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Public Inquiry to make a Final Access Determination for the Wholesale ADSL Service
Discussion Paper

Submission by Herbert Geer Lawyers on behalf of:

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iiNet Limited,

Internode Pty Ltd,

Primus Telecom, and

TransACT Communications Pty Limited

10 April 2012

This submission is made on behalf of Adam Internet, iiNet Limited, Internode Pty Ltd, Primus Telecom and TransACT Communications Pty Limited (collectively, **our Clients**) in response to the ACCC's discussion paper of February 2012 entitled *Public Inquiry to make a Final Access Determination for the Wholesale ADSL Service* (**the Discussion Paper**).

Our Clients welcome the opportunity of responding to the Discussion Paper. This submission sets out our Clients' response to each of the specific questions raised in the Discussion Paper.

1. How do you consider that the mandatory criteria should be interpreted for the purpose of making this FAD?

Our Clients acknowledge the difficult task that the ACCC faces in setting price and non-price terms of access to declared services such as WDSL. The ACCC has to deal with complex issues related to economic theory and factual enquiry, and it receives many detailed and conflicting submissions. Further, the mandatory criteria set out in section 152BCA(1) (**the mandatory criteria**) of Part XIC of the *Competition and Consumer Act 2010* (**the CCA**) appear to be potentially conflicting, such that the ACCC needs to balance the criteria in order to give appropriate weight to each criterion when making a determination.

It is an important rule of statutory interpretation that when interpreting a provision of an Act, that an interpretation that best achieves the object of the Act is to be preferred over other interpretations[1].

The object of the CCA is set out in section 2, as follows:

> *The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.*

Part XIC of the CCA sets out the telecommunications specific access regime, recognising the importance of competition in the telecommunications industry to consumers and the need for specific provisions to adequately regulate and address the complexities of the industry. Section 152AB(1) sets out the object of Part XIC as follows:

> *The object of this Part is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.*

The object of Part XIC is complimentary to the object of the CCA, but is clearly and appropriately specifically targeted towards promoting the welfare or interests of the users of telecommunications services.

[1] *Acts Interpretation Act 1901,* section 15AA states*: In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation*.

Section 152AB(2) provides that for the purposes of Part XIC, in determining whether a particular thing promotes the long-term interests of end-users of carriage services and services supplied by means of carriage services (**listed services)**; regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

- the objective of promoting competition in markets for listed services;
- the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users;
- the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied; and any other infrastructure by which listed services are, or are likely to become, capable of being supplied.

In light of the statutory rule to interpret provisions in a manner that best achieves the object of the Act (or more specifically in this case, the object of the specific Part of an Act), it is important for the ACCC to always have regard to the object of Part XIC of the CCA when giving weight to submissions and when interpreting the mandatory criteria set out in section 152BCA(1) of the CCA at the time of making this FAD. As mentioned above, the sole object of Part XIC is to promote the long term interests of end users (**LTIE**)[2]. In determining whether the FAD promotes the LTIE, regard must be had to whether it promotes competition, achieves connectivity, and encourages use of and investment in infrastructure. We consider that the WDSL FAD will best achieve promotion of the LTIE if it provides an environment where:

> *End users of the WDSL or services provided by WDSL have access to the best possible services at the lowest possible prices.*

For ease of expression, this will be referred to as the **End User Objective**. Clearly, end users cannot receive services unless there are firms that provide those services. Therefore, the inclusion of the adjective 'possible' in the End User Objective is intended to connote there being a sufficient incentive for firms to provide the relevant services at the relevant prices[3]. This acknowledges the need to encourage economically efficient use of and investment in the infrastructure that is used to provide the WDSL.

It is submitted that the End User Objective is clearly what the Australian Competition Tribunal (**the Tribunal**) had in mind when it stated[4]:

> *the interests of end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings.*

In a market that is fully competitive, with low barriers to entry, the End User Objective will be achieved naturally[5]. In other words, the End User Objective will take care of itself. Given the nature of telecommunications markets and the markets that WDSL is a part of (which exhibit natural monopoly characteristics – i.e. it

[2] See section 152AB(1) of the CCA.
[3] Inclusion of the word "possible" also acknowledges that perfect competition or total efficiency are likely to exist in theory only.
[4] *Re Seven Network Limited (No 4)* [2004] ACompT 11, at [120].
[5] i.e. competition leads to productive and dynamic efficiency.

requires the use of ubiquitous infrastructure with high sunk costs, thereby making barriers to entry high), meeting the End User Objective in regards to services provided via the WDSL can only be achieved with the aid of regulatory intervention.

In the WDSL context, achieving the End User Objective requires investment in Telstra's network infrastructure because without it the quality of services provided over the WDSL will deteriorate. Therefore, the End User Objective in regards to the WDSL is best achieved by:

- promoting competition; and
- promoting investment in infrastructure.

This is in line with section 152AB of the CCA. It is submitted that promotion of the LTIE as expressed in section 152AB of the CCA is aimed ultimately at achieving the End User Objective (i.e. promoting competition and investment in infrastructure are not ends in themselves, they are the means to the end of achieving the End User Objective). It is further submitted that, given the nature of the End User Objective, and the fact that access prices will ultimately be recovered from end users, adopting an approach to setting access prices which is overly generous to Telstra as the WDSL service provider cannot be in the LTIE because it will not achieve an outcome whereby end users can obtain the best possible services at the lowest possible prices.

However, although it is submitted that by virtue of section 152AB(1) of the CCA, the promotion of the LTIE is the ACCC's only *objective* as it is Part XIC's only object, the LTIE is not, when setting terms and conditions of Access Determinations, the ACCC's only *consideration*. This is because in addition to consideration of whether the objective of promotion of the LTIE is achieved, the ACCC must also consider the following mandatory criteria[6]:

1. the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, WDSL, and the carrier's or provider's investment in facilities used to supply WDSL **(consideration 1)**;

2. the interests of all persons who have rights to use WDSL **(consideration 2)**;

3. the direct costs of providing access to WDSL **(consideration 3)**;

4. the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else **(consideration 4)**;

5. the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility **(consideration 5)**; and

6. the economically efficient operation of a carriage service, a telecommunications network or a facility **(consideration 6)**.

It is submitted that these considerations are not in any way at odds with promoting the LTIE because they feed in to what is the correct approach to promoting the LTIE, as the following points demonstrate:

[6] See sections 152AH and 152BCA of the CCA.

- As regards consideration 1, if the WDSL access price is set at a level where Telstra's legitimate business interests are not satisfied, Telstra will have no incentive to provide the necessary investment in its network. The result of this lack of investment will be that the quality of services provided to end users via Telstra's network will be affected, which is contrary to the LTIE. The methodology used to estimate Telstra's costs is relevant to this criterion.

- As regards consideration 2, if the WDSL access price is set too high, access seekers will not be able to compete with Telstra. Having effective competition is one of the essential ingredients required to promote the LTIE[7].

- As regards consideration 3, this raises similar issues as consideration 1 – i.e. Telstra should be allowed to recover its efficient direct costs of providing access to WDSL because if it is not allowed to do so, it may not provide the required investment in its network.

- As regards consideration 4, when applied in the context of WDSL access pricing, this recognises that the WDSL access price should be set so as to fairly apportion the cost of any extensions or enhancements. However, it is important to bear in mind that all costs of investments will ultimately be borne by the end-user. Therefore, the costs of such extensions or enhancements should be fairly apportioned between all end-users. It should not be the case that access seeker end-users bear a disproportionate share of the cost in comparison to Telstra end-users or vice versa.

- As regards consideration 5, similar considerations as to consideration 1 apply – i.e. if the WDSL access price is set too low there may be insufficient incentive to make the required investments in Telstra's network, and this will affect the quality of services provided to end-users.

- As regards consideration 6, the efficient provision of services will drive down the price for the services that end-users must pay. Therefore the WDSL access price should be set at a level that encourages efficiency.

It is submitted that the above considerations can be distilled into the following fundamental question that the ACCC should ask itself when setting WDSL access prices:

> *What is the <u>lowest</u> price that can be set which will allow Telstra to recover its reasonable costs in providing WDSL access (including capital costs – i.e. return on, and of, capital)?*

For ease of expression, this will be referred to as the **Fundamental Question**.

