefits of unbundling.

Thirdly, the ACCC considers it is inefficient to require Telstra to offer a fully or hybrid unbundled service. Based on the limited retail cost differential between a bundled and an unbundled service, the ACCC considers that it may not be an efficient use of infrastructure to require Telstra to offer such services.<sup>333</sup> In particular, an unbundled service is likely to be comparable in price to the status quo, while delivering fewer services for end-users. Further, Telstra may not achieve economies of scale, given the expected limited contestable customer base for naked wholesale ADSL services.<sup>334</sup>

The ACCC also considers that a hybrid service is likely to be an inefficient operation of Telstra's network as it does not avoid PSTN architecture used to supply a full service product and is not highly demanded by access seekers.<sup>335</sup>

Further, the ACCC considers that the economic life of Telstra's investments to provide a fully or hybrid unbundled service may be uncertain based on the progressive migration to the NBN. The ACCC considers this relevant given the likely contestable customer base of a retail naked ADSL service supplied via Telstra wholesale ADSL inputs.

Fourthly, the ACCC considers that providing a naked ADSL service without the underlying PSTN service may increase the incidence of line faults, impacting the reliable operation of Telstra's current network infrastructure. The ACCC considers that the provision of a fully unbundled service may be diminished by Telstra's inability to deploy certain testing methods through the PSTN, to locate and diagnose line faults. Further, the ACCC accepts that the

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<sup>329</sup> Paragraphs 152BCA(1)(b) and (d).

<sup>330</sup> Herbert Geer, August 2012 submission, p. 14; AAPT, August 2012 submission, p. 19; Optus, August 2012 submission, p. 27.

<sup>331</sup> Paragraph 152BCA(1)(a).

<sup>332</sup> Paragraph 152BCA(1)(a).

<sup>333</sup> Paragraphs 152BCA(1)(a) and (g).

<sup>334</sup> Paragraphs 152BCA(1)(a) and (g).

<sup>335</sup> Paragraphs 152BCA(1)(a) and (g).

provision of a fully unbundled service may require the use of less accurate and more labour and time intensive methods of identify such faults. Therefore, the ACCC considers that maintaining the status quo will promote the reliable operation of Telstra's wholesale ADSL service provided over its current network.<sup>336</sup>

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<sup>336</sup> Paragraph 152BCA(1)(f).

## 8 Points of interconnection for the wholesale ADSL service

A point of interconnection (POI) is defined in the wholesale ADSL service description.<sup>337</sup> In this inquiry the ACCC considered submissions in relation to whether to include in the FAD:

- a term requiring the deployment of additional POIs; and/or
- a term that has the effect of separating the ADSL service such that the local access component is provided separately from the backhaul transmission component.

Telstra's current wholesale ADSL service includes both local access from the network termination point at the customer premise to the local exchange, and backhaul transmission between the local exchange and the POI with the access seeker's network. Telstra currently deploys 14 POIs which are located in CBD exchanges in the state capitals and in Canberra.<sup>338</sup>

### 8.1 March 2013 Draft Report view

The ACCC did not include either of these terms in the draft FAD. The ACCC considered that their inclusion would not be in the long-term interests of end-users (LTIE) because of the significant costs likely to be required for the implementation of either term.<sup>339</sup> These costs include those associated with the re-engineering of Telstra's ADSL network and the deployment of additional network components, including additional expensive high-capacity BRAS (broadband remote access server) and IGR (internet gateway router) devices.<sup>340</sup>

The ACCC formed the draft view that requiring Telstra to incur these costs and deploy the additional components would likely lead to an inefficient level of investment and under-utilisation of the relevant facilities.<sup>341</sup>

### 8.2 Summary of submissions

Herbert Geer (on behalf of iiNet) submitted that the ACCC should establish what aggregation points Telstra uses for its own traffic and include a term in the wholesale ADSL FAD that allows interconnection at those aggregation points. Herbert Geer submitted this would promote competition in transmission service markets without the disadvantage of requiring Telstra to substantially alter its existing network.<sup>342</sup>

Conversely, Telstra supported the ACCC's draft position in relation to POIs and concurred that the inclusion of such terms would be inconsistent with the statutory criteria.<sup>343</sup> Telstra reiterated that the Digital Subscriber Line Access Multiplexer (DSLAM) cannot split or separate DSL traffic, or provide any of the header and footer information required to

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<sup>337</sup> As defined in the service description for the wholesale ADSL service – see Appendix A.

<sup>338</sup> Telstra, August 2012 non-price terms submission, p. 44; Telstra, August 2012 statement of [c-i-c] [c-i-c], pp. 11-15.

<sup>339</sup> ACCC, March 2013 Draft Report, pp. 116-119.

<sup>340</sup> Telstra, August 2012 non-price terms submission, pp. 55-56.

<sup>341</sup> ACCC, March 2013 Draft Report, pp. 116-119.

<sup>342</sup> Herbert Geer, April 2013 submission, pp. 2-3.

<sup>343</sup> Telstra, April 2013 submission, p. 33.

authenticate and terminate end-user sessions. It submitted that these and other essential network functions required for the provision of a wholesale ADSL service reside in BRAS and IGR devices. Telstra reiterated that IGR devices split the traffic to an appropriate POI, provide routing and traffic management services and provide the physical port infrastructure necessary for a POI.<sup>344</sup>

Telstra's submission also reiterated that its centralised network architecture represented an efficient network design and that the re-engineering of its network would result in a loss of efficiency and would be unlikely to encourage the economically efficient use of and investment in infrastructure.<sup>345</sup> Telstra agreed that recovery of the costs associated with implementing further POIs would likely lead to increased prices for end-users.<sup>346</sup>

Optus stated the wholesale ADSL access service should be unbundled from both a PSTN line and the backhaul service. It noted New Zealand as an example of a market where access seekers self-supply backhaul.<sup>347</sup>

### 8.3 ACCC final view

Consistent with the March 2013 Draft Report, the ACCC has determined that the FAD will not include a term requiring the deployment of additional POIs, or a term that has the effect of separating the local access component from the backhaul transmission component. The ACCC's reasons for this determination are as follows.

The ACCC has approached the assessment of the statutory criteria in relation to POIs as described in chapter 2 of this final report. 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.

The ACCC has considered submissions that the benefits of increasing the number of POIs or otherwise enabling greater use of backhaul provided by parties other than Telstra include: encouraging entry into the market for supply of transmission services; greater competition for the provision of transmission infrastructure; and lower prices for end-users.<sup>348</sup> However, the ACCC considers that these potential benefits are outweighed by the following factors.

Firstly, Telstra submitted that it is not possible to unbundle a wholesale ADSL service to allow an interconnection point between the DSLAM and BRAS. Telstra also submitted that the implementation of either of the proposed terms would significantly increase the direct costs incurred by Telstra. This includes re-engineering of Telstra's delivery network and the deployment of additional high capacity network components including BRAS and IGR devices (which cost in the order of [c-i-c] [c-i-c] and [c-i-c] [c-i-c] respectively).<sup>349</sup> Based on Telstra's submissions, the ACCC understands interconnection at aggregation points deeper

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<sup>344</sup> Telstra, April 2013 submission, pp. 33-34.

<sup>345</sup> Telstra, April 2013 submission, p. 34.

<sup>346</sup> Telstra, April 2013 submission, p. 34.

<sup>347</sup> Optus, April 2013 submission, p. 22.

<sup>348</sup> Subsections 152AB(2)(c); 152AB(2)(e); 152BCA(1)(a); 152BCA(1)(c); 152BCA(1)(e); and 152BCA(1)(g) of the CCA; Optus, August 2012 submission, p. 28; Nextgen, August 2012 submission, pp. 1-3; Macquarie Telecom, August 2012 submission, pp. 14-15.

<sup>349</sup> Telstra, August 2012 non-price terms submission, pp. 46 & 55-56.

into the network would require re-engineering of Telstra's delivery network and require one or more additional BRAS and IGR devices to be deployed.<sup>350</sup>

The ACCC considers that it would be reasonable for Telstra to recover these costs and in its legitimate business interests to earn a normal commercial return on its investment.<sup>351</sup>

Telstra's recovery of such costs would be likely to lead to higher prices for end-users that might outweigh the benefits of increased competition in transmission markets.<sup>352</sup>

Secondly, the ACCC maintains the view from the March 2013 Draft Report that requiring Telstra to incur these costs would not encourage efficient investment in ADSL infrastructure.<sup>353</sup> The ACCC considers that the deployment of additional BRAS and IGR devices appears to be an unnecessary duplication where ADSL can otherwise currently be efficiently supplied using a lesser number of such devices.

Based on the large capacities of these devices, the ACCC considers that further deployment in Telstra's current network may lead to under-utilisation of such infrastructure. The ACCC maintains its position in the March 2013 Draft Report that it may not be efficient to require Telstra to make such investments given the progressive rollout of the NBN and the decommissioning of Telstra's copper network. The ACCC therefore maintains its draft view that the increased direct costs Telstra would incur if either term were included in the FAD would be unlikely to encourage the economically efficient investment in infrastructure.<sup>354</sup>

Thirdly, the ACCC considers that the re-engineering of Telstra's network to accommodate such terms may require Telstra to extend or enhance certain facilities. The ACCC maintains the view that the value to access seekers of such extensions or enhancements of capability may not be significant, based on the costs to accommodate these options.<sup>355</sup>

Fourthly, it is not necessarily in the interest of all persons who have rights to use the declared service to establish additional POIs because utilisation of additional POIs would depend on where they were located. Further, some access seekers submitted that their utilisation of additional POIs would depend on the geographic location of any such POIs.<sup>356</sup>

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<sup>350</sup> Telstra, August 2012 non-price terms submission, pp. 52-56; in particular paragraph [158].

