



Optus Submission

in response to the ACCC's

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

April 2011

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## Section 1. Executive Summary

- 1.1 Optus welcomes the opportunity to participate in the ACCC's inquiry to make a final access determination (FAD) for the wholesale ADSL service.
- 1.2 The ACCC has sought stakeholders' views on a range of matters including the price and non-price terms of access. These issues will be addressed in this submission where Optus will submit that:
  - (a) There are a number of important ancillary charges that the ACCC should address in the FAD. They include the installation charges, connection charges, speed upgrade charges, incorrect call out charges where a Telstra technician attends and incorrect fault report charge. Optus is concerned that to regulate a wholesale ADSL service without incorporating these ancillary charges will provide Telstra with an opportunity to raise prices of these ancillary services and deter access seekers from acquiring a competitively priced ADSL service;
  - (b) A cost based approach should be adopted in setting the monthly access charge for wholesale ADSL. This is consistent with the pricing principles applied by the ACCC in pricing the other declared fixed line services. A cost based approach would also avoid many problems associated with a retail minus or benchmarking approach;
  - (c) The monthly access charge should be levied on a nationally consistent basis. Optus submits that a national charge will promote competition in the wholesale broadband market. It will also provide access seekers with a smooth transition to the NBN and is consistent with the approach taken for retail pricing;
  - (d) The ACCC should not facilitate price discrimination between access seekers. This is inconsistent with the legislative intent; and
  - (e) Telstra should offer an unbundled wholesale ADSL and wholesale line rental services to access seekers.
- 1.3 In the remainder of this submission, Optus will discuss the relevant non-price terms that should be addressed in the FAD and reasons why:
  - (a) the standard access obligations (SAOs) should not apply to operators of non-dominant networks; and
  - (b) there should be no particular geographic areas which should be exempted from the SAOs and/or terms and conditions in the access determination.

## Section 2. The declared service –wholesale ADSL

### Relevant considerations

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

- 2.1 Under section 152BCA, the ACCC must have regard to a number of criteria when making a FAD. This includes:
- (a) Whether the determination will promote the long term interests of end-users of carriage services or services supplied by means of carriage services (LTIE);
  - (b) The legitimate business interests of a carrier or CSP who supplies or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service;
  - (c) The interests of all persons who have rights to use the declared service;
  - (d) The direct costs of providing access to the declared service;
  - (e) The value to a person of extensions, or enhancement of capability, whose cost is borne by someone else;
  - (f) The operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;
  - (g) The economically efficient operation of a carriage service, a telecommunications network or a facility.
- 2.2 Optus supports the ACCC's proposed approach described in Appendix 2 of the ACCC's discussion paper.<sup>1</sup>

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

- 2.3 The ACCC stated that it is not required to define precisely the scope of the relevant markets when applying these criteria to the making of an FAD. Nevertheless, the ACCC's current view is that the FAD will most likely affect retail and wholesale markets for the supply of fixed-line broadband services, either as standalone services or bundled with voice services (excluding VoIP and mobile originated calls).<sup>2</sup>
- 2.4 Optus agrees with the ACCC that it is not required to define precisely the scope of the relevant markets. Optus further agrees with the ACCC that the FAD will most likely affect the retail and wholesale markets for the supply of fixed-line broadband services.

<sup>1</sup> ACCC, Public Inquiry to make a Final Access Determination for the wholesale ADSL service Discussion Paper, February 2012, pp.17-24

<sup>2</sup> ACCC, Public Inquiry to make a Final Access Determination for the wholesale ADSL service Discussion Paper, February 2012, p.5

- 2.5 Optus has discussed the potential substitutes to a wholesale ADSL service in its January 2012 submission.<sup>3</sup> Optus refers the ACCC to this submission for further comments.

### **Section 3. Price related terms and conditions**

*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.*

#### **3.1 CiC begins**

#### **3.2 CiC ends**

#### **3.3 Optus submits that the ACCC should address the following charges in the FAD;**

- (a) The installation charge;
- (b) The monthly charge per end user access;
- (c) The AGVC/ADSL VLANs charge;
- (d) The early termination charge;
- (e) The connection charges including Type A Transfer via LOLO/LOLIG, Type B Transfer via LOLO/LOLIG, the charges per completed non-infrastructure based ADSL transfer request and all other completed installation or transfer requests; and
- (f) Miscellaneous charges including speed upgrade charge; incorrect call out charge where a Telstra technician attends and incorrect fault report charge.

#### *Charges addressed in the IAD*

- 3.4 Optus supports the ACCC proposal to address in the FAD charges that have been addressed in the IAD. This should include monthly charge per end user access, the AGVC/VLAN charge, early termination charge and the connection charges including Type A Transfer via LOLO/LOLIG, Type B Transfer via LOLO/LOLIG and all other completed installation or transfer requests.
- 3.5 Telstra has in the past imposed an unreasonable monthly charge per end user access on access seekers. This is evident from the various offers Telstra has provided to Optus.<sup>4</sup>
- 3.6 All access seekers who purchase Telstra's wholesale ADSL service are required to also purchase the AGVC/VLAN service. Optus is concerned that to regulate a wholesale ADSL service without incorporating the AGVC/VLAN service would provide Telstra with the

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<sup>3</sup> Optus, Submission in response to the ACCC's Discussion Paper into whether wholesale ADSL should be declared under Part XIC of the Competition and Consumer Act, January 2010, pp.18-22

<sup>4</sup> Optus Submission in response to the ACCC's Discussion Paper into whether wholesale ADSL should be declared under Part XIC of the Competition and Consumer Act, January 2010,

opportunity to use AGVC/VLAN pricing to deter access seekers from accessing the wholesale ADSL service.

