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Public inquiry to make final access determinations for the declared fixed line services

Submission by Herbert Geer Lawyers on behalf of:

Adam Internet Pty Ltd,

Aussie Broadband Pty Ltd,

iiNet Limited, and

Internode Pty Ltd

3 June 2011

1. INTRODUCTION

This submission is made on behalf of Adam Internet Pty Ltd, Aussie Broadband Pty Ltd, iiNet Limited and Internode Pty Ltd (collectively, **our Clients**) in response to the discussion paper of April 2011 entitled *Public inquiry to make final access determinations for the declared fixed line services* (**Discussion Paper**).

Collectively, our Clients themselves or through their subsidiaries - i.e. Chime Communications (iiNet), Agile (Internode) and Wideband Networks (Aussie Broadband) - acquire a substantial share of the declared services provided over Telstra's fixed network. Over the last five years, each of them has been forced to notify the ACCC of numerous access disputes about the declared services in order to obtain reasonable terms of access from Telstra. The form of the Final Access Determinations (**FADs**) are therefore extremely important to each of them.

Amendments that were made by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* have resulted in a move from a negotiate/arbitrate regulatory access model to a model where the ACCC is given power to set terms and conditions of access upfront. Under this new model, the setting of terms and conditions upfront is done by means of Access Determinations. The changes to the access regime model have coincided with a shift in the ACCC's thinking regarding the underlying methodology that it uses to set access prices. The ACCC has replaced the traditional TSLRIC+ costing methodology with a Building Block Model (**BBM**) that involves the use of an initial Regulated Asset Base (**RAB**) which is rolled forward during the regulatory period. On 2 March 2011 the ACCC made its first Interim Access Determinations (**IADs**) for fixed line services. These IADs implemented the ACCC's new BBM approach. However, by virtue of section 152BGC(4) of the *Competition and Consumer Act 2010* (**CCA**), the ACCC was not required to observe any requirements of procedural fairness before making the IADs. The ACCC now seeks to make FADs for fixed line services, and the ACCC has issued the Discussion Paper pursuant to section 152BCH of the CCA and Part 25 of the *Telecommunications Act 1997*.

Without regulated access to declared services, competition in telecommunications markets would not exist. Telstra is simply too dominant and, as a fully vertically integrated service provider, can, and has, used its market power to its own competitive advantage. This comes at significant cost to end users. Without regulated access, it is unlikely that competition in fixed line telecommunications services could exist. Therefore, the vital role that the FADs will play in the future of telecommunications competition cannot be overstated, nor can the importance of the ACCC getting things right when determining the content of the FADs.

The Discussion Paper addresses the following matters:

- Pricing approach
- Non Price terms and conditions
- Geographic exemptions
- NBN-based wholesale services
- Fixed principles provisions

The submissions that follow address each of these matters in turn.

2. EXECUTIVE SUMMARY

2.1 Pricing approach

Although there is broad industry acceptance of the adoption of setting access prices by means of the BBM, our Clients have significant concerns with the manner in which the ACCC has gone about setting the initial value for the RAB. It appears to our Clients that rather than calculating the initial value of the RAB and then using that as an input to set prices, the ACCC has adopted an approach which identifies what it considers to be an appropriate ULLS price and then sets the initial value of the RAB so as to be consistent with the price outcome required. This approach appears to our Clients to be contrary to the rationale of using a BBM in the first place.

Our Clients submit that the ACCC needs to revisit its approach to setting the initial value of the RAB, and, in particular, ensure that it gives sufficient consideration to the extent of any past over-recovery by Telstra. Setting an initial value of the RAB which does not sufficiently take into consideration Telstra's past over recovery will not be in the LTIE.

Our Clients submit that when considering the components of the BBM relating to capital expenditure and operational expenditure, the ACCC needs to ensure that the information and data provided by Telstra is subject to a rigorous level of scrutiny and prudency checking and not simply accepted at face value.

As regards the length of the regulatory period, our Clients believe that setting the regulatory period at five years is over-ambitious given that this is the first FAD made by the ACCC. The potential benefit of achieving certainty is outweighed by the potential detriments of locking in mistakes and/or being unable to adequately respond to changing circumstances (for example an agreement between Telstra and the NBN that results in Telstra receiving significant revenue that reduces Telstra's revenue requirement from fixed line declared services). An appropriate level of certainty can be provided by means of the use of fixed principles. Furthermore, our Clients believe that it is inappropriate for the ACCC to set the regulatory period for a FAD beyond the date that the relevant service is declared, as this implies that the ACCC has prejudged the outcome of a future inquiry (that inquiry being whether the services should continue to be declared). In light of these considerations, a shorter regulatory period of no more than three years would be appropriate.

2.2 Non Price terms and conditions

Our Clients consider it is essential that the FADs include non-price terms and conditions and broadly agree with the ACCC's proposed terms. Drawing on their experience as Access Seekers, our Clients have provided comments on the non-price terms and proposed a number of amendments that they consider assist in meeting the FADs objectives.

2.3 Geographic exemptions

The ACCC proposes to incorporate into the FADs the effect of the Tribunal's Exemption Orders but is seeking the view of industry before doing so.

Our Clients believe that it is appropriate that the substance of the ACCC's Orders is treated consistently with the PSTN OA CBD Orders and the Metropolitan Orders. Therefore, if the ACCC decides to no longer give effect to either the PSTN OA CBD

Orders or the Metropolitan Orders (or to amend the manner in which either of those Orders are given effect to) these changes should be reflected in the way that the ACCC gives effect to the ACCC's Class Orders.

Our Clients believe that the regulation of PSTN OA should be consistent with the regulation of WLR and LCS. Our Clients note that WLR and LCS are not declared in the ESAs to which the PSTN OA CBD Orders apply. In light of this, our Clients believe that it is appropriate for the ACCC to give effect to the PSTN OA CBD Orders.

Our Clients believe that the rationale and issues relating to the Tribunal's Metropolitan Orders are the same in respect of each of WLR, LCS and PSTN OA. Therefore, each of the Tribunal's Metropolitan Orders should be treated consistently.

It is submitted that there would not be any obvious benefit for end users from the ACCC giving effect to the Tribunal's Metropolitan Orders. Furthermore, there is a real risk that giving effect to the Tribunal's Metropolitan Exemption Orders would lead to Telstra becoming unconstrained in the markets for wholesale and retail voice services (i.e. services that are not included as part of an internet/voice bundle). Such an outcome would be directly contrary to the Tribunal's rationale for granting the exemptions and this fact should lead the ACCC to conclude that it is not in the LTIE to give effect to the Tribunal's Metropolitan Orders. It is submitted that providing for regulatory certainty and consistency cannot outweigh the need to promote the LTIE because it is the LTIE that must be given fundamental weight[1]. Furthermore, the Tribunal's Metropolitan Orders in their current form do not promote regulatory certainty due to the fact that the exemption footprint is re-assessed every six months. Therefore, if the ACCC insists that the need for regulatory certainty must outweigh the LTIE, in order to give effect to regulatory certainty, the exemption footprint should be locked in at the 181 ESAs that currently meet the Tribunal's criteria for exemption.