<sup>351</sup> Subsections 152BCA(1)(b) and 152BCA(1)(d) of the CCA.

<sup>352</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>353</sup> Subsection 152AB(2) of the CCA.

<sup>354</sup> Subsection 152AB(2)(e) of the CCA.

<sup>355</sup> Subsection 152BCA(1)(e) of the CCA.

<sup>356</sup> Subsection 152BCA(1)(c) of the CCA.

## 9 Standard non-price terms and conditions

### 9.1 Overview

The ACCC maintains its view expressed in the March 2013 Draft Report that it is important to specify a base set of terms in the event that a commercial agreement cannot be reached.

The ACCC has decided to include the following schedules in the FAD:

- billing and notification
- creditworthiness and security
- general dispute resolution procedures
- confidentiality provisions
- suspension and termination
- liability and indemnity
- communications with end-users
- network modernisation and upgrade
- changes to operating manuals.

These schedules were included in the draft FAD. As further discussed in this chapter, the ACCC has made a number of amendments to the terms as they appeared in the draft FAD in the FAD.

Telstra submitted that the upcoming fixed line services FAD inquiry in 2014 presents an opportunity for the ACCC to conduct a holistic review of the non-price terms and conditions (NPTCs) for similar or related declared services.<sup>357</sup> Accordingly, Telstra submitted that some of its proposed amendments should be considered in the context of the wholesale ADSL FAD (**Substantive Submissions**) and indicated that other proposed amendments could be dealt with in the 2014 fixed line services FAD inquiry (**Other Submissions**).

The ACCC considers that it will be appropriate to reconsider NPTCs, and whether there should be a holistic review of the NPTCs, as part of the expected fixed line services FAD inquiry.<sup>358</sup> Therefore, in reaching its final views on the NPTCs for the wholesale ADSL FAD (sections 9.2–9.11 below), the ACCC has addressed Telstra's Substantive Submissions but not its Other Submissions. The ACCC considers that those Other Submissions are more relevant to the forthcoming 2014 FAD inquiry process and will take them into account then if Telstra raises them again in that process.

Discussions on the terms of specific schedules are provided below. The approach adopted by the ACCC in assessing the NPTCs against the legislative criteria is set out in chapter 2.

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<sup>357</sup> Telstra, April 2013 submission, pp. 36-37.

<sup>358</sup> The NPTCs will expire at the same time as the price terms, i.e. 30 June 2014. See section 10.3 on expiry date of the FAD.

## 9.2 Schedule 2 – Billing and notification

### 9.2.1 March 2013 Draft Report view

The ACCC made a draft amendment to clause 2.5 so that the backbilling period allowed in the FAD would mirror the backbilling period provided under any industry code from time to time.<sup>359</sup>

A draft amendment was also made to clause 2.6 to clarify that the entire clause 2.6 would be subject to clause 2.12. This made clear that access seekers are allowed to withhold payment of the disputed amount if a billing dispute notification is given before the due date of the invoice.

### 9.2.2 Summary of submissions

Herbert Geer (on behalf of iiNet) made three submissions in relation to the billing and notifications terms.

Firstly, Herbert Geer maintained its view expressed in its earlier submission that clause 2.14 should be amended so that where an investigation by the Telecommunications Industry Ombudsman involves disputation about charges levied by the access provider, the access seeker should be allowed to raise a billing dispute outside the six month period that is currently provided under the clause.<sup>360</sup>

Secondly, Herbert Geer submitted that it should be made clear that rejection of a billing dispute notice due to incomplete or inaccurate information under clause 2.15(b)(ii)C should not prevent the access seeker from submitting an amended billing dispute notice relating to the same dispute as long as it is submitted within the required timeframe under clause 2.14.<sup>361</sup>

Thirdly, Herbert Geer submitted that the five business day period for the access seeker to submit relevant information which it intends to rely on in a billing dispute under clause 2.16 should be subject to the parties agreeing on a longer period of time.<sup>362</sup>

Telstra reiterated a number of its previous submissions in its response to the draft FAD, specifically that:

- clause 2.7 should be amended so that the access provider does not have to wait for 20 business days and could take immediate action to recover an unpaid amount from an access seeker if the access seeker fails to pay within the 30 calendar day payment period,<sup>363</sup> and
- clause 2.30, which imposes penalty interest rates on the access provider for issuing multiple incorrect invoices, should be deleted or amended as other provisions in

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<sup>359</sup> The current *Telecommunications Consumer Protection Code* (C628:2012) provides for a backbilling period of 160 days under clause 5.4.

<sup>360</sup> Herbert Geer, April 2013 submission, p. 14.

<sup>361</sup> Ibid.

<sup>362</sup> Ibid.

<sup>363</sup> Telstra, April 2013 submission, pp. 38-39.



Schedule 2 already provide sufficient incentives for the access provider to provide accurate billing information.<sup>364</sup>

### **9.2.3 ACCC final view**

The ACCC has retained the billing and notification schedule because the terms encourage timely and accurate billing and provide a resolution process for billing disputes so that parties do not immediately have to resort to court action. The ACCC considers these terms will prevent unnecessary disruptions to business activities and provide assurance to the access provider of how investment costs will be recovered.<sup>365</sup>

#### ***Clause 2.14***

The ACCC considers that the potential increase in the timeframe if the proposed change is made (from 6 months to 25 months) is substantial and may undermine the legitimate interest of the access provider in the timely and efficient recovery of its costs through billing.<sup>366</sup> Because of this, the ACCC considers that the amendment should only be made when it is necessary to protect the interests of access seekers. The lack of evidence that the current timeframes has given rise to issues in the past is relevant as the ACCC cannot be satisfied that the amendment is necessary to protect the interest of the access seekers. For these reasons, the ACCC considers that the timeframe in clause 2.14 should remain.

#### ***Clause 2.15(b)(ii)C***

The ACCC considers that the amendment proposed by Herbert Geer would clarify the operation of the clause<sup>367</sup> and has accepted the proposed amendment in the FAD.

#### ***Clause 2.16***

The ACCC has adopted the amendment proposed by Herbert Geer. The ACCC considers this will benefit both the access provider and access seeker as it would facilitate commercially agreed outcomes that suit both parties where possible and provide flexibility.<sup>368</sup>

#### ***Clauses 2.7 and 2.30***

The ACCC considered Telstra's proposed amendments in the draft FAD and did not adopt them.<sup>369</sup> The ACCC maintains its views expressed in the draft FAD and considers that the proposed amendments would impose significant costs on access seekers and current clauses provide the right incentives to the access providers to provide correct and timely billing.<sup>370</sup> The ACCC has therefore not accepted Telstra's proposed amendments in the FAD.

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<sup>364</sup> Ibid, pp. 39-40.

<sup>365</sup> Sections 152BCA(1)(a) and 152BCA(1)(b) of the CCA.

<sup>366</sup> Section 152BCA(1)(b) of the CCA.

<sup>367</sup> Section 152BCA(3) of the CCA.

<sup>368</sup> Sections 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

<sup>369</sup> ACCC, March 2013 Draft Report, pp. 126-127.

<sup>370</sup> Section 152BCA(1)(b) of the CCA.

## 9.3 Schedule 3 – Creditworthiness and security

### 9.3.1 March 2013 Draft Report view

The ACCC did not make any amendment to the creditworthiness and security schedule as drafted in the Domestic Transmission Capacity Service (DTCS) FAD for the purpose of the draft wholesale ADSL FAD.

### 9.3.2 Summary of submissions

Telstra reiterated a number of its previous submissions in its response to the draft FAD, specifically that:

- the obligation of the access seeker to provide security should be a condition precedent to the supply of services and that the access provider should be able to determine the amount and form of security in Schedule 3,<sup>371</sup>
- clause 3.5 should be amended to broaden the circumstances under which the access provider may require an alteration of security,<sup>372</sup> and
- clause 3.9 should be deleted or amended to only apply to third parties accessing the access seeker's confidential information as any confidential information obtained by the access provider would attract the protection of Schedule 5.<sup>373</sup>

### 9.3.3 ACCC final view

The ACCC has retained the creditworthiness and security schedule because under those terms an access provider is able to obtain security and creditworthiness information. This reduces their financial risk.<sup>374</sup> At the same time, the terms do not impose excessive burden on the access seekers so as to frustrate their ability to acquire services and compete with the access provider.<sup>375</sup>

The ACCC considered Telstra's proposed amendments on the provision and alteration of security in determining the terms of the draft FAD and decided not to adopt them. The ACCC considered that the access provider would be afforded sufficient protection of its interests under the current terms of the schedule.<sup>376</sup> The ACCC acknowledges that the proposed amendments would further protect the legitimate interests of the access provider because these proposed terms give the access provider substantially greater rights in obtaining security from access seekers. However, the ACCC is required to balance this benefit to the access provider with the effect of these on the interests of access seekers and the long-term interests of end-users (LTIE).<sup>377</sup> The ACCC maintains its views expressed in the March 2013 Draft Report that these proposed amendments would impede the ability of access seekers to acquire the service and to compete with the access provider which would

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<sup>371</sup> Telstra, April 2013 submission, pp. 40-41.

<sup>372</sup> Ibid, pp. 41-42.