It is submitted that:

- setting the lowest possible WDSL price will promote efficient competition; and

[7] See section 152AB of the CCA.

- if Telstra is permitted to recover its reasonable costs, its legitimate business interests will be fulfilled and it will have sufficient incentive to make the necessary investments in its infrastructure.

In considering Telstra's return on, and of, capital, it is necessary to distinguish between Telstra's future investment and Telstra's past investment. As regards Telstra's future investment, the ACCC can ensure, by putting an appropriate mechanism in place, that Telstra receives an appropriate return (which will ultimately be paid for by end-users) on appropriate investments.

2. What markets should be considered in applying the mandatory criteria to this FAD?

Our Clients agree with the view expressed in the ACCC's WDSL declaration final decision that the relevant retail and wholesale markets include high speed broadband services, including copper, HFC and optic fibre services.[8]

3. What "other matters" should be considered when making this FAD?

In assessing the LTIE and the mandatory criteria, it is important for the ACCC to look beyond copper based WDSL and to take into account the desirability of creating an environment that will best promote the LTIE in the transition to the NBN. Promoting retail ADSL competition via cost based WDSL is likely to encourage the provision of cheaper, better, and more diverse broadband services to consumers. Particularly with regard to consumers in regional and rural areas, or who are connected via RIMS and pair gains systems, this will assist in ensuring that a range of service providers vigorously compete to win these customers prior to and during transition to the NBN.

4. What charges do you consider should be addressed in this FAD? Please consider the type of charges outlined above as well as any other material charges.

The port and AGVC/VLAN charges are the most important charges that need to be addressed in the FAD (along with the need for charges to account for network cost allocation where WDSL is bundled with WLR). However, the CRA includes a range of other charges that need to also be considered and set in the FAD to ensure that the legislative criteria are considered and addressed. For instance, declaration of WDSL will promote competition and result in access seekers incurring connection and churn related charges. If these charges are not cost based, competition will be hindered.

Telstra imposes the following charges in providing WDSL. Our Clients consider that each should be addressed in the FAD.

- Port charge;
- AGVC/VLAN charge;
- Installation charge;
- End-user configuration change charge (Speed upgrade/downgrade);

[8] *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010 Final Decision February 2012,* at section 3.2.

- WDSL/WLR bundling charge;
- Early termination charge;
- Type A transfer via LOLO/LOLIG charge;
- Type B transfer via LOLO/LOLIG charge;
- Non-infrastructure based DSL request charge;
- Type A reversal via LOLO/LOLIG charge;
- Type B reversal via LOLO/LOLIG charge;
- Migration from LSS to WDSL via LOLO/LOLIG charge;
- Migration from LSS to WDSL rejects/withdrawals and retargets charge; and
- Broadband Transfer rejects/withdrawals and retargets charges.

It is our Clients' view that each charge should be cost based. As regards early termination charges, these should be zero. Given that set-up costs are recovered via the connection fee, the early termination fees appear to be a simple 'extra' charge without justification. In a retail setting, such a fee may be used to offset acquisition costs resulting from marketing activity. No such marketing occurs in the wholesale environment.

5. What methodology or methodologies should be used to develop price terms for this FAD?

In its *Draft Report—Review of the 1997 telecommunications access pricing principles for fixed line services* (**September 2010 Draft Report**), the ACCC proposed moving from its previous pricing methodologies to a new Building Block Model (**BBM**) pricing methodology. After extensive industry consultation, this proposal was ratified and the BBM was subsequently used to set charges for the declared fixed line services being considered at that time. WDSL is provided over the same network as the other declared fixed line services and it is appropriate that charges for WDSL are also calculated by the BBM pricing methodology. This will enable the ACCC is use the same Fixed Line Services Model (**FLSM**) that it used to set prices in the FADs for the ULLS, WLR, PSTN OTA, LCS and LSS services.

In the *Inquiry to make final access determinations for the declared fixed line services, Final Report* of July 2011, the ACCC stated:

> *A building block model (BBM) pricing methodology estimates prices that reflect efficient costs. The ACCC considers that adopting a BBM approach to setting prices for the declared fixed line services meets the objectives of promoting the LTIE because setting prices that reflect efficient costs will promote competition in the markets for carriage services and encourage efficient use of and investment in infrastructure.*
>
> *Access prices that reflect efficient costs, and do not include any monopoly profits, will facilitate access to the infrastructure services required by access seekers to provide a range of communications services to end-users.*
>
> *In addition, the ACCC considers that adopting a BBM approach will promote the LTIE for the following reasons:*

- *Locking-in a value for the RAB fosters predictable revenue and price paths, thereby minimising the likelihood of windfall gains or losses. This certainty promotes efficient use of and investment in infrastructure.*

- *The BBM approach ensures the access provider is adequately compensated for the cost of providing the declared fixed line services over time. The estimated revenue requirement allows the access provider to recoup its efficiently incurred costs,including a commercial return on its investments. Determining prices through a transparent and cost-based pricing model will provide regulatory certainty for both the access provider and access seekers about the way in which the ACCC will set prices. Such certainty promotes efficient investment and competition in the markets for carriage services.*

- *Using a BBM approach will ensure that prices for the declared fixed line services are based on the costs of providing access. This will promote a level playing field for access to the services needed to provide downstream services and promote competition in downstream markets*[9]*.*

Our Clients consider that that the conclusions reached by the ACCC in regards to other fixed services equally apply in regards to WDSL pricing.

The most obvious ways of setting the WDSL port charge seem to be either:

- BBM and/or;

- a WDSL specific cost charge that operates in the same way that the LSS charge is currently set. That is, where a WDSL service has an underlying PSTN service, then all network related costs are recovered via the WLR charge. In this situation there is no need to allocate network costs to the WDSL and the WDSL charge would likely be similar to the LSS charge plus the other costs that Telstra incurs to provide WDSL such as capex and opex relating to its DSLAMs, or the LSS + port costs. This also seems a reasonable way to address the WLR/WDSL bundling issue as it would not matter which service provider supplies the end user's phone line.

Another point to consider is that there should not be a requirement that WDSL can only be provided on lines with an underlying PSTN service. There is no technical impediment or reason that requires the two services on the line, but rather it is a commercial decision of Telstra that impedes competition and prevents consumers from being able to obtain the type of service that they want. Our clients consider that the LTIE will be better achieved if a retail broadband service can be provided via WDSL without the end user also being required to purchase a PSTN voice service, as such a standalone or "naked" WDSL option should be available. At the wholesale level, access seekers should be able to choose between acquiring only WDSL or a WDSL/WLR bundle, with the choice dependent upon the end user's requirement rather than Telstra's. The technology that Telstra uses to deliver WDSL

[9] *Inquiry to make final access determinations for the declared fixed line services, Final Report ' July 2011,* at p.133.

is not fundamentally different technology to that access seekers use to provide retail naked DSL services via the ULLS. Telstra is simply using the LSS with PSTN to deliver a broadband/voice bundle. Telstra may consider that this is an attractive retail proposition, but the forced bundling should not flow through to wholesale markets as it places an unreasonable limitation on the types of services that can be provided to consumers. Clearly, a naked WDSL service could not be charged at the WDSL specific costs rate discussed above, as Telstra's network costs would not be recovered. Therefore this charge would need to be set via the BBM so that network costs are included as a component of the wholesale rate. This suggest a two-tiered price construct depending on whether the end-user's service consists of a WDSL/WLR bundle or a naked WDSL standalone service. We consider that the pricing for these services can be extrapolated from the ACCC's ULLS, WLR and LSS modelling. For a naked WDSL service the charge is the ULLS plus Telstra's port costs. For a bundled service it should be the WLR charge plus the LSS charge plus port costs.

Our Clients consider that AGVC/VLAN charges should also be cost based and that BBM modelling remains appropriate. However, they acknowledge the ACCC's recent decision to use domestic benchmarking to set DTCS rates[10]. If the ACCC considers a similar approach can be utilised in setting AGVC rates, then our Clients consider that NBN Co's CVC pricing structure should be closely examined on the basis that it is closely comparable to the AGVC and based on reasonably current modelling.

