



**Australian  
Competition &  
Consumer  
Commission**

## **Local bitstream access service**

### **Interim access determination and proposal for the final access determination**

**July 2012**



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## List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	asymmetric digital subscriber line
AER	Australian Energy Regulator
AVC	Access Virtual Circuit
BBM	Building Block Model
CAPEX	capital expenditure
CCA	<i>Competition and Consumer Act 2010</i>
c-i-c	commercial in confidence
CSP	carriage service provider
CVC	Connectivity Virtual Circuit
DTCS	domestic transmission capacity service
FAD	final access determination
FAS	Fibre Access Service
IAD	interim access determination
LBAS	local bitstream access service
LTIE	long-term interests of end-users
MDU	multi-dwelling unit
NBN	National Broadband Network
NPTCs	non-price terms and conditions
OPEX	operating expenditure
QoS	Quality of Service
RAB	regulatory asset base
RMRC	retail minus retail cost
RSPs	retail service providers

SAOs	standard access obligations
SAU	special access undertaking
SIOs	services in operation
Telco Act	<i>Telecommunications Act 1997</i>
Tribunal	Australian Competition Tribunal
WBA	Wholesale Broadband Agreement

## Executive summary

This paper sets out the Australian Competition and Consumer Commission's (ACCC) decision on the interim access determination (IAD) for the local bitstream access service (LBAS). The paper provides a statement of the reasons for the IAD (at Part B) and also seeks stakeholder views on proposed content of a final access determination (FAD) for the LBAS (at Part A).

Under the 'level playing field arrangements' introduced into the *Consumer and Competition Act 2010* (CCA) by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*, the ACCC is required to regulate non-NBN superfast networks that are capable of delivering the same service outcomes as the National Broadband Network (NBN).<sup>1</sup>

Accordingly, the ACCC declared the local bitstream access service (LBAS) on 22 February 2012 and commenced a public inquiry to make a final access determination (FAD) for the LBAS on 24 February 2012.<sup>2</sup>

The ACCC has formed its preliminary views on the content of the FAD. The ACCC proposes that the price terms for the LBAS are to be set by benchmarking to NBN Co's regulated prices, once NBN Co's special access undertaking (SAU) is finalised. The ACCC considers that this approach to pricing is the most appropriate and proportionate under the current circumstances regarding the supply of the LBAS. The ACCC also proposes the inclusion of certain non-price terms and conditions (NPTCs) for access to the LBAS.

The ACCC seeks stakeholder submissions on the content of the FAD by 5.00 pm 3 August 2012. After consideration of these submissions, and once regulated pricing for NBN Co has been finalised, the ACCC intends to issue an FAD and an explanatory statement. The ACCC does not currently intend to issue a draft FAD before making the FAD. Once NBN Co pricing is finalised, the ACCC will determine if further consultation is necessary before making the FAD.

The ACCC considers that it will be unable to make an FAD within the six month period following the commencement of the public inquiry, pending the finalisation of NBN Co's SAU. Therefore, the ACCC has made an IAD for the LBAS. The IAD sets the price ceiling for the LBAS to be \$27 per month for a 25/5 megabit per second (Mbps) service, equivalent to NBN Co's price in its Wholesale Broadband Agreement (WBA). Setting a price ceiling for this service will not restrict LBAS providers from offering other services at commercially negotiated prices. The NPTCs in the IAD reflect the ACCC's preliminary views on the NPTCs that are to be included in the FAD.

In addition to the complying with the terms set out in the IAD (and the FAD once it is made), the LBAS providers are also required to comply with the following regulatory obligations:

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<sup>1</sup> See subsection 152AL(3C) of the CCA and Explanatory Memorandum, *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010*, pp. 13–14.

<sup>2</sup> See ACCC, *Layer 2 bitstream service declaration: Final report*, February 2012, available at: <http://www.accc.gov.au/content/index.phtml/itemId/1002378>; and ACCC, *Public inquiry to make an access determination for the local bitstream access service: Discussion paper*, February 2012, available at: <http://www.accc.gov.au/content/index.phtml/itemId/1034770>.

- the requirement to lodge access agreements with the ACCC;
- the non-discrimination obligations; and
- the requirement to lodge statements of difference.

# 1 Introduction

The Australian Competition and Consumer Commission (ACCC) seeks stakeholder views on the making of a final access determination (FAD) for the declared local bitstream access service (LBAS) under section 152BC of the *Competition and Consumer Act 2010* (CCA). The LBAS FAD would set out base terms and conditions of access for the declared service. If an access seeker cannot agree with an access provider on commercial terms of access, the access seeker can rely on the terms in the FAD.

This paper also includes reasons for the ACCC's interim access determination (IAD) for the LBAS. The ACCC has made this IAD because the ACCC does not consider that it will be able to make an FAD within 6 months of starting the public inquiry into making the FAD.<sup>3</sup> This IAD incorporates the ACCC's preliminary views on pricing for the LBAS and non-price terms and conditions (NPTCs) of access. This paper also provides a statement of reasons for the IAD and refers to the materials the ACCC has considered in forming its preliminary views.

This paper is structured in two parts: **Part A** presents the ACCC's preliminary views on the content of the LBAS FAD, while **Part B** presents the ACCC's decision and reasons for the IAD.

## 1.1 Background

As part of the 'level playing field arrangements' introduced into the CCA and the *Telecommunications Act 1997* (Telco Act) by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*, the ACCC was required to declare a Layer 2 bitstream service.<sup>4</sup>

Accordingly, the ACCC made the decision to declare the LBAS on 22 February 2012 under subsection 152AL(3) of the CCA. By declaring a service, the ACCC is able to regulate access to that service. A declared service is subject to the category A standard access obligations (SAOs), which require that an access provider:

- supplies the service to an access seeker on request;
- ensures that the quality and fault handling of the service provided to the access seeker is equivalent to that which it provides itself; and
- allows interconnection.<sup>5</sup>

The service description for the LBAS can be found in **Appendix A**. Further information regarding this service can be found in the ACCC's *Layer 2 bitstream service description: Final report* (February 2012) on the ACCC's website.<sup>6</sup>

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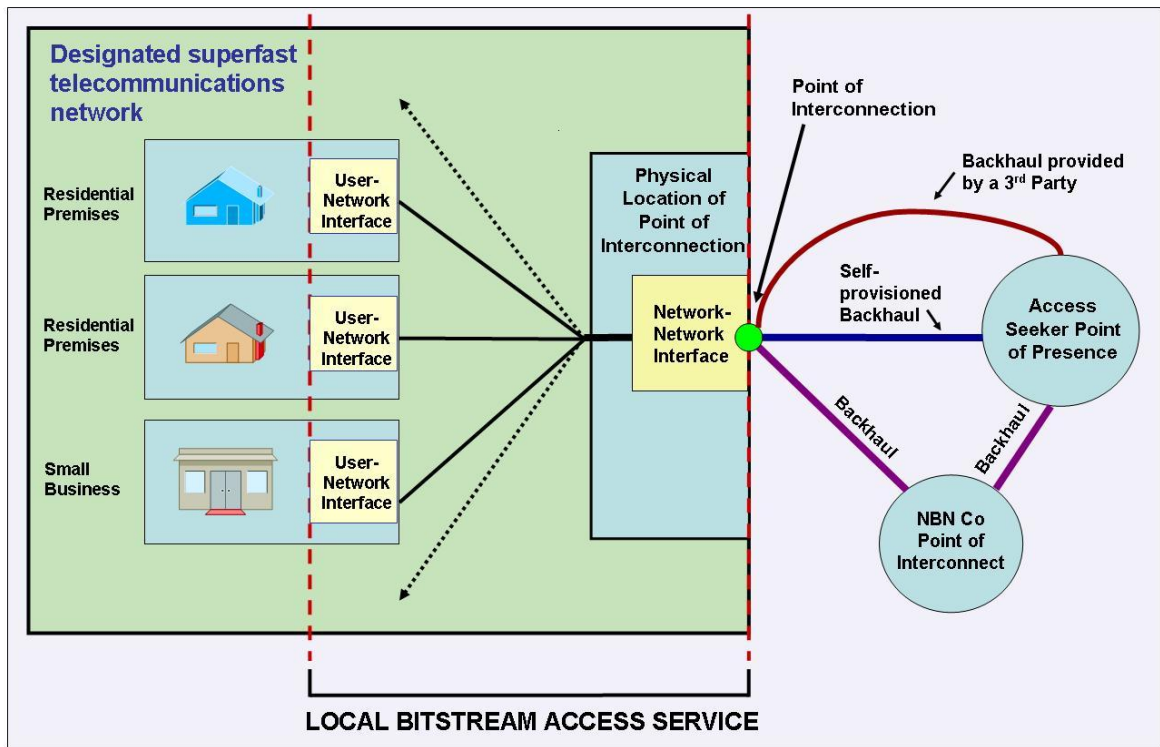
<sup>3</sup> Subsection 152BCG(1) of the CCA requires that the ACCC make an IAD when the ACCC is unable to make an FAD within 6 months of commencement of the public inquiry.

<sup>4</sup> Subsection 152AL(3C) of the CCA. Note that references to the Telco Act and the CCA are references to those acts as amended by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*.

<sup>5</sup> Section 152AR of the CCA.

<sup>6</sup> See: <http://www.accc.gov.au/content/index.phtml/itemId/1002378>.





Under subsection 152BCI(1) of the CCA, the ACCC is required to commence a public inquiry to make an access determination for any newly declared service.<sup>7</sup> The ACCC commenced such a public inquiry under Part 25 of the Telco Act on 24 February 2012.