<sup>373</sup> Ibid, p. 42.

<sup>374</sup> Section 152BCA(1)(b) of the CCA.

<sup>375</sup> Sections 152BCA(1)(a) and 152BCA(1)(c) of the CCA.

<sup>376</sup> ACCC, March 2013 Draft Report, p. 128.

<sup>377</sup> Sections 152BCA(1)(a), 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

not be in the LTIE.<sup>378</sup> Therefore, the ACCC has not adopted these proposed amendments in the FAD.

The ACCC also maintains its view expressed in the March 2013 Draft Report in relation to clause 3.9, which gives the access seeker the right to require a confidentiality undertaking to be given that covers the ongoing creditworthiness information (OCI).<sup>379</sup> The ACCC considers that this clause is necessary to protect the legitimate interests of the access seeker, as it gives them the right to protect their confidential information in the OCI which may not be covered under Schedule 5.<sup>380</sup>

## **9.4 Schedule 4 – General dispute resolution procedures**

### **9.4.1 March 2013 Draft Report view**

The ACCC made draft amendments to clause 4.9 and specified a timeframe of 14 calendar days (or longer if agreed) under which each party is obliged to provide relevant material to the other after the notification of a non-billing dispute notice.

### **9.4.2 Summary of submissions**

Telstra reiterated a number of its previous submissions in its response to the draft FAD, specifically that:

- clause 4.1 should be amended to ensure that the appropriate resolution procedures are used and the access seeker is precluded from initiating both billing and non-billing dispute resolution in relation to the same subject matter,<sup>381</sup> and
- clause 4.2 should be amended to allow the access provider, not an independent arbiter, to determine whether a dispute is about billing or non-billing issues as proposed in its previous submission.<sup>382</sup>

### **9.4.3 ACCC final view**

The ACCC has retained the general dispute resolution procedures schedule because the terms reduce the time and expense of dispute resolution for all parties, promote regulatory certainty and encourage parties to confidently engage in commercial negotiations.<sup>383</sup>

The ACCC has not adopted Telstra's proposed amendments to clauses 4.1 and 4.2 in the FAD. The ACCC considers that the current drafting of clause 4.2 makes clear that if a non-billing dispute is raised or arises in connection with a billing dispute, that dispute will be resolved in accordance with the billing dispute procedures. The ACCC therefore does not consider it necessary to make amendment in clause 4.1. The ACCC considers it may potentially undermine the interests of the access seeker to allow the access provider, instead of an independent third party, to determine whether a billing dispute is in fact a non-billing

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<sup>378</sup> ACCC, March 2013 Draft Report, p. 128.

<sup>379</sup> Ibid, pp. 129-130.

<sup>380</sup> Section 152BCA(1)(c) of the CCA.

<sup>381</sup> Telstra, April 2013 submission, pp. 42-43.

<sup>382</sup> Ibid, p. 43. See also Telstra, August 2012 submission, pp. 97-98.

<sup>383</sup> Sections 152BCA(1)(a), 152BCA(1)(b), 152BCA(1)(c) and 152BCA(3) of the CCA.

dispute.<sup>384</sup> The ACCC considers the proposed amendment may provide the access provider with an undue amount of influence in dispute resolution procedures which could be exploited.

## **9.5 Schedule 5 – Confidentiality**

### **9.5.1 March 2013 Draft Report view**

The ACCC amended clause 7 of the confidentiality undertaking annexed to Schedule 5 to clarify that information stored in an IT backup system which cannot be separately destroyed or deleted is not required to be destroyed under the clause.

### **9.5.2 Summary of submissions**

Telstra reiterated its previous submission that a new subclause 5.5(j) should be inserted so that the access provider could disclose an access seeker's confidential information in accordance with a reporting obligation or a request from a regulatory authority or any other government body in connection with the Structural Separation Undertaking (SSU). Telstra submitted that the circumstances provided under this new subclause are unlikely to be covered by the current subclause 5.5(g).<sup>385</sup>

### **9.5.3 ACCC final view**

The ACCC has retained the confidentiality schedule because the protection of confidential information prevents this information from being used inappropriately, e.g. to gain a competitive advantage.<sup>386</sup> The terms also impose reasonable costs associated with the compliance of the terms.<sup>387</sup>

The ACCC has considered Telstra's proposed new clause and decided not to adopt it in this FAD. The ACCC acknowledges Telstra's argument that there may be circumstances in which information is informally or voluntarily requested from a party. In these cases, the party to whom the request is sent cannot rely on clause 5.5(g) and has to seek consent from the other party before the information can be disclosed. This may lead to delay in providing the required information to the regulatory authority. However, the ACCC considers this issue is not unique to this FAD and could be considered as part of the upcoming fixed line services FAD inquiries in 2014. The ACCC considers that this would allow further consultation and ensure a consistent approach to this issue across all declared fixed line services.

## **9.6 Schedule 6 – Suspension and termination**

### **9.6.1 March 2013 Draft Report view**

The ACCC made draft amendments to clause 6.2(b) providing that only a court could determine when a contravention of law occurred for the purpose of the clause, and that to

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<sup>384</sup> Section 152BCA(1)(c) of the CCA.

<sup>385</sup> Telstra, April 2013 submission, pp. 43-44.

<sup>386</sup> Sections 152BCA(1)(a), 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

<sup>387</sup> Section 152BCA(1)(d) of the CCA.

constitute a suspension event, the access seeker's unlawful use of its facilities must be in connection with the service provided by the access provider.

The ACCC also made a draft amendment to the wording of clause 6.3 which made clear that the failure to pay monies owed that are subject to a billing dispute does not constitute a suspension event under clause 6.2.

### 9.6.2 Summary of submissions

Telstra submitted that the ACCC's draft amendment to subclause 6.2(b) to require a judicial finding of a contravention of law is unworkable and should not be adopted. Telstra argued that this will impose unnecessary delay and may expose the access provider to an ongoing breach of the law.<sup>388</sup>

Telstra also reiterated a number of its previous submissions in response to the draft FAD that:

- subclause 6.2(f) should be amended so that the access provider may suspend any kind of service until a suspension notice is complied with or the suspension event otherwise ceases to exist,<sup>389</sup>
- clause 6.3 should be amended so that the failure to pay money that is subject to a billing dispute would not constitute a suspension event only when a billing dispute has been validly notified by the access seeker,<sup>390</sup>
- subclause 6.5(d)c should be amended so that the access seeker is required to complete, rather than just institute, remedial action within the specified timeframe before the access provider has the right to cease supply of the service,<sup>391</sup> and
- a new clause 6.5(e) should be included providing that the access provider has the right to cease supply in response to a material breach that is not capable of being remedied.<sup>392</sup>

### 9.6.3 ACCC final view

The ACCC has retained the suspension and termination schedule because the terms give rights to the access provider to suspend or terminate services. These terms also provide assurance to access seekers that their services would only be suspended or terminated under specified circumstances and would reduce the occurrence of disruptions to services.<sup>393</sup>

#### *Clause 6.2(b)*

The ACCC has maintained the draft amendment to clause 6.2(b) in the FAD. This amendment clarifies the purpose of this clause to give the access provider a right to suspend the service when there is a contravention of the law, not when the access provider suspects

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<sup>388</sup> Telstra, April 2013 submission, p. 44.

<sup>389</sup> Ibid, pp. 44-45.

<sup>390</sup> Ibid, p. 45.

<sup>391</sup> Ibid, pp. 45-46.

<sup>392</sup> Ibid, p. 46.

<sup>393</sup> Sections 152BCA(1)(a), 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

there is a contravention of the law.<sup>394</sup> The suspension of service on the ground of unlawful use of the service would not only cause significant loss to the access seeker's business, but also serious damage to its reputation.<sup>395</sup>

#### ***Clause 6.2(f)***

The ACCC maintains its view expressed in the March 2013 Draft Report. Having regard to the significant costs the proposed amendment would have on access seekers, as well as the adverse effect this would have on the end-users of the access seekers, the current drafting strikes the right balance between the competing interests of the access provider and access seekers.<sup>396</sup>

#### ***Clause 6.3***

The ACCC understands from Telstra's submission that the proposed amendment is necessary because a billing dispute notice may not be submitted in good faith. In this regard, the ACCC considers that this concern is addressed by clause 2.15(b)(ii)B, which gives the access provider a right to reject a billing dispute notice that was not submitted in good faith. If a billing dispute notice is rejected, then the billing dispute is not notified in accordance with the billing dispute procedures in the FAD, and clause 6.3 would not apply. Therefore, the ACCC does not consider it necessary to amend clause 6.3 to address Telstra's concern.

#### ***Clause 6.5(d)***

The ACCC maintains its view expressed in the March 2013 Draft Report that requiring the access seeker to complete remedial actions within 10 business days would impose a significant burden on the access seeker. In particular, the ACCC has taken into account that access seekers may need time to set up the relevant procedures for undertaking the remedial actions specified by the access provider. The ACCC has also taken into account that the consequence of failing to comply with the clause is the cessation of supply of service. Having regard to these matters, the ACCC considers that the current drafting strikes the right balance between the interests of the access provider and access seekers.<sup>397</sup>

#### ***New clause 6.5(e)***

The ACCC considers that a right to immediately cease supply of service has the potential to cause considerable detriment to access seekers and their end-users if exercised.<sup>398</sup> Therefore, the circumstances under which the access provider can exercise such a right need to be clearly specified. The ACCC does not consider that Telstra's proposed amendment specifies these circumstances clearly enough. A material breach that is irremediable is unclear in its scope and potentially gives rise to disagreement as to whether a breach is in fact remediable. The ACCC considers that current provisions give the access provider adequate protection as, depending on the degree of the breach, the access provider can either suspend or terminate the service if remedial action is not instituted within 10 business days.