3.7 **CiC begins CiC ends**

3.8 In addition, Optus submits that the connection charges should also be addressed in the FAD. The current connection charges Telstra imposes on Optus are unreasonable.

3.9 **CiC begins**

3.10 **CiC ends**

*Installation charge and miscellaneous charges*

3.11 In addition, Optus submits that the ACCC should also address the following charges in the FAD:

- (a) the installation charge; and
- (b) miscellaneous charges including the speed upgrade charge,<sup>5</sup> the incorrect call out charge where a Telstra technician attends and the charge for an incorrect fault report to the Telstra Fault Desk.

3.12 For the same reason provided above regarding the AGVC/VLAN charge, all access seekers who purchase Telstra's wholesale ADSL service are required to pay the installation charge. To regulate a wholesale ADSL service without regulating the installation charge service would provide Telstra with the opportunity to use installation charge to deter access seekers from accessing the ADSL service.

*Miscellaneous charge: Speed upgrade charge*

3.13 Telstra currently prices its wholesale ADSL services based on the ADSL line transmission rate. **CiC begins**

3.14 **CiC ends**

3.15 Optus submits that this is not in the LTIE. Telstra has effectively restricted Optus from providing better quality services to its customers and to compete with Telstra on a level playing field.

3.16 It is important to note that Telstra currently charges its retail customers uniform prices on broadband services regardless of the ADSL line transmission rate the end user acquires. Telstra basically offers its retail customers the best download speeds available in the area. On Telstra's website, it states that "ADSL2+ offers download speeds of up to a maximum of 20Mbps. ADSL2+ is currently available in all major cities and many other major regional centres."<sup>6</sup>

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<sup>5</sup> Charge to change the configuration of an End User Access (eg: if the ADSL line transmission rate is increased or decreased or configuration of the End User's session set-up is changed)

<sup>6</sup> Telstra website, <http://go.bigpond.com/broadband/what-is-broadband/>

3.17 Telstra should therefore provide access seekers the best available ADSL line transmission rate for wholesale ADSL service. Speed is a key driver of customer acquisition. There has been an increasing customer demand for data downloads and applications. This is shown in Table 2 below. Table 2 is extracted from the Australian Bureau of Statistics (ABS). It shows that subscribers are progressively migrating onto higher download speed. In June 2010, there were 2,594,000 subscribers on 8Mbps to less than 24 Mbps but in June 2011, it had increased to 3,913,000. Any changes to the line speed should not result in higher charges to access seekers.

**Table 2: ABS Advertised Download Speed**

Advertised download speed			June 2010	December 2010	June 2011
Less than 256kbps		'000	785	707	579
Broadband					
	256kbps to less than 1.5Mbps	'000	1950	1240	812
	1.5Mbps to less than 8Mbps	'000	3540	4067	4614
	8Mbps to less than 24 Mbps	'000	2594	3530	3913
	24 Mbps or greater	'000	632	901	Na
	24 Mbps to less than 100 Mbps	'000	Na	Na	972
	100 Mbps or greater	'000	Na	Na	18
	Broadband (256kbps or greater)	'000	8717	9739	10328
<b>Total number of subscribers</b>		<b>'000</b>	<b>9502</b>	<b>10446</b>	<b>10906</b>

### 3.18 **CiC begins CiC ends**

*Miscellaneous charges: Incorrect call out charge where a Telstra technician attends & incorrect fault report charge*

3.19 Telstra charges Optus **CiC begins CiC ends** when an end-user directly calls Telstra's fault desk for assistance and **CiC begins CiC ends** for an incorrect call out where a Telstra technician attends.

3.20 Optus submits that the FAD should address both of these charges as they are excessive and do not reflect the true costs of providing the services. Optus considers that incorrect calls to Telstra helpdesk should reflect the lower costs of online lodgement and testing.

### 3.21 **CiC begins**

### 3.22 CiC ends

3.23 Optus submits that the increase in incorrect call out charge is not reasonable. Optus therefore submits that the ACCC should have it addressed in the FAD.

*What methodology(s) should be used to develop price terms for this FAD?*

3.24 Optus submits that a cost based methodology should be adopted to develop price terms for the FAD.

3.25 A cost based methodology is consistent with the pricing principles applied by the ACCC in pricing the declared fixed line services supplied over the Telstra's copper access network. The ACCC said of this approach that:

*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... [as such] 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.<sup>7</sup> [emphasis added]*

3.26 Accordingly, it would be appropriate to also apply a cost based methodology for the ADSL wholesale service. Specifically, the ACCC should seek to price the wholesale ADSL wholesale service in a manner that is consistent with the existing fixed line service model given that there are many common elements.

3.27 There are a number of advantages to using a cost based approach consistent with the fixed line services model over alternative methodologies:

- (a) Established – stakeholders understand the approach so there will be less contention around key parameters and less time required for 'learning' on the part of the ACCC and stakeholders;
- (b) Accepted – stakeholders were supportive of the cost-based approach utilised in fixed services and were able to focus on the inputs rather than the methodology leading to a better outcome for both the access provider and access seekers; and
- (c) Transparent – stakeholders will generally have access to key inputs to facilitate understanding and acceptance of the outputs since it does not rely on information provided by service providers other than Telstra.

3.28 These benefits are in contrast to the other approaches proposed by the ACCC and utilised to price other regulated services:

- (a) 'retail-minus'; and

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<sup>7</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services*, Final Report, July 2011, p.133

(b) Benchmarking.

