

TELSTRA CORPORATION LIMITED

Response to the Commission's Discussion Paper into the public inquiry to make a final access determination for the wholesale ADSL service

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CONTENTS

01	OVERVIEW	4
02	INTRODUCTION	6
2.1.	Some geographic areas should be exempt from the SAOs	6
2.2.	All wholesale ADSL providers should be subject to the FAD	7
2.3.	The Commission should utilise a Retail Minus Retail Cost methodology for setting prices	7
2.4.	There is no need for the Commission to set non-price terms and conditions	8
2.5.	The expiry date for the FAD should be 31 July 2014	8
2.6.	Responses to the Commission's questions	8
2.7.	Approach to making a wholesale ADSL FAD	8
03	EXEMPTION FROM SAOS IN PARTICULAR GEOGRAPHIC AREAS	9
3.1.	Infrastructure-based competition in the market for ADSL services	9
3.2.	Infrastructure-based competition is delivering effective competition	13
3.3.	Infrastructure-based competition continues to bring real benefits to all end-users	14
3.4.	The benefits of infrastructure-based competition cannot be replicated by resale competition in the ADSL context	15
3.5.	Significant risk to the LTIE if the Commission intervenes in effectively competitive markets	15
3.6.	Commission's approach to exemptions	16
04	APPLICABILITY OF FAD TO OTHER ACCESS PROVIDERS	17
05	PRICE	19
5.1.	Charges to be included in FAD	19
5.2.	Charges should be based on RMRC	19
5.3.	Ongoing investment requirements in ADSL networks	20
5.4.	Balance of charges	21
5.5.	Zone structure of charges	21
5.6.	Price discrimination	21
06	NON-PRICE TERMS AND CONDITIONS	23
6.1.	Requirement for active PSTN voice service	23
6.2.	Supplying wholesale ADSL to resellers	24
6.3.	Points of interconnection of the wholesale ADSL service	24
6.4.	Business grade service schedule	25
6.5.	Other commercial terms	26

6.5.1. The Commission should not incorporate “standard” non-price terms in the FAD	26
6.5.2. The “standard” non-price terms should be clear, balanced and reasonable	27
07 COMMENCEMENT AND EXPIRY DATE	28
7.1. Commencement date	28
7.2. Expiry date	28
08 ANNEXURE A – RESPONSES TO QUESTIONS	29
09 ANNEXURE B – LIST OF 289 ESAs	32
010 ANNEXURE C – APPROACH TO MAKING A WHOLESALE ADSL FAD	33
10.1. Legislative criteria	33
10.1.1. Giving fundamental weight to criteria	33
10.1.2. Considering the long term interests	33
10.1.3. Costs of implementation	34
10.2. Scope of the FAD	35
10.3. Other relevant considerations: Telstra’s obligations under its SSU	35

01 OVERVIEW

1. Telstra submits that there are two key points the Commission should consider in this Final Access Determination (**FAD**) inquiry:
 - a. competition in the market for ADSL services – particularly in metropolitan areas – is intense and is driven by the take-up of ULL and LSS services. Unbundled services will remain the means by which competition will be promoted in areas in which access seekers invest in DSLAM infrastructure. In these highly competitive areas, the statutory criteria and good regulatory policy would prescribe that the Commission forbear from intervening; and
 - b. unlike the CAN, ADSL networks are not largely sunk investments. The provision of ADSL services requires ongoing investment to supplement capacity in the face of an exponential growth in data usage. Future, necessary investment in ADSL networks may be discouraged or distorted if the Commission regulates wholesale ADSL services in the same way as ULLS services. Therefore, for those areas where the Commission does intervene, it should do so on a Retail Minus Retail Cost (**RMRC**) basis, at least for the first period of regulation.
2. Telstra elaborates on these issues below.
3. The Commission has recently determined that the declaration nationally of the wholesale ADSL service is in the long term interests of end users (**LTIE**). As Telstra set out in its submission to the Commission's declaration inquiry (**Telstra's Declaration Submission**)¹, a national declaration is at odds with the following facts:
 - a. over the past decade, access seekers have installed DSLAMs in more than 580 Telstra exchanges across Australia – provisioning in excess of 5.9 million interconnect ports;
 - b. this infrastructure has enabled access seekers to win almost 1.8 million end user broadband services supplied using unbundled (ULLS/LSS) services;
 - c. in metropolitan ESAs, there is an average of 4.4 DSLAM-based access seekers in each ESA. And in 289 ESAs, there are a *minimum* of four providers of resale ADSL services – with Telstra competing against at least the three major DSLAM-based providers of retail and wholesale ADSL services – Optus, TPG and iiNet; and
 - d. [c-i-c commences] c-i-c [c-ic ends].

Figure 1: [c-i-c commences] c-i-c [c-ic ends]

4. These facts clearly show three interrelated features of the market for wholesale ADSL services. The first is that access seeker investment in DSLAM infrastructure has significantly impacted on the market for wholesale ADSL services. The second is that DSLAM-based competition is uneven – with access seekers preferring to concentrate their investments in highly profitable

¹See Telstra, Response to the Commission's Discussion Paper into whether wholesale ADSL services should be declared under Part XIC of the *Competition and Consumer Act 2010*, 19 January 2012.

CBD and metropolitan ESAs. The third feature is that in areas where multiple access seekers have deployed extensive competitive infrastructure, there is intense, effective competition for both retail and wholesale ADSL services.

5. In undertaking the FAD inquiry, it is critical that the Commission adopts a sound approach to the future regulation of the wholesale ADSL service, ensuring that it achieves an appropriate balance between regulating wholesale ADSL through price and non-price terms and conditions, and allowing the competitive market for broadband services to work effectively. If such a balance is not achieved, the Commission risks damaging investment incentives and the LTIE. Specifically, the Commission should be mindful that:
 - a. its intervention does not reduce investment incentives, which would reduce dynamic efficiency in the market for retail and wholesale ADSL services;
 - b. its intervention is competitively neutral, applying equally to all resale ADSL providers, so as to avoid distorting market outcomes; and
 - c. its intervention is light-handed and targeted so as to not unnecessarily distort competitive markets.
6. To do otherwise risks reducing investment incentives and distorting the competitive outcomes currently observed in the market for wholesale and retail ADSL services in many areas.
7. In Telstra's view, in order for the Commission to make a FAD that avoids these regulatory risks, the Commission should:
 - a. exempt Telstra and other wholesale ADSL providers from the Standard Access Obligations (**SAOs**) in areas where there is effective competition in the market for wholesale ADSL services. At a minimum, the Commission should exempt the 289 ESAs in which there are at least four providers of wholesale ADSL;
 - b. alternatively, if the Commission considers that it cannot make exemptions in these areas, it should not set a price for these areas in the FAD;
 - c. in other areas, the Commission should set prices with reference to a RMRC pricing construct – which will maintain investment incentives for Telstra and other access providers, and drive dynamic efficiency in the supply of retail and wholesale ADSL services;
 - d. ensure that all providers of resale ADSL services are equally covered by the FAD, to avoid distortions in the market for wholesale ADSL;
 - e. include only essential price terms for the wholesale ADSL service in the FAD (in those areas where the Commission determines to establish access prices) and not include non-price terms. This will enable Telstra and other resale providers to provide a range of competitive, differentiated offerings and efficiently negotiate terms of access with different acquirers; and
 - f. review the FAD in line with the FADs for the other fixed line services – i.e. on or before 31 July 2014.

02 INTRODUCTION

2.1. Some geographic areas should be exempt from the SAOs

8. The Commission should exempt all access providers from the SAOs in 289 CBD and metropolitan ESAs set out in Annexure B to Telstra's submission (at a minimum), on the basis that these ESAs are highly competitive at *both* the *retail* and *wholesale* levels of the ADSL market. In that regard, the Commission's reasoning for removing the exemption in respect of WLR, LCS and PSTN OA do not apply.
9. In that regard, these ESAs are characterised by the following:
 - a. sufficient – and significant – infrastructure (or facilities)-based competition: there are *at least* four infrastructure-based access providers (including Telstra) from whom access seekers and end-users could acquire ADSL services in these ESAs; and
 - b. significant investment in DSLAMS and related ADSL infrastructure.
10. In addition, the ADSL market is also affected by significant growth in mobile wireless broadband services and the availability of fixed line broadband services on alternative networks (such as HFC).
11. End-users have benefited from such competition by:
 - a. lower prices and a significant increase in included value (both in terms of download quotas and connectivity speeds);
 - b. significant growth in the variety of differentiated service offerings and value added features; and
 - c. significant rebalancing of ADSL market shares.
12. Evidence in support of each of the above is set out in section 3 of Telstra's submissions.
13. Telstra submits that, in light of the fact that these ESAs are already highly competitive, regulation is not only unnecessary, it also risks interfering with and reducing dynamic efficiency, investment incentives and (in ESAs in which there is already competition from both self-supply and resale services) risks reducing Telstra's incentives to invest and innovate in fixed line broadband services.
14. The Commission should be mindful that, in considering whether or not to exempt these ESAs, it must also consider whether exemptions would promote the LTIE and other statutory criteria if certain conditions or limitations were imposed (in respect of the application of the exemptions).
15. However, if the Commission considers that it cannot exempt ESAs in which effective infrastructure (or facilities)-based competition already exists, it should not risk setting a regulated price for the wholesale ADSL service in these competitive areas.
16. Telstra's detailed submissions are set out in section 3 below.