The proposed FAD provides a base set of terms and conditions access seekers and access providers may rely on if they fail to reach a commercial agreement. If parties come to an agreement on terms and conditions of access, then their access agreement will prevail over an FAD to the extent of any inconsistency.<sup>8</sup>

Once a public inquiry has commenced, the ACCC must make a decision on making an FAD within six months. This period may be extended by a further six months if the ACCC explains the reasons for the extension.<sup>9</sup> If, after the commencement of the public inquiry, the ACCC considers it unlikely that an FAD will be made within 6 months, it must make an IAD.<sup>10</sup>

<sup>7</sup> Subsection 152BCI(1) of the CCA.

<sup>8</sup> Section 152BCC of the CCA.

<sup>9</sup> Section 152BCK of the CCA.

<sup>10</sup> Subsection 152BCG(1) of the CCA.

## 1.2 Public inquiry process

The ACCC commenced a public inquiry under Part 25 of the Telco Act into making an FAD for the LBAS on 24 February 2012 and released a discussion paper.<sup>11</sup> This discussion paper sought submissions from interested parties on the following issues:

- the nature of the service provided;
- the methodology for pricing the LBAS;
- the duration of access determination; and
- the NPTCs.

The ACCC received submissions in response to the discussion paper from the following interested parties:

- AAPT Pty Limited (AAPT);
- NBN Co Limited (NBN Co);
- OptiComm Co Pty Ltd (OptiComm);
- SingTel Optus Pty Ltd (Optus); and
- Telstra Corporation Limited (Telstra).

All public versions of the submissions are available on the ACCC website.<sup>12</sup>

The ACCC has had regard to all of the relevant submissions from interested parties in forming its views on the IAD.

The ACCC invites stakeholders to comment on the proposed content for the FAD.

## 1.3 Consultation process for a final access determination

Following its review of submissions made in response to the discussion paper, the ACCC has formed its preliminary views on the price and non-price terms to be included in the FAD. These terms are set out in the IAD released with this paper. The ACCC now seeks submissions on the specific terms for the proposed FAD.

The ACCC requests written submissions from interested parties before 5.00 pm on **3 August 2012**. After consideration of these submissions, and once regulated pricing for NBN Co has been finalised, the ACCC intends to issue an FAD and an explanatory statement.

As stakeholder comment is being sought on the content of the proposed FAD now, the ACCC does not currently intend to issue a draft FAD before making the FAD. Once NBN Co pricing is finalised, the ACCC will consider if further consultation is necessary before making the FAD.

The ACCC encourages industry participants, other stakeholders and the general public to make submissions to the ACCC to assist it in determining the content of an FAD for the

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<sup>11</sup> ACCC, *Public inquiry to make an access determination for the local bitstream access service: Discussion paper*, February 2012 (Discussion Paper).

<sup>12</sup> See: <http://www.accc.gov.au/content/index.phtml/itemId/1034770>.

LBAS. The ACCC invites submissions on the statutory criteria the ACCC must apply under subsection 152BCA(1) of the CCA and any other matters that respondents consider relevant.

To foster an open, informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. If interested parties wish to submit commercial-in-confidence material as part of their submission to the ACCC, parties should submit both a public and commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The *ACCC-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC website: <http://www.accc.gov.au/content/index.phtml/itemId/846791>.

The ACCC prefers to receive submissions in electronic forms, either in PDF or Microsoft Word format, which allows the submission text to be searched. Please forward submissions to [accessdeterminations@acc.gov.au](mailto:accessdeterminations@acc.gov.au) by **3 August 2012**.

For further information, please contact:

Kathryn Wood  
Communications Group  
Australian Competition and Consumer Commission  
Email: [kathryn.wood@acc.gov.au](mailto:kathryn.wood@acc.gov.au)  
Phone: (02) 9230 3895

## **Part A: Consultation on the content of the final access determination**

This part of the paper sets out the ACCC's preliminary views on the content of the proposed FAD. It includes summaries of the submissions received in response to the ACCC's discussion paper. It also includes the ACCC's preliminary assessment of the terms the ACCC proposes to incorporate into the FAD against the legislative criteria in subsection 152BCA(1) of the CCA.

## **2 Legislative framework for access determinations**

This section sets out what terms an FAD may contain, the criteria the ACCC must consider in making an FAD, and the legislative framework for IADs.

### **2.1 Content of an FAD**

Section 152BC of the CCA specifies what an FAD may contain. It may include, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the applicable SAOs provided for in the CCA and terms and conditions of access to a declared service.

The IAD in **Appendix C** sets out the ACCC's preliminary views on both price and non-price terms for access to the LBAS. The ACCC considers that the approach taken in the IAD will also be relevant for the future FAD.

### **2.2 Criteria ACCC must consider when making an FAD**

The ACCC must have regard to the criteria specified in subsection 152BCA(1) of the CCA when making an FAD. These criteria are:

- whether the determination will promote the long-term interests of end-users (LTIE) of carriage services or services supplied by means of carriage services;
- the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service;
- the interests of all persons who have rights to use the declared service;
- the direct costs of providing access to the declared service;
- the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility; and
- the economically efficient operation of a carriage service, a telecommunications network or facility.

The ACCC may also take into account any other matters that it thinks are relevant when making an FAD.<sup>13</sup> Further detail on the new access regime and criteria for making FADs can be found in **Appendix B**.

Compliance with an FAD is both a carrier licence condition and a service provider rule.<sup>14</sup> A breach of either a carrier licence condition or a service provider rule may lead to a pecuniary penalty of up to \$10 million for each contravention.<sup>15</sup> Private action to enforce an FAD may also be taken in the Federal Court.<sup>16</sup>

### 2.3 Interim access determination

The CCA allows the ACCC to make an IAD when a service is declared and no FAD has been previously made in relation to that service.<sup>17</sup>

The CCA requires the ACCC to make an IAD if:

- the ACCC makes a declaration under section 152AL of the CCA after 1 January 2011;
- the declaration is not a fresh declaration that replaces a previous declaration;
- a public inquiry into making an FAD for the declared service has commenced; and
- either the ACCC considers it unlikely that an FAD will be made within 6 months after the commencement of the public inquiry, or there is an urgent need to make an access determination before the completion of the public inquiry.<sup>18</sup>

The ACCC is not required to consult with industry or observe any requirements of procedural fairness in relation to the making of an IAD.<sup>19</sup> The CCA does not specify any matters that the ACCC must take into account when making the IAD.<sup>20</sup>

An IAD for a declared service is automatically revoked when the ACCC makes an FAD for that declared service.<sup>21</sup> The ACCC has power to vary an IAD at any time before the FAD is made.<sup>22</sup>

Because the ACCC is of the view that it is unlikely that an FAD will be made within 6 months of the start of this inquiry, the ACCC has decided to make the IAD in **Appendix C**.

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<sup>13</sup> Subsection 152BCA(3) of the CCA.

<sup>14</sup> Sections 152BCO and 152BCP of the CCA.

<sup>15</sup> Section 570 of the Telco Act.

<sup>16</sup> Section 152BCQ of the CCA.

<sup>17</sup> Subsection 152BCG(2) of the CCA.

<sup>18</sup> Subsection 152BCG(1) of the CCA.

<sup>19</sup> Subsections 152BCH(2) and 152BCG(4) of the CCA.

<sup>20</sup> Subsection 152BCA(4) of the CCA.

<sup>21</sup> Subsection 152BCF(9A) of the CCA.

<sup>22</sup> Subsection 152BCN(1) of the CCA.

### 3 Price terms

Subsection 152BC(8) of the CCA requires that the ACCC, in specifying terms and conditions within an access determination, must ‘include terms and conditions relating to price or a method of ascertaining price’.

The matters that the ACCC must take into account when making an access determination, as outlined in **Section 2.2** and further discussed in **Appendix B** of this paper. In setting price terms and conditions for the LBAS FAD, the ACCC will have appropriate regard to these matters. The ACCC’s preliminary views on the application of these criteria to the proposed pricing approach are included in **Section 4**.

This section discusses the ACCC’s proposed approach for establishing price terms and conditions in the LBAS FAD. The ACCC is seeking comment from interested parties on its approach.

#### 3.1 Price terms for the final access determination

The ACCC proposes to adopt a benchmarking approach (discussed at **Section 3.3**) for pricing in the LBAS FAD. To implement this approach, the ACCC proposes to specify at least one LBAS ‘port’ or ‘access line’ product with functional capability that is comparable to corresponding regulated NBN Co Access Virtual Circuit (AVC) product(s). The ACCC proposes to set a price ceiling for each specified LBAS port or access line product equal to its corresponding NBN Co AVC regulated product price.

The ACCC notes that, pursuant to section 152BCC of the CCA terms and conditions in an access agreement between a retail service provider (RSP) and LBAS provider will prevail over an inconsistent access determination.

The ACCC is aware that NBN Co’s products may subject to regulation through a special access undertaking (SAU) accepted by the ACCC (the approach currently proposed by NBN Co), and potentially via any access determinations the ACCC may make in the future. As the regulated pricing for NBN Co has not yet been finalised, the ACCC is not intending to make an FAD that adopts the proposed benchmarking approach until the relevant regulatory processes have been concluded and regulated terms and conditions have been specified for NBN Co services.

#### 3.2 Summary of submissions

The ACCC received 5 submissions in response to the ACCC’s LBAS FAD discussion paper – from Telstra, Optus, NBN Co, AAPT and OptiComm. These submissions addressed issues regarding the approach to pricing LBAS.