- 3.29 Optus highlighted a number of issues with the retail minus approach in its submission to the ACCC on Telstra's Structural Separation Undertaking (SSU)<sup>8</sup> and its submission to the domestic capacity transmission service on the domestic benchmarking approach.<sup>9</sup> The drawbacks of both of these approaches for the wholesale ADSL services are discussed briefly below.
- 3.30 Optus submits that a retail minus approach is not appropriate as it is based on narrowly defined costs that are subtracted from existing uncompetitive retail prices. This makes it extremely difficult for access seekers to offer retail prices which are significantly lower than the incumbent's retail prices. Given Telstra's sheer size, it has access to significant scale economies which are unavailable to its competitors. This has two main implications.
- 3.31 First, it is unlikely that access seekers will be able to earn a normal commercial return using a retail minus wholesale pricing construct. **CiC begins CiC ends** Retail minus makes it very likely that Telstra's competitors will be unable to compete with Telstra in the relevant market(s). It is, therefore, unlikely that pricing the reference ADSL service at the existing retail price and subtracting the avoidable retail costs will result in vigorous competition in the resale ADSL market. Therefore it simply entrenches Telstra's existing market share under the guise of promoting competition.
- 3.32 Second, even if there are competitors taking resale services priced at retail minus, the retail minus pricing construct practically guarantees that there will be no improvement in retail pricing. This is because retail minus makes it extremely difficult for access seekers to offer retail prices which are significantly lower than the incumbent's retail prices, as explained above. In effect, an underlying assumption of retail minus as a pricing approach is that existing retail prices are assumed to be appropriate. This is a fundamental problem.
- 3.33 In fact, Telstra's existing retail prices are very far from appropriate. For example, as of 18 September 2011, Telstra's retail ADSL plans for new customers start from \$59.99 per month on a standalone basis (ie. its BigPond Elite ADSL 5GB plans on a 12-month term).<sup>10</sup> However, Telstra's included data allowance significantly pales in comparison with other access seekers at a similar price point.<sup>11</sup> There are a number of reasons as to why existing retail prices are likely to be too high, the most pertinent being Telstra's market power in the fixed-line market, specifically in regional areas – which has been

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<sup>8</sup> Optus, Submission to the ACCC on Telstra Structural Separation Undertaking and Draft Migration Plan, September 2011

<sup>9</sup> Optus, Submission to the ACCC in response to the review of the Domestic Transmission Capacity Service Pricing Principles, July 2010, pp.36-40

<sup>10</sup> Telstra, Our customer terms: BigPond service section, Part C – ADSL, last updated 18 September 2011, available from <http://www.telstra.com.au/customer-terms/home-family/bigpond-services/adsl/?red=/customerterms/bigpond/adsl.htm>

<sup>11</sup> Optus, Naked broadband plans, <http://optus.com.au/store/phone/Broadband>; iiNet, Broadband plans, <http://www.iinet.net.au/broadband/plans.html>; TPG, ADSL2+, [http://www.tpg.com.au/products\\_services/adsl2plus\\_pricing.php?pricing/adsl2plus](http://www.tpg.com.au/products_services/adsl2plus_pricing.php?pricing/adsl2plus)

highlighted by the ACCC in the past (in 2001 and 2004), notably in describing alleged contraventions by Telstra for vertical price squeeze conduct on two separate occasions.<sup>12</sup>

- 3.34 Optus considers that if the ACCC is to rely on international benchmarking evidence, substantial adjustments would be required in order to take account of Australian-specific factors before such evidence was capable of being used to calculate an appropriate wholesale DSL price for Australia.
- 3.35 It was recognised by the Australian Competition Tribunal that international benchmarking evidence would only be relied upon if various matters were taken into account, including the regulatory environment, the state of the relevant markets and the socio-economic environment:

*In any event, the nature of the international benchmarking exercise was such that it teaches very little, or nothing at all, as to whether Optus' price terms are reasonable having regard to the matters set out in s 152AH and the objectives in s 152AB. In order to place any reliance upon the international benchmarking analysis it would be necessary to know much more about the regulatory environment within which they were determined, the state of the relevant markets and the socio-economic environment in which the mobile services were operative.<sup>13</sup>*

- 3.36 Similarly, Optus submits that it would not be reasonable for the ACCC to rely on domestic benchmarking evidence. As the ACCC noted, the wholesale market for ADSL is not competitive. There are only a limited number of operators who supply wholesale ADSL service to wholesale customers. Besides Telstra, Optus and AAPT supply wholesale ADSL service to wholesale customers.<sup>14</sup> Optus is the second largest wholesale service provider after Telstra, so far as Optus is aware. Further, Optus and AAPT do not have national wholesale ADSL coverage.
- 3.37 There is therefore a very limited set of data available for the ACCC to benchmark against.
- 3.38 A cost based approach would avoid the many problems we have noted with a retail minus or benchmarking approach. More importantly, it would open up the ADSL market for genuine competition on the merits between Telstra and its competitors.

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

- 3.39 Optus submits that the ACCC should ensure the overall charge structure maintains an appropriate balance between the access fees and usage fees.

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<sup>12</sup> ACCC, *Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan*, Discussion Paper, 30 August 2011, p.80

<sup>13</sup> Application by Optus Mobile Pty Limited & Optus Networks Pty Limited [2006] ACompT 8(22 November 2006) para 297

<sup>14</sup> ACCC, *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010 Final Decision*, February 2012, p.4

- 3.40 In the IAD the ACCC set out prices for both access fees and usage fees. The access fee is a monthly charge per end user access. The usage fee is a monthly charge per Mbps per month. It is to be calculated by multiplying the size of the AGVC/Subscribed Data Speed.
- 3.41 Optus supports the approach the ACCC has taken in the IAD. As the usage fee is calculated based on the size of the AGVC/Subscribed Data Speed, it restricts Telstra from favouring carrier service providers (CSPs) who have a larger customers' base and require higher level of network utilisation.
- 3.42 **CiC begins CiC ends**
- 3.43 To price the usage charge based on the rate per Mbps per month therefore ensures that CSPs who have a larger customers' base would not be treated more favourably when compared to the smaller CSPs.
- 3.44 Further, it is difficult for access seekers to predict the precise Subscribed Data Speed they will need in the future. It is expected that end users' demand for higher speed services will continue to increase in the future and thus access seekers may require higher subscribed data speed or a bigger AGVC in the future.
- 3.45 By having the usage fee based on the size of the AGVC/Subscribed Data Speed therefore provides access seekers with the flexibility to make changes when they are required to do so.