2.2. All wholesale ADSL providers should be subject to the FAD

17. Telstra strongly disagrees with the Commission's view (as implemented in the IAD) that the SAOs should only apply to Telstra. In order for the Commission to exempt a carrier from the SAOs in the FAD, the Commission must take into account the matters set out in section 152BCA of the *Competition and Consumer Act 2011* (Cth) (**CCA**) and be satisfied that exempting that carrier would, among other things, promote the LTIE. In short, the Commission must undertake the same assessment that it undertook in its inquiry into varying exemptions in the FADs for the WLR, LCS and PSTN OA.² Telstra submits that, in the absence of such an assessment, a clause such as clause 5.1 of the IAD must not be included in the FAD.
18. Furthermore, Telstra considers that should the FAD not apply to non-dominant networks, the Commission is creating a clear opportunity for distortions in the market for wholesale ADSL. In addition, there is no reason why access seekers who acquire wholesale ADSL services from providers other than Telstra should not be able to access the terms and conditions of the FAD if that would be beneficial to them.
19. Finally, Telstra submits that if the Commission exempts all access providers other than Telstra from the SAOs, it would be inconsistent with the Commission's approach to the exemptions for the WLR, LCS and PSTN OA services, in which it removed not only Telstra's individual exemption but also the ordinary class exemptions for those services. The Commission should be consistent in its approach.
20. Telstra's detailed submissions are set out in section 4 below.

2.3. The Commission should utilise a Retail Minus Retail Cost methodology for setting prices

21. In respect of the other ESAs, Telstra maintains that the most effective pricing methodology, in the context of nationally consistent retail pricing, is the RMRC approach set out in Telstra's Structural Separation Undertaking (**SSU**). In light of the large growth experienced in the retail level of the ADSL market, a RMRC based price, appropriately set, would provide the correct incentives for investment to occur, while allowing access seekers a fair rate of return on their own investments.
22. Telstra considers that the FAD should only set prices for connection, port, AGVC and early termination charges.
23. Telstra notes that the Commission raises concerns about price discrimination. These concerns are unfounded. Price discrimination is generally efficient. Further, it is impractical to define all situations in which it is efficient or inefficient. Instead, price discrimination should be allowed to occur generally. The Commission has sufficient powers to deal with any potential competition concerns that may arise.

² Commission, *Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services, Final Report, Public Version*, December 2011 (**Exemptions Final Decision**).

24. Telstra's detailed submissions are set out in section 5 below.

2.4. There is no need for the Commission to set non-price terms and conditions

25. Telstra considers that the Commission should not include the "generic" non-price terms which are set out in Schedules 3-9 of the IAD, in the FAD, given that those terms have not previously been the subject of dispute between Telstra and access seekers.

26. If, despite Telstra's submissions, the Commission is minded to include non-price terms in the FAD, those non-price terms should be consistent with similar non-price terms included in the draft DTCS FAD and the MTAS FAD, rather than the Commission's 2008 Model Terms.

27. Finally, Telstra considers that the specific non-price terms issues raised by the Commission should not be included in the FAD.

28. Telstra's detailed submissions are set out in section 6 below.

2.5. The expiry date for the FAD should be 31 July 2014

29. The Commission suggests that the expiry date of the FAD should align with the expiry date of the declaration, being February 2017. Telstra considers that setting a FAD with such a long duration for a service with a competitive market would risk inflicting serious damage to the operation of that market, likely damage investment incentives and not be in the LTIE.

30. Telstra considers that the expiry date of the FAD should align with that of the fixed line services, i.e. 31 July 2014.

31. Telstra's detailed submissions are set out in section 7 below.

2.6. Responses to the Commission's questions

32. In order to assist the Commission, Telstra sets out its responses to the Commission's questions posed in the Discussion Paper in Annexure A.

2.7. Approach to making a wholesale ADSL FAD

33. Telstra sets out its comments on the Commission's approach to the making of the FAD in Annexure C.



03 EXEMPTION FROM SAOS IN PARTICULAR GEOGRAPHIC AREAS

34. Telstra submits that the Commission should exempt Telstra and other providers of wholesale ADSL services in areas in which there is effective competition in the market for these services. The Commission has, on several occasions, expressed the view that facilities-based competition (where feasible) is preferable to resale-based competition.³
35. Based on the evidence referred to below, and in line with the Commission's preference, at a minimum, the Commission should exempt Telstra and other providers of resale ADSL services from the SAOs in 289 ESAs listed in Appendix B. Each of these ESAs are highly competitive at both the retail and wholesale levels of the ADSL market, as end users and resale-based service providers can choose ADSL services from at least four infrastructure-based providers.
36. The remainder of this section examines the following:
 - a. the growth in infrastructure-based competition in the market for ADSL services at both the retail level and wholesale level;
 - b. the market outcomes in those areas in which infrastructure-based competition is clearly effective;
 - c. the benefits that infrastructure-based competition has brought to end users (including to end users not directly exposed to competitive infrastructure-based offerings);
 - d. the superiority of infrastructure-based competition to resale-based competition; and
 - e. the risk to the LTIE if the Commission decides to regulate these already highly competitive ESAs.

3.1. Infrastructure-based competition in the market for ADSL services

37. The presence of extensive DSLAM-based infrastructure (together with mobile and fixed wireless broadband, direct fibre and HFC infrastructure) throughout much of metropolitan Australia means that there is deep, effective competition for the supply of broadband services

³ The Commission first set out its detailed views on a preference for facilities-based competition in its 2006 Position Paper on the Review of Fixed Network Services:

The key point... is that to the extent that alternative build is viable and is acting to constrain the behaviour of an incumbent operator, the need for intrusive access or retail regulation is reduced. Similarly, to the extent that quasi-facilities-based forms of entry (through ULLS) are occurring in a significant way, the need for resale forms of regulation is correspondingly lower. (p.14)

The Commission goes on to state that it:

recognises that infrastructure roll-out and competition are not likely to emerge evenly in all areas. Hence, there is a need for the regulatory framework to reflect this market dynamic. The Commission broadly agrees with Telstra's view that in the future it will no longer be appropriate to consider the need for regulation on a national basis. (p.16)

This point is particularly relevant in light of the fact that DSLAM-based competition has emerged unevenly in Australia, yet the Commission has declared the wholesale ADSL service nationally.

in these areas. Accordingly, the Commission should refrain from regulating areas where market competition is proving to be effective.

38. In more than 580 ESAs across Australia, access seekers have installed DSLAM hardware – covering more than [c-i-c commences] [c-i-c] [c-i-c ends] % of CAN SIOs. Telstra and almost two dozen other service providers have invested in DSLAMs and related infrastructure to supply differentiated, innovative offerings (including ancillary services such as IP voice service, IP TV services and video on demand) and wholesale ADSL services are supplied by a number of providers (including Telstra).
39. Telstra acknowledges that investment in DSLAM-based infrastructure by access seekers has been uneven. Access seekers have focused their investments in CBD and metropolitan areas. However, the geographic scope of access seeker investments continues to expand. For example, the construction of new NextGen networks in rural and regional areas (sponsored by Government grants) is already facilitating further competition in these areas. Telstra is aware of competitive builds which have either been completed or are underway in 16 exchanges passed by the Regional Backhaul Blackspot Program. This number could further increase in the future.
40. In any event, the scale of competitive entry and investment across CBD and metropolitan ESAs is significant. For example, the number of ESAs in which access seekers have deployed DSLAM infrastructure in Band 2 (metropolitan) ESAs has increased from [c-i-c commences] [c-i-c] [c-i-c ends] in September 2007 to [c-i-c commences] [c-i-c] [c-i-c ends] in December 2011, with the average number of DSLAM-based access seekers with a presence in these ESAs having increased from [c-i-c commences] [c-i-c] [c-i-c ends] in September 2007 to [c-i-c commences] [c-i-c] [c-i-c ends] in December 2011. [c-i-c commences] [c-i-c] [c-i-c ends].