2.4 NBN-based wholesale services

At this stage it is unclear how many NBN Access Seekers will supply wholesale services. Presumably there will be several and each will be acquiring services from NBN Co on the basis of its standard Wholesale Business Agreement. In this case, Access Seekers or Retail Service Providers will be able to negotiate with the wholesalers to obtain the access to services. Our Clients consider that it is appropriate for declared wholesale services provided via the NBN to be subject to the FADs. The FADs will provide a fall back position that can be utilised in the event that the wholesaler and retail service provider are unable to reach agreement on terms of access and in doing so promote the LTIE by providing conditions where lower prices and diverse services can be encouraged.

2.5 Fixed principles provisions

Our Clients agree with the ACCC's view that "Fixed principles promote regulatory certainty and may provide greater price stability". Our Clients submit that fixed principles combined with a shorter regulatory period are an effective substitute for a longer regulatory period. However, the fixed principles should not lock in error. Therefore the fixed principles should not prevent the ACCC from making appropriate adjustments to account for the difference between forecast expenditure and actual expenditure.

[1] *Telstra Corporation Limited v Australian Competition & Consumer Commission* (2008) 171 FCR 174, at 202

3. PRICING APPROACH

3.1 Introduction

Our clients note that the ACCC is of the view that many of the pricing issues have been substantially resolved[2]. While our Clients accept that there is broad industry acceptance of the ACCC's use of a BBM approach, there remains disagreement over certain aspects of the ACCC's implementation of the BBM approach. Our Clients have a number of concerns with the ACCC's approach, and our Clients urge the ACCC to do the following:

- revisit its approach to setting the initial value of the RAB, and ensure that it is set at a level that takes account of Telstra's recovery of past investment;
- give more scrutiny to the information provided by Telstra; and
- set the regulatory period at no more than three years.

The reasoning behind these requests is set out below.

3.2 Revisiting the approach to setting the initial value of the RAB

It appears to our Clients that rather than implementing the BBM approach under which the value of the RAB determines the final prices, the ACCC appears to have decided what final ULLS price it believes is desirable and worked backwards from there so as to determine the value of the opening RAB[3]. It is respectfully submitted that the inappropriateness of such an approach speaks for itself - i.e. setting a price and then working backwards renders the particular pricing methodology used irrelevant because any pricing methodology is capable of being 'reversed engineered' in this way.

Our Clients acknowledge the difficult task that the ACCC faces in setting access prices. The ACCC has to deal with many complex issues related to economic theory and factual enquiry, and it receives many detailed and conflicting submissions. In light of this, our Clients believe that there may be some value in the ACCC taking some time to rise above the detail and to reconnect with what should be its guiding fundamental objective when setting access prices for the telecommunications industry. That fundamental objective is to promote the long term interests of end users (**LTIE**)[4].

It is submitted that the final output that best promotes the LTIE can be expressed as follows:

> *End users 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

[2] Discussion Paper at p.2.
[3] Discussion Paper at p.47.
[4] See section 152AB of the CCA.

Objective is intended to connote there being a sufficient incentive for firms to provide the relevant services at the relevant prices[5].

It is submitted that the End User Objective is clearly what the Australian Competition Tribunal (**the Tribunal**) had in mind when it stated:[6]

> *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[7]. In other words, the End User Objective will take care of itself. Given the nature of the telecommunications market (which exhibits natural monopoly characteristics – i.e. it requires the use of ubiquitous infrastructure with high sunk costs, thereby making barriers to entry high), the End User Objective can only be achieved with the aid of regulatory intervention.

In the telecommunications context, achieving the End User Objective requires investment in infrastructure because without it the quality of services will deteriorate. This investment can take place on two levels:

- investment by Telstra in its ubiquitous network; and
- investment by Telstra's competitors in their own infrastructure (either stand alone or for use in conjunction with Telstra's ubiquitous network).

Therefore, in the telecommunications context, the End User Objective is promoted by:

- promoting competition; and
- promoting investment in infrastructure.

This is acknowledged in 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 over generous to Telstra 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 of the CCA, the promotion of the LTIE is the ACCC's only *objective*, 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 matters:[8]

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

1. the legitimate business interests of a carrier or carriage service provider 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 **(consideration 1)**;

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

3. the direct costs of providing access to the declared service **(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)**;

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:

- As regards consideration 1, if an access price is set at a level where Telstra's legitimate business interests are not satisfied, Telstra will have no incentives 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.

- As regards consideration 2, if the 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[9].

- As regards consideration 3, this raises similar issues as consideration 1 – ie Telstra should be allowed to recover its efficient direct costs of providing access 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 access pricing, this recognises that an access price should be set so as to fairly apportion the cost of such 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 than Telstra end users or vice versa.

- As regards consideration 5, similar considerations as to consideration 1 apply – i.e. if the 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.

[9] See section 152AB of the CCA.

- As regards consideration 6, the efficient provision of services will drive down the price for the services that end users must pay. Therefore an 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 access prices for the telecommunications industry:

> *What is the lowest price that can be set which will allow Telstra to recover its reasonable costs (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 price will promote efficient competition; and
- 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.

As regards Telstra's past investments, the initial RAB value should be set at a level that allows Telstra to recover an appropriate return on those investments to the extent that Telstra has not already recovered those investments. Setting an initial RAB value that leads to Telstra over recovering its past investments will result in end users paying more than once for those investments, and this will not promote the LTIE. Therefore, in setting the initial value of the RAB, a highly relevant consideration that the ACCC must consider is the extent to which Telstra has already recovered its past investments. In this regard the ACCC states as follows in the Discussion Paper:[10]

> *It is impossible to reach definitive conclusions about the level of Telstra's past cost recovery on the basis of the available data. However, the ACCC considers that available evidence from Telstra's RAF accounts, asset register, annual reports and additional evidence provided in its October and November 2010 submissions suggests that Telstra is unlikely, on average, to have under-recovered depreciation on its network assets under the previous TSLRIC+ approach.*

Our clients are aware that the ACCC has carried out or commissioned studies in the past which showed that Telstra's rate of return from its PSTN was well in excess of the weighted average cost of capital[11]. Our Clients believe that what is required for the ACCC to properly assess what is an appropriate initial RAB value, is for the ACCC to carry out a similar study for the full period 1997 to 2011. If (as our Clients

[10] At page 58.