*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?*

- 3.46 Optus submits that the access charges should be levied on a nationally consistent basis.

*Telstra's motivation to change its charge structure*

- 3.47 **CiC begins**
- 3.48 **CiC ends**
- 3.49 Telstra does not have a definition of zone 1, zone 2 and zone 3. It appears that Telstra has just arbitrarily classified the different ESAs into the three zones. Zone 1 is mostly ESAs where access seekers have installed DSLAMs. This includes CBD and metropolitan areas. Zones 2 and 3 on the other hand are areas where access seekers do not have DSLAMs infrastructure installed. They are mostly regional and remote areas.
- 3.50 Telstra proposes a lower charge for Zone 1 and a higher charge for Zone 2 and 3. Telstra's motive to implement a "zone" structure appears to be to price competitors out of the market.
- 3.51 In the wholesale broadband market, wholesale customers often require national coverage. This is to allow them to supply retail customers in both metropolitan and regional areas.
- 3.52 To purchase wholesale ADSL from multiple suppliers however is costly. Wholesale customers have to incur IT integration costs in order to purchase wholesale ADSL service

from each wholesale ADSL supplier. The cost is approximately **CiC begins CiC ends** In addition, wholesale customers also have to incur ongoing operational costs for purchasing wholesale ADSL from each wholesale ADSL supplier. This includes training for call centre operators and support for the provisioning and fault management systems.

- 3.53 It therefore follows that unless a wholesale supplier could price its wholesale DSL at a price significantly lower than Telstra, wholesale customers would purchase wholesale DSL from Telstra only. **CiC begins CiC ends** A de-averaged wholesale ADSL price therefore will not promote competition in the wholesale broadband market.

#### Smooth transition to the NBN

- 3.54 Further, it is important to note that uniform wholesale pricing is one of the pricing objectives NBN Co needs to achieve. Under the Competition and Consumer Act, NBN is permitted to undertake certain actions that are reasonably necessary for it to achieve uniform national wholesale pricing. For example, the following are authorised;

- (a) Refusal to permit interconnection outside the listed points of interconnection;
- (b) the bundling of services; and
- (c) cross-subsidising in charging for services.

- 3.55 During the transition to the NBN, competition in the retail market is likely to intensify. In regional areas where access seekers don't have DSLAMs infrastructure installed, access seekers would purchase wholesale DSL from Telstra.

- 3.56 Once the NBN is ready-to-service in the area, these services will then be migrated across to the NBN. A national monthly access wholesale DSL charge will therefore provide access seekers a smooth transition to the NBN.

- 3.57 The ACCC has already had regard to the intended charging approach of NBN Co in setting averaged ULLS prices for Bands 1 through 3. In the Statement of Reasons for the IADs, it stated:

*The ACCC has also had regard to the changing nature of the telecommunications industry and NBN Co's stated intention to charge uniform national wholesale prices for the National Broadband Network (NBN).<sup>15</sup>*

- 3.58 The ACCC considered that the averaging approach would "ease industry's transition to national wholesale pricing for the NBN."<sup>16</sup> Similar statements were made in the Discussion Paper.<sup>17</sup> Consistent with this approach, Optus submits that the ACCC should ease industry's transition to the NBN by adopting a uniform national pricing structure for the wholesale ADSL service.

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<sup>15</sup> ACCC, *Interim access determinations for the declared fixed line services: Statement of Reasons*, March 2011, p.15

<sup>16</sup> ACCC, *Interim access determinations for the declared fixed line services: Statement of Reasons*, March 2011, p.15

<sup>17</sup> ACCC, *Public inquiry to make final access determinations for the declared fixed line services*, Discussion paper, April 2011, pp.143-144

### Retail pricing

- 3.59 In addition, the retail plans Telstra offers are priced nationally. All the broadband plans Telstra advertises on its website do not differentiate prices based on the area the end user lives in. For example, all the BigPond Elite plans and the BigPond Ultimate Liberty plans are priced nationally.<sup>18</sup>
- 3.60 Similarly, Optus adopts national pricing for its retail plans also. For example, all the Optus 'yes' Fusion plans, the 120Gb broadband and home phone plan and the 30Gb broadband and home phone plan are priced nationally.<sup>19</sup>
- 3.61 A national wholesale DSL price therefore will assist access seekers to price its downstream services in a more efficient way.

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

- 3.62 Optus submits that the ACCC should not tolerate any price discrimination between access seekers. Price discrimination is not in the LTIE as it will damage competition in the relevant markets.
- 3.63 **CiC begins**
- 3.64 **CiC ends**
- 3.65 Price discrimination therefore has the effect of damaging competition in the relevant markets. The Government has long recognised this problem. In the regulation of the NBN network and the superfast fixed-line networks, the Government has introduced non-discrimination provisions which prohibit NBN Co and the providers of superfast fixed-line networks from discriminating between access seekers. This specifically recognises the risks that can arise where non-discrimination is permitted.
- 3.66 Price discrimination has the effect of preventing access seekers from competing with Telstra in the relevant markets. Telstra has incentives to charge higher prices to access seekers which it considers pose significant threat to its retail arm. Optus therefore submits that there should be no scope for price discrimination between access seekers.