Figure 2: [c-i-c commences] [c-i-c] [c-i-c ends]

41. Telstra and other access seekers continue to make substantial investments in DSLAMs and related ADSL infrastructure. As at the end of February 2012, access seekers had installed more than [c-i-c commences] [c-i-c] [c-i-c ends] interconnect ports in Telstra exchanges. [c-i-c commences] [c-i-c] [c-i-c ends]. Despite the introduction of the NBN, access seekers continue to install interconnect infrastructure and deepen their DSLAM presence. [c-i-c commences] [c-i-c] [c-i-c ends].
42. There are a number of potential thresholds for infrastructure-based competition that the Commission should take into account [c-i-c] when considering exempting certain ESAs from the FAD.
43. As outlined in Telstra's Declaration Submission, one potential threshold would be the Australian Competition Tribunal's (Tribunal's) threshold test for the WLR/LCS and PSTN OA exemptions, which provides a workable benchmark test as to whether a particular exchange is effectively competitive. Although the Tribunal's threshold test ignores competitive constraints arising from the presence of fixed wireless, HFC, Greenfield, CBD fibre and (most notably) mobile wireless broadband services, it nevertheless provides a robust and conservative methodology. To adapt for the differences between the WLR, LCS and PSTN OA voice resale

services and the wholesale ADSL service, Telstra proposes that the Tribunal's threshold test could be amended as follows:

- a. the test could take into account LSS lines (which were excluded in the context of examining competition and capacity with respect to voice services); and
- b. rather than evaluating the market share of access seekers against the total number of CAN lines within an ESA, comparison could be made against the sum of the total number of Telstra-supplied ADSL and unbundled (LSS and ULLS) services.⁴

44. As Telstra set out in its submission to the declaration inquiry, the impact of DSLAM-based investment in ESAs that meet this modified criteria has resulted in competitive market outcomes – with unbundled lines accounting for [c-i-c commences] c-i-c [c-i-c ends]% of ADSL services in these ESAs:

Figure 3: [c-i-c commences] c-i-c [c-i-c ends]

45. [c-i-c commences] c-i-c [c-i-c ends].

46. In the Exemptions Final Decision, the Commission expressed the view that it was necessary to look not only at market outcomes at the retail layer, but also at the wholesale layer. Telstra does not agree that it is necessary for there to be an active competitive market for resale services in order to constrain Telstra (due to the competitive constraint provided by the threat of entry by infrastructure-based access seekers, coupled with the constraints imposed via self-supply of services). Nevertheless, it is clear that there is an active, highly competitive market for resale ADSL services throughout metropolitan Australia.⁵

47. If the Commission remains concerned that effective competition at the wholesale layer requires the active presence of major alternative resale ADSL suppliers (in addition to Telstra), then the Commission could exempt from the SAOs *only those ESAs in which there is active competition in the market for resale ADSL services*. If such a limitation were adopted, the declaration would apply to all ESAs save for those in which Telstra wholesale (and other ADSL resale providers) face direct competition from alternative resale ADSL providers, in addition to competition from access seekers self-supplying using the ULLS and LSS.

⁴ The Tribunal's threshold test only examined those retail and wholesale services it considered directly relevant to assessing whether or not an ESA could be construed as "effectively competitive" in the context of WLR, LCS and PSTN OA. Specifically, it examined data on the total number of basic access services within an ESA, the number of WLR services and the number of ULLS acquirers. However, in order to undertake a similar analysis for wholesale ADSL services, Telstra adapted the Tribunal's approach. The modified threshold is an ESA where there are:

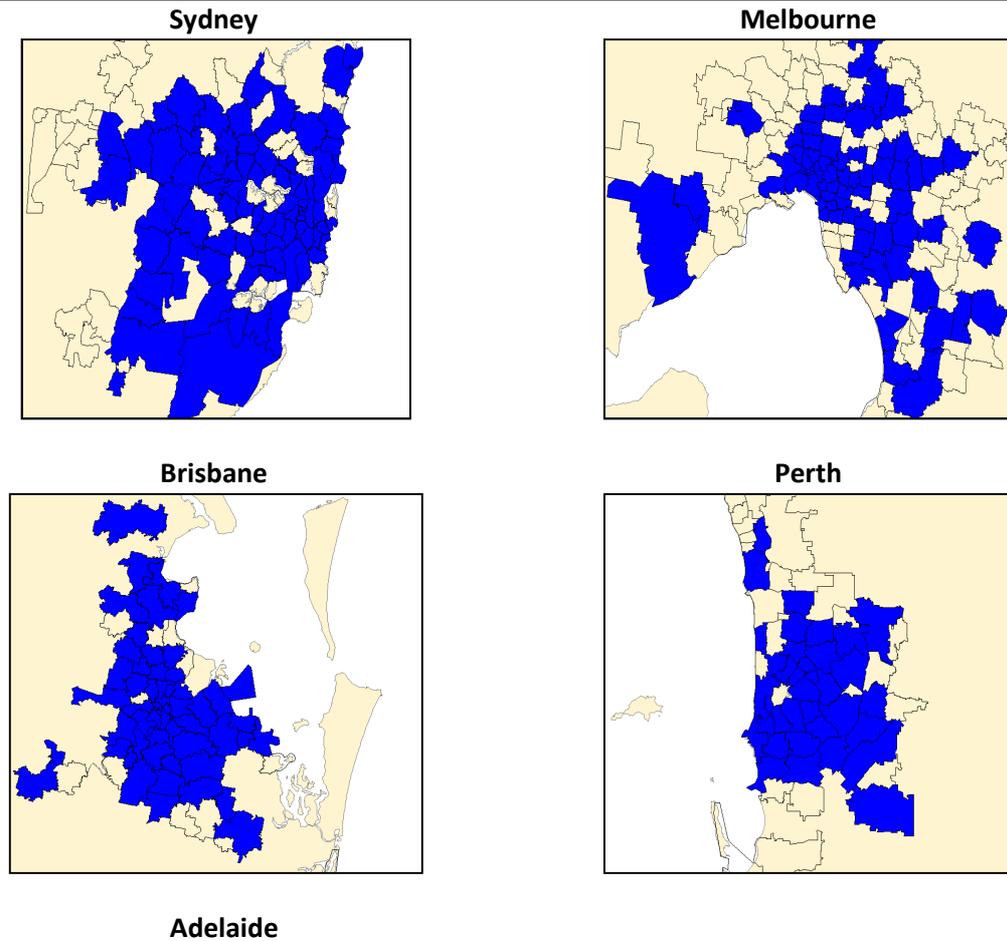
- (1) Three or more ULLS or LSS –based competitors
- (2) An Aggregate Market Share equal to or greater than 30%; and
- (3) ULLS/LSS Spare capacity equal to or greater than 40% of wholesale ADSL SIOs in that ESA.

Where, *Aggregate Market Share* is calculated as the sum of ULLS SIOs, LSS SIOs, wholesale ADSL SIOs and ULLS/LSS Spare Capacity, divided by the Total number of ADSL SIOs in that ESA, and *ULLS/LSS Spare Capacity* is calculated by reference to Tribunal's deeming rule (75% of ULLS and LSS SIOs).

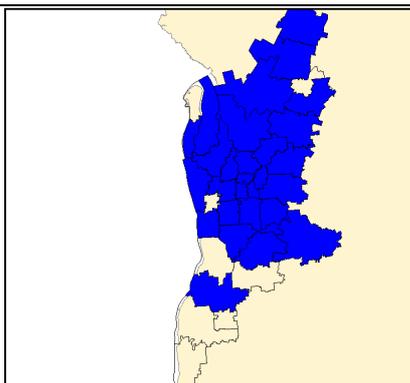
⁵ As the Commission noted in its Final Decision, "There are a number of carriers, including Telstra, Optus and AAPT, which currently offer wholesale DSL services." (See p. 38 of the Final Decision)

48. There are 289 ESAs in which the three largest ADSL competitors to Telstra – Optus, iiNet and TPG – have installed DSLAM-based infrastructure (among others). Each of these offers resale ADSL services.⁶ The following diagrams show that these highly competitive ESAs constitute a clear majority of ESAs in Australia's major metropolitan centres:

Figure 4: ESAs in which there at least 3 DSLAM-based resale DSL providers present (plus Telstra), by capital city



⁶ Optus (see <http://www.optus.com.au/portal/site/wholesale>), TPG (which offers resale services through its Soul brand) (see <http://soulastralia.com.au/wholesale/internet.html>) and iiNet (which provides wholesale ADSL and other services in partnership with AAPT) (see <http://www.aapt.com.au/wholesale>).