6. What overall charge structure should be considered, e.g. between access fees and usage fees?

The ACCC has suggested that the balance between upfront and recurrent charges or between access and backhaul could be important. For instance, weighting the charge too heavily towards access (port) charges will make it difficult for access seekers to supply entry level services, whereas weighting the charges too heavily towards usage based charges may preclude the supply of data intensive applications such as IPTV. Our clients consider that if cost based pricing is implemented there should be little need to weight the pricing. They also submit that removing forced AGVC bundling from the WDSL service will provide considerable benefits in this regard because where access seekers are able to have access to their own transmission they are able to get transmissions costs down to a fraction of the rates charged by Telstra. By removing the forced bundle, competition will deliver lower costs, as it has with transmission services to Access Seeker DSLAMs.

Clearly, the AGVC cannot be excluded from the WDSL service description and must have a set regulated charge, as in many areas Telstra is the sole backhaul provider, however, it should not be mandatory to acquire AGVC off Telstra when acquiring WDSL. Allowing access seekers to choose whether or not to buy AGVC off Telstra in locations where competitive backhaul is available will promote competition in the market for wholesale transmission services as well as the other markets in which WDSL operates. By unbundling the AGVC it will also send signals to other transmission services providers that they are able to compete for this service, this option is currently denied to them by Telstra's control of this service.

[10] ACCC, Draft final access determination for the domestic transmission capacity service (DTCS), Explanatory Statement, December 2011, p.8.

7. Should any of the charges be levied on a zone basis, or should they be levied on a nationally consistent basis? On what basis should areas be grouped into zones, if this construct is to be used?

As the ACCC referred to in its decision to declare WDSL, Telstra's charges are currently levied by geographic zones reflecting the existence or likely existence of competitive DSLAM infrastructure in an ESA. In Zone 1, where competitive DSLAMs have been or may be installed, WDSL charges are significantly lower and Telstra has agreed to give some access seekers a discount for bundling WDSL and WLR. Telstra has also contrived a Zone 1(a) in which access seekers may not have their own DSLAM but in which Optus offers competing wholesale ADSL. In the largely rural and regional ESAs of Zones 2 and 3 where it is unlikely that Telstra will ever face DSLAM based competition, WDSL charges are far higher and our Clients are not offered the WDSL/WLR bundling discount. We consider that this zone variation is unreasonable and contrary to the section 152BCA(1) criteria as its primary basis is to hinder competition in geographic areas where fixed broadband can only be provided by WDSL. Such a basis for artificially determined zoned pricing is detrimental to the LTIE.

Another potential geographic zoning that could be considered is zoning on the basis of the 'Bands' that are used for ULLS pricing, which are based on population density in ESAs. Until 2011, ULLS prices were de-averaged with prices rising steadily from CBD Band 1, to metro Band 2, regional Band 3 and remote Band 4, reflecting the different costs of providing services in each area. In 2011, the ACCC averaged ULLS prices in Bands 1-3, but kept them de-averaged in Band 4, stating that:

> *'setting a separate Band 4 price ensures that the much higher costs of providing services in rural areas is reflected in prices. It also recognises that in Band 4, the small scale of markets, and the greater risks associated with attracting sufficient customers to recoup DSLAM investment costs, are likely to be more important to investment decisions than the ULLS/WLR price differential. This is consistent with the ACCC's argument in the September 2010 Draft Report that national averaging of ULLS prices would not promote competition in remote areas 'given that the ULLS is not technically viable for delivering high speed data services in large parts of rural areas.'*[11]

In the *Public inquiry to make final access determinations for the declared fixed line Services Discussion paper April 2011* (**the April 2011 Discussion Paper**), the ACCC proposed maintaining its approach of setting nationally averaged WLR, LCS and LSS prices. It stated that setting WLR prices on a nationally averaged basis was consistent with the Government's arrangements for setting retail prices.[12] The ACCC stated that neither LCS supply costs nor LSS specific costs are expected to vary significantly by geographic area.[13]

The ACCC's views in regards to averaging and de-averaging ULLS, WLR and LSS prices are relevant to WDSL pricing. Similarly to the ULLS, WDSL is not technically viable for delivering high speed data services in large parts of rural areas where

[11] *Public inquiry to make final access determinations for the declared fixed line Services Discussion paper April 2011*, p.143.
[12] The ACCC stated that The current arrangements are set by the Minister for Broadband, Communications and Digital Economy and are contained in Telstra Carrier Charges – Price Control Arrangements, Notifications and Disallowance Determination No. 1 of 2005.
[13] April Discussion, p.144.

outside town areas copper runs are typically longer and DSL attenuates rapidly with distance. This suggests that WDSL should be priced in the same manner as the ULLS, with prices averaged across Band 1-3 and de-averaged in Band 4. However, WLR and LSS need to also be considered. Prior to declaration (and currently), Telstra only supplied WDSL on a line where the end-user also acquired a PSTN voice service. This provides that Telstra recovers network costs via the WLR charge no matter which carriage service provider is providing the end-user's voice service. The LSS is only supplied on the basis that a PSTN service is also connected on the same line. This again provides that Telstra recovers network costs via the WLR charge. Accordingly, the ACCC's long-held position has been that the LSS should be based on LSS specific costs and not include an allocation of network costs. This is directly analogous to the WDSL, where the access charge for the service could be based on WDSL specific costs, without a network cost allocation as that cost is already recovered via the WLR on a line with an underlying PSTN service.

Again, this suggests that a two tier pricing structure as follows is appropriate:

- WDSL specific costs apply where the end-user also acquires a retail PSTN service. WLR rates are geographically averaged and recover network costs. For the same reasons that the ACCC considered LSS specific costs are unlikely to vary between geographic areas[14], WDSL specific costs are also unlikely to vary significantly between geographic areas. As such, the WDSL cost where the end-user has an underlying PSTN service should be geographically averaged and not include a network costs component.

- Zoning of Naked WDSL can be considered in the same way as ULLS. In this situation, as the end-user does not acquire an underlying PSTN service, it is appropriate that naked WDSL charges are averaged in Bands 1-3 and de-averaged in Band 4. This would reflect the higher costs of providing a naked WDSL service in Band 4.

8. On what basis (if any) should price discrimination between access seekers be encouraged or discouraged?

There are very few situations in which price discrimination between access seekers is reasonable and would not have an anticompetitive effect. Our Clients' view is that price discrimination should be discouraged so as to allow Telstra and access seekers to compete on their merits, innovation and customer service. Our Clients have considered the examples of potential price discrimination raised in the Discussion Paper[15], which consider price discrimination on the basis of

- the wholesale service profile of the access seeker;

- whether the access seeker acts efficiently in acquiring the service; and

- whether the same service provider is supplying a fixed voice service on the ADSL line.

Our Clients consider that price discrimination on the basis of wholesale service profile of the access seeker should not be permitted and agree with the ACCC's

[14] Discussion paper April 2011, p.144.
[15] Discussion Paper, at p.8.

view that '*discrimination on the basis that an access seeker chooses to use their own infrastructure or gain supply from an alternative wholesale provider reduces competition and inhibits the development of effective and efficient markets that might otherwise emerge*.'[16] Our Clients have experienced this discrimination first hand and it has severely limited their ability to compete outside the geographic areas in which they do not own infrastructure. We submit that this is precisely the type of conduct that resulted in the need to declare WDSL.

Our Clients consider that a charge structure that shares genuine cost efficiencies is reasonable and in accordance with the mandatory criteria. For example the use of automated fault reporting and ordering systems is efficient and cheaper for Telstra and access seekers, as such, it is reasonable that automated access should represent the base access price, with non-automated access being allocated the additional costs that it incurs.

Our Clients' views on the price variation between WDSL/WLR bundling and standalone or naked WDSL are discussed above in response to questions 5 and 7. That is, where WDSL is supplied on a line with an underlying PSTN service, the WDSL charge should be based on WDSL specific costs. It does not cost Telstra more to provide the two services to two different wholesale customers and therefore, there should not be a discount for a single access seeker acquiring both WDSL and WLR on the same line.

9. What other price-related terms should be addressed in this FAD? In general terms, what do you consider an appropriate outcome for these terms and conditions?

Please refer to our response to questions 1, 4, 5, 6, 7 and 8.

10. What do you consider are the key commercial terms needed for commercial supply of the Service to occur? Do you consider the 2008 Model Terms should be applied (where relevant) in developing an FAD that addresses those terms? If not, on what basis should these terms and conditions be developed?