[11] ACCC, Final Determinations for model price terms and conditions of the PSTN, ULLS and LCS services, October 2003 p.45; see also the report by Ovum: Telstra Financial and Economic Profit Analysis, a Report for the ACCC, 31 October 2001.

believe is likely) this study shows that Telstra's rate of return throughout that period was well above the weighted average cost of capital, it would be reasonable for the ACCC to:

- conclude that Telstra has recovered all, or at least a large part of, its past investment; and

- make an appropriate adjustment to the initial value of the RAB to take into account Telstra's past over recovery.

If the extent of past over recovery is very high, this may require the initial value of the RAB to be set at, or near, the scrap value of Telstra's network. It is submitted that setting the initial value of the RAB at, or near, scrap value would not deter future investment by Telstra because any such future investment would be rolled into the RAB and Telstra would recover an appropriate return on that investment. In any event, our Clients question the continuing relevance of incentives for Telstra to invest in its network given the impending arrival of the NBN and Telstra's structural separation. Indeed at page 78 of the Discussion Paper, the ACCC states the following:

> *The ACCC expects that Telstra's investments are likely to focus on 'baseline' projects needed to maintain its current network and cater for population growth and that Telstra is unlikely to undertake significant discretionary investments in the fixed line network, due to the roll-out of the NBN.*

In summary out Clients believe that:

1. The ACCC should allow price to be determined by a correct application of the BBM approach rather than setting the price first and then working backwards.

2. In order to determine if the initial value of the RAB will promote the LTIE, the ACCC is required to consider and make a finding on the extent that Telstra has recovered or over recovered its past investments.

3. In order to discharge the requirement referred to in point 2 above, the ACCC should undertake or commission a study to ascertain the extent that Telstra has recovered or over recovered its investments during the period 1997 to 2011.

4. If the study referred to in point 3 above shows that Telstra has over recovered its investments during the period 1997 to 2001, the ACCC should adjust the initial value of the RAB accordingly in order to ensure that the initial value of the RAB is set on a basis which promotes the LTIE.

3.3 Scrutiny of the information provided by Telstra

It appears to our Clients that the ACCC may simply have accepted at face value much of the information and data provided by Telstra. Given Telstra's obvious, and understandable, self interest in achieving as high an access price as possible, it is not appropriate for the ACCC to proceed in this way. Rather, the ACCC must ensure that the information and data provided by Telstra is subject to an appropriate level of scrutiny. This applies in particular to:

- Telstra's capital expenditure forecasts;

- Telstra's claimed indirect operating expenditure; and
- the costs of supplying the LSS.

Our Clients believe that the information and data provided by Telstra on each of these issues should be subject to rigorous scrutiny and prudency checks by the ACCC, and it is incumbent on the ACCC to demonstrate that such scrutiny and prudency checks have occurred.

3.4 The length of the regulatory period

Our Clients acknowledge the ACCC's desire to provide certainty to industry. However, our Clients believe that setting the regulatory period at five years is over-ambitious given that this is the first FAD made by the ACCC. Our Clients believe that the potential benefit of achieving certainty is outweighed by the potential detriments of locking in mistakes and/or being unable to adequately respond to changing circumstances (for example an agreement between Telstra and the NBN that results in Telstra receiving significant revenue that reduces Telstra's revenue requirement from fixed line declared services). Our Clients believe that an appropriate level of certainty can be provided by means of the use of fixed principles. Furthermore, our Clients believe that it is inappropriate for the ACCC to set the regulatory period for a FAD beyond the date that the relevant service is declared, as this implies that the ACCC has prejudged the outcome of a future inquiry (that inquiry being whether the services should continue to be declared). In light of these considerations, our Clients believe that a shorter regulatory period of no more than three years would be appropriate.

4. NON PRICE TERMS AND CONDITIONS

4.1 Introduction

Our Clients agree with the ACCC's proposal to include non-price terms and conditions relating to access to the declared services in the FADs. Including non-price terms in the FADs provides greater certainty for the Access Provider and Access Seekers. Not including non-price terms would lead to problems associated with the parties having a lack of clarity in regards to their obligations and increase the potential for the Access Provider to implement unreasonable and anticompetitive practices.

Overall, our Clients consider that the ACCC's proposed non-price terms are reasonable and fair to both Access Seekers and the Access Provider. Our Clients are concerned that the non-price terms do not completely cover the field in regards to all aspects of access to a service and that this has potential to limit the ability for the FADs to actually be implemented. This could be an issue that becomes apparent when access is acquired under a FADs, which supports the view that a regulatory period of less than the proposed 5 years is appropriate.

Our Clients submit that terms relating to liability, iVULLS and facilities access should be included in the FADs.

Our Clients submit that the ACCC should not include Telstra's WLR, LCS and PSTN OA geographic exemptions in the FADs.

Our Clients consider that the FADs should apply to wholesale services supplied by NBN Access Seekers using the NBN, where the service is declared.

Our Clients agree with the ACCC's proposal to make fixed principles provisions but consider that the ACCC should only do so if the principles are based upon data that it has verified as being complete and accurate.

4.2 Comments on non-price terms included in the draft FAD

4.2.1 Schedule 8 – Billing and Notifications

Subject to concerns relating to the proposed time frames for backbilling and billing disputes, our Clients agree with the ACCC's proposed terms. Our Clients consider that the Billing and Notifications provisions can be improved, their suggestions follow.

4.2.1.1 Backbilling

Clause 8.5(b) 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 8.6 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*[12]*)* (**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 8.5(b) of the FAD. 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 in breach of the TCP Code.

It is clear that clause 8.5(b) of the FAD is inconsistent with clause 6.5.4(d) of the TCP Code, and as such, is also potentially inconsistent with clause 8.6 of the FAD.

This can be easily remedied by providing the Access Provider with the right to invoice access seekers for a maximum period of up to 5 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 8.5(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

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

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, the Access Seekers 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.

The Access Seekers therefore propose the following amendment:

> *8.5 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 8.6, no more than 5 Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except:*
>
> *(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.*

4.1.1.2 Time frames for billing disputes

In clause 8.15 of Schedule 8, the ACCC proposed that a billing dispute cannot be raised after 6 months from the due date of an invoice. This should be extended to 9 months to allow access seekers sufficient time to extract data relevant to the analysis of the dispute. Further, it should be extended beyond 9 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 FADs' 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.

4.2.1.3 Uncertainty regarding the right to withhold payment of disputed amounts

There is a drafting inconsistency between clauses 8.7 and 8.13 that requires clarification in order to avoid disputes between the Access Provider and Access Seekers. Clause 8.13 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 8.7, 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 8.13 needs to be redrafted to clarify this ambiguity.