3.2. Infrastructure-based competition is delivering effective competition

49. ADSL services offered over unbundled CAN lines (that is, services based on ULLS and LSS) are the primary competitive alternatives to Telstra supplied ADSL services.
50. Taking the market as a whole, as at December 2011, Telstra's national market share of ADSL broadband service at retail was [c-i-c commences] [c-i-c] [c-i-c ends]%. This has remained largely unchanged since September 2007. At the wholesale layer, Telstra's wholesale ADSL services account for [c-i-c commences] [c-i-c] [c-i-c ends]% of all non-Telstra retail broadband lines (or [c-i-c commences] [c-i-c] [c-i-c ends]% of all broadband lines), with unbundled lines accounting for [c-i-c commences] [c-i-c] [c-i-c ends]% of all broadband lines. These figures suggest unbundled lines provide a significant constraint to any potential for Telstra to misuse any perceived market power in relation to wholesale ADSL services.
51. However, the national figures understate the healthy competition between Telstra supplied services and ADSL services offered over unbundled CAN lines. The examination of shares in Band 1 and Band 2, when compared to the market as a whole, clearly shows market outcomes that are more competitive where DSLAM-based investment is occurring. The Commission should not regulate the areas in which infrastructure investment (such as DSLAMs, mobile wireless networks and HFC networks) has been greatest as that investment has resulted in effective competition at both the wholesale and retail layers of the ADSL market.
52. At a minimum, the Commission should exempt wholesale ADSL services from the SAOs within the 289 ESAs set out in Annexure B. Within these 289 ESAs (which provide more than [c-i-c commences] [c-i-c] [c-i-c ends] ADSL services to end users – or [c-i-c commences] [c-i-c] [c-i-c ends]% of all ADSL services supplied over the CAN), the impact of unbundled CAN lines, has had the clearest impact on the relative shares of broadband lines. The significant degree of competition faced at both the retail and wholesale layers of the ADSL market in these ESAs is clearly reflected in the changing market shares (as shown below):

Figure 5: [c-i-c commences] [c-i-c] [c-i-c ends]

53. [c-i-c commences] [c-i-c] [c-i-c ends].
54. As noted above, Telstra is only one of (at least) four suppliers of competitive wholesale ADSL services in the 289 ESAs. Telstra submits that it is not necessary for there to be regulation of

resale services due to the competitive constraint provided by the threat of entry by infrastructure-based access seekers, coupled with the constraints imposed via self-supply of services.

3.3. Infrastructure-based competition continues to bring real benefits to all end-users

55. Benefits to end users as a result of infrastructure-based competition include lower end user prices, a significant increase in included value (both in terms of download quotas and connectivity speeds), considerable growth in the variety of differentiated service offerings and value added features, as well as a significant rebalancing in market shares. As noted above, at the wholesale layer, Telstra competes with a growing number of alternative suppliers of resale ADSL services (including Optus, iiNet/AAPT, Soul/TPG, NEC and Amcom) as well as competing with the self-supply of resale services by ULLS-based access seekers.
56. Greater infrastructure-based competition (from DSLAMs, mobile-wireless and HFC networks) has resulted in significant changes in the prices paid by end users for ADSL services, and the relative value of services available in the market. In recent years, the number of players offering voice and voice bundled services through the ULLS has increased, with TPG, iiNet, and Internode entering the market since September 2007.
57. This influx of new competitors offering fixed line voice and bundled services has enabled end-users to have the benefit of more differentiated offers, including Triple Play plans (being bundled plans offering calls, broadband and IP television).
58. The value offered at particular price points has increased significantly. As an example, Telstra's retail customers can today purchase a \$59.95 ADSL2+ and broadband plan with 50GB of included data quota. This is more than 80 times the quota available on the same priced plan in September 2007 (which at that time offered only 1.5Mbps download speeds). More generally, Telstra has responded to competition by offering greater value and reducing access charges across its ADSL plans.
59. [c-i-c commences] [c-i-c] [c-i-c ends]

Figure 6: [c-i-c commences] [c-i-c] [c-i-c ends]

60. Importantly, although infrastructure-based competition is largely focused in metropolitan areas, end users in regional and rural areas also benefit because Telstra typically markets its offers on a national basis. Thus, when Telstra responds to competitor offers (which apply in metropolitan areas), end users in regional and rural areas can also gain access to offers with lower prices and/or higher included value.
61. Telstra further submits that the market for ADSL services is also affected by the significant growth in mobile wireless broadband services and the availability of fixed line broadband services on alternative networks (such as HFC networks). Mobile wireless broadband services are increasingly being used in addition, and in some instances as a substitute, to traditional fixed line broadband services.

3.4. The benefits of infrastructure-based competition cannot be replicated by resale competition in the ADSL context

62. As noted above, infrastructure-based competition has not only driven competitive outcomes in the retail (and wholesale) markets for ADSL services – but has also enabled greater competition in ancillary markets. In this respect, infrastructure-based competition differs from, and is superior to, resale-based competition. Infrastructure-based competition (specifically DSLAM-based competition) allows access seekers to directly control the technical specifications (and input costs) of their backhaul, core and broadband access networks. Greater control enables access seekers to provide more competitive, customised offerings and has enabled access seekers to innovate in the ADSL market (with ADSL2+ and Annex-M offerings all being delivered first to market by providers using unbundled services) at the retail and wholesale layer.
63. In addition to a greater range of competitive offerings (and more intense competition) in the market for ADSL services, investments in DSLAM-based infrastructure have enabled innovative offerings from DSLAM-based competitors in ancillary services, including in the voice and IPTV markets.
64. Critically, the inherent technical limitations of resale services do not enable these differentiated and innovative services to be offered by service providers. Therefore resale-based competition cannot provide the same competitive pressure in either the market for retail and wholesale ADSL services or in the markets for voice and IPTV services as can infrastructure-based competition.
65. The Commission must be mindful of setting FAD terms that could bias access seekers to favour resale services over continued, otherwise efficient, investment in DSLAM-based services – as reduced investment in these offerings will not only negatively impact competition (and end users benefits) in the market for ADSL services – but also the market for ancillary services.

3.5. Significant risk to the LTIE if the Commission intervenes in effectively competitive markets

66. Given the evidence described above, Telstra submits there is significant infrastructure based competition in the 289 ESAs and that in these ESAs there is effective competition in market for wholesale ADSL services (and retail ADSL services). Accordingly - and as a minimum – the Commission should exempt these areas from the FAD. Alternatively, if the Commission considers that it cannot make exemptions in areas in which there is effective infrastructure-based competition, it should not risk setting a regulated price in these competitive areas.
67. If the Commission were to set a regulated access price in these ESAs (or in any areas in which there is effective competition) there is a significant risk that it will be to the detriment of the LTIE. Implementing regulated prices in areas where several service providers have made considerable investments (and continue to make these investments) in order to compete in a highly competitive market for wholesale and retail ADSL services is likely reduce investment incentives and anchor a diverse and dynamic set of service offerings to the price and features of the regulated service.



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68. The risks of reducing investment incentives by unnecessarily regulating access prices in a competitive market was highlighted by TPG in its submission on the declaration of the wholesale ADSL service. TPG noted:

In some instances, competition is not promoted by declaration. As an example, the recent decision by the ACCC to remove the exemption on certain exchange areas has had the result that TPG's investment in voice infrastructure in those areas will yield less benefit to TPG than had those exemptions remained. As a result, the business case for increasing that voice infrastructure has become more difficult to justify.

69. TPG goes on to note that in regional areas this is unlikely to be a problem, as in TPG's opinion, in regional areas TPG is unlikely to install DSLAM infrastructure. However, in competitive metropolitan ESAs (such as the 289 ESAs), TPG's concerns serve as a stark warning to the Commission. Unnecessary intervention and regulation will reduce investment incentives and can reduce the overall business case for competitive alternatives to Telstra's services – clearly to the detriment of the LTIE.

3.6. Commission's approach to exemptions

70. In determining whether or not to exempt some geographic areas from the SAOs, the Commission should consider the following. First, the Commission has power to exempt certain areas from the SAOs so long as the exemptions are consistent with the statutory criteria in section 152BCA.
71. Neither this section nor any other section of the CCA prescribes the markets which must be tested against these criteria. Accordingly, if the Commission is satisfied that the proposed exemptions would promote the LTIE (by causing lower prices, improved service quality and/or greater choice for consumers) and would be consistent with the other criteria by reference to the retail ADSL market, it would be unnecessary for the Commission to examine, for example, the wholesale market in isolation and satisfy itself that that market is independently consistent with the criteria.
72. Second, the Commission must consider whether, if certain conditions or limitations (in respect of the application of the exemptions) were imposed, the exemptions would continue to promote the LTIE and be consistent with the other criteria. In *Telstra Corporation Limited v Australian Competition Tribunal*,⁷ the Full Court of the Federal Court of Australia considered the Commission's power to impose conditions and limitations under the old s 152AT(5) of the Trade Practices Act 1974. The Full Court concluded that:

"The purpose of s 152AT(5) is to give the ACCC a tool to fashion the appropriate conditions and limitations when it thinks that the application by the carrier or carriage service provider for an order exempting that carrier or carriage service provider ought to be made. The purpose of s 152AT(5) is to allow the ACCC to fashion appropriate conditions and limitations which would go towards promoting the LTIE.

⁷ [2009] FCAFC 23.

In our opinion, it cannot be said that there is some threshold that must be reached by the applicant before the question of conditions or limitations arises... What the ACCC must do on an application is to consider whether it should make an order of the kind in s 152AT(4) and, in doing so, must at all times keep in mind whether the order could be made if appropriate conditions and limitations were imposed.

Section 152AT(5) provides a valuable tool in the hands of a regulator which can be used to ensure that the regulator can be satisfied that an order will promote the LTIE."

73. The analysis under sections 152BC and 152BCA should be the same. Accordingly, the Commission must "at all times keep in mind" whether the exemptions, if "appropriate conditions and limitations" to address any identified barriers to entry were imposed, would be consistent with the statutory criteria.
74. If the Commission is concerned that exempting, at a minimum, the highly competitive 289 ESAs set out in Annexure B, is not consistent with the statutory criteria, the Commission should set out the reasons for its concerns. In doing so, the Commission will give Telstra and others an opportunity to propose appropriate conditions and limitations which may address the Commission's concerns and enable exemptions to be made.