Telstra submitted that it is not aware of any services currently available that meet the threshold requirement for the LBAS.<sup>23</sup> It stated that, given the absence of LBAS services and the lack of information regarding costs of supply there would be no basis to definitively

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<sup>23</sup> Telstra, *Submission to the ACCC’s Public inquiry to make an access determination for the local bitstream access service: Discussion Paper February 2012*, 23 March 2012, p. 3.

determine price and non-price terms of supply that could be considered reasonable or in the LTIE.<sup>24</sup>

Telstra submitted that a retail minus retail cost (RMRC) pricing method is likely to be difficult to implement and, therefore, inappropriate.<sup>25</sup> This is because the networks that are used to supply the LBAS are likely to be newly built and will be under an obligation to supply on a wholesale only basis.<sup>26</sup>

Telstra stated that a cost based method of ascertaining prices the most appropriate.<sup>27</sup> Telstra submitted that a cost based method could be based on the building block methodology that establishes a regulatory asset base (RAB), rolls forward the asset base each year and prices in a manner that provides a return on the asset base, a return of the asset base and allowance for operating expenditure (OPEX) and taxation expenses.<sup>28</sup>

Finally, Telstra submitted that alternatively, or in addition to a cost based approach, the ACCC could also establish a price ceiling for its LBAS FAD.<sup>29</sup> Telstra submitted, given the current lack of cost and pricing information, ‘the only reasonable starting point for determining this price ceiling is NBN Co’s proposed pricing for comparable bitstream services’.<sup>30</sup> Telstra stated that benchmarking against NBN Co prices could potentially be used as a ‘short-term remedy’.<sup>31</sup> Telstra submitted that adjustments may need to be made to account for differences between NBN Co and operators of non-dominant networks.<sup>32</sup>

AAPT submitted that a building block, cost based model is the best method of promoting the LTIE and that other models, including benchmarking, are ineffective on their own.<sup>33</sup> However, AAPT stated that there is likely to be a lack of information about the costs of providing LBAS.<sup>34</sup> AAPT therefore submitted that aligning the LBAS pricing to NBN Co’s pricing should be in the LTIE as it will help ensure that consumers will have access to equivalent services at comparable prices.<sup>35</sup>

OptiComm submitted there are insufficient of numbers of premises connected to LBAS networks to enable a cost based model to be built.<sup>36</sup> It also submitted that access pricing should be not less than the prices for equivalent services offered by NBN Co.<sup>37</sup>

Optus submitted that it would be premature for the ACCC to set prices until it has finalised its view on prices for access to the National Broadband Network (NBN) and it understands

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<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*, pp. 7–8.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*, p. 8.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*, pp. 8–9.

<sup>32</sup> *ibid.*, p. 8.

<sup>33</sup> AAPT, *Submission to ACCC’s Public inquiry to make an access determination for the local bitstream access service: Discussion paper February 2012*, 23 March 2012, p. 3

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> OptiComm, *Submission to ACCC’s Public inquiry to make an access determination for the local bitstream access service: Discussion paper February 2012*, 23 March 2012, p. 7.

<sup>37</sup> *ibid.*, pp. 1, 7.

the circumstances in which such networks will be deployed.<sup>38</sup> Optus stated that the ACCC should be cautious in its attempt to set price terms and ensure that the Layer 2 bitstream service is priced at efficient costs and meets the LTIE.<sup>39</sup>

NBN Co submitted that any price or non-price terms for the LBAS need to have regard to the intent of the level playing field legislation. NBN Co also stated that there will be material differences in the costs faced by LBAS operators and NBN Co.<sup>40</sup>

### **3.3 ACCC's preliminary view**

The ACCC has examined the relative merits of implementing a benchmarking or cost-based approach to pricing the LBAS. A high-level examination of the various options is contained in this section.

#### **Cost based BBM**

One option for pricing LBAS would be for the ACCC to adopt a cost based pricing approach, for example the ACCC could construct a Building Block Model (BBM) for LBAS operators.

In general, the ACCC has recognised that a cost based BBM pricing approach has a number of advantages.<sup>41</sup> For example, a BBM seeks to estimate prices that reflect efficient costs, while ensuring that the access provider is adequately compensated for the costs of supplying the service(s). However, the BBM approach may also have certain disadvantages, including a significant regulatory burden on industry from the complexities and high data requirements of the approach.

If implementing a BBM approach for LBAS, the ACCC would need to obtain data from each LBAS network operator that is sufficient to calculate a RAB, capital expenditure (CAPEX), OPEX, demand forecasts, asset lives, cost of capital, cost allocation factors and tax. Taking this regulatory approach would subject LBAS network operators to similar data reporting requirements to that typically required by the ACCC of much larger providers and access seekers of regulated services. Due to the small size and private ownership structures of the many LBAS providers, the ACCC's preliminary view is that the regulatory burden of implementing such an approach would be disproportionate.

The ACCC also acknowledges that a wide range of networks, products and network operators are covered by the LBAS declaration. As a result, accurately estimating cost-based prices may be difficult to achieve. The notable lack of clarity around the costs of providing LBAS services, as highlighted by Telstra, AAPT and Opticomm's submissions, supports this observation.

Given the above considerations, the ACCC considers that a BBM cost based approach to setting LBAS prices should not be adopted at this time. The ACCC notes, however, that this

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<sup>38</sup> Optus, *Submission to ACCC's Public inquiry to make an access determination for the local bitstream access service: Discussion paper February 2012*, 5 April 2012.

<sup>39</sup> *ibid.*

<sup>40</sup> NBN Co, *Submission to ACCC's Public inquiry to make an access determination for the local bitstream access service: Discussion paper February 2012*, 23 March 2012.

<sup>41</sup> For example, see ACCC, *Inquiry to make final access determinations for the declared fixed line services: Final report*, July 2011, p. 133.



preliminary position would not prohibit it from revisiting whether a cost based approach would be appropriate in the future, should circumstances change regarding the supply of LBAS.

## **Benchmarking to NBN Co regulated products**

Submissions from interested parties indicated that LBAS products and prices could be benchmarked to those of NBN Co. The ACCC's preliminary view is to adopt this approach when it makes the FAD for LBAS, as noted earlier (see **Section 3.1**).

The benchmarking approach proposed by the ACCC would establish a price ceiling for specified LBAS products based on regulated NBN Co prices. The ACCC proposes that this approach only establish regulated prices for LBAS products where there has been a regulated price determined for a corresponding NBN Co product. This approach will require LBAS operators to offer specified LBAS products at a price no greater than the nominated price ceiling, but allow the freedom to offer other LBAS products not specified in a LBAS access determination.

## **ACCC's preliminary assessment of pricing approach**

The ACCC considers that the proposed benchmarking of LBAS prices represents a relatively light-handed approach to determining price terms or a method of ascertaining prices. This position is seen as desirable for the reasons set out below and is considered against the legislative criteria in **Section 4**.

The ACCC's preliminary assessment is that less than one per cent of total services in operation (SIOs) in Australia are, at present, potentially subject to LBAS regulation. The ACCC notes that the Ministerial exemptions,<sup>42</sup> have also reduced the scope of networks potentially subject to the LBAS declaration.

The ACCC also acknowledges that, at present, there are a number of relatively small network operators (in terms of number of SIOs and premises contracted to build) that will be subject to the declaration (LBAS providers). The ACCC notes that these LBAS providers are typically operating in greenfields estates, although other small network operators operating in brownfield areas (e.g. providing MDU<sup>43</sup> services) may also be subject to the declaration. The proposed benchmarking pricing approach will place a low information cost and regulatory burden on each of these providers, relative to a cost-based alternative.

### *Specifying LBAS products*

Implementing a benchmarking approach will require the ACCC to identify the specific products for benchmarking. In making the proposed FAD, the ACCC is considering setting

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<sup>42</sup> The ACCC notes that if the Minister has exempted a network under subsection 141A(1) of the Telco Act, that network is not a designated superfast telecommunications network (through the operation of subsection 152AGA(2) of the CCA), and as such the LBAS declaration does not apply. Where a local access line or an owner of a network is exempted under subsections 141A(2) or 141A(3) of the *Telecommunications Act 1997*, there is no mechanism to automatically exempt the local access line or owner from the operation of a declaration under subsection 152AL(3C) of the CCA. Currently the Minister has made exemption decisions in relation to Telstra and TransACT.

<sup>43</sup> MDU stands for multi-dwelling unit.

prices for a subset of LBAS products by specifying certain LBAS products to be offered on regulated terms.

The nature of the LBAS service description (and the flexibility of the networks over which LBAS is supplied) means that there are number of specific wholesale products that can be potentially captured by the declaration. For example, LBAS operators offer a number of ‘speed’ tiers for their access services, including products of 25/5 megabits per second (Mbps), 50/20 Mbps and 100/40 Mbps – all of which potentially constitute an LBAS product. These access services can also be specified with regard to a number of Quality of Service (QoS) characteristics.

By specifying certain products, for example the 25/5 Mbps residential-grade LBAS product specified in the attached IAD (see **Part B**), the ACCC can establish a regulated reference point product or products for access seekers, while allowing LBAS provider the freedom to offer other LBAS products and product combinations not specified in an LBAS access determination.

The ACCC notes that the LBAS is a local access service involving comparatively little aggregation or transmission as part of the service. The ACCC considers that the LBAS can be compared with NBN Co’s AVC product component (part of NBN Co’s Fibre Access Service (FAS)). LBAS differs from NBN Co’s network in that LBAS specifies a local Point of Interconnection and as such involves comparatively little aggregation. LBAS does not involve an equivalent component to NBN Co’s Connectivity Virtual Circuit (CVC).

The ACCC considers that the AVC provides appropriate benchmarks for specific LBAS products and prices. Therefore, the ACCC’s proposed approach is to specify LBAS products in the FAD where similar NBN Co AVC product components have been specified for regulation over the NBN.

#### *Inclusion of voice capability*

In developing its approach for the FAD, the ACCC is considering whether to include a requirement for LBAS providers to provide voice capability as part of the specified LBAS products. This would require LBAS providers to configure their Layer 2 services in a way that would allow access seekers to offer quality voice services to end-users.