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

- 3.67 Optus submits that besides the price terms it mentioned elsewhere, the ACCC should ensure Telstra will offer access seekers an unbundled wholesale ADSL and wholesale line rental (WLR) services.
- 3.68 Currently Telstra imposes a condition on access seekers that wholesale ADSL must be purchased together as a bundle with WLR. Telstra has previously argued that this is not a condition:

<sup>18</sup> Telstra website, <http://go.bigpond.com/broadband/?ref=Net-Head-Int-Plans-Broadband>

<sup>19</sup> Optus website, <https://www.optus.com.au/shop/broadband/topbroadbandplans>

“...because of Telstra’s core systems and platform design, ADSL services can only be provisioned when a telephone line has been provisioned at the end-user’s premises. That core systems/platform limitation applies to both wholesale and retail services.”<sup>20</sup>

3.69 Telstra however currently offers its retail customers naked ADSL service. Telstra currently offers its retail customers the option to take ADSL with or without a Telstra fixed phone plan. Some of the plans Telstra offers include BigPond Turbo ADSL and BigPond Elite ADSL.<sup>21</sup>

3.70 An example is the BigPond Elite 5Gb plan. If customer takes up a bundled telephony and broadband service, the price per month for the broadband service is \$29.95 if the customer signs up a 24 month contract, \$49.95 if the customer doesn’t wish to sign up on a contract. If a customer takes up a naked broadband service, the price per month will be \$59.95. This is shown in diagram 1 below.

**Diagram 1: Telstra BigPond Elite 5Gb plan<sup>22</sup>**

Do you also have a Telstra full service home phone?	Plan term	Price per month	Minimum cost
Telstra full service home phone customer with the BigPond Broadband Benefit	24 month	\$29.95	Min cost \$1509.60 + \$9.95 delivery <sup>1</sup>
Telstra full service home phone customer	Casual Plan	\$49.95	Min Cost \$380.90 + \$9.95 delivery <sup>2</sup>
Standalone plan	Casual Plan	\$59.95	Min Cost \$358.95 + \$9.95 delivery <sup>3</sup>

3.71 Similarly whilst ULLS can support both resale telephony and resale ADSL, Optus offers both its retail and wholesale customers naked resale ADSL service. **CiC begins CiC ends**, Optus considers it is important to provide customers with the option of selecting a naked ADSL service.

3.72 This is particularly important in the lead up to the NBN. An unbundled wholesale ADSL service will provide access seekers the option to bundle wholesale ADSL service with

<sup>20</sup> Telstra, Letter to the ACCC Discussion paper into whether wholesale ADSL services should be declared under Part XIC of the Competition and Consumer Act 2010 –Access Seekers’ Submissions, 8 February 2012

<sup>21</sup> Telstra, Our Customer Terms BigPond service section, last changed on 10 February 2012, pp.5-6, <http://www.telstra.com.au/customer-terms/home-family/bigpond-services/adsl/>

<sup>22</sup> Telstra website, <http://go.bigpond.com/broadband/29-plan/>

other services such as mobile services which promotes innovation and customers' choice.

## Section 4. Non price terms and conditions

*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 other basis should these terms and conditions be developed?*

- 4.1 The ACCC has included in the IAD a number of non-price terms. This includes billing and notification; creditworthiness and security; general dispute resolution procedures; confidentiality provisions; communications with end users; suspension and termination and resale services.
- 4.2 Optus supports the inclusion of these non-price terms in the FAD as it promotes greater certainty to the industry and will provide parties with better guidance on what constitutes fair and reasonable conditions of access. Many of these non-price terms are adopted from the 2008 model non-price terms.
- 4.3 Optus' specific comments in response to each of the non-price terms will be discussed below.

### Billing and Notification

- 4.4 Optus supports the inclusion of billing and notification provisions in the FAD. The IAD outlines the billing and notification framework, including the manner in which access provider is paid for services it supplies, and sets out procedures dealing with billing disputes.
- 4.5 The ACCC should however amend some of these clauses so that it reflects the ACCC's in principal position to ensure access providers provide accurate bills to access seekers so that end-users are billed accurately and in a timely manner. Optus' specific comments in response to the billing provisions are outlined below:
- (a) Backbilling: Clause 3.5 (b)

Optus submits that the access provider should only be allowed to backbill within a period of 95 days instead of six months as provided in the IAD. This brings the provision in line with what is currently adopted in the Telecommunications Consumer Protections (TCP) Code.<sup>23</sup> The TCP Code says:

*A Supplier must ...not delay the Billing Charges to another Supplier in the Billing chain by more than 95 days from the date the Charge was incurred by the Customer.*<sup>24</sup>

- (b) Backbilling in relation to "New service": clause 3.5(b)(ii)

<sup>23</sup> Communications Alliance Ltd, Industry Code Telecommunications Consumer Protection Code, C628: 2007, September 2007

<sup>24</sup> Communications Alliance Ltd, Industry Code Telecommunications Consumer Protection Code, C628: 2007, September 2007, clause 6.5.4

- 4.6 Optus submits that the ACCC should define the term “New Service”. It is not clear what new service refers to, eg whether it is a new account or individual service. If it is an individual service, then the six month clause is largely redundant. Missed billing is usually only with new individual services.
- 4.7 Further, the backbilling period for “New service” should be restricted to 190 days instead of 8 months. Again, this brings the provision in line with the TCP Code. The TCP Code says:

“A Supplier must...not Bill for Charges older than 190 days from the date the Charge was incurred by the Customer.”