04 APPLICABILITY OF FAD TO OTHER ACCESS PROVIDERS

75. The Commission has asked whether the SAOs should apply to operators of non-dominant networks. This follows an approach taken in the IAD to exempt all other access providers from the SAOs, other than Telstra. Telstra considers that, to the extent that the SAOs apply to wholesale ADSL in particular geographic areas, they should apply to all access providers.
76. In that regard, in order for the Commission to exempt an access provider from the SAOs in the FAD, the Commission must take into account the matters set out in s 152BCA of the CCA and be satisfied that exempting that access provider would, among other things, promote the LTIE. In short, the Commission must undertake the same assessment that it undertook in its inquiry into varying exemptions in the FADs for the WLR, LCS and PSTN OA.⁸ To date, the Commission has not undertaken such an assessment. Rather, the Commission exempted all other access providers from the SAOs in the IAD on the bases that:
- Telstra is the dominant access provider of wholesale ADSL services with a ADSL network that significantly exceeds the reach of all other suppliers of wholesale ADSL; and
 - it is only Telstra's access terms that have given rise to competition concerns in regard to the wholesale ADSL service.⁹
77. Telstra submits that neither of these bases is relevant to the assessment that the Commission should undertake. In any event, neither is a sufficient basis on which to exempt other access providers from the SAOs.

⁸ Commission, *Inquiry into varying the final access determinations for the WLR, LCS and PSTN OA services, Final Report, Public Version*, December 2011, p 6.

⁹ Commission, Discussion Paper, p 12.

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78. First, the Commission's finding that Telstra's ADSL network significantly exceeds that of other providers may be true on a national level – but it ignores the fact that in metropolitan areas several providers operate networks of a comparable size to Telstra. In section 5 of its submissions, Telstra showed that the market for ADSL is highly competitive at both the retail and wholesale layers – driven by access seekers' investments in DSLAM-based infrastructure. In areas in which access seekers have installed DSLAM-based infrastructure the market for ADSL services exhibits quite different characteristics and outcomes, compared to areas in which access seekers have chosen to not install competitive infrastructure. As noted above there are 289 ESAs in which Optus, iiNet and TPG (as well as Telstra) have all installed DSLAM infrastructure and offer both retail *and resale* ADSL services. Within these 289 ESAs access seekers can choose to acquire wholesale ADSL services from at least four providers. [c-i-c commences] [c-i-c] [c-ic ends]. In light of the above, there is no reason why the SAOs should not apply to those access providers. Second, it is irrelevant that the Commission has not received complaints from acquirers in respect of other access providers' terms and conditions of access.
79. Further, Telstra submits that if the assessment of the criteria to which the Commission must have regard in determining whether or not to exempt other access providers from the SAOs is undertaken, it shows that exempting all other access providers from the SAOs would not promote the LTIE or be consistent with the other statutory criteria. That is because access seekers who acquire wholesale ADSL services from access providers other than Telstra would be unlikely to be able to access the terms and conditions of the FAD. That is because those access providers would only be incented to offer the terms and conditions of the FAD if faced with a real risk of migration of their access seekers to Telstra. However, the costs associated with migration (such as changes to billing systems so that they are compatible with Telstra's, as well as any 'downtime' for those access seekers' end-users during the migration) may exceed the price advantage of the FAD. In such circumstances, those access providers are not faced with a real risk of migration. There is no reason why the terms and conditions of the FAD should not be available to those access seekers, if they are in their interests.
80. Finally, Telstra submits that if the Commission exempts all other access providers than Telstra from the SAOs, it would be inconsistent with the Commission's approach to the exemptions for WLR, LCS and PSTN OA services, in which it removed not only Telstra's individual exemption but also the ordinary class exemptions for those services. The Commission should be consistent in its approach.
81. Accordingly, the Commission should not exempt other access providers from the SAOs.

05 PRICE

5.1. Charges to be included in FAD

82. Telstra considers that the proposed FAD should only apply to connection, port, AGVC and early termination charges. Whilst these charges do not cover the full range of charges levied, the remaining charges tend to be once off charges for changes to the service, or charges to encourage appropriate behaviour by wholesale customers (for example, for incorrect call out fees, incorrect fault reports etc).
83. Telstra submits that the FAD should expressly state that the prices set out do not include any amount which Telstra may levy in order to recover tax paid by Telstra or any tax, duty, levy, charge or impost in relation to Telstra's infrastructure or facility paid by Telstra. This is to ensure that the FAD makes clear that the prices do not include GST, infrastructure tax or carbon tax which may be recovered in addition to the prices set.

5.2. Charges should be based on RMRC

84. As noted in Telstra's submissions to the Commission in relation to whether wholesale ADSL should be declared, the most effective pricing methodology, in the context of highly competitive metropolitan areas and nationally consistent retail pricing, is the RMRC approach set out in Telstra's SSU. As the retail ADSL service is experiencing large growth both in terms of the number of services and the growing demand for downloads by each end user, a RMRC based price, appropriately set, provides the correct incentives for investment to occur, while allowing access seekers a fair rate of return on their own investments.
85. Whilst Telstra agrees with the Commission's adoption of RMRC for the pricing of ADSL, the Commission has made a number of ad hoc changes to Telstra's RMRC calculation (provided to the Commission on 5 September 2011) which undermines its use of that methodology. These changes include:
- a. The Commission has reduced the average retail price of ADSL2+ by \$3 per month to "make an allowance for short term offers, and billing level discounts and rebates, that Telstra offers from time to time, as short term offers and not all discounts and rebates would be reflected in the Telstra price model".¹⁰ However, Telstra has already advised the Commission that the average retail price for ADSL2+ in its pricing model reflected all offers and discounts available at the time. When Telstra updated the data to take account of recent changes, the average revenue increased marginally rather than decreased.
 - b. The Commission appears to have made several assumptions in setting the prices. First, the Commission has assumed that Telstra wholesale ADSL services earn on average [c-i-c commences] [c-i-c] [c-i-c ends] per month from every SIO on other miscellaneous charges

¹⁰ ACCC (2012), *Interim Access Determination for the Wholesale ADSL Service: Statement of Reasons*, February 2012, p. 11.

(such as reversals, changes to service configuration, incorrect fault reporting etc). Telstra is unaware of the basis on which this assumption has been made. The correct amount, based on yield, is [c-i-c commences] c-i-c [c-i-c ends].

- c. Further, the Commission's methodology is to apply an average connection charge (amortised over 18 months) to every SIO regardless of when the SIO was connected. The Commission's approach overstates the retail and wholesale connection charges. Telstra submits that the more accurate application of the RMRC framework would be the actual retail and wholesale revenues earned from connection divided by the total number of SIOs supplied. This has the overall effect of reducing the retail and wholesale connections charge and increasing the monthly charge by only [c-i-c commences] c-i-c [c-i-c ends] per SIO per month.

5.3. Ongoing investment requirements in ADSL networks

86. There are differences in the demand profiles for the CAN (i.e. basic access services) and ADSL services. The demand for CAN services (and thus its investment profile) is relatively stable whereas the demand for ADSL services is increasing both in terms of the number of services and the growing demand for downloads by each end user.
87. Greater take-up and use of ADSL services (driven by greater competition) has greatly increased the utilisation of Telstra's ADSL network. In regional areas in particular, Telstra increasingly faces capacity constraints across its ADSL network. If the Commission is minded to set prices in the FAD, the Commission needs to consider the impact that setting lower prices for wholesale ADSL services will have on Telstra's incentives to invest further in its ADSL network.
88. Where Telstra faces capacity constraints, it is because of the culmination of a number of interrelated factors:
 - a. DSLAM-based competition in the market for ADSL and related services has resulted in changes to market shares, lower end user prices and increased value in ADSL plans, and the introduction of new and innovative service offerings (such as IPTV), which have benefited end users.
 - b. Although access seekers have principally focused their investments in CBD and metropolitan areas (such as the 289 ESAs identified in Annexure B), the benefits to end users set out above have been felt nationally. This is principally because Telstra has maintained a consistent policy of setting retail prices at a national level. In responding to greater competition from DSLAM-based competitors in the CBD and metropolitan areas, Telstra has lowered retail prices and increased the included value in its plans nationally.
 - c. Greater competition in the retail market has resulted in greater take-up of ADSL services. At the same time, competition (and demand from end users) has required all service providers to lower their prices (or include substantially greater value at a particular price point).

d. The greater demands being placed on the ADSL network have resulted in many areas suffering from congestion, or being likely to suffer from congestion in the near future.

89. To address congestion issues, Telstra reviews its investment options on an ongoing basis. In doing so, Telstra must make choices in the allocation of scarce investment capital among its fixed line and mobile networks in both metropolitan and regional areas.
90. Telstra faces an increasing need to invest in ADSL network capacity, and at the same time faces declining returns on ADSL investments in many areas. In areas in which the economics of expanding capacity are less favourable (due to higher upgrade costs, or lower anticipated incremental revenues), Telstra's potential return on investment is already low and continues to decline due to the flow-on impacts of DSLAM-based competition.
91. Given the competing demands faced by Telstra for scarce investment capital, further reductions in Telstra's returns to ADSL will only exacerbate this issue.