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<sup>394</sup> See ACCC, March 2013 Draft Report, p. 136.

<sup>395</sup> Section 152BCA(1)(c) of the CCA.

<sup>396</sup> Sections 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

<sup>397</sup> Section 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

<sup>398</sup> Sections 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

## **9.7 Schedule 7 – Liability and indemnity**

### **9.7.1 March 2013 Draft Report view**

The ACCC added a new clause to Schedule 7 in the draft FAD to make clear that nothing in the schedule affects parties' entitlements to damages under Part 5 of the *Telecommunications (Consumer Protection and Service standards) Act 1999*.

### **9.7.2 Summary of submissions**

Telstra reiterated its previous submission that clause 7.1 should impose a minimum liability cap of \$1 million on all access seekers as it would be consistent with standard commercial practice and would strike an appropriate balance between the interests of the access provider and access seekers.<sup>399</sup>

### **9.7.3 ACCC final view**

The ACCC has retained the liability and indemnity schedule because the terms manage the allocation of capital risks between the parties, which will assist the parties in their commercial negotiations and thereby reduce barriers to entry.<sup>400</sup> The terms also give incentives to parties to act in a safe and reliable manner to avoid causing losses or injuries. The ACCC considers that the costs of acting in this manner would not be unreasonable having regard to the benefit.<sup>401</sup>

The ACCC maintains its view expressed in the March 2013 Draft Report and has not adopted Telstra's proposed liability cap of \$1 million.<sup>402</sup> The ACCC does not consider that Telstra's proposed \$1 million liability cap is an appropriate balance between the interests of the access provider and access seekers.<sup>403</sup> As the ACCC stated in the March 2013 Draft Report, there is no information which can be relied on to assess any particular amount of liability cap is the most appropriate having regard to the statutory criteria. The purpose of including the clause is to ensure that an access seeker's contingent liability is not open-ended and the parties are free to negotiate a specified liability cap which suits their particular circumstances.

## **9.8 Schedule 8 – Communications with end-users**

### **9.8.1 March 2013 Draft Report view**

The ACCC made a draft amendment to subclause 8.2(a) to clarify that the access provider is only allowed to communicate with the access seeker's end-users in relation to goods and services which the access provider currently supplies or previously supplied to the end-users through its retail business unit.

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<sup>399</sup> Telstra, April 2013 submission, pp. 46-47.

<sup>400</sup> Sections 152BCA(1)(a), 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

<sup>401</sup> Sections 152BCA(1)(d) and 152BCA(1)(f) of the CCA.

<sup>402</sup> ACCC, March 2013 Draft Report, p. 139.

<sup>403</sup> Sections 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

The ACCC also made a draft amendment to subclause 8.2(e) allowing the access provider to communicate with the access seeker's end-users in connection with an emergency, not just in an emergency.

### **9.8.2 Summary of submissions**

Telstra submitted that the ACCC's draft amendment to clause 8.2(a) should not be adopted as it may exclude circumstances in which it would be legitimate for the access provider to communicate with end-users other than through its retail business unit, such as in the event of a network fault. Telstra submitted that subclause 8.2(a) could be amended to permit other relevant business units, such as the network services business unit to contact end-users where appropriate.<sup>404</sup>

Telstra also reiterated its previous submission that a new clause should be included to require 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>405</sup>

### **9.8.3 ACCC final view**

The ACCC has retained the communications with end-users schedule because the terms ensure that the parties represent themselves and their services fairly and accurately when dealing with end-users. In particular, the terms seek to prevent the access provider from exploiting its vertical integration to win customers and encourage parties to compete fairly.<sup>406</sup>

The ACCC does not agree with Telstra's submission in relation to clause 8.2(a). Clause 8.2(a) expressly permits the access provider to communicate with an access seeker's end-users. It is intended that as long as the circumstances fall under this clause, the access provider is allowed to engage in marketing of its goods and services. To allow the communication requested by Telstra would allow a member of the network service business unit to engage in marketing and attempt to win back customers when they attend the premises of the end-user or otherwise communicate with the end-user in the event of a network fault. The ACCC considers that this defeats the purpose of the schedule and does not promote competition and the LTIE.<sup>407</sup> In the event that the network service business unit of the access provider needs to communicate with the end-users for legitimate purposes, the ACCC considers that these should occur in a manner or in circumstances agreed by the parties as provided under clause 8.2(d). Therefore, the ACCC has maintained the draft amendment to clause 8.2(a) in the FAD.

The ACCC also maintains its view expressed in the March 2013 Draft Report in relation to the new clause on reseller obligations proposed by Telstra.<sup>408</sup> The ACCC considers the obligation to ensure access seekers comply with certain obligations, even if qualified by 'so far as is reasonably practicable', would impose additional costs on access seekers. This could potentially incentivise access seekers to include these obligations in their contracts with resellers, impinging on the ability of the access seeker to reach agreement with resellers,

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<sup>404</sup> Telstra, April 2013 submission, p. 47.

<sup>405</sup> Ibid, p. 48.

<sup>406</sup> Sections 152BCA(1)(a), 152BCA(1)(b) and 152BCA(1)(c) of the CCA.

<sup>407</sup> Sections 152BCA(1)(a) and 152BCA(1)(c) of the CCA.

<sup>408</sup> ACCC, March 2013 Draft Report, p. 144.



which may heighten barriers to entry to the wholesale and retail market for ADSL services.<sup>409</sup> In so far as Telstra has concerns about resellers making false and misleading representations regarding the access provider, the resellers are subject to provisions in the Australian Consumer Law in the course of their dealing with end-users. The ACCC considers that the likely detriment to competition in this case outweighs any perceived benefit to the access provider.<sup>410</sup>

## **9.9 Schedule 9 – Network modernisation and upgrade**

### **9.9.1 March 2013 Draft Report view**

The ACCC included terms relating to network modernisation and upgrade in the draft FAD, which were based on the terms adopted in the DTCS FAD, previous FADs and the SSU. The ACCC also included terms relating to a coordinated capital works program which are included in the SSU but excluded in the DTCS FAD.

The ACCC inserted an additional clause 9.18 to take into account that Telstra has complied with the initial obligation to submit a coordinated capital works program forecast in the provision of wholesale ADSL service under the SSU.

### **9.9.2 Summary of submissions**

Telstra reiterated its previous submission that the inclusion of terms relating to network modernisation and upgrade may lead to dual regulation and increased compliance costs for the access provider, as it is obliged to comply with such terms in the SSU. Telstra also argued that the inclusion of clause 9.18 which waives the access provider's obligation to comply with clause 9.10 if the equivalent clause in the SSU has been complied with does not provide satisfactory protection against dual regulation. Telstra proposed that if the schedule is retained, clause 9.18 should extend the waiver to all obligations in the schedule.<sup>411</sup>

### **9.9.3 ACCC final view**

The ACCC does not agree with Telstra's submissions. Once the wholesale ADSL FAD specifies terms in relation to network modernisation and upgrade, the relevant terms in the SSU (Schedule 4, clauses 10–14) will not apply.<sup>412</sup> Therefore, there would be no dual regulation and hence no increased compliance costs for the access provider.<sup>413</sup>

The inclusion of clause 9.18 is intended to reduce the compliance cost of the access provider as the ACCC recognises that Telstra has already submitted a three year coordinated capital works program forecast under clause 11.1(a) of Schedule 4 of the SSU when the SSU first came into effect. If clause 9.18 was not included, the access provider would need to submit a three year coordinate capital works program forecast again within 14 calendar days from the date the FAD takes effect. This is a one-off obligation which the ACCC does not consider necessary to impose on the access provider again. Instead, the ACCC considers it sufficient

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<sup>409</sup> Section 152BCA(1)(a) of the CCA.

<sup>410</sup> Sections 152BCA(1)(a) and 152BCA(1)(b) of the CCA.

<sup>411</sup> Telstra, April 2013 submission, pp. 48-49.

<sup>412</sup> Clause 14(c)(ii), Schedule 4, SSU.

<sup>413</sup> Section 152BCA(1)(b) of the CCA.

that the access provider complies with its ongoing obligations in relation to the updating of its coordinated capital works program forecast and other associated obligations provided in the schedule.

## **9.10 Schedule 10 – Changes to operating manuals**

### **9.10.1 March 2013 Draft Report view**

The ACCC included terms relating to changes to operating manuals in the draft FAD which were based on Schedule I of the 2008 Model Terms.

### **9.10.2 Summary of submissions**

Telstra submitted that the inclusion of terms relating to changes to operating manuals is unnecessary and problematic due to the lack of historical access disputes, uncertainty regarding the meaning of operating manual and potentially having to maintain two amendment processes for operating manuals.<sup>414</sup> Telstra proposed that if the schedule remains, a number of amendments should be made, including that:

- clause 10.3 which gives the access seeker the right to invoke the dispute resolution procedures should be deleted as clause 10.1 already provides the access seeker a reasonable opportunity to comment on the access provider's proposed amendment; or alternatively, a longer notification period could be provided to access seekers who are materially adversely affected,<sup>415</sup>
- if clause 10.3 is retained,
  - the dispute resolution procedures should only be invoked on an objective basis and within 15 business days of receiving the notice set out in subclause 10.1(a),<sup>416</sup>
  - in determining whether the proposed amendment is unreasonable, regard should be had to ensuring that the terms relating to the service supplied to more than one access seeker are consistent and the impact of the amendment across all access seekers,<sup>417</sup>
  - clause 10.1 should provide that notwithstanding an access seeker's ability to invoke clause 10.3, the access provider may amend the operating manuals,<sup>418</sup> and
- clause 10.2 should be amended so that it is sufficient for the access provider to make a copy of the new operational document available to the access seeker.<sup>419</sup>

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<sup>414</sup> Telstra, April 2013 submission, p. 49.