(c) Timeframe to provide material relied upon: clause 3.17

- 4.8 There is no period within which the other party has to provide the relevant materials upon which it is to rely. Optus suggests that this information should be provided within 25 days of the Billing Dispute Notice. The proposed redraft is as follows:

Clause 3.17: *“Each party shall, as early as practicable after a Billing Dispute Notice, but in all cases within 25 Business Days of receipt of the Billing Dispute Notice (or longer period if agreed by the parties), provide...”*

#### Creditworthiness and Security

- 4.9 Optus accepts the ACCC’s proposal to include creditworthiness and security terms in the FAD. Optus however proposes the ACCC to make a minor amendment to clause 9.1 to ensure security should only be requested when it is reasonably necessary to protect the legitimate business interests of the Access Provider. The proposed amendment is outlined below:

*“Unless otherwise agreed by the Access Provider, subject to clause 4.3, 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 4.2, the Security (as shall be determined having regard to clause 4.3 and as may be varied pursuant to clause 4.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.”*

#### General Dispute Resolution Procedures

- 4.10 Optus supports the ACCC’s proposal to include general dispute resolution procedures in the FAD. Optus agrees with the ACCC that general dispute resolution procedures facilitate the resolution of disputes in an expeditious manner without the need to resort to legal proceedings or commercial arbitration.
- 4.11 Optus further agrees with the ACCC’s proposed drafting.

#### Confidentiality provisions

- 4.12 Optus supports the ACCC’s proposal to include confidentiality provisions in the FAD. The provisions ensure confidential information will only be used or disclosed where there is a legitimate purpose.

- 4.13 Optus further supports the ACCC to include the standard confidentiality undertaking form in the FAD.
- 4.14 The drafting of the confidentiality provisions are appropriate. Optus however questions the inclusion of clause 11.11 since it does not appear to be a standard contract term –it provides access seekers the right to invoke an audit process if it has prima facie evidence to suggest that an access provider has used the confidential information for non-legitimate reason.

#### Communication with end-users

- 4.15 Optus supports the ACCC's proposal to include terms and conditions for communications with end users. This is particularly so when access seekers often have to rely on the Access Provider's technicians to perform services which means that access seekers are placed in a vulnerable position should the access provider try to 'win back' customers.
- 4.16 However, Optus questions the practicality of clause 7.4, as it would be onerous to make and maintain each record of communication the party has with the other party's end user.

#### Suspension and termination

- 4.17 Optus generally accepts the ACCC's position to include suspension and termination provisions in the FAD. Optus however is concerned that:
- (a) the proposed termination provisions do not address circumstances in which an access seeker would be entitled to terminate part, or all of, the services or agreement as a result of contractual breaches of the access provider;
  - (b) the proposed termination provisions give the access provider the right to terminate the service in the event that there is a billing dispute on hand;
  - (c) in some circumstance, remedial actions requested by an access provider might take longer than 20 business days.
- 4.18 To address these problems, Optus proposes the ACCC to amend clause 9.2 so that:
- (a) it is mutual (and make all other consequential amendments), or insert new clauses that deal with suspension and termination by access seeker;
  - (b) it ensures the service does not terminate in the event that there is a billing dispute on hand;
  - (c) it allows the 20 business days to be extended in circumstance where reasonably required as a result of the remedial action requested by the access provider. This prevents the situation where the access provider requests remedial action that cannot be undertaken within 20 business days and therefore is able to engineer a right to terminate part or all of the services. The proposed amendment to the wording of clause 9.2(3) is as follows:

*“...within 20 Business Days (or other period as is reasonable as a result of the remedial action requested in the Suspension Notice)...”*

### Resale services

- 4.19 Optus supports the ACCC’s inclusion of this clause. Optus considers that this clause ensures that competition in the wholesale and retail broadband market will be promoted.
- 4.20 **CiC begins CiC ends**
- 4.21 This clause will ensure that Telstra is restricted from discriminating between different access seekers.

*What other non-price terms and conditions 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.*

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

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

- 4.22 Optus submits that the ACCC should also include the network modernisation and upgrade provisions, the changes to operating manual provisions and “unbundled wholesale ADSL” in the FAD.

### The network modernisation and upgrade provisions

- 4.23 It is important to provide access seekers of wholesale ADSL appropriate information and notice in the event Telstra modernises its network.
- 4.24 Optus’ past experience in regard to Telstra’s network modernisation in South Brisbane is evidence that it is necessary to include the network modernisation and upgrade provisions in the FAD.
- 4.25 **CiC begins**
- 4.26 **CiC ends** This is not in the LTIE and will not promote competition in the relevant markets.
- 4.27 Optus therefore proposes the ACCC to include in the FAD the network modernisation provisions. However Optus submits that the network modernisation provisions outlined in the 2008 model terms need to be amended. Currently the 2008 model terms are not sufficient to ensure equivalence between Telstra and access seekers. As the South Brisbane example demonstrated, the information supplied by Telstra is of limited use and does not assist access seekers to plan for the migration or to advise end users about the upgrade.
- 4.28 Optus submits that at a minimum, the FAD should require Telstra to provide to access seekers the following information;

- (a) the alternative services available;
  - (b) the date of supply, pricing, interconnection requirements and technical specifications of the alternative services available;
  - (c) the planned migration process including the migration dates for individual services and the costs involved;
  - (d) the extent of the network upgrade;
  - (e) the exact services that will be affected;
  - (f) the exact manner in which the services will be affected, including whether the service will be affected, in whole or, in part; and
  - (g) the “cease sales date” for any new services.
- 4.29 The inclusion of these specific information requirements is important in reducing the effect on end-users. Without the information, access seekers are not in a position to know how to optimise their networks and services in the most efficient manner and in the timeframe provided by Telstra.
- 4.30 Optus further proposes that the ACCC requests Telstra to provide access seekers with a forecast of forthcoming upgrades, including upgrades that involve only one ESA. While the model terms already has a provision on a Coordinated Capital Works Program (CCWP) Forecast, Telstra is only obliged to provide the CCWP forecast when the upgrade involves more than one ESA.
- 4.31 **CiC begins CiC ends**
- 4.32 Optus submits the inclusion of forecast upgrades that involve only one ESA will promote equivalence of access between Telstra and access seekers. An earlier notification would provide access seekers with an opportunity to make contingency plans and take the planned upgrade into account in their infrastructure planning and in their marketing. Access seekers might adjust a marketing campaign it would otherwise have carried out in the affected area.