Given that a FAD is intended to provide a base set of terms and conditions that access seekers can rely on if they are unable to come to an agreement with an access provider on the terms and conditions of access to a declared service[17], our Clients believe that in addition to price terms, the WDSL FAD should include:

- reasonable terms relating to standard non price commercial matters; and
- terms that are required to address particular issues relating to the provision of WDSL by Telstra, in order to better promote the LTIE.

Each of these requirements will be considered in turn.

(a) Standard commercial matters

Subject to the comments made below, our Clients believe that the ACCC's *Model Non-Price Terms and Conditions Determination 2008* **(the Model**

[16] ACCC, Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final Decision, February 2012, p.39.
[17] Discussion Paper - February 2012, P.1.

Terms) should be used as the basis for the standard commercial terms in the WDSL FAD. Our Clients note that the Model Terms provide terms of access in respect of the following matters:

- Billing and Notifications;
- Creditworthiness and Security;
- Liability (Risk Allocation) Provisions;
- General Dispute Resolution Procedures;
- Confidentiality Provisions;
- Communications with End Users;
- Network Modernisation and Upgrade Provisions;
- Suspension and Termination;
- Changes to Operating Manuals;
- Ordering and Provisioning; and
- Facilities Access.

Our Client's view on the appropriateness of adopting the Model Terms in each of the these areas into the WDSL FAD is set out below.

Billing and Notifications

Subject to concerns relating to the proposed timeframes for backbilling and billing disputes, our Clients agree with the adoption of the Model Terms on billing and notifications. However, our Clients consider that it is appropriate to make a number of minor modifications to the billing and notification terms so as to improve their reasonableness.

Backbilling

Clause A.5(b) of the Model Terms allows the Access Provider to backbill the Access Seeker for up to 6 months after a charge was incurred by the Access Seeker's customer. This time frame can be extended if the Access Seeker agrees, where the charges relate to a 'new Service', or where the charges were incurred on an overseas network.

Clause A.6 requires the parties to comply with industry codes and standards. Of relevance is clause 6.5.4(d) of Communications Alliance's *Telecommunications Consumer Protections Code (C628:2007*[18]*) (***the TCP Code***), which does not permit service providers to bill for charges older than 190 days from the date the charges were incurred. The TCP Code does not provide any exceptions to this rule that are relevant to clause A.5(b) of the Model Terms. The result is that the Access Provider can backbill the Access Seeker for 6 months or more, but though the Access Seeker must pay the Access Provider, the Access Seeker cannot actually attempt to recover the late billed charges from its customers without being

[18] Available from: http://www.commsalliance.com.au/__data/page/21676/C628_2007.pdf

in breach of the TCP Code. It should be noted that the 190 period has been reduced to 160 days in the draft revised version of the TCP Code[19]

It is clear that clause A.5(b) of the Model Terms is inconsistent with clause 6.5.4(d) of the TCP Code, and, as such, is also potentially inconsistent with clause A.6 of the Model Terms. This can be easily remedied by providing the Access Provider with the right to invoice access seekers for a maximum period of up to 4 months after the charges were incurred, rather than 6 months or longer. This would protect the Access Provider's right to payment where its systems have late billed services and ensures the Access Seekers still have the opportunity to subsequently invoice end-user customers without being in breach of the TCP Code. This also acknowledges that the Access Provider has control over its billing systems and unlike Access Seekers is therefore able to actively implement steps to reduce the risk associated with late billing.

Our Clients also consider that clause A.5(b)(ii) is unreasonable. There is no reason to provide the Access Provider with the right to extend its invoicing period for 8 months simply because a service is being billed for the first time. For the reasons discussed above, this again places Access Seekers in the position where they cannot recover late billed charges from their customers as a result of the TCP Code. It is unclear what the ACCC means by 'new Service', for instance it is not clear whether this refers to a new type of service or to a service that is being billed to a particular customer for the first time. This requires clarification. However, in either case, it is not necessary to allow the Access Provider an extended period of 8 months to bill for the service. Customer particulars are always supplied prior to a service being connected, so the fact that a service may have been connected to a particular customer is no cause for billing to be delayed. Further, our Clients are not aware of a situation where the introduction of a new type of service results in significant billing delays warranting a billing time frame extension that has negative financial repercussions for Access Seekers. Development of the billing capability is an essential component of the product development. If the new product or service cannot be billed, it should not be made available.

Our Clients therefore propose the following amendments:

A.5 The Access Provider shall be 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 A.6, no more than <u>4 Months</u> have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except:

[19] See clause 5.4.2(c) of the *Telecommunications Consumer Protections (TCP) Code (C628:2012)* Available from: http://www.commsalliance.com.au/__data/page/21676/C628_2007.pdf

(i) where the access seeker gives written consent to a longer period (such consent not to be unreasonably withheld); or

~~*(ii) to the extent that the Charges relate to a new Service being billed for the first time, in which case such Charges may be invoiced up to 8 months after the relevant amount was incurred by the access seeker's customer, subject to agreement with the access seeker (such agreement not to be unreasonably withheld); or*~~

(ii) to the extent that the Charges relate to services supplied by an overseas carrier and the Access Provider has no control over the settlement arrangements as between it and the overseas carrier, in which case the Access Provider shall invoice such amounts as soon as is reasonably practicable.

Time frames for billing disputes

Clause A.15 of the Model Terms provides that a billing dispute cannot be raised after six months from the due date of an invoice. This should be extended to nine months to allow access seekers sufficient time to extract data relevant to the analysis of the dispute. Further, it should be extended beyond nine months where:

- the Billing Dispute establishes billing errors and the same billing errors occurred into the period prior to the disputed period; or
- the Billing Dispute involves investigation by the Telecommunications Industry Ombudsman (**TIO**). The TIO has jurisdiction to investigate complaints that have arisen up to 24 months prior. A large percentage of the complaints investigated by the TIO relate to billing. If Access Seekers are not able to instigate a Billing Dispute because of the Model Terms' set time frames, they will not be able to comply with their obligation to provide the TIO with all information that is relevant to a complaint.

Uncertainty regarding the right to withhold payment of disputed amounts

There is a drafting inconsistency between clauses A.7 and A.13 of the Model Terms that requires clarification in order to avoid disputes between the Access Provider and Access Seekers. Clause A.13 provides that disputed charges may be withheld when a Billing Dispute Notice is given to the Access Provider by the due date for payment. Though clause A.7, which prohibits amounts being withheld, states it is subject to notification of a Billing Dispute, it also states that payments can only be withheld if the Access Provider agrees. We expect that the ACCC's intention is to allow disputed charges to be withheld until a matter is resolved where the dispute is promptly notified. Clause A.13 needs to be redrafted to clarify this ambiguity.

Time frame for provision of relevant information in a Billing Dispute

Clause A.17 of the Model Terms provides that each party shall provide the other party with information relevant to a dispute 'as early as practicable'. Our Clients consider that a maximum time frame of three weeks should be stipulated to ensure that Billing Disputes are not unnecessarily delayed. A three week time frame would also assist the Access Provider to comply with clause A.18, which provides that the Access Provider shall try to resolve disputes within 30 days. If the Access Provider fails to meet this three week time frame, the likely result is that the dispute period will be unnecessarily extended. Where this occurs, the Access Seeker's requirement to pay interest under clause A.21 should be waived. This would avoid the Access Seeker incurring unreasonable extra costs and expedite resolution of disputes.

Creditworthiness and Security

Our Clients agree that the Access Provider requires the ability to ensure that it is paid for the use of its network and services it provides. However, it is also important that the credit checks and security demands reflect the Access Provider's actual risk and cannot be used by the Access Provider as a means to place undue pressure on its competitors. The Access Provider should not as a matter of course require Security to be given or deny access before credit checks are completed. Security should only be given and credit checks should only be performed where it is necessary to protect the legitimate business interests of the Access Provider.

