

**Optus Submission to  
Australian Competition and Consumer Commission  
in response to  
Draft Decision  
Fixed Services Review Declaration Inquiry**

**June 2009**

## Table of Contents

<b>1. Introduction.....</b>	<b>3</b>
<b>2. Continued Declaration of Fixed Line Services .....</b>	<b>4</b>
<b>3. Duration of the Declarations .....</b>	<b>5</b>
<b>4. Recent Developments in the Telecommunications Sector .....</b>	<b>6</b>
Government NBN announcement.....	6
Tribunal’s rejection of Telstra’s HFC exemption application .....	8
Telstra public statement on duplication .....	10

## **1. Introduction**

---

- 1.1 In November 2008 the ACCC began its review of the declarations of the following six fixed-line services (which are due to expire on 31 July 2009):
- Unconditioned Local Loop Service (ULLS);
  - Line Sharing Service (LSS);
  - PSTN originating access (PSTN OA);
  - PSTN terminating access (PSTN TA);
  - Local Call Service (LCS); and
  - Wholesale Line Rental (WLR).
- 1.2 In June 2009 the ACCC released its draft decision, in which it proposed to extend the current declarations for the five year period to 31 July 2014, without altering the current service descriptions.
- 1.3 Optus supports the proposal set out in the ACCC's draft decision. Extension of the existing declarations is a sensible and measured approach in current circumstances. The proposed five year period will be of great assistance in providing regulatory certainty to all participants in the telecommunications industry during a period of significant change and uncertainty.
- 1.4 The remainder of this submission contains brief comments in response to the ACCC's draft decision and sets out Optus' view on recent developments in the telecommunications sector relevant to the declaration of fixed-line services.

## 2. Continued Declaration of Fixed Line Services

---

- 2.1 The ACCC in its draft decision has set out its preliminary view on each of the six fixed line services and proposed to extend the declaration of each service for a period of five years with no variation to the existing service descriptions. In doing so the ACCC emphasised the role of the declarations in facilitating competition in the face of a dominant fixed line incumbent operator. It noted that:<sup>1</sup>

*“Telstra still controls the infrastructure by which the overwhelming majority of fixed voice and fixed broadband services are provided and because of its vertical integration Telstra enjoys a strong position in fixed voice and fixed broadband services. This affects the potential for competitive entry in the wholesale market. A large retail customer base is typically necessary to justify investment in infrastructure before a new entrant can compete effectively with Telstra.”*

- 2.2 The ACCC has taken the view that there remains strong justification for the continued regulation of fixed line services since “Telstra’s CAN and in particular the ULLS remains an enduring bottleneck service.”<sup>2</sup>
- 2.3 The ACCC further noted that the impact of the ULLS as a potential competitive alternative to the WLR, LCS and PSTN OA services remains “contingent upon there being no barriers to ULLS entry.”<sup>3</sup> Consequently, the ACCC took the view that “there are not currently sufficient competitive constraints on Telstra to ensure that the PSTN OA service or an effective substitute would be provided on a national basis on reasonable terms and conditions to access seekers absent declaration.”<sup>4</sup> Similar arguments apply to the PSTN TA, LCS and WLR services.
- 2.4 Optus agrees with the ACCC’s reasoning, and considers that extension of the existing declarations is a sensible and measured approach in the circumstances. Optus supports the ACCC’s proposal to extend the declarations of the six fixed-line services with no variation to the existing service descriptions.

---

<sup>1</sup> ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, Draft Decision, June 2009, page 59

<sup>2</sup> ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, Draft Decision, June 2009, page 65

<sup>3</sup> ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, Draft Decision, June 2009, page 59

<sup>4</sup> ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, Draft Decision, June 2009, page 89

### 3. Duration of the Declarations

---

- 3.1 The ACCC in its draft decision has proposed to extend the declarations of the six fixed-line services for a period of five years. In its discussion of the duration of the extension, the ACCC emphasised the importance of regulatory certainty. It stated that:<sup>5</sup>

*A five year declaration for each service takes into account the need for regulatory certainty during the transition period from fixed-line competition, which currently occurs primarily over Telstra's CAN. This transition period is likely to extend for several years, due to the time required to roll out the new FTTP and wireless/satellite network and the time required for downstream providers and customers to transition to the new network.*

*The ACCC considers one of the most important issues for this declaration inquiry is to ensure that telecommunications providers are able to operate in an environment of maximum regulatory certainty while significant structural and competitive changes occur in the industry. The extent of industry change that will likely occur during the transition period is unprecedented since the implementation of the open competition telecommunications regime in 1997.*

- 3.2 Optus considers that the extension of the declarations for five years is appropriate, given the recent announcement of the Government's proposed NBN roll out. The proposed five year period will be of great assistance in providing regulatory certainty to all participants in the telecommunications industry during a period of significant change and uncertainty.
- 3.3 Optus agrees with the ACCC's reasoning, and supports its proposal to extend the declarations for a five year period.