<sup>415</sup> Ibid, pp. 49-50.

<sup>416</sup> Ibid, pp. 50-51.

<sup>417</sup> Ibid, p. 51.

<sup>418</sup> Ibid, p. 50.

<sup>419</sup> Ibid, p. 50.

### **9.10.3 ACCC final view**

The ACCC considers that the purpose of including the NPTCs is that the parties could be certain of the terms that apply if agreement cannot be reached. In this respect, the fact that there is a lack of historical disputes in relation to changes to operating manuals or that the access provider may have a different process for changes to operating manuals does not remove the benefit of having a base set of terms in regard to this issue. The ACCC considers that operational documents concerning the service capture any operating documents which affect the access seeker's access to the service. This is consistent with the objective of this schedule that access seekers should be notified of any changes that affect their abilities to acquire services or require them to change their existing systems or processes to comply with certain operational arrangements of the access provider.<sup>420</sup>

#### ***Clause 10.3***

The ACCC considers that clause 10.3 should be retained in the FAD. The ACCC considers that although the access provider must give notification to and receive comment from access seekers when it intends to change an operating manual, it does not need to obtain consent from access seekers to do so. Therefore, the ability to invoke dispute resolution procedures provides a necessary safeguard to access seekers.<sup>421</sup> Due to the importance of this right, the ACCC also considers that it should not be subject to any of the restrictions proposed by Telstra, which have the effect of making it impossible or difficult for access seekers to rely on clause 10.3.

#### ***Clause 10.2***

The ACCC has considered Telstra's current approach in respect of its wholesale services, and is of the opinion that it does not adversely affect an access seeker's interests.<sup>422</sup> Telstra's current practice involves providing notifications of amendments and making documents available online. In such a case, an access seeker would be made aware that the amendment to operating documents has been made and could immediately obtain a copy if it wants to. For these reasons, the ACCC has made an amendment to clause 10.2 based on Telstra's proposal in the FAD.

## **9.11 Other terms**

### **9.11.1 March 2013 Draft Report view**

The ACCC did not include terms in relation to ordering and provisioning in the draft FAD.

### **9.11.2 Summary of submissions**

Herbert Geer submitted that terms reflecting the following provisions in the SSU should be included in the FAD:

- Overarching equivalence commitment

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<sup>420</sup> Section 152BCA(1)(c) of the CCA.

<sup>421</sup> Section 152BCA(1)(c) of the CCA.

<sup>422</sup> Section 152BCA(1)(c) of the CCA.

Herbert Geer submitted that an FAD term requiring Telstra to provide equivalence as between Telstra Retail and the access seeker in relation to ordering and provisioning would provide a means of allowing access seekers to directly enforce Telstra's commitment under the SSU. Herbert Geer acknowledged that certain aspects of the equivalence commitment, such as price equivalence, would not be appropriate to be included in an FAD.<sup>423</sup>

- DSL upgrades

Herbert Geer submitted that clause 15 of the SSU (excluding clause 15(e)) should be included in the FAD as it promotes competition and the LTIE. Herbert Geer also submitted that as clause 15 of the SSU will have no effect for so long as the wholesale ADSL service remains an active declared service, there is a compelling reason to replicate it in the FAD.<sup>424</sup>

- Equivalence and transparency metrics

Herbert Geer submitted that metrics 8 to 11 in Schedule 3 of the SSU as well as the applicable service level rebates in Schedule 7 of the SSU should be included in the FAD.<sup>425</sup>

### 9.11.3 ACCC final view

The ACCC has considered Herbert Geer's proposal to include the three relevant clauses in the SSU but has decided not to adopt the proposal for the following reasons.

The overarching equivalence commitment in the SSU, which requires Telstra to ensure equivalence in relation to the supply of Regulated Services<sup>426</sup> to Telstra's wholesale customers and its retail business units, is only enforceable by the ACCC in accordance with the enforcement mechanism set out in Schedule 11 of the SSU.

The ACCC understands Herbert Geer's submission that including an overarching equivalence commitment in the FAD may provide an additional incentive for Telstra to provide equivalence, as this would enable access seekers to directly enforce Telstra's commitment under the SSU. However, in determining the terms of the FAD, the ACCC must have regard to the fact that Telstra is required to engage in conduct in order to comply with the SSU.<sup>427</sup> Given the nature of the specific ACCC enforcement mechanism prescribed in the SSU for possible breaches of the overarching equivalence commitment, inclusion of an overarching equivalence commitment in the FAD, particularly in a redacted or modified form, would likely give rise to inconsistency between the SSU and the FAD.

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<sup>423</sup> Herbert Geer, April 2013 Submission, pp. 15–16.

<sup>424</sup> Ibid, pp. 16–17.

<sup>425</sup> Ibid, p. 17.

<sup>426</sup> As provided under clause 71 of Schedule 1 to the *Telecommunications Act 1997*, a regulated service in this context means a declared service under Part XIC of the CCA unless the Minister declares otherwise.

<sup>427</sup> Section 152ER of the CCA.

Furthermore, the ACCC is satisfied that the measures contained in the SSU, together with the standard access obligations (SAOs),<sup>428</sup> provide appropriate safeguards for wholesale customers in relation to the ordering and provisioning of wholesale ADSL.

Unlike the network modernisation and upgrade terms in the SSU (discussed in section 9.9.3 above), the equivalence and transparency metrics in Schedule 3 of the SSU would continue to apply even if the FAD contains these terms. This means that Telstra would need to comply with the obligations in both the SSU and the FAD. The ACCC does not consider it is necessary to replicate these provisions in the FAD.

The DSL upgrade provisions under clause 15 of the SSU provide that if Telstra develops a DSL upgrade or a mass market naked DSL product, Telstra must make available a relevant comparable wholesale upgrade or naked DSL product to its wholesale customers.

The ACCC notes that, as submitted by Herbert Geer, clause 15 of the SSU has no effect while wholesale ADSL is an active declared service. However, the ACCC does not consider it is necessary to replicate these provisions in the FAD.

This is because should Telstra develop a naked DSL product or upgraded DSL product, the SAOs would require Telstra to take all reasonable steps to ensure the technical and operational quality of the declared service supplied to its wholesale customers is equivalent to that which it provides to itself.<sup>429</sup>

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<sup>428</sup> Sections 152AR(3)(b) and 152AR(4A) of the CCA.

<sup>429</sup> Section 152AR(3)(b) of the CCA

## 10 Other issues

### 10.1 Restriction on resale

Schedule 11 in the draft FAD provides that the wholesale ADSL service can be acquired on the terms specified in the FAD for the purpose of resale. This schedule also provides 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.

Herbert Geer submitted that these terms are appropriate, are required to promote competition, and should be included in the FAD.<sup>430</sup> No other submissions were received on this issue.

The ACCC maintains the view expressed in the March 2013 Draft Report that these terms will promote competition and the long-term interests of end-users (LTIE).<sup>431</sup> Therefore, the ACCC has retained Schedule 11 in the FAD.

### 10.2 Business grade services

The ACCC did not include any terms relating to business grade services in the draft FAD.<sup>432</sup> No submissions were received in relation to this issue.

The ACCC therefore maintains its position in the March 2013 Draft Report and has not included any terms relating to business grade services in the FAD.<sup>433</sup>

### 10.3 Commencement and expiry date

#### 10.3.1 Commencement date

##### *March 2013 Draft Report view*

The ACCC was of the view that the FAD should commence on publication. The ACCC did not consider there to be any factors in the period of time while the IAD was in effect which justified backdating the FAD.<sup>434</sup>

##### *Summary of submissions*

Telstra agreed with the ACCC's draft view. Telstra submitted that the approach taken in the March 2013 Draft Report is consistent with the position taken in other FADs, and this would promote certainty and price stability for industry.<sup>435</sup>

On the other hand, Macquarie Telecom and Herbert Geer both submitted that the FAD should be backdated. Both stakeholders submitted that Telstra gamed the regulatory process

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<sup>430</sup> Herbert Geer, April 2013 submission, p. 17.

<sup>431</sup> ACCC, March 2013 Draft Report, p. 152.

<sup>432</sup> Ibid.

<sup>433</sup> Ibid.

<sup>434</sup> Ibid, p. 154.

<sup>435</sup> Telstra, April 2013 submission, p. 35.

through its unsolicited submissions on congestion pricing, which ultimately delayed the inquiry and the application of cost-based pricing.<sup>436</sup> Herbert Geer noted that Telstra's failure to provide requested information contributed to delaying the inquiry.<sup>437</sup>

Macquarie also submitted that in deciding this issue, the ACCC should consider that access seekers are denied the benefit of lower prices if the FAD is not backdated.<sup>438</sup>

### *ACCC final view*

The ACCC has decided to maintain its position in the March 2013 Draft Report that the FAD should commence on publication.<sup>439</sup>

As discussed in the July 2012 Issues Paper, the ACCC considers that the approach taken in relation to backdating is different in the context of access determinations inquiries compared to the previous access dispute arbitration regime. While in an access dispute arbitration there was a tendency to backdate to limit regulatory gaming by an access provider, this is not the case in the context of access determination inquiries. This is because the ACCC has greater control over the process of the inquiry and the concerns around regulatory gaming are less likely to arise.