5.4. Balance of charges

92. Telstra submits that the balance of charges between connection, access and usage as it currently stands should remain.

5.5. Zone structure of charges

93. Telstra supports the use of the zones for pricing of wholesale ADSL. Further, Telstra submits that wholesale ADSL prices in zone 1 should be lower than in zones 2 and 3, as, broadly speaking, services in zones 2 and 3 are more expensive to supply than they are in zone 1. For example, transmission distances tend to be longer and scale smaller in zones 2 and 3.

5.6. Price discrimination

94. The Commission raises three possible price discrimination scenarios; first based on whether the wholesale customer is a builder or reseller; second whether the customer acts efficiently in acquiring the service; or third whether the same service provider is supplying a fixed voice service on the ADSL line.
95. Telstra submits that price discrimination is generally welfare enhancing. Telstra's wholesale customers sell to different types of end users with different characteristics of usage and different strategies focused on delivering different types of services. These differences typically mean that wholesale customers require different wholesale price structures to suit their respective business models. Prior to wholesale ADSL being declared, bilateral negotiations between wholesale customers and Telstra had resulted in many different price structures and price points. For instance, some wholesale customers negotiated low port

charges and high AGVC/VLAN charges whereas others negotiated high port charges and low AGVC/VLAN charges.¹¹

96. The Commission's concern is that price discrimination has led to an anti-competitive situation whereby wholesale customers that had built ULLS and/or LSS networks, faced higher wholesale ADSL prices than wholesale customers that had not. Telstra has previously provided evidence that demonstrates that there is no statistically significant difference between the wholesale ADSL prices paid by wholesale customers that have ULLS and/or LSS networks and those that do not, even though different bilateral negotiations have resulted in different price structures and price points.¹² Furthermore, even if a difference did exist, the Commission should not ban all forms of price discrimination. Such an approach risks creating welfare losses (by eliminating beneficial price discrimination) that exceed the potential welfare gains (such as price discrimination that promotes welfare by raising output).

¹¹ Telstra refers to and relies upon Telstra's Declaration Submission, pp 14-16.

¹² Telstra refers to and relies upon the expert report of Dr Paul Paterson entitled [c-i-c commences] [c-i-c] [c-i-c ends] dated January 2012 (Annexure C to Telstra's Declaration Submission).

06 NON-PRICE TERMS AND CONDITIONS

6.1. Requirement for active PSTN voice service

97. The Commission acknowledges that Telstra requires an underlying PSTN service on the line before it will supply retail or wholesale ADSL services, which precludes the provision of “naked” ADSL services.¹³
98. Telstra submits that the FAD should include a requirement for an underlying PSTN service on the line before ADSL services are supplied, thus clarifying that Telstra is not required to offer wholesale naked ADSL services.
99. First, as the Commission is aware, Telstra does not offer naked ADSL services at a retail level. Thus, the FAD should not require Telstra to offer a service at a wholesale level which it does not offer at retail. Such a requirement goes beyond – and is inconsistent with – the principle of equivalence in the SAOs. In that regard, s 152AR(3)(b) of the CCA requires the access provider to take all reasonable steps to ensure that the technical and operational quality of the declared service supplied to the access seeker is equivalent to that which the access provider provides to itself. The principle of equivalence does not require the access provider to supply a service to the access seeker which it does not supply to itself. Accordingly, the Commission is restricted – pursuant to s 152BCB(3) of the CCA – from making a FAD which would have such an effect.
100. Second, as the Commission notes, offering a wholesale naked ADSL service will require network and systems changes. Even if the Commission was not restricted from making a FAD which would require Telstra to offer wholesale naked ADSL services, the productisation and systems costs involved in doing so are likely to be substantial. In order for Telstra to recover these costs, they would have to be recovered in the charge for the wholesale naked ADSL service.
101. Third, requiring Telstra to offer a wholesale naked ADSL service would likely have broader implications, such as for the manner in which Telstra recovers its line costs from its overall charges. In order for Telstra to recover these line costs, they would also have to be recovered in the charge for the wholesale naked ADSL service.
102. Fourth, end-users benefit from a requirement for an underlying PSTN service on the line before ADSL services are supplied. By requiring an underlying PSTN service on the line, Telstra is able to provide a better quality of service. This includes the provision of better fault detection through the use of direct current (**DC**) testing facilities provided through the local access switch. DC testing provides the most reliable method of detecting line faults from the exchange. Further, requiring an underlying PSTN service on the line reduces corrosion in joints as a direct result of the wetting current. Less corrosion in joints results in fewer assurance calls and better service performance. These benefits are not available if the requirement for an underlying PSTN service on the line is removed.

¹³ Commission, Discussion Paper, p 11.

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103. Accordingly, the FAD should include, for clarity, a requirement for an underlying PSTN service on the line before an ADSL service is supplied.

6.2. Supplying wholesale ADSL to resellers

104. The Commission is concerned that commercial offers of access to the wholesale ADSL service have sought to restrict or impede resupply of the wholesale ADSL service to a reseller.¹⁴ Accordingly, the Commission included Schedule 10 in the IAD, which provides that access seekers can acquire wholesale ADSL services in order to supply those services to a reseller, and that access seekers are not required to notify or obtain Telstra's consent if they do so.
105. Telstra submits that the Commission should not include similar terms in the FAD, for the following reasons.
106. First, it is important that resellers are subject to Telstra's terms and conditions of access to ensure Telstra's network and the supply of its wholesale ADSL service are not compromised in any way and, if they are compromised, that remedial action is promptly taken. In that regard, resellers could have – and have had – significant impacts on Telstra's network and the supply of services. To the extent that such "reseller" clauses were included in Telstra's commercial agreements, it was for the purpose of ensuring that resellers were subject to Telstra's terms and conditions of access, and not for the purpose of impeding or restricting resale of Telstra's wholesale ADSL service.
107. Second, in Telstra's commercial negotiations with access seekers, Telstra is not preventing access seekers from reselling its wholesale ADSL service. Rather, it has negotiated with access seekers to ensure that the access seeker will procure compliance by the reseller with Telstra's terms and conditions.
108. In light of the above, Telstra considers that it is unnecessary to include terms similar to those in Schedule 10 of the IAD, in the FAD.

6.3. Points of interconnection of the wholesale ADSL service

109. The Commission has asked whether or not default points of interconnection should be specified, and if so, what points of interconnect should be nominated. The Commission notes that the FAD could potentially nominate that points of interconnection are to be associated with a specific class of Telstra exchange, such as an exchange in the relevant CBD – which is the point of interconnect that Telstra currently offers – and/or associated with the exchange closest to the end-user or an intermediate exchange.
110. Telstra considers that the FAD should not specify points of interconnection different to those that are already defined in the service description for the wholesale ADSL service:

¹⁴ Commission, Discussion Paper, p 11.

A point of interconnection means an interface that is:

- (a) *A physical point of interconnection which allows the interconnection of facilities in accordance with subsection 152AR(5) of the Competition and Consumer Act 2010; and*
- (b) *Located in the same state/territory that the access provider associates with the exchange service area in which the end-user network boundary is located.*

111. There is no simple – or inexpensive – technical solution for Telstra to implement such changes if they were to be included in the FAD. As noted above, Telstra's existing points of interconnection are in CBDs (for both retail and wholesale ADSL services). If different points of interconnection were specified, a technical solution would need to be implemented such that the wholesale ADSL service would have to be aggregated back to the existing CBD point of interconnect and then sent back out again to the new point of interconnection. Such a solution would place a greater (and inefficient) strain on Telstra's core network. In addition, such a solution could require Telstra to significantly invest to augment capacity in its network and require the provision of associated space and capacity at the new point of interconnect. Further, such a solution would degrade the level of service being provided to the end user by increasing latency.
112. The costs involved in implementing such a solution are likely to be significant and in that regard, the Commission is restricted – pursuant to s 152BCB(1)(f) of the CCA - from making a FAD which would require Telstra to bear an unreasonable amount of the costs of extending/enhancing the capability of a facility or maintaining extensions to or enhancements of the capability of a facility. Therefore, those costs would have to be recovered in the charge for the wholesale ADSL service.

6.4. Business grade service schedule

113. The Commission has asked for views as to whether or not the FAD should incorporate non-price terms and conditions of access regarding the supply of business grade services. The Commission notes that such terms and conditions might include business grade service assurance, after hours provisioning or other operational support that could be required to provide downstream services to business end-users.
114. Telstra considers that such non-price terms and conditions should not be included in the FAD because it goes beyond the scope of the declared service.
115. In that regard, the Commission amended the service description in the declaration inquiry so that it was clear that the wholesale ADSL service is "an internet grade, best efforts...service" as opposed to a business grade service. Accordingly, a business grade service is beyond the scope of the service description for the wholesale ADSL service and, pursuant to s 152BC(1) of the CCA, is beyond the scope of an access determination (which must relate to a declared service).