It is not a normal business practice for a wholesale supplier to require long term customers to provide it with Security, unless the circumstances of a particular customer are such that Security is necessary to reasonably protect the supplier. Our Clients have all been wholesale customers of Telstra for many years and pay their invoices when due. Given Telstra's obvious power and ability to inflict damage on our Clients' businesses, to not pay Telstra's invoices in a timely fashion would place their business under unacceptable risk. Though clause B.3 of the Model Terms provides that security shall only be requested when it is reasonably necessary to protect the legitimate business interests of the Access Provider, this can be interpreted as allowing Telstra to demand security at a level that can cover all unpaid or uninvoiced amounts. Assuming monthly billing in arrear, this would be two months' worth of invoices. The terms should make it clear that credit checks and security are only required when an Access Seeker first acquires services from the Access Provider or when events give rise to genuine concerns about the Access Seeker's ability or willingness to pay its debts. Our Clients suggest the following amendment:

B.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 B.2, the Security (as shall be determined having regard to clause B.3 and as may be varied pursuant to clause B.4) in respect of amounts owing by the Access Seeker to the Access Provider under this agreement. <u>This clause B.1 is to apply only when the Access Seeker first acquires services from the Access</u>*

Provider, or on the occurrence of a subsequent event that gives rise to genuine concerns regarding the Access Seeker's ability or willingness to pay its debts.

Liability (Risk Allocation) Provisions

Our Clients believe that it is appropriate for liability (risk allocation) provisions to be included in the FAD. This is because our Clients' experience is that the liability provisions included in the commercial terms offered by Telstra are invariably one-sided in Telstra's favour. If the FAD does not contain liability provisions, Telstra will argue that the relevant terms of Telstra's underlying Customer Relationship Agreement Standard Terms will apply. Due to Telstra's superior bargaining position, our Clients believe that it would be appropriate if Access Seekers can avail themselves of even handed liability provisions. Subject to the comments below, our Clients believe that the appropriate liability provisions that should be incorporated into the FAD are those contained in clause C of the 2008 Model Terms.

Our Clients note that the overriding principle behind clause C of the 2008 Model Terms is to place the risk of a loss with the party that has the ability to control that risk and/or the amount of loss[20]. Our Clients accept that clauses C.1 to C.15(a), C.21 and C.22 are consistent with this principle and that the effect of these clauses is to attribute risk in an even handed manner. Therefore, our Clients encourage the ACCC to adopt those provisions into the FAD, subject to the following suggestions:

- Our Clients suggest that the amount of the cap in clause C.3(e) should be specified at a level that reflects insurance cover. As such they suggest that clause C.3(e) be amended to:

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

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

As regards clauses C.15(b) to C.20 of the 2008 Model Terms, our Clients submit that these clauses do not give effect to the principle that the party that has the ability to control the risk should be liable for the risk. The Access Provider has control over the delays, failures and errors referred to in clause C.15(b) (**the Problems**). The Problems have the potential to cause Access Seekers to suffer loss. Our Clients believe that merely precluding Telstra from recovering charges for a service that it is not providing does not give Telstra sufficient incentive to do everything reasonably practical to rectify the Problems in a timely manner. Therefore,

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

our Client's submit that clauses C.15(b) to C.20 should not be included in the FAD.

General Dispute Resolution Procedures

Our clients agree that reasonable access terms require a means for disputes to be resolved quickly and cheaply. However, to ensure that disputes are expedited, the process requires time frames to be met by the parties. This could be achieved by amending Clause D.9 as follows:

D.9 Each party shall as early as practicable, and within 3 weeks unless a longer period is agreed between the parties, after the notification of a Non-Billing Dispute pursuant to clause D.3…

Confidentiality Provisions

Our Clients consider that the confidentiality provisions in section E of the Model Terms are acceptable and that it is important for a standard form of confidentiality undertaking to be specified in order to remove the potential for unnecessary negotiation about undertakings. Our Clients do, however, consider that an amendment to the confidentiality undertaking at annexure 1 of the Model Terms is required to enable it to be complied with in practice.

Clause 7 of the confidentiality undertaking sets out requirements for the destruction or return of confidential information. Though this is broadly acceptable, the provision fails to take into account technical practicalities relating to the destruction of confidential information contained in emails that are stored in the parties' back-up systems. When documents containing confidential information are emailed between people working on a matter, it becomes impossible to delete them from back-up servers. This results in the 'destroy or deliver' clause in the proposed confidentiality undertaking being impossible to adhere to in practice, which places the person who has completed a personal undertaking in an unreasonable position. This is an issue that has been previously discussed and resolved between some of our Clients and Telstra following problems with document destruction that was experienced following the completion of access disputes and court proceedings. It was agreed between some of our Clients and Telstra that an amendment to the destruction clause would be made to resolve this problem. Our Clients suggest that the proposed destruction clause be amended in the same fashion as follows:

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; or

(b) my ceasing to be employed or retained by [undertaking company]

(providing that I continue to have access to the Confidential Information at that time); or

(c) my ceasing to work 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 back-up systems that cannot be separately destroyed or deleted.

Communications with End Users

Subject to the point relating to clause F.2(a) addressed below, our Clients believe that the provisions in section F of the Model Terms appropriately allow the Access Provider to communicate with the end-users of an Access Seeker in a reasonable manner whilst preventing the Access Provider from using its position to engage in unreasonable forms of marketing. Our Clients request that the following amendments be made to clause F.2(a) to remove an unintended ambiguity that allows the Access Provider to contact and market to an Access Seeker's end-user in relation to goods and services that the Access Provider previously supplied to the end-user:

F.2 Subject to clause F.3, the Access Provider may communicate and deal with the Access Seeker's end users:

(a) in relation to the Access Provider's current or previous supply of goods and services to the end-user;

Network Modernisation and Upgrade Provisions

Section G of the Model Terms deals with network modernisations and upgrades. Our clients note the view expressed in the Discussion Paper[21] that section G of the Model Terms may not be relevant to the supply of WDSL. Although the definition of 'Major Network Modernisation and Upgrade' is drafted with specific reference to ULLS, our Clients believe that the provisions in section G of the Model Terms should be included in the WDSL FAD, subject to subparagraphs (a) and (b) of clause G.9 (i.e. the clauses that make specific reference to ULLS) being deleted. Our Client's believe that there is no reason in principle why Telstra should not be required to comply with the requirements of section G of the Model Terms in circumstances where Telstra undertakes network changes that will result in either:

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

As regards the protections afforded to Access Seekers afforded by section G of the Model Terms, our Clients submit that stronger protections are required as detailed below.

[21] Discussion Paper, at p.10.

It is reasonable that Access Seekers should generally receive an equivalent period of notice concerning a planned network upgrade as an Access Provider effectively provides itself. However, our Clients consider that the proposed minimum periods of 30 weeks for a General Notification and 26 weeks for an Individual Notification are insufficient to allow Access Seekers to respond to an upgrade by investigating and implementing possible alternative methods of service delivery. Our Clients consider that a minimum period of 18 months notice is necessary to ensure suitable arrangements are made to service end-users. Our Clients submit that section G of the Model Terms should be amended to reflect this.

Our Clients also consider that the FAD should specify or restrict the costs that Access Seekers will incur as a result of a Major Network Modernisation and Upgrade or Coordinated Capital Works Program. It would be unreasonable if the Access Provider is able to impose charges on an Access Seeker for early termination, disconnection, or migration to a new service that are the result of the Access Provider's decision to modernise its network. Accordingly, our Clients suggest the following addition to section G of the Model Terms:

> *Where the Access Provider undertakes a Major Network Modernisation and Upgrade or Coordinated Capital Works Program, the Access Provider must not impose charges on Access Seekers that result from the Access Provider's decision or works. For example, the Access Seeker must not impose charges for:*
> *(a) termination of services or agreements;*
> *(b) disconnection;*
> *(c) migration to an alternative service;*
> *(d) processing facilities access requests; or*
> *(e) any aspect of the works that Access Seekers undertake relating to the removal of their equipment from Telstra facilities*
> *that reasonably result from the Access Provider's Major Network Modernisation and Upgrade or Coordinated Capital Works Program.*

<u>Suspension and Termination</u>

Subject to the points relating to:

- clause H.2(b); and
- the access seeker's right to terminate for convenience,

addressed below, our Clients believe that the provisions in section H of the Model Terms are appropriate for inclusion in the FAD.