4.2.1.4 Time frame for provision of relevant information in a Billing Dispute

Clause 8.17 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 3 weeks should be stipulated to ensure that Billing Disputes are not unnecessarily delayed. A 3 week time frame would also assist the Access Provider to comply with clause 8.18, which provides that the Access Provider shall try to resolve disputes within 30 days. If the Access Provider fails to meet this 3 week time frame, the likely result is that the dispute period will be unnecessarily extended. Where this occurs, the Access Seekers' requirement to pay interest under clause 8.21 should be waived. This would avoid the Access Seeker incurring unreasonable extra costs and expedite resolution of disputes.

4.2.2 Schedule 9 – 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 9.3 of the FAD 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:

9.1 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 9.2, the Security (as shall be determined having regard to clause 9.3 and as may be varied pursuant to clause 9.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD. This clause 9.1 is to apply only when the Access Seeker first acquires services from the Access 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.

4.2.3 Schedule 10 – General dispute resolution procedures

Our clients agree that reasonable access terms require a means for disputes to be resolved quickly and cheaply.

4.2.3.1 Suggested amendment

Clause 10.9.

To ensure that disputes are expedited, the process requires time frames to be met by the parties. This could be achieved by amending Clause 10.9 as follows:

10.9 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 10.3…

4.2.4 Schedule 11 – Confidentiality provisions

Our Clients consider that the proposed confidentiality provisions 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 proposed confidentiality undertaking form is required to enable it to be complied with in practice.

Clause 7 of the proposed confidentiality undertaking form 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 destruction 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.

4.2.5 Schedule 12 – Communications with end users

Our Clients broadly agree with the proposed terms and conditions in schedule 12 and consider that the 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 is unreasonable forms of marketing. Our Clients request that the following amendments be made to clause 12.2(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:

12.2 Subject to clause 12.3, 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;

4.2.6 Schedule 13 – Network modernisation and upgrade provisions

As Telstra's recent and ongoing actions in closing down the South Brisbane exchange have shown, Telstra is both willing and able to utilise its ability to upgrade its network in a manner that causes significant disruption to the ability of Access Seekers to provide services to end-users. This damages competition and is detrimental to the LTIE.

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 and submit that schedule 13 should be amended to reflect this.

The ACCC has previously stated that it considers that regulation under Part XIC of the TPA (or CCA) should focus on those elements of the fixed-line network that continue to represent 'enduring bottlenecks'[13]. The effect of Telstra's modifications to the South Brisbane ESA is a de facto exemption from regulated access to bottleneck infrastructure. A situation where Telstra is able to unilaterally exempt itself from providing regulated services without any oversight from the ACCC is clearly contrary to how Part XIC of the CCA is intended to operate. In such circumstances it is imperative for the FADs to ensure that where the Access Provider removes access to a declared service that it must offer affected Access Seekers access to an alternative and equivalent service on equivalent terms for a period that is not time limited. For example, the replacement service in South Brisbane has been offered to our Clients for an inadequate time period. Our Clients submit that the following clause should be added to schedule 13:

> *Where the Access Provider undertakes a Major Network Modernisation and Upgrade or Coordinated Capital Works Program, the Access Provider must provide affected Access Seekers with access to an alternative and equivalent service on equivalent terms as the declared service that the Access Seeker acquired prior to the Major Network Modernisation and Upgrade or Coordinated Capital Works Program. The Access Seeker may utilise this alternative service until access is terminated in accordance with this FAD.*

Our Clients also consider that the FADs needs to 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. Further clarity is also required in regards to the costs that Access Seekers incur in relation to removing redundant DSLAM and other equipment from Telstra exchanges after a modernisation. For example, it would be unreasonable if the Access Provider could use this as an opportunity to impose charges on Access Seekers for processing facilities access requests or for any other aspect of the projects that Access Seekers will be forced to undertake to remove their equipment. Our Clients suggest the following amendment:

> *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.*

[13] Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, Final Decision July 2009, p. 10

4.2.7 Schedule 14 – Suspension and termination

Our Clients broadly agree with the ACCC's position regarding when an Access Provider should be entitled to suspend or terminate a service. 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, the FADs should provide that Access Seekers can terminate their access for convenience and without penalty.

4.2.7.1 Suggested amendments:

Clause 14.2(b)

As currently drafted the Access Provider's right to suspend an Access Seeker's services for a contravention of a law 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 the ULLS or WLR 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 the declared fixed service 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:

> *14.2(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;*

To enable access seekers to terminate access for convenience, our Clients suggest that the following new clause be added to schedule 14:

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

4.2.8 Schedule 15 – Changes to operating manuals

Perhaps the greatest threat to the smooth operation of the FADs is that they do not specify terms for all aspects of access to the declared services. Currently, access to declared services is via a myriad of interrelated customer access agreements, service schedules, and operational documents. The FADs do not attempt to cover the field by specifying terms to replace all of these documents. As such, even where an Access Seeker acquires access to a service on the basis of a FAD, there will still be several Telstra agreements and operational documents that will directly or indirectly affect the manner that access is provided. Our Clients accept that Telstra will from time to time need to make changes to these documents, however, it

is important that Telstra is not able to do so in a manner that is unreasonably detrimental to Access Seekers' acquisition of declared services.

It is also important that the provisions of schedule 15 apply not only to 'operational documents', but also apply to other documents that include provisions relevant to aspects of access to declared services. This is necessary to prevent the Access Provider unilaterally amending a document or agreement that is not characterised as an operational document, and in doing so detrimentally impacting access to a declared service.

Our Clients' preferred position is that the Access Provider cannot make changes to operational documents without the Access Seeker's agreement, which must not be unreasonably withheld. In the alternative, it needs to be made clear that the Access Provider must not make unreasonable amendments. Though, as currently drafted clause 15.3 allows access seekers to dispute amendments that are unreasonable or deprive them of rights contained in the FAD, the FAD should state outright that the Access Provider must not make changes that are of this nature.

4.2.8.1 Suggested amendments

Clause 15.1(a)

Add the following subclauses:

> *"(iii) the change not being unreasonable; and*
>
> *(iv) the change not depriving the Access Seeker of a fundamental part of its rights contained in this FAD."*

Clause 15.3

Add the following sentence at the end of this clause:

> *"The Access Seeker must not implement the amendment until the dispute is resolved or otherwise finalised."*

Clauses 15.1 to 15.3

Wherever the phrase 'operational document' or 'operational documents' is used, replace with

> *"operational documents or other documents that include provisions relevant to aspects of access to declared services"*

4.2.9 Schedule 16 – Ordering and provisioning

Subject to the suggestions below, our Clients broadly agree with Schedule 16.