The ACCC maintains its view expressed in the March 2013 Draft Report that it does not consider backdating the FAD to be justified in this inquiry. The ACCC considers that the significant amount of time taken to finalise the FAD reflects the volume and complexity of the issues that were required to be addressed. The ACCC considers that where legitimate issues have been raised in an inquiry, the ACCC will give due consideration and conduct further consultation with stakeholders where appropriate.

For the avoidance of doubt, the FAD clarifies that the IAD prices applied from 14 February 2012 until the date the FAD commences.

## **10.3.2 Expiry date**

### *March 2013 Draft Report view*

The ACCC was of the view that the FAD should expire on 30 June 2014.<sup>440</sup> The ACCC considered that departing from the date of the expiry of the declaration was warranted because it would align with the expiry of the current fixed line services FADs, also on 30 June 2014.<sup>441</sup> Therefore, it would allow the wholesale ADSL prices to be reviewed and updated at the same time as the prices for other fixed line services, which would ensure consistency with the pricing approach used in setting the prices for services using the same network assets.<sup>442</sup>

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<sup>436</sup> Macquarie Telecom, April 2013 submission, p. 6; Herbert Geer, April 2013 submission, p. 19.

<sup>437</sup> Herbert Geer, April 2013 submission, p. 19.

<sup>438</sup> Macquarie Telecom, April 2013 submission, p. 6.

<sup>439</sup> ACCC, March 2013 Draft Report, p. 154.

<sup>440</sup> ACCC, March 2013 Draft Report, pp. 154-155.

<sup>441</sup> Section 152BCF(6)(a) of the CCA.

<sup>442</sup> ACCC, March 2013 Draft Report, pp. 154-155.

### *Summary of submissions*

Telstra, Macquarie Telecom and Herbert Geer supported the ACCC's draft view on the expiry date of the FAD and considered that it would be appropriate to review the pricing for the wholesale ADSL service with the other fixed line services.<sup>443</sup>

### *ACCC final view*

The ACCC maintains its view expressed in the March 2013 Draft Report and has set 30 June 2014 as the expiry date of the FAD. As discussed above, this allows the ACCC to review the prices for the wholesale ADSL service along with the prices for other fixed line services that use the same network assets. This ensures consistency in the pricing approach adopted for all fixed line services and reduces the risk of the access provider over- or under-recovering the cost of supplying these services.<sup>444</sup>

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<sup>443</sup> Telstra, April 2013 submission, p. 35; Macquarie Telecom, April 2013 submission, p. 6; Herbert Geer, April 2013 submission, p. 19.

<sup>444</sup> Section 152BCA(3) of the CCA.



## 11 Fixed principles provisions

An FAD may contain a fixed principles provision, which allows a provision in an FAD to have an expiry date after the expiry date of the FAD.<sup>445</sup> Such a provision allows the ACCC to ‘lock-in’ a term so that it would be consistent across consecutive FADs.

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 has decided that the wholesale ADSL FAD will 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 fixed principles provisions included in the FAD set out in some detail the framework for estimating prices in the next and subsequent regulatory periods.

The nominal termination date for the fixed principles provisions in the wholesale ADSL FAD will 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.

### 11.1 March 2013 Draft Report views

In the March 2013 Draft Report, the ACCC proposed to include fixed principles provisions in the FAD that specified the framework for estimating prices for the wholesale ADSL service using a building block model (BBM) approach.<sup>446</sup> The provisions related to:

- **Initial RAB value** – For calculating of prices for the wholesale ADSL service – The ACCC considered 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** – For calculating prices for the wholesale ADSL service – The ACCC considered 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** – For updating the opening RAB value each year to reflect forecast capital expenditure, 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

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<sup>445</sup> Section 152BCD of the CCA.

<sup>446</sup> ACCC, March 2013 Draft Report, pp. 156-160.

would 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.

- **Components of the revenue requirement** – The ACCC considered 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 would comprise a return on the RAB, a return of the RAB (that is regulatory depreciation), forecast operating expenditure and an allowance for tax liabilities.
- **Operating expenditure forecasts** – The fixed principles provisions would specify the factors the ACCC will take into account in assessing the reasonableness of Telstra’s operating expenditure forecasts to ensure that the forecast expenditures reflect prudent and efficient costs.
- **Capital expenditure forecasts** – The fixed principles provisions would specify the factors that the ACCC will take into account in assessing the reasonableness of Telstra’s capital expenditure forecasts to ensure that the forecast expenditures reflect prudent and efficient costs.
- **Demand forecasts** – The ACCC proposed to include a fixed principles provision that specifies the process for assessing the access provider’s demand forecasts.
- **Weighted average cost of capital (WACC)** – The fixed principles provisions would specify that a vanilla WACC is used to estimate the return on capital and the cost of equity is estimated using the Capital Asset Pricing Model. The ACCC considered it would not be appropriate to specify values for any of the WACC parameters in the fixed principles provisions.
- **Tax liabilities** – 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** – Where possible, the determination of cost allocation factors should reflect the following principles:
  - 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; and
  - no cost should be allocated more than once to any service.

## 11.2 Summary of submissions

The ACCC received one submission on its proposed fixed principles provisions.

Herbert Geer submitted that including fixed principles relating to the use of the building block model to calculate prices for wholesale ADSL will provide certainty to industry.<sup>447</sup>

Herbert Geer also submitted that the proposed fixed principle provisions that lock in the RAB values for the 'Data Equipment' asset class should include an ability for the ACCC to adjust the values in circumstances where errors in calculating the opening RAB values for these asset classes become evident.<sup>448</sup>

### **11.3 ACCC final views**

The ACCC confirms its view that the proposed fixed principles provisions are appropriate. These provisions have been included in the wholesale ADSL FAD at Clause 6.

The ACCC considers that including the fixed principles provisions in the FAD will promote certainty and predictability in the framework for setting prices for the wholesale ADSL service in future regulatory periods. This will in turn promote the efficient use of and investment in infrastructure and be in the legitimate business interests of the access provider and in the interests of access seekers.<sup>449</sup> A more detailed assessment of the legislated matters to which the ACCC must have regard to is discussed in chapter 2.

In regard to Herbert Geer's submission about the risk of including erroneous RAB values in the fixed principles provisions, the ACCC notes clause 6.2 of FAD allows the ACCC to modify or remove a fixed principles provision in certain circumstances.<sup>450</sup> Specifically, 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.

The ACCC considers that this provision would allow the ACCC to revise the RAB values if any errors were subsequently identified in the calculation of these values.

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<sup>447</sup> Herbert Geer, April 2013 submission, pp. 4 & 19.

<sup>448</sup> Herbert Geer, April 2013 submission, pp. 4 & 19-20.

<sup>449</sup> Subsection 152AB(2)(e) and subsection 152BCA(1)(b) and (c) of the CCA.

<sup>450</sup> Pursuant to subsection 152BCN(4) of the CCA, a fixed principles provision cannot be varied or removed unless the FAD sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.

## 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 March 2013 Draft Report
AAPT, Submission by AAPT Limited (5 April 2013) on Australian Competition and Consumer Commission Draft Report, <i>Public inquiry to make a final access determination for the Wholesale ADSL service</i> , dated March 2013, 5 April 2013. <b>(AAPT, April 2013 submission)</b>
City of Whittlesea, Wholesale ADSL Final Draft Access Determination Submission City of Whittlesea April 2013, 5 April 2013. <b>(City of Whittlesea, April 2013 submission)</b>
Herbert Geer, Public Inquiry to make a final access determination for the Wholesale ADSL Service (the WDSL Public Inquiry), 3 April 2013. <b>(Herbert Geer, April 2013 letter)</b>
Herbert Geer, Public Inquiry to make a Final Access Determination for the Wholesale ADSL

Service, Submission by Herbert Geer Lawyers on behalf of: iiNet Limited (Confidential Version), 5 April 2013. <b>(Herbert Geer, April 2013 submission)</b>
Macquarie Telecom, Public Inquiry to Make a Final Access Determination for the Wholesale ADSL Service, 5 April 2013. <b>(Macquarie Telecom, April 2013 submission)</b>
Optus, Optus Submission in response to the ACCC's Draft Report – Public Inquiry to make a Final Access Determination for the Wholesale ADSL service (Confidential version), 11 April 2013. <b>(Optus, April 2013 submission)</b>
Optus, Additional information on comparable wholesale ADSL rates in Europe and New Zealand, 17 April 2013. <b>(Optus, April 2013 supplementary submission)</b>
Optus, Optus submission on Wholesale ADSL service Draft Report – April 2013: Meeting with ACCC Commercial-in-Confidence, 23 April 2013. <b>(Optus, April 2013 presentation on its submission)</b>
Optus, Additional information for Wholesale ADSL Inquiry – Commercial in Confidence, 8 May 2013. <b>(Optus, May 2013 letter)</b>
Telstra, Response to the Commission's Draft Report in the Public inquiry to make a final access determination for the Wholesale ADSL service (Confidential version), 5 April 2013. <b>(Telstra, April 2013 submission)</b>
Frontier Economics (on behalf of Telstra), Congestion and Telstra's retail pricing plans – Note prepared for King & Wood Mallesons and Telstra (Confidential version), 9 April 2013. <b>(Frontier Economics, April 2013 submission)</b>
Submissions received in response to the ACCC's information requests
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. <b>(Telstra, October 2012 response to information request)</b>
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.