116. In any event, Telstra already provides business grade wholesale services, which already include the types of non-price terms and conditions to which the Commission refers.¹⁵

6.5. Other commercial terms

117. The Commission proposes to include the following “standard” or “generic” commercial terms in the FAD, from the Commission’s 2008 Model Terms:

- a. Billing and notification;
- b. Creditworthiness and security;
- c. General dispute resolution procedures;
- d. Confidentiality provisions;
- e. Communication with end-users; and
- f. Suspension and termination.

6.5.1. The Commission should not incorporate “standard” non-price terms in the FAD

118. The more generic commercial concepts in the above terms have, historically, not been a matter for dispute between the parties. Accordingly, it is reasonable to assume that the subject matter covered by the 2008 Model Terms are well settled between the parties and that the parties do not have any issues with the equivalent provisions of their commercial agreements. Thus, it is unnecessary to include these terms in the FAD.

119. If, despite Telstra’s submissions, the Commission is minded to incorporate “standard” non-price terms in the FAD, those non-price terms should be consistent with similar non-price terms included in the draft DTCS FAD and the MTAS FAD, rather than the Commission’s 2008 Model Terms. That is because the non-price terms developed in the context of FADs for other services to date have been the subject of detailed consideration by Telstra and access seekers. They also incorporate a number of amendments proposed by parties in order to align more closely with commercial practice and to ensure that the non-price terms are clear, balanced and reasonable.

120. In addition, the Commission should not incorporate the above 2008 Model Terms into the FAD, given their nature. The 2008 Model Terms are non-binding and, as previously acknowledged by the Commission, were intended to *“assist parties to reach commercial agreement on the terms and conditions of access, or to submit access undertakings, thus providing more timely access for Access Seekers’ to core fixed line network services”*.¹⁶

121. The 2008 Model Terms are a useful starting point for parties when entering into commercial agreements for the supply of services. However, their non-binding nature reflects that they were not intended - and are not appropriate - to be applicable to all Access Seekers and all Access

¹⁵ See for example Wholesale Business DSL <http://www.telstrawholesale.com.au/products/data-broadband/wholesale-business-dsl/index.htm> or Business Data Access <http://www.telstrawholesale.com.au/products/data-broadband/business-data-access-solution/index.htm>.

¹⁶ Commission, *Final Determination - Model Non-price Terms and Conditions*, November 2008, p 3.

Providers in all circumstances. The fact that the 2008 Model Terms have largely not been adopted by the industry since their publication reflects this.

122. The FAD, on the other hand, is intended to be a binding set of terms applicable to the Access Provider and the Access Seeker where they are unable to agree on a set of commercial terms. This will be the case regardless of how inappropriate or unsuitable the terms may be. In this regard, a breach of the FAD, in addition to enlivening any remedies available to the parties at law for breach of contract, constitutes a breach of a carrier licence condition and a service provider rule, which could result in pecuniary penalties of up to \$10 million for each contravention.
123. Given the different nature of the 2008 Model Terms and the FAD, industry consultation on the 2008 Model Terms does not mean that they should be incorporated into the FAD. This is because the parties may not have raised issues and/or concerns, given the clear understanding that the 2008 Model Terms were only a non-binding starting point for contractual negotiations.
124. Telstra agrees that the other “standard” non-price terms referred to in the Discussion Paper should not be included in the FAD.

6.5.2. The “standard” non-price terms should be clear, balanced and reasonable

125. Telstra intends to comment substantively on non-price terms, if any, following the Commission issuing a draft final access determination. However, Telstra makes the following preliminary comments in order to assist the Commission.
126. In light of the severe consequences for Access Providers and Access Seekers if they breach the FAD, and in order to avoid unnecessary disputes regarding the interpretation of various terms of the FAD, the FAD (like the draft DTCS FAD and the MTAS FAD) should be clear.
127. The FAD must be carefully drafted to ensure that it also strikes an appropriate balance between two competing considerations. On the one hand, the FAD must contribute to an effective regime for infrastructure sharing that will facilitate competition in the telecommunications market. On the other hand, the FAD must avoid placing undue, onerous or unnecessary costs and burdens on market participants who would otherwise invest in infrastructure, so that infrastructure can continue to be developed and shared between market participants. If the scale is tipped in favour of economic disincentives on Access Providers, then instead of investing in infrastructure that may be shared, Access Providers are likely to invest in other areas.
128. Further, the FAD should be balanced in its application to Access Providers and Access Seekers.
129. The FAD should also be reasonable in its impact on both Access Providers and Access Seekers. The FAD should not impose on Access Providers unduly onerous obligations which have little or no benefit for Access Seekers.

07 COMMENCEMENT AND EXPIRY DATE

7.1. Commencement date

130. The Commission proposes that the FAD should commence upon its publication in final form.¹⁷

131. Telstra does not consider it appropriate for the FAD to apply on and from the date of publication. That is because Telstra will need sufficient time to implement the various price and non-price terms (if the Commission is minded, despite Telstra's submissions, to include non-price terms in the FAD). Accordingly, Telstra submits that the FAD should commence 21 days after the date on which it is published by the Commission.

7.2. Expiry date

132. The Commission states that in specifying an expiry date, it must have regard to the principle that the expiry date should be the same as the expiry of the declaration for the wholesale ADSL service, being 14 February 2017.

133. Telstra considers that the circumstances in respect of wholesale ADSL service warrant a difference in the expiry dates of the FAD and the declaration. An earlier expiry date would provide an opportunity for the Commission and industry to assess whether or not the terms of the FAD continue to be appropriate given the continued roll out of the NBN. An expiry date of 31 July 2014 balances the need for sufficient certainty for the industry as well as flexibility to reassess the terms of the FAD in light of the continued roll out of the NBN. In addition, an expiry date of 31 July 2014 aligns with the expiry date of the FADs for the fixed line services. Telstra considers that, if the Commission intends to reassess the pricing methodology and thus price terms for the fixed services, it should also do so for the wholesale ADSL service on a holistic basis. Alignment of the expiry dates for the FADs for these services would enable such a holistic reassessment.

134. Thus, Telstra submits that an earlier expiry date of 31 July 2014 is warranted in the circumstances.

¹⁷ Commission, Discussion Paper, p 13.

08 ANNEXURE A – RESPONSES TO QUESTIONS

This Annexure contains Telstra’s responses to the questions posed in the Commission’s Discussion Paper.

No	Question	Telstra’s Response
1	How do you consider that the mandatory criteria should be interpreted for the purpose of making this FAD?	Telstra refers the Commission to section Annexure C of Telstra’s submission. Telstra intends to respond more fully on the Commission’s approach to and application of the statutory criteria upon release of the draft FAD.
2	What markets should be considered in applying the mandatory criteria to this FAD?	Telstra refers the Commission to section 3 of Telstra’s submission. Telstra submits that, for the reasons set out in that section, that the ADSL market is already highly competitive at both the retail and wholesale levels of that market.
3	What “other matters” should be considered when making this FAD?	Telstra considers that the Commission should consider the impact of Telstra’s equivalence obligations under the SSU. Telstra submits that on the basis of those obligations, the Commission should either refrain from setting terms in the FAD in respect of matters already covered by the SSU or ensure that any terms set are consistent with the SSU. Telstra refers the Commission to Annexure C of Telstra’s submission.
4	What charges do you consider should be addressed in this FAD? Please consider the type of charges outlined above as well as any other material charges.	The Commission should only address charges in the FAD relating to connection, port, AGVC and early termination charges. Telstra refers the Commission to section 5.1 of its submission.
5	What methodology or methodologies should be used to develop price terms for this FAD?	Telstra maintains that the most effective pricing methodology, in the context of nationally consistent retail pricing, is the RMRC approach set out in Telstra’s SSU. In light of the demand growth for retail DSL (both in terms of the number of services and the amounts of downloads demanded by end users), a RMRC based price, appropriately set, would provide the correct incentives for investment to occur and allow access seekers a fair rate of return on their investments. Telstra refers the Commission to section 5.2 of Telstra’s submission.
6	What overall charge structure should be considered e.g. between access fees and usage	Telstra considers that the charge structure – or balance of charges – between connection, access and usage as it currently stands is appropriate and should be adopted. Telstra refers the Commission to section 5.4 of Telstra’s submission.

	fees?	
7	Should any of the charges be levied on a zone basis, or should they be levied on a nationally consistent basis? On what basis should areas be grouped into zones, if this construct is to be used?	Telstra supports the levying of charges for the wholesale ADSL service on a zone basis. Further, prices for the wholesale ADSL service in Zone 1 should be lower than in Zones 2 and 3 on the basis that, generally, it is more expensive to supply the wholesale ADSL service in those Zones. Telstra refers the Commission to section 5.5 of Telstra's submission.
8	On what basis (if any) should price discrimination between access seekers be encouraged or discouraged?	Price discrimination can be welfare enhancing. Telstra refers the Commission to section 5.6 of Telstra's submission.
9	What other price-related terms should be addressed in this FAD? In general terms, what do you consider an appropriate outcome for these terms and conditions?	None. Telstra refers the Commission to its response to question 4, above.
10	What do you consider are the key commercial terms needed for commercial supply of the Service to occur? Do you consider the 2008 Model Terms should be applied (where relevant) in developing an FAD that addresses those terms? If not, on what basis should these terms and conditions be developed?	As set out in section 6 of Telstra's submission, Telstra does not consider that any commercial terms need to be included in the FAD, given that these terms have not, historically, been disputed between parties. If, however, the Commission is minded to include commercial terms in the FAD, the 2008 Model Terms should not be applied in developing them. That is because the 2008 Model Terms have been superseded by the commercial terms developed in the context of the draft DTCS FAD and MTAS FAD. Accordingly, commercial terms in the FAD for the wholesale ADSL service should be consistent with those terms. Telstra refers the Commission to section 6 of Telstra's submission.
11	What other non-price terms and conditions of access do you consider should be included in this FAD? Please consider those terms outlined above as well as any other access terms that you consider to be of material significance.	The other non-price terms and conditions of access raised by the Commission in the Discussion Paper should not be included in FAD, for the reasons set out in sections 6.1-6.4 of Telstra's submission.