4.2.9.1 Suggested amendments:

Clause 16.7

Clauses 16.6. and 16.7 allow the Access Provider to postpone an MNM cutover where there is a 'significant variation' between the 56 and 20 day forecasts, with significant variation being defined as more than 10%. The 56 day notice period allows the Access Provider to ensure that it's contractors are available to perform

jumpering work on the day of cutover. The significant variation ensures that access seekers forecast accurately and that the number of contractor technicians on site for the cutover corresponds with reasonable approximation to the amount of work that has been booked in. This is reasonable, however a variation of only 10% is not so significant that the technicians are unlikely to be able to perform the work, particularly given that the Access Provider still has 20 business days, or 1 month, notice of the change in forecast cutovers in the MNM and ample time to book more or less technicians for the required work. It is our Clients' view that a 'significant variation' should refer to a variation of at least 50%.

Clause 16.10

The FAD does not explain how a Limitation Notice must be published by the Access Provider. Our Clients submit that the publication should include the Access Provider publishing the Limitation Notice on its website and sending individual notices to each access seeker.

Clause 16.21(d) – LSS to ULLS migration process and LSS to ULLS migration process charges

Our Clients support the ACCC's proposal to include an LSS to ULLS migration process in the FAD. Our Clients consider that Telstra's repeated refusal to implement an integrated LSS to ULLS migration process has been a significant impediment to competition in the broadband market for a number of years. Unfortunately, the FAD does not specify an LSS to ULLS migration charge. Our Clients submit that in order to prevent Telstra using this as an opportunity to implement an unreasonably high charge, the FAD must specify the rates that should apply for single connection migrations and managed network migrations.

The charge should be included in Schedule 6 of the FADs and should be at least no more than a ULLS single or MNM connection charge and should not include an LSS disconnection charge because the connection of the ULLS also in effect disconnects the LSS. As such the following should be added to the end of clause 16.21(d):

"This will not include any charge for disconnection of the LSS."

4.2.10 Service Levels

Our Clients consider that the FADs should include service levels that the Access Provider is required to adhere to in regards to ordering, provisioning and fault rectification. Presently these tend to be on a best efforts basis without service levels. As a minimum the service levels should include the following conditions:

- Access Providers should be obliged to provide levels of service on a non-discriminatory basis and equivalent to that which they provide to themselves; and
- If the Access Provider fails to achieve service levels, it is required to pay the Access Seeker an appropriate credit.

4.3 Comments on non-price terms not included in the draft FAD

4.3.1 Liability

Our Clients believe that it is appropriate for liability (risk allocation) provisions to be included in the FADs. 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 FADs do 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 FADs 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[14]. 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 FADs, 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. Our Clients believe that Telstra will only have a sufficient incentive to rectify the Problems in a timely manner if Telstra is required to provide appropriate service credits or rebates. Our Clients believe that issues of this nature may be better dealt with as part of the service level terms included in the sections of the FADs dealing with service levels for provisioning and fault rectification. Therefore, our Client's submit that clauses C.15(b) to C.20 should not be included in the FADs. Rather, appropriate terms dealing with service levels (including appropriate service level credits or rebates) should be included in the terms relating to provisioning and fault rectification.

4.3.2 iVULLS

The ACCC is correct in its understanding that Telstra has employed an iVULLS ordering and provisioning process, which Telstra calls 'eVULLS' or enhanced Vacant ULLS.

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

iVULLS uses a soft dial tone to identify the corrected already-connected pair, and migrates it with a single re-patch to the acquirer's ULLS port. It, like an IULLS, should be a cheaper connection than VULLS because the pair doesn't have to be located or checked first, i.e. a truck roll is not required to provision the service.

Our Clients consider that the FADs should include iVULLS price and non-price terms.

4.3.3 Facilities access

Our Clients consider that the facilities access provisions set out in Part K of the 2008 Model Terms should be adopted in the FADs. As the ACCC is aware, delayed access to facilities can significantly impeded access seekers' ability to compete. Clear facilities access terms are required to limit Telstra's ability to deny or delay access and as such, need to be included in the FADs.

5. GEOGRAPHIC EXEMPTIONS

References in these submissions to:

- the ACCC's Class Orders;
- the PSTN OA CBD Orders; and
- the Tribunal's Metropolitan Orders;

(collectively the **Exemption Orders**)

are as defined in the Discussion Paper.

The ACCC proposes to incorporate into the FADs the effect of the Exemption Orders but is seeking the view of industry before doing so. Our Client's views are set out below. For ease of expression: "*incorporating into the FADs the effect of the Exemption Orders*" will be referred to below as "*giving effect to the Exemption Orders*".

5.1 The ACCC's Class Orders

Our Clients believe that it is appropriate that the substance of the ACCC's Orders is treated consistently with the PSTN OA CBD Orders and the Metropolitan Orders. Therefore, if the ACCC decides to no longer give effect to either the PSTN OA CBD Orders or the Metropolitan Orders (or to amend the manner in which either of those Orders are given effect to) these changes should be reflected in the way that the ACCC gives effect to the ACCC's Class Orders.

5.2 The PSTN OA CBD Orders

Our Clients believe that the regulation of PSTN OA should be consistent with the regulation of WLR and LCS. Our Clients note that WLR and LCS are not declared in the ESAs to which the PSTN OA CBD Orders apply. In light of this, our Clients believe that it is appropriate for the ACCC to give effect to the PSTN OA CBD Orders.

5.3 The Tribunal's Metropolitan Orders

Our Clients believe that the rationale and issues relating to the Tribunal's Metropolitan Orders are the same in respect of each of WLR, LCS and PSTN OA. Therefore, our Clients will address the Tribunal's Metropolitan Orders globally.

Please note that for ease of expression reference will be made only to WLR. However, a reference to WLR includes, as the context requires, a reference to LCS and PSTN OA.

It appears to our Clients that there are two separate bases which support the ACCC's view that it is appropriate for the ACCC to give effect to the Tribunal's Metropolitan Orders:

- doing so will promote the LTIE; and
- doing so will promote regulatory certainty and consistency.

Our Clients will consider each of these in turn.

The LTIE

At the outset it should be noted that the Tribunal concluded that making the Tribunal's Metropolitan Orders was only in the LTIE if the exemptions were subject to the conditions specified in the Tribunal's Metropolitan Orders[15]. These conditions included significant additions to the conditions that the ACCC had imposed when the ACCC granted the WLR exemptions which were the subject of the appeal to the Tribunal[16]. Therefore, as regards promoting the LTIE, the Tribunal was of the view that the following was the correct order of precedence:

1. grant the exemptions subject to the Tribunal's conditions;

2. maintain regulation;

3. grant the exemptions subject to the ACCC's exemption criteria and conditions; and

4. grant the exemption on the basis of the exemption criteria suggested by Telstra.