Telstra, Wholesale ADSL FAD inquiry – Request for data on AGVC/VLAN and, 3 May 2013. (Telstra, May 2013 response to information request)

## Appendix C: Detailed responses to submissions on implementation of the cost-based methodology

The following sections contain the ACCC's detailed responses to a number of the submissions on the ACCC's implementation of the cost-based methodology for estimating draft FAD prices for wholesale ADSL.

### C.1 Establishing the assets used to supply wholesale ADSL

The ACCC has analysed Optus' submission on the appropriate value of the RAB for the 'Data Equipment' asset class in the FLSM,<sup>451</sup> and considers that there is insufficient evidence to depart from the values used in the March 2013 Draft Report. The ACCC notes that Optus has not submitted detailed calculations in support of its analysis; as a result, the ACCC has been unable to exactly replicate all of Optus' figures reported in its submission. Further, the ACCC considers that Optus' analysis makes a number of significant assumptions. The ACCC considers that Optus' assumptions tend to overestimate the capital cost 'implied by the FLSM', and to underestimate the costs incurred in supplying wholesale ADSL. These matters are discussed in the following paragraphs.

In calculating what it considers to be the capital costs implied by the FLSM, Optus has made an assumption that a Digital Subscriber Line Access Multiplexer (DSLAM) has 576 end-users. The ACCC considers that some of the DSLAMs operated by Telstra may have capacity for significantly fewer end-users: the ACCC notes, for example, that a consultant's report previously submitted by Telstra made reference to a 'typical' 300-port DSLAM sub-rack.<sup>452</sup> The ACCC notes that reducing the estimated number of end-users would lower the estimated capital costs associated with each DSLAM using Optus' proposed methodology. Optus' analysis also appears to assume that all ports on a DSLAM are in use which, given the broad footprint of Telstra's ADSL network, may be unlikely.

In addition, the ACCC considers Optus' own 'grossed-up' estimates of DSLAM costs may be unrealistic as they fail to include a number of relevant assets needed to supply wholesale ADSL. In producing its estimates, Optus 'grossed up' the estimated cost of a DSLAM by adding an estimated cost for BRASs and IGRs (on a per-DSLAM basis).<sup>453</sup> However, a number of other assets within the 'Data Equipment' asset class are required to supply wholesale ADSL services including switches, IP traffic managers, element managers and software. In addition, Optus' analysis does not account for other costs involved in supplying the wholesale ADSL service, including network buildings/support and indirect capital assets. By not including all relevant costs in its analysis, it is likely that the framework proposed by

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<sup>451</sup> Optus, April 2013 submission, p. 9.

<sup>452</sup> Telstra, *Public inquiry to make Final Access Determinations for the declared fixed line services – Part C of Telstra's response to the Commission's discussion paper: Schedule C.1 – Update of expert opinion on the cost of DSLAM infrastructure*, June 2011, p. 3. This report is available on the ACCC's website at: <http://transition.accc.gov.au/content/index.phtml?itemId=991349>.

<sup>453</sup> Optus used figures submitted by Telstra in response to the July 2012 Issues Paper on the number of Broadband Remote Access Servers (BRASs) per DSLAM and Internet Gateway Routers (IGRs) per DSLAM, as well as the cost of BRASs and IGRs.

Optus (with analysis on a per-DSLAM basis) significantly underestimates the cost of assets needed to supply wholesale ADSL services.

## C.2 Capital expenditure

The ACCC assessed the magnitude of capital expenditure for each of the different components of the combined ‘Data Equipment’ asset class—‘Pair Gain Systems’, ‘Switching Equipment – Local’ and ‘Data Equipment’—as well as capital expenditure trends for each of those components. The ACCC considers that:

- Submissions have stated that Telstra may be less likely to invest in DSLAMs and copper network assets due to the deployment of the NBN. Capital expenditure on DSLAMs (and related assets such as housing and ADSL line cards) represents a proportion of the total capital expenditure for the ‘Data Equipment’ asset class in recent years. A significant amount of Telstra’s capital expenditure consists of expenditure on IP network equipment such as switches, servers, routers and traffic managers.
- Assets in Telstra’s asset register relating to the IP network are unlikely to be copper-specific and therefore Telstra is unlikely to face the same disincentives to invest (due to the rollout of the NBN) as for copper-specific infrastructure such as DSLAMs. In addition, the ACCC considers that Telstra’s investment in these assets is likely to have been driven by the strong growth in traffic on its ADSL network in recent years.
- Telstra’s asset register shows that investment in DSLAMs (and related assets such as ADSL line cards) appears to have increased in 2011-12 relative to previous years. This is consistent with Telstra’s statements (quoted by Optus) regarding Telstra’s upgrade of around 2,000 sites to be able to provide ADSL2+. The Top Hat rollout schedule on the Telstra Wholesale website shows that a significant number of sites were upgraded in the second half of 2012: that is, the 2012-13 financial year.<sup>454</sup> Therefore, the ACCC considers that it is not unreasonable to forecast that capital expenditure, even on the copper-specific assets within the combined ‘Data Equipment’ asset class, may increase by a nominal [c-i-c] [c-i-c] over 2012-13.
- Telstra’s expectation that its capital expenditure to sales ratio will decline ‘beyond 2014-2015’, as quoted in Optus’ submission,<sup>455</sup> is referring to a period that is beyond the expiry of the current wholesale ADSL FAD. Further, the ACCC notes that a decline in the capital expenditure to sales ratio will not necessarily result in a decline in capital expenditure overall if sales revenue is increasing. The ACCC notes that Telstra’s sales revenue has been increasing in recent years.<sup>456</sup>

Therefore, the ACCC considers that its capital expenditure forecasts from the March 2013 Draft Report are appropriate.

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<sup>454</sup> Telstra, *IP DSLAM Rollout Schedule (18/2/2013)*, available at:

<http://www.telstrawholesale.com.au/products/broadband/adsl/adsl-reports-plans/index.htm>.

<sup>455</sup> Optus, April 2013 submission, p. 18.

<sup>456</sup> Telstra, *5 year financial summary: Half-yearly comparison – Half year ended 31 December 2012*, available at: <http://www.telstra.com.au/abouttelstra/investor/financial-information/financial-results/index.htm>.

### **C.3 Cost allocation factors**

The following sections discuss the ACCC's responses to the three key issues raised in submissions relating to cost allocation factors.

#### **C.3.1 Allocation of DSLAM costs to services other than DSL services**

The ACCC notes Telstra's submission that, because the combined 'Data Equipment' asset class in the FLSM contains DSLAMs, some DSLAM costs may be considered to be implicitly allocated to services other than DSL services. However, the ACCC reiterates its statement from the March 2013 Draft Report that the Analysys model's cost allocation factor for 'Data Equipment' was developed under the assumption that DSLAMs form part of the this asset class.<sup>457</sup> If DSLAMs were removed from the Data Equipment asset class, this may also effect the cost allocation for the remaining assets in the asset class. Further, the ACCC maintains its view that DSLAMs 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>458</sup> Finally, the ACCC does not consider it appropriate to disaggregate assets into a large number of asset classes in the FLSM, each containing relatively few assets. For these reasons, the ACCC maintains its view that the allocation of DSLAM assets to the 'Data Equipment' asset class—and the cost allocation factor for 'Data Equipment'—is appropriate.

#### **C.3.2 Adjustment of cost allocation factors for payments received by Telstra under the Definitive Agreements**

The ACCC recognises that Telstra's commitments under the Definitive Agreements<sup>459</sup> will influence its capital and operating expenditure in the coming years. However, the ACCC does not consider it appropriate to adjust the cost allocation factors in the FLSM for any asset classes in the current wholesale ADSL FAD to reflect the Definitive Agreements. The ACCC has reached this decision for the following reasons. First, with the exception of the 'Data Equipment' asset class, all forecasts in the FLSM were made at the time of the July 2011 fixed line services FADs. The ACCC notes that it did not make 'specific adjustments to the design of the FLSM, or the inputs to the FLSM, to take into account the impacts of the NBN roll-out' in the July 2011 FADs.<sup>460</sup> Therefore, the ACCC considers that the forecasts and cost allocation factors for these asset classes do not require any adjustment in the current wholesale ADSL FAD because they do not include any NBN-related expenditure. Second, the ACCC considers that it is unlikely that operating and capital expenditure on assets in the 'Data Equipment' asset class will be significantly affected by the Definitive Agreements. The

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<sup>457</sup> ACCC, March 2013 Draft Report, p. 36.

<sup>458</sup> Ibid.

<sup>459</sup> Telstra, *Telstra signs NBN Definitive Agreements*, 23 June 2011, available at: <http://www.telstra.com.au/abouttelstra/download/document/tls778-telstra-signs-nbn-definitive-agreements.pdf>.

<sup>460</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services: final report*, July 2011, p. 32.

Definitive Agreements primarily cover network elements such as dark fibre links, rack spaces in exchanges, ducts and lead in conduits.<sup>461</sup>

The ACCC intends to consult with industry on the appropriate method of taking into account Telstra's commitments under the Definitive Agreements in the next FAD inquiry for wholesale ADSL and the fixed line services.