It may be desirable to include a requirement for voice capability in the LBAS FAD for the following reasons:

- Voice capability is typically acquired by end-users as part of their fixed line telecommunications services;
- Providing a quality voice service to end-users typically requires specific configuration at the network level e.g. prioritisation of voice traffic;
- The benchmark NBN Co products explicitly include voice capability as part of its AVC product components;
- Information on products currently offered by a sample of fibre operators suggest that voice capability is being offered as part of existing wholesale access services.

In making the FAD, the ACCC could, for example, include a requirement that the LBAS provider would need to include the following characteristics for a specified LBAS product:

- 1) a prioritised, symmetric bitstream of sufficient capacity to provide a voice service;
- 2) if available and requested by the access seeker, use of an analogue voice port on the network termination unit at the end-user's premises.

The ACCC is seeking views on whether the inclusion of a voice requirement for specified LBAS products would be appropriate.

*Questions on which the ACCC seeks views:*

- 1) Do parties consider that the proposed benchmarking approach is likely to be appropriate for establishing LBAS prices for the FAD for the initial regulatory period (of 3 years, discussed below in **Section 5.2**? Are there any other pricing approaches that would likely be more appropriate for setting LBAS prices in the circumstances?
- 2) If the proposed pricing approach is adopted, which specified 'port' or 'access line' LBAS products should be included in the FAD for LBAS? What characteristics should these products include?
- 3) If the proposed pricing approach is adopted, which, if any, ancillary products (e.g. connection charges) should be included in the FAD for LBAS?
- 4) Should the ACCC include a requirement to provide voice capability for the specified LBAS products? Would the voice capability characteristics proposed above likely be appropriate to include in the FAD for specified LBAS products?
- 5) If the proposed pricing approach is adopted, how often should prices be realigned to the prices of benchmarked products (e.g. annually, at the commencement of the following FAD etc.)?

## **4 Assessment of the price terms and conditions against the legislative criteria**

The ACCC's preliminary views on how the proposed pricing approach discussed above will address the relevant legislative criteria are outlined below. The ACCC is seeking comment from interested parties on these issues.

As indicated in **Section 3**, there are a number of factors that make it difficult to determine with precision how the market(s) affected by the LBAS declaration will develop over time. The ACCC's consideration of its approach to regulating LBAS may develop over time in response to new information or changing circumstances in the market. Similarly, the ACCC views on how LBAS regulation addresses the legislative criteria to which the ACCC is required to have regard may also develop.

### **Paragraph 152BCA(1)(a) – whether the determination will promote the long-term interests of end-users**

The ACCC's preliminary view is that the benchmarking approach for the initial regulatory period (described in **Section 3**) will promote the LTIE.<sup>44</sup>

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<sup>44</sup> The ACCC is proposing an initial regulatory period of 3 years as discussed in **Section 5.2** below.

In considering the LTIE, the ACCC must have regard to the following objectives: the promotion of competition; achieving any-to-any connectivity; and encouraging the economically efficient use of and investment in infrastructure.

*Promotion of competition*

The ACCC notes that in the discussion paper the ACCC referred to two broad markets as relevant to the LBAS FAD, for the purposes of prompting consideration of competition issues. These relevant markets were described as i) the market for the wholesale supply of Layer 2 bitstream services, and ii) the market for the wholesale and retail supply of Layer 3 bitstream services.<sup>45</sup>

The ACCC considers that, for the purposes of the LBAS FAD for the initial regulatory period, it is appropriate to consider the product and geographic dimensions of the characteristics or functions of the good or services in both the retail and wholesale markets. The ACCC also notes that it is not required to precisely define the relevant market or markets in which the declared services are supplied. Rather the ACCC considers that it is sufficient to broadly identify the scope of the relevant market or markets that are likely to be affected by the ACCC's regulatory decision.

Noting that the ACCC has broadly identified the scope of the market or markets for this LBAS FAD, it considers the relevant markets to be the wholesale and retail markets for the supply of fixed line telecommunications services (including broadband and voice services) in geographic areas serviced by network operators subject to the LBAS declaration. The ACCC notes that the market for providing fixed line telecommunications networks in new or greenfields estates is also likely to be affected by an LBAS FAD.

The ACCC notes the requirement within the Telco Act that provision of the LBAS is to be on a wholesale basis only. Therefore it is the ACCC's preliminary view that, while the incentive for self preferential or discriminatory behaviour is not precluded, competitive concerns arising from vertical integration of LBAS providers are not significant.

The ACCC is of the view that reasonable access prices will allow RSPs to enter and compete in retail markets where end-users are serviced by networks subject to the LBAS declaration. Benchmarking against NBN Co prices will ensure that RSPs will not have to pay prices greater than those prices for comparable NBN Co access products in order to compete in retail markets affected by the LBAS declaration. This pricing approach will therefore act to encourage RSPs to enter areas serviced by LBAS operators and promote retail competition in LBAS areas.

At the network level, the NBN benchmarking pricing approach for LBAS means that LBAS providers are likely to continue to compete against NBN Co for greenfields tenders, and will do so under similar regulatory settings for their declared services.

*Encouraging the economically efficient use of and investment in infrastructure*

The ACCC's preliminary view is that the proposed benchmarking approach will encourage the economically efficient use of and investment in infrastructure.

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<sup>45</sup> Discussion Paper, p. 15.

The ACCC notes that NBN Co is setting uniform national wholesale prices and that NBN Co has set its current prices with regard to, amongst other things, current market wholesale pricing.<sup>46</sup> Therefore, the prices resulting from the benchmarking approach may not specifically reflect the costs of providing the LBAS for a particular product, on a particular network, at a given point in time. However, the ACCC's preliminary view is that the proposed approach will enable operators to, at least, recover efficiently incurred costs of supplying the service and give confidence to LBAS providers that they will be able to set prices to recover costs in future developments. However, the benchmarking approach will also mean that LBAS providers will be constrained from charging prices significantly in excess of the efficient level. Competition for new estates and a need to attract RSPs onto their networks may further act to constrain LBAS operators from pricing in excess of the efficient level.

Regarding incentives for efficient investment, the ACCC has noted that the NBN benchmarking pricing approach for LBAS means that LBAS providers are likely to continue to compete against NBN Co for greenfields tenders, and will do so under similar regulatory settings for the declared services. The ACCC considers that competition for these estates may help to promote efficient investment in networks operated by LBAS providers and network infrastructure over time.

#### *Any-to-any connectivity*

The ACCC's preliminary view is that its proposed pricing approach for the FAD would not have an effect on the achievement of any-to-any connectivity. This is because the ACCC's proposed FAD approach deals with commercial terms of access only and does not address issues relating to the interconnection of networks.

### **Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider**

The ACCC's preliminary view is that the access provider's legitimate business interests are met by adopting the proposed benchmarking approach for the following reasons.

The ACCC considers that it is appropriate to adopt a regulatory approach for the LBAS that does not impose a large burden on industry. The ACCC's preliminary view is that the regulatory burden of establishing cost models for multiple LBAS operators would be substantial and disproportionate to the circumstances regarding the current supply of LBAS. The benchmarking approach represents a more appropriate regulatory response to LBAS pricing that will still enable access to the LBAS at a regulated reference point that is in line with access prices for the NBN Co network.

The ACCC's proposed approach, i.e. to set prices for specified LBAS products where similar AVC product components are subject to specific regulation under NBN Co regulatory arrangements, will also provide for the legitimate business interests of LBAS operators. This will apply a similar level of constraint as that applying to NBN Co and allow LBAS operators to continue to pursue their pre-existing business plans without unnecessarily restricting operators from recovering their costs of supplying LBAS.

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<sup>46</sup> NBN Co, *Corporate Plan 2011–13*, 17 December 2010, p. 91.

**Paragraph 152BCA(1)(c) – interests of all persons who have rights to use the declared service**

The ACCC considers that this criterion requires it to have regard to the interests of access seekers. Generally, the interests of access seekers will be served by having access to the declared LBAS service at prices which allow them to compete in downstream markets.

The ACCC's preliminary view is that the benchmarking approach will enable access seekers to obtain specified LBAS products at prices no greater than those available for similar NBN Co products. This should enable access seekers who profitably provide services in downstream markets over NBN Co's network to likewise compete in downstream markets over networks subject to the LBAS declaration.

**Paragraph 152BCA(1)(d) – direct cost of providing access to the declared service**

For this criterion, the ACCC considers that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access, and includes the incremental costs of providing access. The ACCC interprets this criterion, and the use of the term 'direct costs', as allowing consideration to be given to a contribution to indirect costs.

Given the lack of clarity around the costs in relation to the provision of LBAS services, particularly across all of the operators and networks to which the LBAS declaration may apply, it is difficult to make definitive findings in relation to this criterion.

The ACCC's preliminary view is that regulated prices which result from the benchmarking approach will, at least, enable access providers to recover the direct costs of providing the LBAS in relation to the specified products.

**Paragraph 152BCA(1)(e) – value to a party of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC preliminary view is that this criterion is not relevant to its proposed approach to adopt a benchmarking pricing approach for the LBAS.

**Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility**

The ACCC considers that the proposed benchmarking approach will not compromise the safe and reliable operation of any carriage service, telecommunications network or facility.

The proposed pricing approach for the declared LBAS should lead to prices that allow the access provider to recover the costs of necessary maintenance expenditures and network asset replacement costs required to ensure that the declared fixed line services are provided in a safe and reliable manner.

### **Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service, a telecommunications network or a facility**

The ACCC has previously noted that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE.<sup>47</sup>

Based on the considerations above, the ACCC considers that adopting a benchmarking approach to setting prices for the declared LBAS will, at least for the initial regulatory period, encourage the efficient operation of carriage services provided on networks subject to the LBAS declaration.

### **Paragraph 152BCA(2) – supply of one or more other eligible services**

The ACCC notes that there are other eligible services (falling outside of the LBAS declaration) that may be provided over networks that are subject to LBAS declaration, for example non-‘superfast’ services (<25 Mbps). The ACCC’s preliminary view is that the proposed pricing approach will not significantly affect the supply of such services.