It appears to our Clients that the Discussion Paper is raising the possibility of 1 and 2 above being substituted (i.e. the choice is between giving effect to the Tribunal's Metropolitan Orders or not giving effect to the Tribunal's Metropolitan Orders). There is no suggestion in the Discussion Paper that giving effect to 3 or 4 would be appropriate.

It is respectfully submitted that in order for the ACCC to properly discharge its function under section 152BCA of the CCA, it must decide for itself whether giving effect to the Tribunal's Metropolitan Orders is in the LTIE, rather than simply rubber stamping the Tribunal's view on the issue. It appears to our Clients that the ACCC has sought to form its own view on this issue, hence the analysis included in the Discussion Paper.

Promoting the LTIE is the ACCC's ultimate objective when setting terms of access[17]. It is submitted that when considering whether giving effect to the Tribunal's Metropolitan Orders would promote the LTIE, it is appropriate for the ACCC to consider what benefits would result to end users from giving effect to the Tribunal's

[15] *See Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [155]-[163]
[16] It should be noted that the Tribunal found that granting the exemptions on the basis of the ACCC's conditions without the additional conditions imposed by the Tribunal would be "positively contrary" to the LTIE – ibid at [160] – [161].
[17] Section 152AB CCA.

Metropolitan Orders. It is submitted that it is difficult to conclude that something will promote the LTIE if it does not have any benefits for end users.

The ACCC states that the potential benefits for end users are as follows (emphasis added and footnotes omitted):[18]

> *The ACCC also remains of the view that the relatively small amount of additional investment that may be made by access seekers due to the effect of the exemptions would be efficient. This is because, where necessary,* ***the move to ULLS-based provision of fixed voice services prior to a fibre upgrade will allow access seekers to build their reputation and customer base through the ability to provide differentiated products****. The ACCC considers that this will allow access seekers to better transition to an alternative service and make it more viable to compete in downstream markets when fibre is deployed.*

Therefore, it appears to our Clients that the ACCC has formed the view that the benefit to end users from giving effect to the Tribunal's Metropolitan Orders would be that access seekers would provide differentiated products via the ULLS. It is respectfully submitted that this conclusion is no more than an assumption which is not borne out, as the examples below demonstrate. Furthermore, the flaw in the view that switching to ULLS will make it easier to switch to the NBN seems, with respect, self evident: i.e. ULLS is a copper based service.

Example 1

(Note for the purposes of this example it is assumed that the LSS to ULLS migration condition in the Tribunal's Metropolitan Orders is either satisfied or does not apply[19]). The end user receives a bundled voice and broadband service from an access seeker. The access seeker uses LSS and WLR to provide the service. The access seeker's DSLAMs are not PSTN voice grade compatible[20]. Regulation of WLR is withdrawn, thereby giving Telstra the opportunity to charge prices that are above Telstra's efficient costs of providing the service. Telstra puts up the price of WLR. (In this regard the ACCC should note that our Clients have advised that Telstra has refused to pass on the ACCC's IAD rates in exempt ESAs, but is only offering the far higher CRA rates, which also include an even higher rate for WLR services for business end-users). In this scenario the access seeker has the following options:

1. pass on the price increase to the end user;

2. absorb the price increase itself;

3. seek a wholesale WLR alternative from another access seeker;

4. invest in the necessary equipment to allow it to provide PSTN voice services using the ULLS; or

5. no longer provide PSTN voice services.

[18] Discussion Paper, at page 237.
[19] This condition is set out in clause 6.8 of the Tribunal's Metropolitan Orders.
[20] Note that for ease of expression a reference to a DSLAM is a reference to a DSLAM that is unable, without modification, to provide PSTN voice services, and a reference to an MSAN is a reference to equipment that is capable of providing a PSTN voice service.

It is submitted that option 1 clearly has no benefits for end users.

As regards option 2, in the long run this will affect the access seeker's ability to compete and ultimately stay in business. It is difficult to see how an access seeker taking this option would result in any benefits to end users.

As regards option 3, this assumes the existence of alternative wholesale suppliers. This is a big assumption to make. None of our Clients are aware of any current, or likely future, alternative wholesale suppliers of unbundled WLR that is not simply a resale of Telstra's WLR (i.e. the service is not provided via an access seeker DSLAM/MSAN). There is currently only one wholesale supplier alternative to Telstra which offers a bundled service using its own MSANs, i.e. it wholesales voice and data bundled together only, it does not wholesale voice services without data. However, if the access seeker in the example above were to opt for such a bundled service, they would effectively be stepping down the ladder of investment as regards the provision of broadband internet services. This would be entirely contrary to the ACCC's rationale for giving effect to the Tribunal's Metropolitan Orders. Even if option 3 were available, there does not appear to be any basis on which to conclude that it would deliver lower prices or better quality services for end users (the quality of service issue is considered below when considering option 4).

As regards option 4, it is necessary to consider potential improvements to quality of service and potential reductions in price. In terms of improvements to quality of service:

- as regards the end user's broadband internet service, swapping from LSS to ULLS will not result in any service quality improvements (i.e. in both cases it will be the same Telstra copper line that will be used to provide the service in conjunction with the access seeker's DSLAM/MSAN);

- as regards the end user's PSTN voice service, it is unlikely that option 4 would lead to any material improvement in service quality or differentiation (i.e. a PSTN voice service is a PSTN voice service).

In terms of the end user benefiting from lower prices, option 4 would require investment in order to change from DSLAM based provision to MSAN based provision. In this regard the Tribunal found that recovering the outlay on an MSAN could take up to five years[21]. In addition to this, it would be necessary for the access seeker to invest in switching capability and, where the access seeker has already deployed DSLAMs, changing to service provisions via MSANs may require system changes to be made. The cost of this investment must be borne by someone (i.e. either the access seekers pass it on to end users or they absorb it themselves, therefore the same issues as with options 1 and 2 arise). While the requirement to have regard to the 'long term' *could potentially* justify forcing access seekers to take option 4 (i.e. option 4 *could possibly* lead to lower prices for bundled internet and voice services once the costs of the necessary additional equipment have been fully recovered), it is important for the ACCC to acknowledge that whether such lower prices will result is a matter of pure speculation (i.e. giving effect to the Tribunal's Metropolitan Orders would be a gamble because access seekers might simply opt for options 1 or 2). It is submitted that the deployment of the NBN makes it more likely that access seekers will chose options 1 or 2 (i.e. attempt to rough things out until the NBN) rather than choosing option 4.

[21] *See Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [143] note the Tribunal used the term "DSLAM" to incorporate the term "MSAN" - ibid at [103].

As regards option 5, it is hard to see how end users having less choice could be a benefit to end users.