---

<sup>5</sup> ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, Draft Decision, June 2009, page 109

#### 4. Recent Developments in the Telecommunications Sector

---

- 4.1 Since respondents' submissions to the Fixed Services Review discussion paper, there have been a number of developments in the telecommunications sector relevant to fixed-line services. The implications of three developments are reviewed in this section, namely:
- the Government's announcement to establish a new company to build and operate a national broadband network (NBN);
  - the Australian Competition Tribunal's (ACT) decision to endorse the ACCC's view on Telstra's HFC exemption application; and
  - recent Telstra statements on duplication of infrastructure.
- 4.2 Optus submits that all of these developments provide support for the ACCC's decision to extend the declaration of the fixed line services.

#### Government NBN announcement

- 4.3 When submissions were made in March 2009 in response to the ACCC's discussion paper, the direction of the Government's NBN policy was unknown. Further information is now available, following the Government's 7 April announcement that it would establish a new company to build and operate a wholesale-only, open access NBN using a mix of fibre-to-the-premises (FTTP) and wireless and satellite technologies.<sup>6</sup>
- 4.4 The ACCC has recognised that the NBN "will have a major effect on the future telecommunications regulatory environment"<sup>7</sup> and that "the eight year transition period will likely be a time of significant structural and competitive changes as the industry moves to an environment where an NBN exists alongside Telstra's fixed network infrastructure."<sup>8</sup> However, it has also taken the view that it would be premature to factor the NBN into market and competition analysis.<sup>9</sup>
- 4.5 Optus acknowledges that many details relating to the NBN's network design and available services have not yet been finalised, and that some aspects of the NBN's impact on the market are not yet clear. Nevertheless, other aspects of the NBN are already apparent from the available information. Optus submits that where reliable information about the NBN is available, the ACCC should indeed factor it into market and competition analysis.
- 4.6 For example, it is apparent from the available information that:

---

<sup>6</sup> Joint media release of the Prime Minister, Treasurer, Minister for Finance and Minister for Broadband, "New National Broadband Network," 7 April 2009, [http://www.minister.dcita.gov.au/media/media\\_releases/2009/022](http://www.minister.dcita.gov.au/media/media_releases/2009/022)

<sup>7</sup> ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, Draft Decision, June 2009, page 6

<sup>8</sup> ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, Draft Decision, June 2009, page 14

<sup>9</sup> ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, Draft Decision, June 2009, page 6

- the new Government-majority-owned company will deploy a Fibre to the Premises (FTTP) high capacity broadband network to 90% population coverage and fixed wireless network and satellite coverage to the remaining 10% of the population.<sup>10</sup>
- the NBN will be an open access wholesale-only network with very strong natural monopoly characteristics (in that it will have large fixed costs and low variable costs).
- NBN users will be able to achieve significantly faster speeds on the NBN compared to the CAN immediately it is constructed and in the foreseeable future. DBCDE in its NBN policy paper considers that “Fibre optic to the home and workplace technology (or FTTP) is the state of the art ‘future proof’ fixed broadband technology and is capable of providing customers with download speeds of 100 Mbps and upload speeds of 50 Mbps.”<sup>11</sup> This is comparable to the current achievable access speeds of up to 20Mbps<sup>12</sup> offered on Telstra’s ADSL 2+ network.

4.7 This information should be taken into account in two ways:

- First, given that it is announced Government policy, the ACCC should take it into account as a reliable ‘forecast’ of likely future market conditions.
- Second, the ACCC should be aware that the announcement will have an *immediate* impact on expectations. For example, the announced policy is already impacting the decision-making processes of market participants with regard to infrastructure investment. These decision-making processes are based upon participants’ current expectations of return on investment, which are influenced by currently available information – including announced Government policy. Thus the immediate impact on expectations should be taken into account immediately, notwithstanding the lack of complete information.

4.8 A key implication of the Government’s announcement is that the ACCC should place less weight on any arguments that continued regulation might discourage efficient investment in infrastructure.

4.9 Optus submits that it would be inefficient for any party to construct new fixed line telecommunications access infrastructure independent of both the CAN and the NBN (‘bypass’ infrastructure). In particular, it would not be productively efficient, because industry demand can be satisfied by building a single network (the NBN) at lower cost than investing in both the NBN and in alternative bypass infrastructure. That is, it would represent inefficient duplication of infrastructure.