12	What general approach do you consider would be appropriate in developing an FAD that addresses those terms?	Telstra refers the Commission to its response to question 11, above.
13	In general terms, what do you consider to be an appropriate outcome for each of these terms and conditions?	Telstra refers the Commission to its response to question 11, above.
14	Should SAOs apply to operators of non-dominant networks?	The SAOs should apply to all access providers of wholesale ADSL services, rather than just Telstra. To exempt other access providers from the SAOs would be contrary to the LTIE and the other statutory criteria. In any event, the Commission must, in considering this issue, undertake the same assessment that it undertook in its inquiry into varying exemptions in the FADs for the WLR, LCS and PSTN OA. In that regard, Telstra submits that it would be inconsistent with the Commission's approach to the exemptions for those services if it were to exempt from the SAOs all other access providers other than Telstra. Telstra refers the Commission to section 4 of Telstra's submission.
15	Should the ACCC consider exempting particular geographic areas from the SAOs and/or terms and conditions included in the access determination? Why/why not?	Telstra submits that the Commission should exempt all access providers from the SAOs in at least the 289 CBD and metropolitan ESAs listed in Annexure B, on the basis that those ESAs are highly competitive at both the retail and wholesale levels of the ADSL market. Telstra refers the Commission to section 3 of Telstra's submission.
16	What is an appropriate time period for the FAD?	Telstra considers that the FAD should commence 21 days after publication and should expire on 31 July 2014. Telstra refers the Commission to section 7 of Telstra's submission.
17	Are there any circumstances that warrant a difference in the expiry dates of the access determination and the wADSL declaration?	Yes. Telstra considers that the continued roll out of the NBN as well as the ability to reassess the pricing methodology of the fixed services and the wholesale ADSL service on a holistic basis warrant an expiry date consistent with that of the fixed services FADs and earlier than the expiry of the declaration for the wholesale ADSL service. Telstra refers the Commission to section 7 of Telstra's submission.

09 ANNEXURE B – LIST OF 289 ESAs

[c-i-c commences] [c-i-c] [c-i-c ends]

010 ANNEXURE C – APPROACH TO MAKING A WHOLESALE ADSL FAD

10.1. Legislative criteria

135. In the Discussion Paper, the Commission sets out its approach to the making of the FAD. Telstra makes the following comments on the approach.

10.1.1. Giving fundamental weight to criteria

136. As the Commission is aware, it must consider each of the criteria in section 152BCA(1) of the CCA and must have regard to and give fundamental weight to each. Further, in weighing up the mandatory relevant considerations set out in the section, the Commission cannot “jettison or ignore” any mandatory consideration, or “give it cursory consideration only in order to put it to one side”.¹⁸

137. The Full Court of the Federal Court has provided guidance on the content of this obligation in the following terms:

When the expression “... regard must be had to ...” is used in a statute in respect of a particular criterion or factor to be considered by a decision maker, the decision maker is bound to treat such a factor as a central or fundamental element in the making of the relevant decision (see the discussion of these principles by Rares J in Telstra Corp Ltd v ACCC [2008] FCA 1758 at [103] to [112]).

138. In the decision cited by the Full Court, Rares J said, in reference to High Court authorities,¹⁹ on obligations expressed in similar terms:²⁰

I am of opinion that the sense in which the High Court used the expression “fundamental weight” in this context is to require the decision-maker to treat the consideration of the factors, as opposed to the factors themselves, as a central element in the deliberative process: Meneling Station 158 CLR at 338 per Mason J.

10.1.2. Considering the long term interests

139. Sub-section 152BCA(1)(a) requires the Commission to take into account the overall object of Part XIC, which is the LTIE.

¹⁸ *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [107], citing *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 244 per Gleeson CJ, Heydon and Crennan JJ.

¹⁹ *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [107], citing *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 244 per Gleeson CJ, Heydon and Crennan JJ.

²⁰ *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [110].

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140. In considering the LTIE, the Commission must direct its attention to the “long-term”, which is “the period over which the full effects of the ... decision will be felt, with players adjusting to the decision, including by entering or exiting the relevant markets.”²¹ What is required is not some balancing between the short-term and the long-term, and a misplaced focus on the short-term may again lead the Commission into error.²² Accordingly, the effect of this reasoning is to equate the Part XIC concept of “long-term” with the economic concept of “long run”, which is a period of time sufficient for all factors of production to be varied.
141. Given that one of the Commission’s objectives is to promote investment, regard has to be directed to the impact of the FAD on investment decisions by access providers and access seekers. As the Commission will appreciate, investment decisions by access providers are long-term in nature. Regulatory decisions by the Commission directly influence such investment decisions and therefore have long-term implications for the welfare of end-users. Accordingly, the “period over which the full effects of the ... decision will be felt” implies that the concept of “long-term” should be interpreted in light of the duration of the investment by the access provider as well as the access seeker. In that respect the short term effects, such as short term price reductions, are irrelevant in the consideration of this criterion. Furthermore, short term price reductions will degrade investment in the wholesale ADSL service which will have adverse effects on end users and thus will not be in the LTIE.

10.1.3. Costs of implementation

142. The Commission is required to take into account the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else. This criterion is relevant to any proposed terms and conditions which would require Telstra to make changes to its network, IT systems or otherwise, at significant cost, or enhance the capability of its facilities in order to comply with the FAD. Therefore, the Commission must give fundamental weight to the Access Provider’s direct costs of implementation where it:
- a. imposes new processes;
 - b. specifies changes to systems;
 - c. identifies additional information that the Access Provider must make available to an Access Seeker; or
 - d. imposes any other non-price term that increases costs or risks.
143. This consideration suggests that the Commission should not mandate, via the mechanism of a FAD, that steps be undertaken unnecessarily. In addition, Telstra submits that the consideration militates against the Commission imposing obligations where there are substantial implementation costs or increased risks and the obligations would not promote the LTIE to any significant extent. The Commission must also consider – at the time of making the FAD – whether the costs of implementing the FADs can be recovered.

²¹ *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 at [235] per the Court, citing with apparent approval *Re Seven Network Ltd (No 2) (2004)* 187 FLR 373 (Australian Competition Tribunal) at [119-131].

²² Compare *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 at [243-246] per the Court.

144. Telstra intends to respond more fully on the approach and application of the statutory criteria upon the release of the draft FAD.

10.2. Scope of the FAD

145. The FAD must be within the scope of the Commission's powers. Thus, the Commission must not make a FAD which would have any of the effects set out in subs 152BCB(1). That is, the FAD must not include provisions which, for example:

- a. require a person (other than an Access Seeker) to bear an unreasonable amount of the costs of extending or enhancing a facility's capability: subs 152BCB(1)(f); or
- b. require the provision of access where there are reasonable grounds to believe that the Access Seeker would fail to comply with the relevant terms and conditions: subs 152BCB(1)(g).

146. Examples of the grounds mentioned in subs 152BCB(1)(g) include evidence that the Access Seeker is not creditworthy²³ or repeated failure by the Access Seeker to comply with terms and conditions on which a Service has been provided.²⁴

10.3. Other relevant considerations: Telstra's obligations under its SSU

147. The Commission should consider the impact of Telstra's equivalence obligations under the SSU. Clause 9 of the SSU sets out Telstra's commitment to ensure equivalence between wholesale ADSL and the equivalent retail service in respect of:

- a. the technical and operational quality;
- b. the operational systems, procedures and processes used in the supply of the services;
- c. the information provided in relation to (a) & (b); and
- d. the price that is charged for the service.

148. The Commission should take this into account and either refrain from setting terms in the FAD in respect of matters already covered by the SSU or ensuring that, at least, any terms set are consistent with the SSU.

²³ CCA, subs 152BCB(2)(a).

²⁴ CCA, subs 152BCB(2)(b).