*Questions on which the ACCC seeks views:*

- 6) With regard to the matters that the commission must take into account in making a final access determinations are prescribed in sections 152AB and 152BCA of the CCA (attached in **Appendix B** and discussed), how does the proposed pricing approach address these matters?
- 7) Do parties have views on the ACCC’s preliminary views of the assessment of the proposed pricing approach against the criteria, as set out above?

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<sup>47</sup> For example ACCC, *Inquiry to make final access determinations for the declared fixed lines services: Final report*, July 2011, p. 23.

## 5 Non-price terms and other matters

Access seekers and access providers are able to commercially negotiate non-price terms and conditions of access to the LBAS. The ACCC considers that the inclusion of relevant NPTCs in access determinations provides parties with certainty of the terms that will apply if they cannot agree on a commercial access arrangement.

In the FADs for fixed line services, the mobile terminating access service and the domestic transmission capacity service (DTCS), the ACCC included NPTCs.<sup>48</sup> Those terms are based on the ACCC's Model Non-Price Terms & Conditions Determination 2008 (2008 Model Terms).<sup>49</sup> In the course of its inquiries into those FADs the ACCC has incorporated submissions made by the industry and made amendments to the 2008 Model Terms where it considers the legislative criteria set out in the CCA will be promoted.<sup>50</sup>

The 2008 Model Terms were the culmination of a whole of industry consultation on model NPTCs for the core services under the previous regulatory regime.

The ACCC has included NPTCs in the IAD for the LBAS that are consistent with its past reasoning and currently proposes to include these NPTCs in the FAD. Submissions on these NPTCs are invited. The ACCC will incorporate any suggested modifications to the NPTCs that are likely to further promote the legislative criteria.

### 5.1 Non-price terms and conditions

The NPTCs that have been included in the LBAS IAD cover the following areas:

- billing and notifications;
- creditworthiness and security;
- general dispute resolution procedures;
- confidentiality; and
- suspension and termination .

The ACCC included those particular terms as it considers that they are fundamental commercial terms that are relevant to the LBAS. The ACCC notes that some of the NPTCs included in the FADs for other declared services do not appear to be relevant to the LBAS and have not been included in the IAD:

- communications with end users;
- liability (risk allocation);
- network modernisation and upgrade provisions; and

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<sup>48</sup> These access determinations can be found on the Register of Access Determinations on the ACCC website: <http://www.accc.gov.au/content/index.phtml/itemId/971651>.

<sup>49</sup> The 2008 Model Terms can be found on the ACCC's website at: <http://www.accc.gov.au/content/index.phtml?itemId=849788>.

<sup>50</sup> C.F. Mobile Terminating Access Service FAD, available at: <http://www.accc.gov.au/content/index.phtml/itemId/990531>, and Domestic Transmission Capacity Service FAD, available at <http://www.accc.gov.au/content/index.phtml/itemId/990533>.



- facilities access.

The ACCC seeks further submissions on the appropriateness of including the above NPTCs in the LBAS FAD. It also seeks submissions on any other terms and conditions that should be included and whether any modifications to the terms that have been included in the IAD are necessary to make them appropriate for the LBAS FAD.

## Summary of submissions

The ACCC received five submissions in response to the discussion paper. These submissions contained general views on NPTCs for the LBAS but did not provide specific comments on particular NPTCs.

One issue raised was whether the ACCC should attempt to align NPTCs for the LBAS with any SAU the ACCC proposed to accept from NBN Co. AAPT and Telstra submitted that the ACCC should consider doing this, while NBN Co submitted that different terms and conditions may be appropriate.

AAPT submitted that it considers that the NPTCs included in the LBAS FAD should align with the terms contained in any NBN Co SAU that is accepted by the ACCC.<sup>51</sup>

Telstra's primary submission was that there was not enough information available (about the LBAS) to allow the ACCC to set appropriate NPTCs and therefore the ACCC should wait for services to be developed before establishing definitive NPTCs for the LBAS.<sup>52</sup>

In the alternative, Telstra submitted that were the ACCC minded to establish NPTCs it could potentially use those established by NBN Co for its bitstream access service as a starting point. If it were to do so, the ACCC would need to consider these terms and conditions in the context of the ongoing consultation on the NBN SAU.<sup>53</sup>

In contrast, NBN Co submitted that given the network and services deployed by other network providers may be different to those deployed by NBN Co, it may also be the case that different NPTCs are appropriate in the FAD. NBN Co submitted that this would be consistent with the intent of the CCA.<sup>54</sup>

The ACCC also received the following submissions which considered different issues to those set out above.

AAPT submitted that the LBAS FAD should include:

- Terms that would be sufficient to meet the open, non-discriminatory access requirement for supply of the LBAS (being terms that ensure the LBAS must be provided to access seekers on the same price and non-price terms except where a difference in terms is needed to remove indirect discrimination).

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<sup>51</sup> AAPT, *Submission*, 23 March 2012, p. 4.

<sup>52</sup> Telstra, *Submission*, 23 March 2012, p. 9.

<sup>53</sup> *ibid.*

<sup>54</sup> NBN Co, *Submission*, 23 March 2012, p. 2.

- Terms ensuring LBAS access providers make available a range of services and products to access seekers (for different classes of customers) that are technically equivalent to the NBN services and products that are, or will be, offered by NBN Co to RSPs.<sup>55</sup>

OptiComm submitted that it would consider any of the NPTCs listed in the discussion paper acceptable, but would prefer the LBAS was not regulated.<sup>56</sup>

OptiComm also submitted that it would be appropriate to include terms that proscribed companies that offered the LBAS from also offering retail services (directly or through a related entity). OptiComm submitted that LBAS providers should operate with a specified minimum number of RSPs to ensure the wholesale services are promoted and actively used.<sup>57</sup>

Optus did not submit a view on proposed NPTCs.

### **ACCC's preliminary view**

The ACCC has had regard to each of the submissions it has received and maintains its view that setting NPTCs in the LBAS IAD and proposed FAD provides base terms and conditions for situations where parties are unable to reach a commercial agreement. This approach is consistent with the approach the ACCC has taken in other determinations and has the benefit of providing some level of certainty for industry and for investment decisions by potential access seekers.

The ACCC has had regard to the specific comments made about the alignment of the NPTCs for the LBAS FAD with the NPTCs in any SAU the Commission proposes to accept from the NBN Co. At this time the ACCC has not yet accepted an undertaking from NBN Co. The ACCC further notes that because of the statutory time frames for this inquiry, the ACCC is releasing an IAD for the LBAS.

The ACCC has had regard to industry views that the information available about the nature of services covered by the LBAS declaration is limited and that there appears to be only a few services currently in operation that meet the LBAS service description.

The ACCC is of the view that some of the NPTCs currently proposed are likely to be non-contentious to industry participants and therefore should be included in both the IAD and the proposed FAD. In this regard the ACCC notes:

- Significant industry consultation was engaged in on non-price terms for core services under the previous regime prior to the 2008 Model Terms being established.
- The amendments to 2008 Model Terms included in later determinations also followed extensive public consultations.
- Industry participants are invited to submit their views on the appropriateness of the specific NPTCs set out in the IAD for inclusion in the LBAS FAD.

The ACCC considers it important to the development of future LBAS that potential entrants are provided with certainty about the base NPTCs of access that will apply if parties are unable to reach a commercial agreement.

<sup>55</sup> AAPT, *Submission*, 23 March 2012, p. 4.

<sup>56</sup> OptiComm, *Submission*, 23 March 2012, pp. 7–8.

<sup>57</sup> *ibid*, p. 8.

In reaching its views on the proposed NPTCs, the ACCC notes that OptiComm, (who currently supplies a service that meets the LBAS service description), considers the NPTCs listed in the discussion paper acceptable.

The ACCC notes that during the operation of the IAD the NPTCs included in the IAD will not impact parties who negotiate their own terms and conditions of access. The ACCC invites submissions on whether the NPTCs in the IAD should be included in the LBAS FAD.

*Questions on which the ACCC seeks views:*

- 8) Are the NPTCs set out in the IAD appropriate for inclusion in the LBAS FAD?
- 9) For any NPTCs in the IAD that are considered not appropriate for inclusion in the LBAS FAD, please provide details of any modifications that can be made to the NPTCs to make them appropriate.
- 10) Are there any other NPTCs that should be included in the LBAS FAD? If so, please include details.
- 11) Are there any matters that should be considered when determining the NPTCs for the LBAS FAD?

## **5.2 Duration of the final access determination**

Subsection 152BCF(5) of the CCA specifies that an access determination must have an expiry date. The CCA requires that the declaration of this Layer 2 bitstream service cannot be varied or revoked and does not have an expiry date.<sup>58</sup> It is therefore not possible to align the expiry date of the access determination with the expiry of the declaration as envisaged by subsection 152BCF(6) of the CCA.

The ACCC has sought submissions on the appropriate duration of the LBAS FAD and noted the factors that may influence the duration include: the need for regulatory certainty and the need for flexibility to adapt to a changing environment.

The ACCC also notes that the declaration may apply to services supplied over a range of greenfield networks not yet built.

### **Summary of submissions**

AAPT, Optus and Telstra each provided views indicating a preference for the ACCC to publish an FAD with a short duration. In particular, the parties submitted the following:

- AAPT submitted that it did not hold a strong view, but considered a 3 year period appropriate to balance the need for regulatory certainty and the need for flexibility.<sup>59</sup>
- Optus agreed that it is not appropriate to align the expiry of the FAD with the timeframe of the declaration. Optus noted the demand for the LBAS was currently limited and submitted that to encourage take up of the service and price certainty a duration of no longer than three years was appropriate.<sup>60</sup>

<sup>58</sup> Subsections 152ALA(1), 152ALA(5), 152ALA(5A) and 152AO(4) of the CCA.