#### Changes to operating manuals

- 4.33 **CiC begins**
- CiC ends**
- 4.34 There is always a risk that the unilateral right of variation will be used to impose an obligation on that access seeker that is unreasonable, or it will be used for purposes that deprive the access seeker a fundamental part of the bargain it obtained when entering into the agreement.
- 4.35 Optus therefore submits that it is important to include provisions on changes to operating manuals that ensure Telstra is not entitled to amend the operational manual on a unilateral basis.

### An unbundled wholesale ADSL and wholesale line rental (WLR) services

- 4.36 As mentioned in section 3, the ACCC should include provisions which ensure Telstra will offer access seekers an unbundled wholesale ADSL and WLR services.
- 4.37 Optus refers its submission in section 3 for reasons why Telstra should offer an unbundled solution.

### Application of SAOs

<i>Should the SAOs apply to operators of non-dominant networks?</i>
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- 4.38 Optus submits that other operators of non-dominant networks should not be subject to the SAOs. Overregulation can result in inefficiencies which may prevent the market from functioning properly and impose unnecessary regulatory burdens on the industry. The burden of regulatory compliance has long been recognised as a problem.
- 4.39 The Australian Competition Tribunal (the Tribunal) also stated that unnecessary regulated access may have anti-competitive consequences including:
- “... First, there is the risk that access prices might truncate the rewards from a successful investment but might not reduce the losses from unsuccessful ventures. This reduces the extent to which the regulated firm might undertake efficient, but risky, investments. Second, access regulation can distort an access seeker’s investment to build upstream infrastructure if inputs further down the supply chain are priced below the competitive level. Third, in efficient markets arbitrage opportunities disappear. Conversely, inefficient arbitrage opportunities can be perpetuated by access regimes that offer substitute levels of access.”<sup>25</sup>*
- 4.40 Other operators of non-dominant networks do not have market power in the supply of both the retail and wholesale ADSL services. Applying the SAOs to operators of non-dominant networks therefore will result in overregulation.
- 4.41 There are only a limited number of operators who supply wholesale ADSL service to wholesale customers. Besides Telstra, Optus and AAPT supply wholesale ADSL service to wholesale customers.<sup>26</sup> Optus is the second largest wholesale service provider after Telstra, so far as Optus is aware.
- 4.42 In 2009-10, Optus had a market share of 16% in the retail broadband market. Telstra on the other hand had 41% market share.<sup>27</sup>
- 4.43 Optus and AAPT only have a very limited market presence in the wholesale broadband market when compared to Telstra. Telstra dominates both the wholesale and retail broadband markets. The ACCC found that the three largest competing ADSL networks supply only 8 to 13% of retail and wholesale SIOs. In metropolitan areas, Telstra’s ADSL

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<sup>25</sup> Application by AAPT [2009] ACompT 5, para 41

<sup>26</sup> ACCC, Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010 Final Decision, February 2012, p.4

<sup>27</sup> ACCC, Telecommunications Report 2009-10, published September 2011 p.34

network supplies around 50% of these SIOs and in regional areas, it supplies around 96% of such SIOs.

- 4.44 The ACCC also concurred that other suppliers such as Optus and AAPT do not put a material competitive constraint on Telstra in the supply of fixed-line broadband in the national market:

*“In observing the level of competition in this segment of the wholesale market, the ACCC considers that a strong competitive resale market has not developed. While some suppliers – such as Optus and AAPT - do offer ULLS-based wholesale ADSL to other ISPs in their respective footprints, the ACCC does not consider that these amount to a material competitive constraint on Telstra in the national market for the supply of fixed-line broadband.”<sup>28</sup>*

- 4.45 Optus currently relies on the use of its DSLAMs (in conjunction with ULLS) to supply wholesale ADSL service. Unlike Telstra, access seekers like Optus and AAPT do not have a national DSLAM footprint. The footprint is restricted to areas where Optus has installed DSLAMs at Telstra exchanges. **CiC begins CiC ends** Telstra on the other hand has 2800 DSL-enabled ESAs nationwide.
- 4.46 It is unlikely that access seekers would engage in large scale DSLAMs investment as a result of the deployment of the NBN. DSLAMs investment costs are significant and the anticipated deployment of the NBN reduces the expected return from a DSLAM investment since it reduces the time available to earn revenue and recoup investment costs.
- 4.47 This is recognised by the ACCC. The ACCC has stated that it is unlikely that there will be significant further expansion of the current DSLAMs footprint due to the saturation of markets viable for investment and barriers to entry in other regions. Some examples of the barriers to entry include the lack of competitive backhaul, the cost of backhaul infrastructure in rural and regional areas and the lack of scale in regional and rural ESAs which makes it difficult to obtain a commercial rate of return on DSLAM investment.<sup>29</sup>
- 4.48 Telstra therefore has and will continue to retain a dominant position in the supply of wholesale broadband services.
- 4.49 Further, Optus is a committed provider of services to its wholesale customers. Optus currently offers both retail and resale ULL services using its DSLAM infrastructure. Equal opportunity is opened to both residential customers and wholesale customers on a “first come first served basis”. **CiC begins**
- 4.50 **CiC ends**
- 4.51 Internode has previously submitted to the ACCC that Optus’ backhaul charge is a small fraction of Telstra’s AGVC charges. This again shows that Optus is a committed provider of wholesale ADSL services. To impose standard access obligation on Optus in the supply

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<sup>28</sup> ACCC, Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010 Final Decision, February 2012, p.21

<sup>29</sup> ACCC, Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010 Final Decision, February 2012, pp.14-15, 22

of wholesale ADSL service therefore would be unnecessary and would result in overregulation.