Example 2

The end user receives a voice only service from an access seeker. The access seeker uses WLR to provide the service. The access seeker is a pure reseller and does not have any DSLAM or MSAN infrastructure. Regulation of WLR is withdrawn and Telstra puts up the price of WLR. In this scenario the access seeker has the same options as in example 1. However, as regards option 3, it is important for the ACCC to be aware that the primary business for most ULLS based access seekers is the provision of retail broadband internet services or bundled voice and internet retail services. Many ULLS based access seekers do not provide:

- a retail stand alone voice service; or
- wholesale services.

In light of this, it is difficult to see how the existence of such ULLS based competitors (regardless of the amount of spare DSLAM capacity that they may have) could be a constraint on Telstra in either the wholesale market for PSTN voice services or the retail market for PSTN voice services (i.e. the market for PSTN voice services not sold as part of a voice/internet bundle). Please refer to Annexure 1 of these submissions which provides information relevant to whether our Clients would act as a constraint on Telstra in the wholesale and retail markets for PSTN voice services in the event that regulated access to WLR is withdrawn.

It should be noted that the ability of ULLS based access seekers to provide a constraint on Telstra appears to have been the basis on which the Tribunal decided to make the Tribunal's Metropolitan Orders[22]. However, the Tribunal appears not to have considered the basis on which such ULLS based access seekers could constrain Telstra specifically in the wholesale or retail markets for PSTN voice services (i.e. voice services that are not provided as part of a bundle). It is respectfully submitted that as the Tribunal did not give specific consideration to all relevant markets when considering whether ULLS access seekers could constrain Telstra, the Tribunal's consideration was less thorough than is necessary. In other words, while it is accepted that in those ESAs that satisfy the Tribunal's criteria for exemption, ULLS access seekers provide an adequate constraint on Telstra in the wholesale and retail markets for broadband internet services and bundled services, there appears to be no basis, and the Tribunal did not identify any basis, for concluding that ULLS based access seekers will provide a constraint on Telstra in the wholesale and retail markets for PSTN voice services.

Annexure 2 to these submissions sets out the content of an email from Steve Dalby (Chief Regulatory Officer of iiNet) to the ACCC which explains why providing PSTN voice services via the ULLS is not a viable option to iiNet. In light of this information, and the information in Annexure 1, there would appear to be no basis for concluding that ULLS access seekers will be able to constrain Telstra in all relevant markets should regulated access to WLR be withdrawn.

It is submitted that the ACCC should not conclude that competition that relies on regulated access to WLR has no value to end users. As the Tribunal pointed out:[23]

[22] See *Application by Chime Communications Pty Ltd (No 2)* [2009] A CompT 2 at [157] and *Application by AAPT Limited* [2009] ACompT 5 at [41] and [42].
[23] ibid, at [161].

> *Unless there is in existence a state of affairs in which it is likely that entrants (and potential entrants) will constrain Telstra, the grant of the exemptions sought will be positively contrary to the long-term interests of end-users. The Tribunal appreciates that Telstra believes ULLS-based technology is superior to that based on WLR/LCS. That, however, is of little concern to the Tribunal. It is not the function of the Tribunal to make a choice between technologies and between competing goods and services based on their quality (or on any other factor). Those choices are made by consumers. But, while the consumer makes that choice, they benefit from the availability of both old and new technologies or old and new products and services. Competition between old and new lowers the production costs of both. Product quality and performance are also improved and choices are broadened.*

It is respectfully submitted that, given the Tribunal's view on the value of competition based on WLR, and the need for Telstra to be constrained in the relevant markets, had the Tribunal considered the likely effect of the exemptions on the specific markets individually, rather than considering in general terms whether or not Telstra would be constrained by ULLS access seekers, the Tribunal would not have granted the exemptions. In other words, applying the Tribunal's reasoning to each specific market leads to the conclusion that a situation where Telstra is unconstrained in the markets for wholesale and retail PSTN voice services is "positively contrary" to the LTIE.

As regards option 4, in this scenario (i.e. the access seeker provides voice only services) it is dangerous for the ACCC to assume that it would be viable for such an access seeker to move up the ladder of investment and deploy MSAN infrastructure (i.e. the previous consideration by the ACCC and the Tribunal on the viability of installing an MSAN is based on the assumption of the MSAN being used to provide broadband internet and voice services. Therefore, the revenue stream that would be used to recover the cost of the MSAN would come from the broadband internet service and the voice service. The Tribunal's finding does not necessarily apply to the ability to recover the cost of a MSAN on the basis of revenues received from voice only services).

Conclusion on the LTIE

It is submitted that the consideration around Example 1 above shows that the ACCC's view that giving effect to the Tribunal's Metropolitan Orders would lead to increased service differentiation is nothing more than an assumption that is unlikely to arise in practice. In light of this, there would appear to be no obvious benefit for end users from the ACCC giving effect to the Tribunal's Metropolitan Orders. Furthermore, the consideration around Example 2 above shows that there is a real risk that giving effect to the Tribunal's Metropolitan Exemption Orders would lead to Telstra becoming unconstrained in the markets for wholesale and retail voice services (i.e. services that are not included as part of an internet/voice bundle). This is directly contrary to the Tribunal's rationale for granting the exemptions and should lead the ACCC to conclude that it is not in the LTIE to give effect to the Metropolitan Exemptions.

Even if ULLS based access seekers did decide to provide wholesale PSTN voice services that are not part of a bundle, this could take considerable time. Turning non PSTN voice infrastructure into PSTN voice compatible infrastructure would not only require considerable investment in new equipment, it would also require access to Telstra exchanges. The ACCC is well aware of the significant obstacles that

access seekers face in accessing Telstra's exchanges due to Telstra's antiquated work practices[24].

Giving effect to regulatory certainty and consistency

The ACCC states the following:[25]

> *The ACCC is of the preliminary view that Telstra and access seekers may have made investments in preparation for the exemptions coming into effect. Access seekers may have installed new DSLAM/MSAN equipment in order to provide voice services via the ULLS. Telstra is likely to have invested in new billing systems in preparation for the exemptions taken effect. The ACCC considers that regulatory certainty and consistency is necessary to protect such efficient investment, and create a certain environment to promote future efficient investment.*

It is respectfully submitted that the ACCC's reasoning in this regard is not attractive. Taken to its logical conclusion it would mean that no regulatory decision that has been relied upon, no matter how perverse, could ever be reversed. In any event, the ACCC's view appears to be based on speculation. More importantly, providing for regulatory certainty and consistency cannot outweigh the need to promote the LTIE because it is the LTIE that must be given fundamental weight[26], and for the reasons stated above, giving effect to the Tribunal's Metropolitan Orders is unlikely to promote the LTIE and there is a serious possibility that giving effect to the Tribunal's Metropolitan Orders will actually harm the interests of end users (i.e. result in unnecessary price increases for end users). Furthermore, the Tribunal's Metropolitan Orders in their current form do not promote regulatory certainty due to the fact that the exemption footprint is re-assessed every six months. Therefore, in order to give effect to regulatory certainty, the exemption footprint should be locked in at the 181 ESAs that currently meet the Tribunal's criteria for exemption.