<sup>59</sup> AAPT, *Submission*, 23 March 2012, pp. 3–4.

<sup>60</sup> Optus, *Submission*, 5 April 2012.

- Telstra noted that as there is a lack of detailed information about the LBAS. Telstra submitted a shorter term (in the order of 2 or 3 years) was appropriate because it would allow the ACCC to reassess information pertaining to the LBAS in a relatively shorter period of time.<sup>61</sup>

OptiComm and NBN Co did not submit a view on the duration of the FAD.

### **ACCC's preliminary view**

The ACCC has had regard to each of the submissions it has received and proposes the LBAS FAD have a duration of three years.

For the reasons stated above in **Section 5.2** it is not possible to align the length of the FAD with the length of the LBAS declaration as the declaration does not expire.

The ACCC agrees generally with the proposition that a shorter regulatory period will provide it the opportunity to reassess information pertaining to the LBAS relatively sooner. An FAD of short duration would also allow the ACCC to reconsider price and non-price terms once a greater number of LBAS type services have developed.

The ACCC considers the NBN roll out is a factor that may become increasingly relevant to the provision of the LBAS in the near future. A shorter regulatory period may allow the ACCC to take into consideration the progress made in the roll out of the NBN relatively sooner and the extent of the provision of equivalent services available over the NBN.

While a duration shorter than three years may offer greater flexibility, the ACCC's current view is that a duration less than three years is less likely to create certainty and encourage efficient investment in infrastructure.

The three year period proposed balances these competing concerns and is consistent with the submissions made by parties to date. The ACCC invites further submissions on the proposed three year duration of the LBAS FAD.

*Questions on which the ACCC seeks views:*

12) Is the proposed duration of the FAD appropriate? If not, what is the appropriate duration?

## **6 Assessment of the non-price terms against the legislative criteria**

The ACCC proposes to include the following NPTCs in the LBAS FAD:

- billing and notifications;
- creditworthiness and security;
- general dispute resolution procedures;
- confidentiality provisions; and
- suspension and termination.

<sup>61</sup> Telstra, *Submission*, 23 March 2012, p. 9.

In making the IAD (see **Part B**), the ACCC has included NPTCs in the same form as it proposes for the FAD. Therefore, the ACCC refers to the IAD Schedules in undertaking the following assessments against the legislative criteria in subsection 152BCA(1) of the CCA.

The ACCC invites comments on its assessment of the NPTCs against the legislative criteria.

*Questions on which the ACCC seeks views:*

13) Do you agree with the ACCC's application of the legislative criteria in subsection 152BCA(1) of the CCA? Please provide reasons.

## **6.1 Billing and notification**

The proposed terms regarding billing and notifications are set out in Schedule 2 of the LBAS IAD. These provisions specify the way in which an access provider may bill for services and set out procedures for resolving billing disputes.

### **Paragraph 152BCA(1)(a) – whether the determination will promote the long-term interests of end-users**

The ACCC has considered whether the billing and notification terms set out in Schedule 2 of the LBAS IAD will promote the LTIE. The ACCC believes these provisions will promote competition in LBAS market(s) and encourage efficient investment in infrastructure. The ACCC does not consider that the billing and notification terms directly concern the connectivity of telecommunications networks.

The billing and notification terms promote competition in LBAS market(s) by preventing unnecessary disruptions to business activities as a result of errors or ongoing disputes. The terms also help to ensure accurate and timely billing, which allows access seekers to then bill end-users in a timely manner.

By specifying the timeframes for providing invoices and making payments, the billing and notification terms help to promote certainty for access providers. The terms also reduce capital risks by providing assurance of how investment costs will be recovered. As a result, the provisions promote the economically efficient investment in infrastructure by which listed services are supplied, and any other infrastructure by which listed services are capable of being supplied.

### **Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider**

The ACCC has balanced the legitimate business interests of the access provider with other competing considerations under subsection 152BCA(1) of the CCA. The ACCC is of the view that the terms and conditions in Schedule 2 of the LBAS IAD allow access providers to earn a normal return on their investment with respect to the risks involved, such as not being paid the amount owing. This promotes certainty and encourages efficient investment in the LBAS. The ACCC also considers that an access provider's legitimate business interests will benefit from the certainty of clear and timely billing dispute resolution processes.

Following the public consultation on the making of the DTCS FAD, the ACCC amended clause 2.23 of the NPTCs to ensure that billing disputes are only escalated following the

completion of the procedures set out in clause 2.18. The ACCC considers that this amendment is appropriate for the LBAS FAD. This supports the legitimate business interests of access providers by ensuring that billing disputes are only escalated after a revised proposed resolution has been provided.

### **Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service**

The ACCC believes that this criterion requires consideration of the interests of access seekers. The terms and conditions in Schedule 2 of the LBAS IAD create obligations regarding payment of invoices and billing dispute notification. However, the ACCC does not consider that these obligations are excessive to the point of deterring potential access seeker entry into the market.

The billing and notification provisions allow access seekers at least 20 business days before an access provider can take action to recover unpaid payments. This is considered to be a reasonable length of time for access seekers to identify and rectify any issues. The ACCC also considers that the timeframes for escalating billing disputes will allow access seekers sufficient time to consider the merits of any dispute before undertaking any further action.

The rules and responsibilities around billing and dispute resolution set by the LBAS IAD can reduce the duration of disputes and lead to more efficient and economical dispute resolution outcomes. Clause 2.30 of the NPTCs also provides an incentive for access providers to produce accurate billing information and to rectify errors in a timely manner. This will help to prevent unnecessary disruptions to the business activities of access seekers and other users of the LBAS.

The ACCC considers that the terms in Schedule 2 of the LBAS IAD are important to access seekers because they require accurate and timely billing data in order to bill end-users. Access seekers may be adversely affected if bills are materially inaccurate or unduly delayed, or if workable processes do not exist to resolve billing disputes in an appropriate and timely manner.

### **Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service**

The ACCC considers that the terms and conditions in Schedule 2 of the LBAS IAD do not directly impact on the direct costs of providing access to the declared services. Rather, these terms stipulate the invoicing processes by which costs are recovered.

### **Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that the terms and conditions in Schedule 2 of the LBAS IAD will not affect the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else. This is because this Schedule 2 refers to billing and notifications and not the value of network enhancements.

### **Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services**

The ACCC considers that the terms and conditions in Schedule 2 of the LBAS IAD will not affect operational and technical requirements necessary for the safe and reliable operation of a carriage service. The billing and notification terms do not address operational and technical requirements.

### **Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 2 of the LBAS IAD help to promote the economically efficient operation of a carriage service. Clear billing and dispute resolution procedures help to make operations more efficient by improving payment certainty and the timeliness of dispute resolution.

## **6.2 Creditworthiness and security**

The proposed terms regarding creditworthiness and security are set out in Schedule 3 of the LBAS IAD. These provisions cover the access provider's rights to make enquiries of the access seeker's ability to pay, and to require that security may be provided in certain circumstances.

### **Paragraph 152BCA(1)(a) – whether the determination will promote the long-term interest of end-users**

The ACCC has considered whether the creditworthiness and security terms and conditions in Schedule 3 of the LBAS IAD will promote the LTIE. The ACCC is of the view that practical and functional creditworthiness and security terms will satisfy the objective of promoting competition by removing unnecessary barriers for access seekers, while providing protection against capital risks for the access provider. The assurance provided to access providers will also lead to economically efficient investment in infrastructure. The terms and conditions in Schedule 3 of the LBAS IAD do not directly concern the connectivity of telecommunications networks.

The terms and conditions in Schedule 3 of the LBAS IAD seek to effectively balance the interests of access seekers and access providers. The ACCC understands that unnecessary or excessive creditworthiness information or security requirements could potentially delay or frustrate an access seeker's ability to acquire services. This may create an obstacle to their ability to compete in the telecommunications markets. The ACCC has developed the terms and conditions to ensure that they are not unnecessary or excessive to the extent that they would deter entry or hinder an access seeker's ability to compete in telecommunications markets.

The ACCC considers that the terms and conditions in Schedule 3 of the LBAS IAD help to minimise the financial risk for the access provider. This will provide assurance to the access provider that it will recover the costs of investment. By providing protection for the access provider, this will help to promote competition and encourage economically efficient investment in infrastructure.

### **Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider**

The ACCC has considered the impacts of the terms and conditions in Schedule 3 of the LBAS IAD on the legitimate business interests of access providers. This involves consideration of an access provider to achieve a normal return on investment, having regard to the relevant risks involved.

The creditworthiness and security terms will benefit the access provider by providing security and reducing financial risk. The provisions seek to balance the rights of access providers to make enquiries of an access seeker's ability to pay for services and to provide security, while also ensuring that the terms don't create barriers to entry.

The provision of security protects the access provider's interests in being paid for a debt due. Allowing the access provider to request security before all credit checks are completed benefits the access provider by not exposing it to the risk of default in the intervening period of supply.

The access provider's ability to request creditworthiness information from the access seeker, to receive it within a certain timeframe and then require security to be altered, further supports the legitimate business interests of the access provider to ensure cost recovery.

Following the public consultation into the DTCS FAD to better serve the legitimate business interests of the access provider, the ACCC amended clause 3.3(b) in the DTCS FAD to ensure that security reflects the amount invoiced in respect of the DTCS.

The ACCC considers that the terms and conditions in Schedule 3 of the LBAS IAD benefit the legitimate business interests of a carrier or CSP by facilitating the management of financial risk and protecting its commercial return on investments.

### **Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service**

The ACCC is of the view that the terms and conditions in Schedule 3 of the LBAS IAD achieve an appropriate balance between the interests of access seekers who have the right to use the LBAS and access providers.