<sup>10</sup> DBCDE, “New National Broadband Network,” Joint Media Release, 7 April 2009, [http://www.minister.dbcde.gov.au/media/media\\_releases/2009/022](http://www.minister.dbcde.gov.au/media/media_releases/2009/022)

<sup>11</sup> DBCDE, *21<sup>st</sup> Century Broadband*, Policy Brochure, April 2009, page 4

<sup>12</sup> In reality, actual speeds may vary due to technical factors. Therefore, as Telstra’s disclaimer notes “About 70 per cent of members on the 8Mbps plan can access speeds around 6Mbps or more. About 50 per cent of members on the 20Mbps plan can access speeds around 10Mbps or more.” Telstra, *ADSL Broadband*, Available from URL: [http://www.telstra.com.au/bigpond\\_internet/adsl2.html](http://www.telstra.com.au/bigpond_internet/adsl2.html) (accessed 18/5/09)

- 4.10 The Government also takes the view that the NBN will be natural monopoly infrastructure and that alternative infrastructure will not be required, as is clear from its expressed intention to conserve cash by inviting industry participants to vend in their existing compatible fibre assets in exchange for equity in the new NBN.<sup>13</sup>
- 4.11 Moreover, construction of bypass infrastructure is unlikely in any event, since there is unlikely to be a strong business case for “infrastructure competition” against the NBN given it is intended to serve the bulk of the population and will have enormous scale advantages. The NBN will have an important influence on industry participants’ current expectations of the likely return from any contemplated infrastructure investment. Optus notes that a key finding of a comprehensive study of Next Generation Access (NGA) carried out by WIK on behalf of the European Competitive Telecommunications Association (ECTA) was that:<sup>14</sup>
- “For most of the national territory, once a first mover has deployed fibre-based NGA, it will not be profitable for another firm to replicate that infrastructure.”*
- 4.12 That report noted that:<sup>15</sup>
- “The economics of FTTx do not support multiple replication of the access network sufficient to achieve effective competition.”*
- 4.13 Finally, Optus submits that it is no longer efficient for Telstra to make further significant infrastructure investments in the CAN. In particular, it would not be productively efficient, because industry demand can be satisfied by building a single network (the NBN) at lower cost than investing in both the NBN and in further copper network infrastructure. Further, it would not encourage dynamic efficiency because copper is now legacy technology and once the NBN is in operation the industry will be able to make timely changes to products in response to changes in consumer tastes and in productive opportunities via best-in-use FTTP technology.
- 4.14 Consequently, Optus submits that the fact of the Government’s NBN announcement supports the ACCC’s decision to extend the fixed line service declarations.

### **Tribunal’s rejection of Telstra’s HFC exemption application**

- 4.15 In a recent judgement the Australian Competition Tribunal rejected Telstra’s appeal of the ACCC’s decision on the ‘HFC exemption’ application.<sup>16</sup> In that application Telstra had applied for Optus to be denied access to the ULLS and other regulated fixed services within Optus’ HFC network footprint. Telstra’s rationale for the exemption was that it would encourage

---

<sup>13</sup> ZDNet, “Stephen Conroy’s stab in the dark,” 18 May 2009, <http://www.zdnet.com.au/insight/communications/soa/Stephen-Conroy-s-stab-in-the-dark/0,139023754,339296470,00.htm>

<sup>14</sup> J. Scott Marcus, March 2009, Submission to the Select Committee on the National Broadband Network, Senate of Australia, p.1.

<sup>15</sup> WIK, *The Economics of Next Generation Access*, p.XXI

<sup>16</sup> Application by Telstra Corporation Ltd [2009] ACompT 1 (22 May 2009)

Optus to upgrade its HFC network and stimulate further ‘infill’ investment in order to serve premises currently unserviceable by the network, and thereby stimulate facilities-based competition.

- 4.16 As the ACCC has noted,<sup>17</sup> the Tribunal endorsed the ACCC’s view that the HFC exemption would lead to significant disincentives for companies to deploy infrastructure, due to the discriminatory nature of the exemption.
- 4.17 Further, Optus submits that the Tribunal’s judgement in the ‘HFC exemption’ case is also directly relevant to the interpretation of the legislative criteria which the ACCC must apply in deciding on the declaration of fixed services.
- 4.18 With regard to the concept of the “promotion of competition”, the Tribunal rejected Telstra’s argument based on facilities-based competition. It effectively concluded that facilities-based competition based on alternative networks (such as HFC) would not be a significant improvement over access-based competition using the ULLS and other declared services, stating that:<sup>18</sup>

*The competition that Telstra submitted would flow from Optus connecting additional premises exists now and would continue to exist in the future without the exemption.*