### **C.3.3 Adjustment of Analysys cost allocation factors to remove building assets**

The ACCC has undertaken further analysis of the costs within the two 'Switching Equipment' asset classes in the Analysys model in response to Optus' submission. The ACCC notes that the Analysys model includes certain network buildings and network support costs in the 'Switching Equipment' asset classes. The inclusion of these costs within the 'Switching Equipment' asset class in the Analysys model may lead to higher cost allocation factors for these asset classes for wholesale ADSL than would be the case if these assets were removed (as proposed by Optus).

In the FLSM, all network buildings and support assets and costs have separate asset classes and are not included in any of the three 'Switching Equipment' asset classes. If the ACCC adjusted the 'Switching Equipment' cost allocation factors from the Analysys model (as proposed by Optus), this would have the effect of decreasing the cost allocation factors for wholesale ADSL but increasing the 'Switching Equipment' cost allocation factors to other services (e.g. PSTN voice services). In addition, the removal of buildings/support assets from Analysys' 'Switching Equipment' cost allocation factors would have a minor effect on the cost allocation factors for wholesale ADSL that are calculated using the 'revenue share' method,<sup>462</sup> which would lead to a lower allocation of buildings/support costs for wholesale ADSL (but a higher allocation for other services).

As submitted by Optus, it may be possible to revise the proportional allocation of costs of 'Switching Equipment' asset classes to various services by removing the network buildings/support assets prior to calculating the relevant allocation factors. As noted above, however, any adjustment to the cost allocation factors for 'Switching Equipment' for wholesale ADSL would also have implications for the 'Switching Equipment' cost allocation factors calculated for other services. Therefore, the ACCC does not consider it appropriate to adjust the Analysys cost allocation factors for 'Switching Equipment', by removing buildings/support assets, in the current wholesale ADSL FAD. If an adjustment was made to the cost allocation factors for wholesale ADSL—and not for the other services in the FLSM—it would be inconsistent with the assumptions used to determine cost allocation factors, and prices, for other services in the FLSM in the current FADs. The ACCC considers that an adjustment, if made to cost allocation factors for wholesale ADSL only, may not allow Telstra to recover its efficient costs across all services over the period of the current FADs.

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<sup>461</sup> Telstra, *Telstra signs NBN Definitive Agreements*, 23 June 2011, pp. 11-12.

<sup>462</sup> Including 'Network Land', 'Network Buildings/Support', 'Other Communications Plant and Equipment' and 'Indirect Capital Assets'.

Therefore, the ACCC's final view is to maintain the cost allocation factors from the Analysys model for 'Switching Equipment – Local' and 'Switching Equipment – Trunk' for the current wholesale ADSL FAD. However, the ACCC intends to consider the allocation of costs to the declared fixed line services as part of a holistic review during the inquiry to make the next wholesale ADSL and fixed line services FADs.

Finally, the ACCC does not consider that the current method of estimating cost allocation factors leads to a 'double counting' of buildings/support assets. Network buildings/support assets are only included in the 'Network buildings/support' asset class's RAB in the FLSM; they are not included in the FLSM's RAB for any of the 'Switching Equipment' asset classes.

## C.4 Other issues

This section discusses the ACCC's response to Optus' submission that the revenue requirement for wholesale ADSL should be adjusted to reflect the changed revenue requirements for some of the other services in the FLSM.

First, the ACCC notes that the revenue requirement figures quoted by Optus appear to have been sourced from the version of the FLSM released in April 2011 (which was used to estimate draft FAD prices). A number of changes were made to the FLSM between the version released in April 2011 and the version released in July 2011 (as described in table 4.1 of the ACCC's July 2011 final decision for the fixed line services FADs<sup>463</sup>). These changes resulted in a revenue requirement of [c-i-c] [c-i-c] for the five separate services modelled in the FLSM for the July 2011 FADs. When compared to the total revenue requirement for the same services in the March 2013 version of the FLSM (which was used to estimate draft FAD prices for wholesale ADSL), the July 2011 version of the FLSM has a difference in revenue requirements of only [c-i-c] [c-i-c] rather than the \$31 million figure quoted by Optus.

Second, the ACCC considers that the main cause of the [c-i-c] [c-i-c] difference in revenue requirements—a small change in the WACC used in the March 2013 version of the FLSM (compared to the July 2011 version)—should not affect the revenue requirements and prices estimated for the declared fixed line services in the July 2011 FADs. In estimating draft FAD prices for wholesale ADSL, the ACCC updated a number of market-estimated WACC parameters.<sup>464</sup> This had a minor effect on the revenue requirements of the Core asset classes in the FLSM: specifically the 'return on capital' revenue requirement and, to a lesser extent, the 'tax' revenue requirement. The WACC calculated in the July 2011 version of the FLSM was considered to provide an appropriate risk-adjusted rate of return to Telstra for the entire period of the fixed line services FADs (1 July 2011 to 30 June 2014). The ACCC considers that updating the WACC for the purposes of a separate decision—the wholesale ADSL FAD—should not retrospectively affect the revenue, or prices, determined for the purposes of the fixed line services FADs.

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<sup>463</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services: final report*, July 2011, pp. 34-36.

<sup>464</sup> These market-estimated parameters are the risk free rate, debt risk premium and debt issuance costs.

## Appendix D: Inputs used to estimate wholesale ADSL FAD prices in the FLSM

This appendix provides details on the inputs used to estimate the FAD prices in the FLSM for the wholesale ADSL FAD.

**Table D.1: Allocation of forecast capital expenditure by 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	
Core radio bearer equipment	
Other communications plant and equipment (Core)	
Network land	
Network buildings/support	
Indirect capital assets	
Data equipment	[c-i-c]

**Table D.2: Estimated total and remaining asset lives for ‘shared’ asset classes (in years)**

Core asset class	Total asset life	Remaining asset life (for 2009 RAB)
Switching equipment – local	27.0	[c-i-c]
Switching equipment – trunk	25.0	
Inter-exchange cables	38.0	
Transmission equipment	[c-i-c] [c-i-c]	
Core radio bearer equipment	16.0	
Other communications plant & equipment (Core)	[c-i-c] [c-i-c]	[c-i-c]
Network land	10,000.0	10 000.0
Network buildings/support	[c-i-c] [c-i-c]	[c-i-c] [c-i-c]
Indirect capital assets	10.0	5.0
Data equipment	6.0	[c-i-c] [c-i-c]

**Table D.3: 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	
Core radio bearer equipment	
Other communications plant and equipment (Core)	
Network land	
Network buildings/support	
Indirect capital assets	
Data equipment	[c-i-c]

**Table D.4: Average usage per SIO (in Mbps)**

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

**Table D.5: 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%



**Table D.6: Methods used to determine initial cost allocation factors and cost allocation factors for 2013-14**

Core asset class	Initial cost allocation factor method	Allocation factor for 2013-14
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 (Core)	R	0.09
Network land	R	0.09
Network buildings/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	

**Table D.7: 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%

**Table D.8: IAD model price relativities – geographic zones**

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

## Appendix E: Final access determination



### Final Access Determination No. 1 of 2013 (WADSL)

#### *Competition and Consumer Act 2010*

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The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes this final access determination under section 152BC of the *Competition and Consumer Act 2010*.

Date of determination: 29 May 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 access determination	Applicable schedules
Wholesale ADSL	13 February 2017	Final Access Determination No. 1 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 12 applies to the interpretation of this final access determination ('FAD'). The Schedules form part of this FAD.

## 3. Commencement and duration

- 3.1 This FAD commences on 29 May 2013.
- 3.2 Unless sooner revoked, this FAD 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 2–11.

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: sections 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.

6.3A The below fixed principles provisions come into force in relation to the Wholesale ADSL service on 29 May 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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## Schedule 1 – Price terms

1.1. The prices for the Service for the period 14 February 2012 to 28 May 2013 are:

1.1.1. The connection charge for a Service is:

Connection type	Charge per connection
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:

Applicable Geographic Area	Charge per port per month
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:

Period	Rate per Mbps per month
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	\$0.00
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 prices for the Service for the period 29 May 2013 to 30 June 2014 are:

- 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	\$24.44
Zone 2+3	\$29.66

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>
\$32.31

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>
\$32.31

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	\$0.00
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 6 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 *Competition and Consumer Act 2010* (Cth) (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 clause 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.

(d) For avoidance of doubt, if the Access Provider rejects a Billing Dispute Notice under clause 2.15(b)C, the Access Seeker is not prevented from providing an amended Billing Dispute Notice to the Access Provider relating to the same dispute provided that the amended Billing Dispute Notice is provided within the timeframe under clause 2.14.

2.16 The Access Seeker must, as early as practicable and in any case within five Business Days, unless the Parties agree on a longer period, 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) 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 Australian Commercial Disputes Centre (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 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.

6.10. 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 where 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 notify the Access Seeker and make available to 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*

**“2011 Fixed Line Services FADs”** means Final Access Determinations No. 1–6 of 2011 made by the ACCC on 20 July 2011 (as varied from time to time);

**“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 13 May 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;

**“Business Day”** means any day other than Saturday or Sunday or a day which is a gazetted public holiday in the place concerned;

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<sup>1</sup> <http://www.telstrawholesale.com.au/download/document/access-broadband-adsl-en-ex.xls>.

**“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 13 May 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 named Zone 2 and Zone 3 (as they stood on 13 May 2013) on the ADSL enabled exchange list that Telstra maintains for the purpose of calculating monthly end-user access charges for a Service.