Clause H.2(b)

As currently drafted the Access Provider's right to suspend an Access Seeker's services under clause H.2(b) is too broad in order to reasonably protect the interests of the Access Provider. For instance, as currently drafted, the Access Provider could suspend an Access Seeker's access to WDSL on the basis that the Access Provider considers the Access Seeker

has installed a wireless base station in a manner that contravenes a State planning law. Suspension or termination on this basis would clearly be unreasonable as it has no relevance to the Access Provider's supply of WDSL to the Access Seeker and is unlikely to be the intention of this provision. This clause requires amendment so that it is unambiguously clear that the Access Provider cannot suspend an Access Seeker's service in circumstances where:

- the contravention of a law is unrelated to the Access Provider's provision of a Service or Facility to the Access Seeker; and
- the Access Provider unilaterally decides that the Access Seeker's use of Facilities is in contravention of a law without this view being supported by the decision of a court and the court's decision is not the subject of an appeal.

Our Clients suggest the following amendment:

H.2(b) a Court determines that the Access Seeker's use ~~either~~ of ~~its Facilities or~~ the Access Provider's Facilities is in contravention of any law and that Court's decision is not the subject of an appeal;

Termination for convenience

Given that the obligation to supply declared services is on the Access Provider and Access Seekers do not have a corresponding obligation to acquire services, a FAD should provide that Access Seekers can terminate their access for convenience and without penalty. To enable access seekers to terminate access for convenience, our Clients suggest that the following new clause be included in the FAD in addition to the clauses contained in section H of the Model Terms:

> *"The Access Seeker may terminate its acquisition of the Service without penalty or charge on one month's written notice to the Access Provider."*

Changes to Operating Manuals

Section I of the Model Terms deals with changes to operating manuals. Our clients note the view expressed in the Discussion Paper[22] that section I of the Model Terms may not be relevant to the supply of WDSL. Our Clients acknowledge that:

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

In light of this, our Clients accept that section I of the Model Terms as drafted is not suitable for inclusion in the FAD. However, this does not mean that:

[22] Discussion Paper, at p.10.

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

In light of this, our Clients submit that a suitably amended version of section I of the Model Terms should be included in the FAD.

Ordering and Provisioning

Section J of the Model Terms deals with ordering and provisioning. Our clients note the view expressed in the Discussion Paper[23] that section J of the Model Terms may not be relevant to the supply of WDSL. Our Clients acknowledge that section J of the Model Terms is drafted with specific reference to the ULLS and so it is not relevant to the supply of WDSL. However, this does not mean that the FAD should not contain terms and conditions that relate to service delivery and fault rectification. Our Clients note that the ACCC has recently accepted Telstra's Structural Separation Undertaking (**SSU**) which contains commitments relating to equivalence and transparency in relation to the supply of regulated services. In light of this, we believe that it would be appropriate for the FAD to incorporate the following commitments made by Telstra in the SSU that relate to service delivery and fault rectification as relevant to WDSL:

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

In addition, the FAD should acknowledge that Access Seekers may have statutory entitlements under the *Telecommunications (Consumer Protection and Service Standards) Act 1999* in respect of provisioning and fault rectification.

Facilities access

While terms and conditions relating to facilities access are not relevant to the WDSL service as currently provided by Telstra, if, as Our Clients submissions below on the following issues are accepted:

- the mandatory provision of the AGVC; and
- the limitation of access pick up points to capital cities,

facilities access provisions would become relevant, and it would be appropriate for terms and conditions relating to facilities access to be included in the WDSL FAD.

[23] Discussion Paper, at p.10.

(b) Particular issues relating to WDSL that need to be addressed in order to better promote the LTIE

Our Clients submit that the non price terms in the WDSL FAD should address the following issues in order to better promote the LTIE:

- the mandatory provision of the AGVC;
- the mandatory bundling of a PSTN Voice service;
- the limitation of access pick up points to capital cities; and
- the restriction on reselling the WDSL service to wholesale customers.

Each of these issues will be considered in turn.

The mandatory provision of the AGVC

As stated in response to question 6 above, the AGVC cannot be excluded from the WDSL service description, as in many areas Telstra is the sole backhaul provider, however, it should not be mandatory to acquire AGVC off Telstra when acquiring WDSL. Allowing access seekers to choose whether or not to buy AGVC off Telstra in locations where competitive backhaul is available will promote competition in the market for wholesale transmission services as well as the other markets in which that WDSL operates.

The mandatory bundling of a PSTN Voice service

In its letter to the ACCC of 8 February 2012, Telstra stated bundling is not imposed as a condition (of acquiring WDSL) and that '*because of Telstra's core systems and platform design, ADSL services can only be provisioned where a telephone line has been provisioned at the end-user's premises. That core systems/platform limitation applies to both wholesale and retail services.*'[24] Telstra's explanation of this limitation was redacted from the public version of its letter. Our clients consider that any limitations that Telstra has built into its systems that force end-users serviced by WDSL to also acquire a PSTN service can and should be removed. As discussed in response to question 5, the technology that Telstra uses to deliver WDSL is not fundamentally different technology to that access seekers use to provide retail naked DSL services via the ULLS. Technologically, Telstra is not limited from removing what is in effect forced bundling of two services at both the wholesale and retail level, with the extra costs of a voice service frequently not wanted or required by consumers. Our clients submit that Telstra imposes this requirement not because of limitations in its systems but rather because forced bundling of voice and broadband is a simple and effective way to increase revenue and boost subscriber numbers on the PSTN. Telstra's determination to hold on to this revenue stream, even at the expense of and despite the requests of its own retail customers was

[24] Telstra letter to the ACCC, 8 February 2012, Pub. P.3.

demonstrated on 28 February 2012 when Telstra announced its retail plans for services provided over the NBN. Communications Day reported:

> *'…[Telstra] has resisted user calls for a broadband-only offering, with its packages tied to a compulsory home voice plan at the existing rate of $31.95 per month…A Telstra spokesperson said the decision to not offer a broadband-only service was to keep the pricing uniform with other access technologies and to simplify its plans, but added that the decision will be reviewed "over time in line with customer demand." "We have had unified pricing structures on HFC and ADSL for some time now and this is the same approach," the spokesperson told CommsDay, adding that the new plans are applicable to all customers and not specific to NBN.'*[25]

Allowing Telstra to continue to force WDSL/WLR bundling limits consumer choice and impedes the development of innovative competition over WDSL in the transition to the NBN. If Telstra's wholesale customers were permitted to acquire naked WDSL and subsequently take it to the retail market, then it is far more likely that Telstra retail would follow suit and give its retail customers what they have been asking for, naked DSL. This is very relevant to ensuring a smooth transition to the NBN, when broadband only services are likely to be standard. It is vital that the ACCC's WDSL FAD encourages an environment in which broadband only competition can flourish on a national basis, rather than such competition being limited to CBD and metro ESAs with competitive DSLAMs.

<u>The limitation of access pick up points to capital cities</u>

Competition can be seriously inhibited if Access Seekers are not able to compete with Telstra Retail on a level playing field. Last year, Telstra publicly stated that BigPond has access to 147 aggregation points, indicating that it can reach customers far deeper into the network than the access pickup points forced upon its competitors, which are limited to capital city pickup points (and only ever have been). In order to provide a level playing field, Access Seekers should have the option of connecting at the aggregation points deeper in the network.

<u>The restriction on reselling the WDSL service to wholesale customers</u>

Our Clients note that the Interim Access Determination for the WDSL service expressly allows an Access Seeker to acquire the WDSL service for the purpose of supplying to a reseller without the need to obtain Telstra's consent to do so[26]. Our Client's believe that this non price term condition is appropriate, is required to promote competition and should be included in the WDSL FAD.

[25] Communications Day, Issue 4165, 28 February 2012, p.1.
[26] Schedule 10 - Interim Access Determination No. 1 of 2012 (WDSL).

11. What other non-price terms and conditions of access do you consider should be included in this FAD? Please consider those access terms outlined above as well as any other access terms that you consider to be of material significance.

Our Clients believe that in order to allow the FAD to serve the purpose it is intended to serve, the ACCC needs to ensure that the FAD is capable of providing a complete set of terms and conditions or a method for ascertaining a complete set of terms and conditions (i.e. the FAD should 'cover the field'). The reasons for this, and, in our Clients' view, the simplest and most effective way to achieve this, are considered below.