5.4 Response to ACCC's specific questions

Set out below are our Client's responses to the ACCC's specific questions regarding the Tribunal's Exemption Orders.

Should the effect of the PSTN OA CBD Orders (and the corresponding class order) be incorporated into the FAD for the PSTN OA service?

Yes, see section 5.2 above.

Should the effect of the Tribunal's Metropolitan Orders (and the corresponding class orders) be incorporated into the FADs for the WLR, LCS and PSTN OA services?

No, see section 5.3 above.

Are there alternative suppliers of the PSTN OA, LCS and WLR services in the Attachment A ESAs, or is there a prospect of such alternative suppliers

[24] Hence the need for condition 6.12 of the Tribunal's Metropolitan Orders. This condition has a cut off date and, in any event, provides no assistance to an access seekers who wishes to enter an exchange in order to adapt their DSLAMs for the purpose of providing wholesale voice services.
[25] Discussion Paper at page 248.
[26] *Telstra Corporation Limited v Australian Competition & Consumer Commission* (2008) 171 FCR 174, at 202

entering the Attachment A ESAs? Please provide evidence to support your response.

As stated in section 5.3 above, none of our Clients are aware of any current, or likely future, alternative wholesale suppliers of unbundled WLR. There is currently only one wholesale supplier alternative to Telstra which offers a bundled service, i.e. it wholesales voice and data bundled together only, it does not wholesale voice services without data. See also Annexures 1 and 2 to these submissions.

Have recent developments with regards to the NBN build affected the rationale for the exemptions? If so, please provide evidence.

As stated in section 5.3 above, our Clients respectfully submit that the basic rationale for the exemptions is flawed as there will be no definite benefits to end users from forcing access seekers to provide services by means of ULLS only. Continuing with a strategy that forces access seekers to invest in copper specific infrastructure where there are no obvious benefits to end users, and where Telstra will become unconstrained in the relevant PSTN voice telephony markets, is at best, misguided. Doing so in the face of Government policy that mandates the use of fibre based infrastructure seems perverse.

Is there any other information or matters that the ACCC should have regard to when deciding whether to incorporate the effect of the Exemption Determinations into the FADs for the WLR, LCS and PSTN OA services?'

See section 5.3 above.

Please provide comments on the ACCC's preliminary consideration of the subsection 152BCA(1) criteria in respect of including the effect of the Exemption Determinations in the relevant FADs. Where necessary, please provide supporting materials for your comments.

For the reasons given in section 5.3, our Client's believe that the basic premises behind the ACCC's decision to give effect to the Tribunal's Metropolitan Orders (i.e. that service quality and differentiation will be increased and ULLS access seekers will provide a constraint on Telstra in the wholesale market for voice services) are fundamentally flawed. These flaws infect the ACCC's entire reasoning process when considering whether giving effect to the Tribunal's Metropolitan Orders will promote the LTIE. As the promotion of the LTIE must be given fundamental weight, the ACCC's desire for regulatory certainty cannot outweigh the LTIE. Furthermore, the Tribunal's Metropolitan Orders in their current form do not promote regulatory certainty because they require the exemption footprint to be reassessed every six months.

Should the Minimum Characteristics set out in the Tribunal's Metropolitan Orders be amended for the purpose of the FADs as follows:

"any period which an end-user is unable to receive a broadband service by means of the copper pair servicing the end-user's Standard Telephone Service by reason of that migration is no longer than four hours or such other period determined by the Commission"

Our Client's do not believe that such an amendment is appropriate. Three hours is more than a reasonable time period.

For the purpose of incorporating the Exemption Determinations into the FADs, should the reporting requirements (in respect of each Attachment A ESA) be revised to no longer require ULLS-based competitors to submit information on 'Number of installed DSLAMs'?

Yes, our Client's support this proposed amendment. As the ACCC rightly points out, the information on number of installed DSLAMs is not relevant to the spare capacity assessment.

If the Exemption Determinations are incorporated into the FADs for the WLR, LCS and PSTN OA services, should the exemptions expire on 24 August 2014 for the WLR and LCS services; and on 9 September 2014 for the PSTN OA service?

Our Clients believe that the expiry date set by the Tribunal is appropriate. For the reasons given in section 3.4 of these submissions, our Clients do not believe that the FADs should extend beyond the current expiration of the declared services.

6. NBN-BASED WHOLESALE SERVICES

At this stage it is unclear how many NBN Access Seekers will supply wholesale services. Presumably there will be several and each will be acquiring services from NBN Co on the basis of its standard Wholesale Business Agreement. In this case, Access Seekers or Retail Service Providers will be able to negotiate with the wholesalers to obtain the access to services. Our Clients consider that it is appropriate for declared wholesale services provided via the NBN to be subject to the FADs. The FADs will provide a fall back position that can be utilised in the event that the wholesaler and retail service provider are unable to reach agreement on terms of access and in doing so promote the LTIE by providing conditions where lower prices and diverse services can be encouraged.

7. FIXED PRINCIPLES PROVISIONS AND REGULATORY PERIOD

The ACCC discusses the use of fixed principles in Section 25 of the discussion paper. It notes that "Fixed principles promote regulatory certainty and may provide greater price stability". Our Clients agree with that sentiment and consider that fixed principles provide a compelling reason why adopting a shorter regulatory period will not create an unacceptable degree of uncertainty. Our Clients submit that fixed principles combined with a shorter regulatory period are an effective substitute for a longer regulatory period.

The ACCC proposes fixed principles on:

- locking in the RAB;
- the RAB roll forward approach;
- how to forecast service demand, operating and capital expenditure;
- how the WACC should be estimated; and
- cost allocation.

Fixed principles that deal with these issues will tightly constrain the issues that are debated at a regulatory reset, and therefore provide a material level of certainty at the time of regulatory review.

If fixed principles are introduced, then we consider that the balance here clearly favours a shorter regulatory period. If revised and updated forecasts reflect

materially better information on Telstra's costs and demands (including better knowledge about the deal with NBN Co and the de-commissioning of the copper network) then that is a material benefit that would not be captured under the proposed five year regulatory period. Furthermore, the fixed principles should not lock in error. Therefore the fixed principles should not prevent the ACCC from making appropriate adjustments to account for the difference between forecast expenditure and actual expenditure.

Adam Internet Pty Ltd,
Aussie Broadband Pty Ltd,
iiNet Limited, and
Internode Pty Ltd.

3 June 2011