- 4.19 On this basis Optus submits that any argument that deregulation will promote competition on the basis that it fosters facilities based competition should be rejected, since not only would any new facilities built by access seekers as a result of deregulation be a socially wasteful investment<sup>19</sup> (as discussed below), but also any competition that arguably would exist after deregulation already exists now.
- 4.20 The ‘HFC exemption’ judgement is also relevant to the interpretation of the concept of “the efficient use of and investment in infrastructure”. The Tribunal noted that the efficiency of making investments in infrastructure must be evaluated according to social cost benefit,<sup>20</sup> and that if alternative measures of provision are available at a cheaper cost then this will be relevant to the question of whether investment is efficient in social terms. It noted:<sup>21</sup>

*As Optus submitted, even if in the future with the exemption Optus were to expand the reach of its HFC network and offer services via that network to end-users who it currently services through a Relevant Service, this might not represent socially efficient investment if alternative measures of provision were available at a cheaper cost. This, Optus said, would plainly not be in the LTIE.*

---

<sup>17</sup> ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, Draft Decision, June 2009, page 17

<sup>18</sup> Application by Telstra Corporation Ltd [2009] ACompT 1 (22 May 2009), at [116]

<sup>19</sup> Application by Telstra Corporation Ltd [2009] ACompT 1 (22 May 2009), at [115-116]

<sup>20</sup> Application by Telstra Corporation Ltd [2009] ACompT 1 (22 May 2009), at [16]

<sup>21</sup> Application by Telstra Corporation Ltd [2009] ACompT 1 (22 May 2009), at [112]

- 4.21 In rejecting Telstra’s arguments, the Tribunal concluded that duplication of ‘last half-mile’ access infrastructure would be a socially wasteful investment:<sup>22</sup>

*There is no suggestion in Telstra’s submissions or the s 152AW(4) material to which the Tribunal was directed that Telstra’s CAN or its HFC network lack capacity. The infill investment Telstra submits would flow from the exemption would, in effect, be but a duplication of Telstra’s CAN and its HFC network. Such duplication of this ‘last half-mile’ infrastructure, if it were to occur, would, on the face of it, be a socially wasteful investment.*

*Nothing put to the Tribunal convinced it otherwise.*

- 4.22 On the basis of the above discussion, Optus submits that any argument that deregulation would promote efficient investment should be rejected, since alternative measures of provision (ie, the existing CAN) are available at a cost cheaper than the cost at which access seekers could build infrastructure (since the CAN need not be constructed, but only maintained). It follows that any new facilities built by access seekers as a result of deregulation would be duplicative and socially wasteful investment.
- 4.23 The ACCC recognised the undesirability of inefficient duplication in its draft decision, where it stated that:

*“...where duplication of a network element would lead to the loss of technical and allocative efficiency greater than any competitive gains that duplication might achieve, the ACCC considers that regulated access to that element would be more likely to promote the LTIE.”*<sup>23</sup>

- 4.24 Optus submits that the Tribunal’s judgement in the ‘HFC exemption’ case provides support for the ACCC’s decision to extend the declarations of the fixed line services.

### **Telstra public statement on duplication**

- 4.25 Optus notes that even Telstra, in a recent public submission on backhaul, has expressed its opposition to the “*the heavy and unnecessary financial burden of inefficient duplication of networks*”<sup>24</sup> and recognised that access to existing infrastructure is more efficient than duplication, particularly where there is existing spare capacity in the network. For example, Telstra states:<sup>25</sup>

*“On many low-volume regional routes considered for duplication, there is existing spare capacity in the transmission network or the*

---

<sup>22</sup> Application by Telstra Corporation Ltd [2009] ACompT 1 (22 May 2009), at [115-116]

<sup>23</sup> ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, Draft Decision, June 2009, page 17

<sup>24</sup> Telstra, May 2009, *Response to Backhaul Blackspots Initiative Stakeholder Consultation Paper*, p.10

<sup>25</sup> Telstra, May 2009, *Response to Backhaul Blackspots Initiative Stakeholder Consultation Paper*, pp.11,12

*network could be readily and cost effectively upgraded to provide additional capacity if required.”*

*“Another alternative is for the Government to obtain access to Telstra or others’ existing transmission network, which is likely to be more cost effective than duplication.”*

*“Telstra believes that price and product choices flowing from transmission duplication may be over-estimated and should be compared to the alternative of better utilising existing transmission capacity.”*

- 4.26 Optus submits that (consistent with Telstra’s statements above) facilitating access to the existing CAN (which has existing spare capacity) is more efficient than attempting to encourage the duplication of infrastructure facilities. This provides further support for the ACCC’s decision to extend the declarations of the fixed line services.