(a) the reasons why a FAD should cover the field

In order to understand the reasoning process that leads to the conclusion that a FAD should cover the field, it is necessary to have regard to the following:

- an important conceptual distinction that exists within the concept of an 'access agreement' as defined in section 152BE of the CCA;
- the operation of the telecommunications access regime under Part XIC of the CCA as in force prior to the amendments that were made by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* (**CCS Act**); and
- the effect of changes that were made to the telecommunications access regime by the CCS Act.

Each of the above will be considered in turn.

Access Agreements

The concept of an 'access agreement' as defined in section 152BE of the CCA needs to be treated with care because it includes the following two types of agreements which are conceptually distinct:

- an agreement which is the result of meaningful negotiations between the parties and which contains terms and conditions that both parties accept are reasonable (**Genuine Agreement**); and
- an agreement which is the result of the first party to the agreement taking advantage of its stronger bargaining position and effectively forcing the second party to accept terms and conditions which the second party does not accept are reasonable (**Take it or Leave it Agreement**).

This distinction needs to be kept in mind in order to ensure that the regulatory framework operates as it was intended to.

Part XIC of the CCA prior to the CCS Act amendments (**the Former Access Regime**)

Under the Former Access Regime, if an access provider and access seeker entered into a Genuine Agreement, there was no work for the ACCC to do. However, in the case of a Take it or Leave it Agreement, an access seeker could request regulatory intervention by means of an arbitration which allowed the ACCC, if it determined it was necessary, to set regulated terms and conditions (**Arbitrated Terms**)[27]. This was commonly referred to as the 'negotiate/arbitrate' model. Under this model, the Arbitrated Terms would override the terms of the Take it or Leave it Agreement. The ACCC was able to set indicative prices and make model terms and conditions of access. This allowed access providers and access seekers to know what the ACCC's likely approach in an arbitration would be.

Changes to the Former Access Regime made by the CCS Act

Practical difficulties arose with the 'negotiate/arbitrate' model because Telstra tended to only offer Take it or Leave it Agreements which were inconsistent with what had become well established regulated terms (i.e. access seekers were forced to seek arbitrations in circumstances where the outcome of the arbitration was obvious to all parties concerned due to the existence of indicative prices, model terms and previous arbitration decisions). The legislative response to these difficulties was to move away from the 'arbitrate' part of the model and instead allow the ACCC to set upfront regulated terms which could be applicable without the need for an arbitration. However, the ACCC's ability to set upfront regulated terms was not intended to interfere with the parties' ability to enter into a Genuine Agreement. This is clearly acknowledged in the Explanatory Memorandum relating to the CCS Act, as follows (emphasis added)[28]:

> *Currently Part XIC of the CCA provides that if parties cannot agree on the terms of access to a declared service, then either party (the carrier or carriage service provider that provides access to the service, or the access seeker) can notify an access dispute to the ACCC. The ACCC must then arbitrate the dispute. The terms and conditions of access are then those determined by the ACCC in its arbitration determination for those two parties only. This is known as the 'negotiate-arbitrate' model.*
>
> *Since it is clear that the 'negotiate-arbitrate' model is not producing effective outcomes for industry or consumers, Part 2 of Schedule 1 to the Bill reforms the regime to allow the regulator to set up front prices and non-price terms for declared services.* ***This will create a benchmark which access seekers can fall back on, while still allowing parties to negotiate different terms.***

According to the Explanatory Memorandum relating to the CCS Act, this new model, which relies on the setting of upfront terms, was intended to work as follows (emphasis added)[29]:

[27] See former Division 8 of Part XIC of the CCA.
[28] At p.4.
[29] At pp.52, 53.

1. *The ACCC would declare a service, and set standard price and non-price terms of access for the declared service in an access determination.*
2. ***An access provider would be obliged to offer the declared service to any access seeker on the terms set down in the access determination. The two parties could still negotiate different terms.***
3. *The ACCC would be able to specify in the access determination fixed principles for treating certain on-going matters such as the depreciation methodology or the regulatory asset base, which could be set for a longer duration than the duration of the access determination.*
4. *The ACCC would not be able to issue ordinary exemptions from the access obligations as it can now; however anticipatory exemptions would still be available.*

For ease of expression the situation where an access seeker is able to fall back on regulated terms and conditions will be referred to as **the Regulated Terms Default Position**. The difficulty with the Regulated Terms Default Position is that in practice Telstra will not provide a service unless the customer enters into a customer relationship agreement (**CRA**) with Telstra. Given that the CRA is an access agreement that will override regulated terms, an Access Seeker's ability to rely on the Regulated Terms Default Position can be problematic because Telstra can, and does:

- Offer a CRA which contains terms and conditions that are inconsistent with the regulated terms. This requires the Access Seeker to identify the inconsistencies and request amendments. Given that Telstra's CRA is an intricate document which contains a number of layers of inter related contractual obligations many of which will be inconsistent with regulated terms, this is a difficult and costly exercise (in our Clients' experience Telstra will simply refuse to entertain any sort of regulatory terms pass through clause).

- Refuse to provide regulated terms until inconsistent access agreements have expired.

- Seek to lock in the terms of an Interim Access Determination and thereby delaying access to the terms of a final access determination.

Our Clients believe that in order for the Regulated Terms Default Position to work as intended, the FAD should make it clear that for the FAD terms to apply, it is not necessary for an access seeker to enter into an access agreement with the access provider. In order for this to be possible the FAD must cover the field.

(b) how the WDSL FAD can cover the field

It is submitted that the WDSL FAD will cover the field if, in addition to the price and non price terms discussed above, it incorporates the following[30]:

- the commitments in Part D of Telstra's Structural Separation Undertaking (**SSU**) that are relevant to WDSL (this will fill any gaps relating to performance standards and service levels); and
- Telstra's technical specifications and operational manuals that are relevant to WDSL (the ACCC can direct Telstra to inform it which technical specifications and operational manuals are relevant to WDSL), these will, of course, be subject to the overarching commitment to equivalence in Telstra's SSU.

12. What general approach do you consider would be appropriate in developing an FAD that addresses those terms?

An approach that seeks to identify:

- reasonable terms relating to standard non price commercial matters;
- terms that address issues of concern that are particular to the supply of WDSL by Telstra; and
- what is required to allow the WDSL FAD to 'cover the field' so as to allow the Regulated Terms Default Position to operate as intended.

13. In general terms, what do you consider to be an appropriate outcome for each of these terms and conditions?

In general terms an appropriate outcome would be:

- reasonable terms relating to standard non price commercial matters;
- terms that are required to address the issues of concern that are particular to the supply of WDSL by Telstra; and
- a FAD that to 'covers the field' so as to allow the Regulated Terms Default Position to operate as intended.

as set out in response to questions 10 and 11.

14. Should SAOs apply to operators of non-dominant networks

The ACCC said that its current view is that the WDSL SAO's should not apply to access providers other than Telstra. Our clients agree that limiting the SAOs to Telstra is appropriate as it reflects:

- Telstra's position as the dominant service provider;

[30] i.e. this could be by means of incorporation by reference rather than having to restate the relevant provisions in the FAD.

- the massive spread of Telstra's DSL network in comparison with the limited geographic coverage of other service providers,

- that the repeated competition concerns relating to DSL have only ever been raised about Telstra's conduct; and

- that other service providers with limited market share and no position of market dominance will have no option except to at least match Telstra's price if they want to compete in the market for WDSL.

Further, operators of other networks such as ULLS networks, and resellers of WDSL, would each operate on a differing cost basis that would make their incorporation into the WDSL FAD price terms problematic. Given Telstra's dominance and spread, it is unlikely that applying the SAOs to other service providers would promote competition or the LTIE.

15. Should the ACCC consider exempting particular geographic areas from the SAOs and/or terms and conditions included in the access determination? Why/why not?

As the ACCC is aware, for several years our clients have expressed the view that Telstra's conduct in regards to the provision of WDSL has damaged competition, with the effects being most obvious in ESAs without competitive DSLAMs and in regards to end-users connected via RIMs or pair gains systems where Telstra is the sole service provider. In its January 2012 submission arguing against declaration of WDSL, Telstra submitted that WDSL declaration should exclude 285 ESAs that meet a modified version of the Australian Competition Tribunal's threshold test for the WLR/LCS and PSTN OA exemptions.[31] Our clients consider that the ACCC correctly decided that WDSL should be declared on a national basis. Accordingly, our Clients submit that it is not appropriate to exempt any geographic areas from the SAOs or from terms and conditions that are included in the WDSL FAD. Our clients submit that any consideration into whether to grant the exemptions requested by Telstra should have close regard to the experience of the WLR/LCS and PSTN OA exemptions, which proved to be detrimental to competition and provided no benefit to the LTIE.