The ACCC has decided that access should not be conditional upon the completion of credit checks or the provision of security. Security preconditions have the potential to create unnecessary delays in accessing the service and may deter entry into telecommunications markets. The terms in Schedule 3 have been drafted such that conditional access is to be requested only in certain circumstances. This may be when an access seeker is first acquiring the service and where it does not have a credit history, or when a subsequent event occurs that would give rise to genuine concerns around the access seeker's ability to pay its debts.

The ACCC has also concluded that it is not appropriate for an access provider to determine the amount and form of security or to determine the terms and conditions on which that security is to be maintained by an access seeker. This may unnecessarily result in access providers determining restrictive terms of access.

The Schedule 3 terms and conditions also provide for the access seeker to reduce its security where the access seeker can demonstrate an improvement in its creditworthiness or a material



change in circumstances. Such credit reviews have the potential to free up working capital for the access seeker. This counterbalances the lack of incentive for the access provider to reduce security requirements for its downstream competitors.

The ACCC considers that the terms and conditions in Schedule 3 of the LBAS IAD accommodate the interests of all persons who have the right to use the LBAS.

#### **Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service**

The creditworthiness and security terms and conditions will not impact on the direct costs of providing access to the declared service, as they do not contribute to those costs. Indirectly, the protection afforded to the access provider means that any direct costs incurred are likely to be recovered.

#### **Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that the terms and conditions in Schedule 3 of the LBAS IAD will not affect the value to a person of extensions, or enhancements of capability, whose cost is borne by someone else because this Schedule 3 does not relate to changes to the network.

#### **Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services**

The ACCC considers that the terms and conditions in Schedule 3 of the LBAS IAD will not affect operational and technical requirements necessary for the safe and reliable operation of a carriage service, as they do not address operational and technical requirements.

#### **Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 3 of the LBAS IAD will not affect the economically efficient operation of a carriage service, as they do not impact on the ability of the access provider and access seeker to operate their respective services, networks and facilities in an economically efficient manner.

### **6.3 Dispute resolution procedures**

The proposed terms regarding the general dispute resolution procedures are set out in Schedule 4 of the LBAS IAD. These general provisions do not apply to billing disputes, which are covered in Schedule 2 of the LBAS IAD.

#### **Paragraph 152BCA(1)(a) – whether the determination will promote the long-term interests of end-users**

The ACCC does not consider that the terms and conditions in Schedule 4 of the LBAS IAD directly impact on the LTIE in terms of the objectives of promoting competition, achieving any-to-any connectivity, and the objective of encouraging the economically efficient use of, and investment in, infrastructure.

However, the existence of defined and balanced dispute resolution procedures indirectly promotes the LTIE. These procedures can reduce the time and expense of dispute resolution for all parties. The dispute resolution procedures promote regulatory certainty and encourage parties to confidently engage in commercial negotiations.

### **Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider**

The ACCC considers that the general dispute resolution procedures achieve a balance between the legitimate business interests of the access provider and the interests of the access seeker. The procedures, obligations and rights in Schedule 4 of the LBAS IAD apply equally to both access providers and access seekers.

The provisions in Schedule 4 encourage simple, flexible, timely and inexpensive dispute resolution procedures. This prevents undue reliance on legal proceedings or arbitrations. It is in the mutual interest of both access providers and access seekers to have certainty about processes regarding dispute resolution and the ability to resolve non-billing disputes quickly.

The mediation processes outlined in Schedule 4 of the LBAS IAD are in accordance with the objective dispute resolution guidelines from the Australian Commercial Dispute Centre. The processes also provide for equal representation at mediation and in front of the expert committee. Each party is required to bear its own costs of mediation and the expert committee, and share the costs of the mediator or the independent member of the expert committee. In this way, the terms do not place an unreasonable share of the costs on one party.

The ACCC has adopted Telstra's recommendation received in the DTCS public inquiry that the general dispute resolution procedures be confined to the terms and conditions of the FAD. This allows parties to negotiate their own dispute resolution procedures for terms not covered by the FAD and allows greater flexibility over commercial negotiations.

### **Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service**

For the reasons set out above regarding paragraph 152BCA(1)(b) of the CCA, the ACCC is of the view that dispute resolution procedures benefit both the legitimate interests of the access provider and the interests of the access seekers who have the right to use the LBAS.

### **Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service**

The ACCC considers that the terms and conditions in Schedule 4 of the LBAS IAD do not affect the direct costs of providing access to the declared service because they do not directly contribute to the costs of providing access to the declared service. However, the procedures may indirectly reduce costs for all parties by reducing the time and expense associated with dispute resolution.

### **Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that the terms and conditions in Schedule 4 of the LBAS IAD do not relate to extensions, or enhancement of capability, whose cost is borne by someone else because these terms do not refer to the value of network enhancements.

#### **Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services**

The ACCC considers that the terms and conditions in Schedule 4 of the LBAS IAD will not affect operational or technical requirements necessary for the safe and reliable operation of a carriage service.

#### **Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 4 of the LBAS IAD will not affect the economically efficient operation of a carriage service, as they do not impact on the ability of access providers and access seekers to operate their respective services, networks and facilities in an economically efficient manner.

### **6.4 Confidentiality provisions**

The proposed terms regarding the use and protection of confidential information are set out in Schedule 5 of the LBAS IAD. These provisions seek to ensure that confidential information used or obtained in the course of providing access is not used to the other party's detriment.

#### **Paragraph 152BCA(1)(a) – whether the determination will promote the long-term interests of end-users**

The ACCC considers that the inclusion of confidentiality provisions is in the LTIE because it protects the confidential information of both access providers and access seekers and prevents this information from being used inappropriately. The ACCC considers that the confidentiality provisions in Schedule 5 of the LBAS IAD are necessary to protect the sensitivity of information that is exchanged during normal business operations.

Appropriate confidentiality provisions are likely to promote competition because access seekers and access providers have assurance that commercially sensitive information cannot be used to gain a competitive advantage to the detriment of the other party. Parties are also more likely to make efficient investments in infrastructure knowing that their confidential information is protected. The ACCC considers that the confidentiality terms and conditions do not have an effect on any-to-any connectivity.

#### **Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider**

The ACCC considers that the terms and conditions in Schedule 5 promote the efficient use of confidential information, minimise costs to parties in disclosing information and promote the legitimate business interests of the access provider. If the confidential information of the

access provider is not properly protected, the access provider may suffer losses. The confidentiality terms in Schedule 5 of the LBAS IAD help to prevent that loss.

Following the public consultation on the making of the DTCS FAD, the ACCC has amended clause 5.10 to include notification rights in response to termination events specified in clause 6.8. The ACCC considers that this amendment is reasonable and is in the legitimate business interests of the access provider.

### **Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service**

The ACCC considers that the terms and conditions set out in Schedule 5 of the LBAS IAD serve the interests of access seekers. These provisions help to protect the confidential information from misuse by the access provider by outlining procedures for handling confidential information. The ACCC recognises that the confidential information provided by access seekers when provisioning services is potentially very valuable. Protecting that information from misuse is in the access seekers' interests.

### **Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service**

The ACCC understands that confidentiality terms in Schedule 5 may require an access provider to develop systems to comply with the terms.<sup>62</sup> The ACCC submits that any costs associated with this development are not unreasonable given the necessity of protecting confidential information. The ACCC is of the view that the terms and conditions in Schedule 5 of the LBAS IAD strike the right balance between imposing additional costs and protecting the interests of access seekers.

### **Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that this criterion is not relevant because the terms and conditions in Schedule 5 of the LBAS only include processes for confidentiality, not any network enhancements.

### **Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services**

The ACCC considers that this criterion is not relevant because the terms and conditions in Schedule 5 of the LBAS IAD do not have implications for the safe and reliable operation of the network.

### **Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 5 of the LBAS IAD promote the economically efficient operation of a carriage service by outlining procedures for secure

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<sup>62</sup> ACCC, *Model non-price terms and conditions: Final determination*, November 2008, p. 25.

information sharing. Without the fear of confidential information being disclosed, parties are able to candidly share information necessary for the provision of services.

## **6.5 Suspension and termination**

The proposed terms and conditions regarding the suspension and termination of LBAS services are set out in Schedule 6 of the LBAS IAD. These terms cover the circumstances in which an access provider may suspend or terminate a service of an access seeker, including timeframes for an access seeker to rectify their conduct.

### **Paragraph 152BCA(1)(a) – whether the determination will promote the long-term interests of end-users**

The ACCC has considered whether the inclusion of the suspension and termination provisions in Schedule 6 of the LBAS IAD is in the LTIE. The ACCC is of the view that the suspension and termination provisions will help to promote competition and encourage efficient investment in infrastructure. The suspension and termination provisions in Schedule 6 of the LBAS IAD are not relevant to the objective of any-to-any connectivity.

Under the LBAS IAD an access provider may only suspend service, apart from in an emergency as below, once it has given notice of its intention to suspend the service to the access seeker. The suspension and termination provisions are likely to encourage efficient investment in infrastructure because access seekers have assurance that their service will not be indiscriminately suspended or terminated for trivial matters. This is also likely to promote competition, because access seekers will be able to operate their businesses in competition with other services without disruption due to inappropriate matters.

### **Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or carriage service provider**

The ACCC has taken into account the legitimate business interests of the access provider in determining the terms and conditions in Schedule 6 of the LBAS IAD. The suspension and termination provisions are important for the access provider. They are a means by which an access provider can protect its legitimate business interests in achieving a normal return on its investment, having regard to relevant risks.

Following the public consultation on the making of the DTCS FAD, the ACCC decided to include immediate rights of suspension during an emergency, to maintain safety to networks and persons, and to respond to the events specified in clause 6.8. This allows access providers to suspend or cease services in reasonable circumstances, while ensuring that access seeker's business is not disrupted inappropriately.