Application of SAOs in particular geographic areas

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

- 4.52 The ACCC should not exempt particular geographic areas from the SAOs and/or terms and conditions included in the access determination.
- 4.53 Whilst there are some areas where access seekers have installed DSLAMs to compete with Telstra in the supply of broadband services in both the wholesale and broadband market, Optus submits that exempting particular geographic areas from the SAOs is not in the LTIE.
- 4.54 Telstra has the majority of market shares in band 1 and 2 areas. As the ACCC found, Telstra has over 50.9% of market shares in the wholesale ADSL market. For reasons provided below, Optus considers that Telstra still has market power in band 1 and 2 areas.

*Pair gain/RIM affected premises*

- 4.55 In RIM affected premises or where large pair gain systems (LPGS) were installed, the copper lines cannot be DSL-enabled by ULLS based access seekers. There are currently 11 percent of copper lines that are RIM/LPGS affected.<sup>30</sup> They are distributed widely throughout the CAN. For example, 8 per cent of lines in Telstra Zone 1 areas and 15 percent of lines in Zone 2/3 areas are RIM/LPGS affected.<sup>31</sup>
- 4.56 Telstra on the other hand would be able to supply wholesale ADSL in RIM affected premises. In June 2011, it was reported that Telstra is undergoing a trial upgrade to its copper network which will allow it to provide broadband services to customers in the RIM affected areas.<sup>32</sup>
- 4.57 This upgrade involves a custom-made extension that sits on top of existing street cabinets that allow Telstra to fit in more equipment. It was reported that Telstra will be able to treble the number of available ADSL ports in the cabinets and increase speeds to ADSL+ level up to 20 Mbps. In October 2011, Telstra announced that approximately 2,000 street side cabinets will be equipped within 18 months.<sup>33</sup>
- 4.58 If certain geographic areas are exempted from the SAOs and/or the terms and conditions included in the access determination, this will have the effect of denying

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<sup>30</sup> ACCC, Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010 Final Decision, February 2012, p.24

<sup>31</sup> ACCC, Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010 Final Decision, February 2012, p.24

<sup>32</sup> Telstra website, <http://exchange.telstra.com.au/?p=15830>

<sup>33</sup> Telstra website, <http://exchange.telstra.com.au/?p=15830>

access seekers from accessing Telstra's wholesale ADSL services in RIM affected areas. Telstra will be the only provider who is capable to offer access seekers or end users a ADSL service. This will not promote competition in the downstream markets.

#### *Switching costs incurred by access seekers*

- 4.59 Switching costs can act as a barrier to customers changing suppliers, which may outweigh the costs of remaining with Telstra and paying additional wholesale fees.
- 4.60 Wholesale customers have to incur IT integration costs in order to purchase wholesale ADSL service from each ULLS resale provider. The cost is approximately **CiC begins CiC ends**
- 4.61 Secondly, customers have to incur incremental ongoing operational costs for purchasing ULLS resale services. This includes training for call centre operators and support for the provisioning and fault management systems. **CiC begins CiC ends**

#### *'Whole of Business' solution*

- 4.62 Some wholesale customers require national coverage either for reasons of advertising simplicity (they want to be able to offer services anywhere) or because they want to be able to serve business customers who require a single supplier to be able to serve all customer sites located at different geographic locations on a 'whole of business' (WOB) basis.
- 4.63 The ability to supply integrated product offerings, that is, the supply of a range of telecommunications services by a single supplier, is a critical requirement for many business end-users, including small and medium business as well as large corporate and government (C&G) customers.
- 4.64 **CiC begins CiC ends**
- 4.65 ULLS is used in areas where Optus has DSLAMs infrastructure in place and wholesale ADSL is used in areas where Optus does not have DSLAMs presence.
- 4.66 If Telstra is exempted from supplying wholesale ADSL in certain geographic areas, it will restrict Optus from supplying a WOB solution to its SMB customers. SMB customers typically have premises located in more than one exchange area. Optus however does not have the capability to offer national coverage as its DSLAM footprint is limited to **CiC begins CiC ends** compared to Telstra's more than 2800 exchanges.

#### *Commencement and expiry*

*What is an appropriate time period for the FAD?*

*Are there any circumstances that warrant a difference in the expiry dates of the access determination and the wADSL declaration?*

- 4.67 The expiry date of the wholesale ADSL declaration is on 14 February 2017. However, Optus submits that the ACCC should set a shorter expiry date for the FAD. Optus proposes the ACCC to set the FAD for a 3 year period.

- 4.68 If access prices are set based on the efficient cost of providing the service, a 5 year period is too long in ensuring robust expenditure forecasts and robust forecast demand can be obtained.
- 4.69 The telecommunications industry is dynamic and change is constant. An example is the advent of the NBN, which represents an obvious catalyst to review the underlying costs Telstra faces within the next five years.
- 4.70 A shorter regulatory period therefore will allow for changes to be incorporated into prices closer to the date when they are known. Costs are more accurately forecast which reduces risks to both access seekers and the access provider.

**Appendices and attachment**

**Appendix A: Telstra Miscellaneous Charges**

**CiC begins**

**CiC ends**

## **Appendix B: Example of why wholesale competition has not developed**

**CiC begins**

**CiC ends**

**Attachment 1: Minutes of Optus meeting with wholesale customer, November 2010 - Confidential**