In December 2011, the ACCC varied the FADs for WLR, LCS and PSTN OA to remove geographic exemptions after reaching "*the conclusion that removing the exemptions will promote competition, the efficient use of and investment in infrastructure, and the long term interests of end-users*." The ACCC stated that *"[a]fter analysing the submissions and information provided to it, the ACCC has found clear evidence that the exemptions have not promoted competition in the exempt areas and are unlikely to do so in the future. In addition, the ACCC has concluded that the exemptions have the potential to undermine efficiency in the use of, and investment in, infrastructure*".[32]

Our Clients submit that granting the exemptions sought by Telstra will:

- impede the ability of access seekers, particularly those without DSLAMs, to compete;

[31] Telstra submission, Pub, pp18-20
[32] ACCC, Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services, Final Version, December 2011, Pub, p. 6.

- give Telstra the opportunity to leverage its non-regulated position in the exempt ESAs in a manner that could negatively impact competition in both the exempt and non-exempt ESAs. For example: by not providing the service in the exempt ESA; by charging a higher price if an access seeker uses another service provider in any ESAs; refusing to supply the service in an exempt ESA unless the access seeker agrees to minimum commitments of other Telstra products; or by refusing to supply the service in an exempt ESA unless the access seeker agrees to use Telstra as wholesale aggregator on NBN;

- encourage inefficient use of infrastructure by pressuring investment in infrastructure that otherwise would not be considered by an efficient operator, in order to gain access to services either not available or not available without unsatisfactory conditions;

- provide no advantage to the LTIE, i.e. if an access seeker can obtain a preferable service via another network then it will do so despite Telstra's SAOs;

- repeat the WLR/LCS experience where Telstra kept access prices at higher CRA rates in exempt ESAs, i.e. the exemption did not promote LTIE as prices didn't drop across the board and remained higher in the exempt exchanges;

- increase access seeker costs if they have to negotiate access terms with a range of other service providers in different exempt ESAs; and

- not address access issues faced where a SIO is connected via a RIM or large pair gain system.

16. What is an appropriate time period for the FAD?

The duration of the FAD must be set in accordance with section 152BCF of the CCA, which broadly provides that an access determination comes into force on the specified day and unless revoked ceases to be in force on the expiry date. Our Clients submit that the FAD should commence on the date of declaration of WDSL and expire on 1 July 2018, the designated day by which Telstra should not be in control of a fixed line network providing services to retail customers.[33]

(a) The FAD's specified day of commencement

Of particular relevance to the date of commencement of the WDSL FAD are subsections 152BCF(4) and 152 BCF(4A) of the CCA, which specify when an access determination can commence in the situation of (a) replacing another FAD; or (b) replacing an IAD.

Subsection 152BCF(4) provides if:

(a) an access determination is expressed to replace a previous access determination relating to access to the declared service; and

[33] *Telecommunications Act 1997*, section 577A

(b) the previous access determination is not an interim access determination;

the specified day must be the first day after the expiry of the previous access determination.

Subsection 152BCF(4A) provides if:

(a) an access determination is expressed to replace a previous access determination relating to access to the declared service; and

(b) the previous access determination is an interim access determination; and

(c) the declared service is covered by a declaration under section 152AL;

the specified day must not be earlier than the day on which the declaration came into force.

The difference between subsections 152BCF(4) and 152BCF(4A) is:

- if a FAD replaces a FAD, the second FAD must commence after the expiry of the first FAD,

however,

- if a FAD replaces an IAD, the FAD may commence from the date of declaration, i.e. the FAD can take the place of the IAD by operating retrospectively.

So in the present circumstances, the WDSL FAD can commence from 14 February 2012, when the service was declared.

As the ACCC expressed in the Statement of reasons for making the WDSL IAD, it was required to make the IAD because the FAD will not be made within six months and the IAD was required to provide certainty as to default terms and conditions until the FAD is made.[34] Unlike a FAD, in making the IAD the ACCC was not required to undertake a public inquiry[35], observe procedural fairness[36], or have regard to the mandatory criteria[37]. Further, the ACCC can amend an IAD at any time before a FAD is made[38] and the IAD is automatically revoked when the FAD is made[39]. The clear purpose of an IAD is to provide a quick fix until a thorough and appropriate solution can be researched and implemented in the FAD. We consider it likely that the price terms of the FAD will be significantly different to the IAD. If so, the mandatory criteria will be very relevant in the ACCC's

[34] ACCC, *Interim access determination for the wholesale ADSL service,* Statement of Reasons, February 2012, p. 5.
[35] Subsection 152BCH(2) of the CCA.
[36] Subsection 152BCG(4) of the CCA.
[37] Subsection 152BCA(4) of the CCA.
[38] Subsection 152BCN(1) of the CCA.
[39] Subsection 152BCF(9A) of the CCA.

decision of the FAD's commencement date. We submit that if the FAD price terms differ to the IAD terms, the FAD should commence on the date that WDSL was declared, and for the avoidance of any doubt, the FAD should state that it prevails over the terms of the IAD. In accordance with the CCA's hierarchy[40], this will have the following effect:

- Where an access seeker has acquired WDSL under an access agreement up to the point that the FAD is made, the access agreement will continue to prevail.[41]

- Where an access seeker has acquired WDSL on the basis of the IAD up to the point that the FAD is made, and without an access agreement, the FAD will prevail.

As noted above, the FAD automatically *revokes* the IAD. The normal meaning of 'revoke' is 'to take back or withdraw; annul, cancel, or reverse; rescind or repeal'.[42] The word has some level of ambiguity as to whether it has retrospective effect such that it reverses and replaces a matter entirely so that it never had any operation, or whether the revocation has only a present and future effect That is, revocation can cancel the IAD from its commencement on 15 February 2012 or from the time that the FAD is made. Subsection 152BCF(4A) acknowledges this by providing that a FAD can have retrospective effect, replacing an IAD. We consider that the ACCC's decision on the commencement date requires it to have regard to the mandatory criteria. In our view, adherence to the mandatory criteria will result in the FAD commencing on the date of declaration and overriding the IAD. The interpretation of the mandatory criteria with regard to WDSL that the ACCC sets FAD terms in, for example, September 2012 are unlikely to be any different to the circumstances in February 2012. The only difference is that in February, the ACCC had not had the opportunity to comply with its obligations in making a FAD. If the ACCC decides in September after considering the mandatory criteria and submissions made in the public inquiry that the WDSL price should be for example $10/month, then it is very likely that applying those criteria with hindsight to February 2012 will reach the same result. If so, application of the mandatory criteria requires that the FAD is backdated to the date of declaration.

(b) The FAD's expiry date

Section 152BCF(6) provides:

> *In specifying an expiry date for an access determination, the Commission must have regard to:*
>
> *(a) in a case where the declared service is covered by a declaration under section 152AL, the principle that the expiry date for the determination should be the same as the expiry date for the declaration (as that declaration stood at the time when the access determination was made) unless, in the Commission's opinion, there are*

[40] See section 152AY of the CCA.
[41] 152BCC.
[42] The Concise Macquarie Dictionary.

circumstances that warrant the specification of another date as the expiry date for the access determination; and

(b) such other matters (if any) as the Commission considers relevant.

The ACCC declared WDSL for a period of 5 years, until 14 February 2017. Unless the ACCC considers that circumstances warrant otherwise, subsection 152 BCF(6)(a) provides that the WDSL FAD should expire on the same date. We consider that WDSL declaration will be required until the transition from Telstra's copper CAN to the NBN is complete, or at least until the designated day of 1 July 2018, when Telstra should not be in control of a fixed line network providing services to retail customers[43].

17. Are there any circumstances that warrant a difference in the expiry dates of the access determination and the WDSL declaration?

Please see above answer to question 16.

Adam Internet,
iiNet Limited,
Internode Pty Ltd,
Primus Telecom, and
TransACT Communications Pty Limited

10 April 2012

[43] *Telecommunications Act 1997*, section 577A.