### **Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service**

The ACCC has also taken into account the interests of other parties when including the terms and conditions in Schedule 6 of the LBAS IAD. The suspension and termination provisions are important for access seekers because the terms ensure that their businesses are not disrupted inappropriately. In situations where an access seeker is in breach of an access

agreement, the terms in Schedule 6 protect the interests of access seekers by providing that the access provider can only suspend or terminate a service after giving sufficient notice of its intention to do so and providing an opportunity for the breach to be remedied. This ensures that a service will not be unreasonably interrupted.

Schedule 6 also provides some protection for access seekers where the service has been terminated. An access provider must refund to an access seeker a fair and equitable proportion of those sums paid under the FAD for a period extending beyond the date on which the supply of the service has been terminated.

#### **Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service**

Providing access to a declared service imposes direct costs on the access provider. The ACCC has had regard to these costs in including the terms and conditions in Schedule 6 of the LBAS IAD. These terms and conditions provide a means by which the access provider may suspend or terminate a service of an access seeker in specific circumstances. This allows the access provider to protect itself from commercial risks such as in the event where an access seeker fails to pay its bills.

Overall, the terms and conditions in Schedule 6 of the LBAS IAD balance the interests of all parties in relation to the costs associated with access to the declared service.

#### **Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that the terms and conditions in Schedule 6 of the LBAS IAD are not relevant to extensions, or enhancements of capability, whose cost is borne by someone else. This is because the terms relate to the circumstances under which an access provider may suspend or terminate a service, rather than the circumstances under which a party may recover costs relating to network enhancements.

#### **Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services**

The ACCC considers that the terms and conditions in Schedule 6 of the LBAS IAD do not limit arrangements to ensure safe and reliable operation of carriage services.

#### **Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service**

The terms in Schedule 6 of the LBAS IAD allow an access provider to suspend the supply of a service when the access seeker has failed to pay money owing or has otherwise breached its obligations under the LBAS IAD. The ACCC considers that these clauses encourage and support the economically efficient operation of carriage services and associated networks of the access provider. It is not economically efficient for an access provider to be required to supply a carriage service where an access seeker is consistently defaulting on payment.

## **Part B – Statement of reasons for the interim access determination**

This part of the paper provides a statement of reasons for the IAD. It sets out the price and non-price terms in the IADs and why the ACCC has decided on these terms. It also provides an assessment of these terms against the LTIE.

### *Extension of the period for making the access determination*

The ACCC has decided to extend the period for making the LBAS FAD under subsection 152BCK(3) of the CCA. As the ACCC intends to benchmark LBAS pricing to the regulated pricing of services by NBN Co, a final decision on the FAD is not proposed to be made until the regulation of NBN Co pricing has been finalised. The original six month period for making the LBAS FAD expires on 24 August 2012. At this stage, it does not appear that the pricing of NBN Co services will be finalised at that time.

Therefore, the ACCC is extending the period for making the LBAS FAD until 24 February 2013. This additional six month period is the longest that the ACCC can extend the public inquiry at this point in time, however the ACCC will be able to further extend this period if necessary.<sup>63</sup> This current extension will allow for progress towards the finalisation of the regulated NBN Co pricing and further consultation with industry, if necessary, on the pricing for the LBAS.

### *Regulatory obligations on providers of LBAS*

The declaration of the LBAS imposes certain regulatory obligations on providers of the LBAS in addition to this IAD. These include:

- the requirement to lodge access agreements with the ACCC;
- the non-discrimination obligations; and
- the requirement to lodge statements of difference.

Section 152BEA of the CCA requires that access providers lodge their access agreements with the ACCC. An agreement must be lodged within 28 days after the agreement was entered into. To lodge agreements, access providers should email the agreements to: [accessagreements@acc.gov.au](mailto:accessagreements@acc.gov.au). Further information about this obligation can be found on the ACCC's website: <http://www.accc.gov.au/content/index.phtml/itemId/977010>.

Sections 152ARA and 152ARB of the CCA require that access providers must supply the LBAS on a non-discriminatory basis. The ACCC has published guidelines on these non-discrimination obligations. The guidelines can be found on the ACCC's website: <http://www.accc.gov.au/content/index.phtml/itemId/1020587>.

Section 152BEBF of the CCA requires that access providers must provide the ACCC with a statement about the differences between an access agreement and an access determination (including an IAD). The ACCC is consulted on the form of these statements of difference in its consultation on the non-discrimination guidelines. The required form for a statement of difference is in section 9 of the non-discrimination guidelines. Statements of difference

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<sup>63</sup> Subsection 152BCK(3) of the CCA.

should be emailed to: [statementdifferences@acc.gov.au](mailto:statementdifferences@acc.gov.au). The ACCC is required to publish statements of difference on its website. Further information can be found on the ACCC's website: <http://www.acc.gov.au/content/index.phtml/itemId/1020594>.

## 7 Price terms in the interim access determination

### *Choice of methodology*

As described in **Part A**, the ACCC is of the preliminary view that a relatively light-handed approach to determining price terms or a method of ascertaining prices for this LBAS FAD is appropriate. It is therefore proposing to adopt a benchmarking pricing approach in the LBAS FAD.

The ACCC has considered and is not proposing to adopt a cost based approach to setting LBAS prices, because:

- Cost-based pricing approaches would place a very significant regulatory burden on current networks operators subject to the LBAS declaration, given their size and ownership characteristics.
- The LBAS declaration covers a wide range of networks, products and networks operators which potentially have different cost characteristics. This does not facilitate an accurate estimation of cost-based prices for LBAS.
- There is a lack of clarity around the costs of providing LBAS services. Indeed, it may prove difficult to effectively establish the costs of providing LBAS services.

The benchmarking approach proposed by the ACCC for the FAD will establish a price ceiling for particular LBAS products based on regulated NBN Co prices. The ACCC proposes that this approach only establish a regulated price for an LBAS product where there has been a regulated price determined for a corresponding NBN Co product. This approach will require LBAS operators to offer (on request) specified LBAS products at a price no greater than the nominated price ceiling. However, LBAS operators will have the freedom to offer other LBAS products not specified in an LBAS access determination (or other non-LBAS services) at commercially negotiated prices.

The CCA requires the ACCC to make an IAD if the ACCC considers it is unlikely that a FAD in relation to access to the service will be made within 6 months after the commencement of the FAD public inquiry. Given that the timeframe for finalising NBN Co regulated prices is likely to go beyond the initial 6 month period of the LBAS inquiry, the ACCC is not proposing to make an FAD with its proposed pricing approach within the 6 month timeframe. Therefore the ACCC is required to make an IAD for LBAS.

In keeping with this proposed approach, the ACCC has decided to set price terms in the LBAS IAD that are benchmarked to NBN Co prices. However, as noted above, the regulation of NBN Co prices has not yet been finalised. While NBN Co has submitted an SAU to the ACCC for consideration, the ACCC has not yet made a final decision regarding this SAU. Also the ACCC has not made any access determinations in relation to NBN Co services.



Therefore, for the IAD the ACCC has decided to benchmark LBAS prices to NBN Co prices currently offered in its Wholesale Broadband Agreement (WBA).

#### *Specifying LBAS products and prices*

The LBAS is a local access service involving comparatively little aggregation or transmission as part of the service. As discussed in **Part A**, the ACCC considers that the LBAS can be compared with NBN Co's AVC product component (part of NBN Co's FAS). The ACCC considers that the AVC provides appropriate benchmarks for specific LBAS products and prices.

The nature of the declared LBAS means that there are number of specific wholesale products that can be potentially captured by the declaration. For example, LBAS operators offer a number of 'speed' tiers for their access services, including products of 25/5 Mbps, 50/20 Mbps and 100/40 Mbps. These access services can also be specified with regard to a number of QoS characteristics.

The ACCC has decided to limit the number of products in the LBAS IAD. The ACCC considers this is an appropriate approach, given that the regulatory pricing for NBN Co has not yet been finalised and therefore it is not clear which NBN Co AVC product components, e.g. 'speed' tiers, will be subject to specific regulation.

Therefore, the ACCC has decided to specify a regulated price for one LBAS product. The ACCC has chosen to specify an LBAS product is a residential grade 25/5 Mbps product which is the 'lowest-speed' LBAS product that is:

- captured by the LBAS declaration (which only includes 'superfast' services, that have a download transmission rate of normally more than 25mbps);
- widely available in the market currently. NBN Co offers a 25/5 Mbps AVC product and the ACCC is aware that other operators which are subject to the LBAS declaration also offer a similar access product.

For the purposes of the IAD, the ACCC has decided to specify that, in meeting their SAOs under the CCA, a carrier providing (or capable of providing) the LBAS must offer a LBAS product with the following characteristics:

- 1) a downstream data rate of 25 Mbps (peak information rate);
- 2) an upstream data rate of 5 Mbps (peak information rate);
- 3) residential-grade service characteristics; and
- 4) use of a data port (e.g. Ethernet connector) on the network termination unit at the end-user's premises.

The ACCC has defined 'residential-grade service characteristics' as entry-level characteristics (e.g. service level agreements) that are appropriate for supplying a service to residential end-users. The characteristics of the supplied LBAS product should reflect any relevant industry standards. The ACCC considers that specifying this general level of service quality is appropriate for specifying an entry-level LBAS product. The ACCC is not seeking to set specific service levels at this time, however should concerns arise regarding service levels the ACCC may consider doing so.

For the purposes of the IAD, the ACCC has decided not to include specific requirements for the provision of voice capability for the specified 25/5 Mbps LBAS product. As discussed in **Part A**, the ACCC is seeking views on its proposed approach to include requirement to provide voice capability as part of a specified LBAS products in the LBAD FAD.

In finalising the LBAS FAD, the ACCC will review the scope of the LBAS products and ancillary services to be regulated in the FAD.

In determining the price for this specified LBAS product in the IAD, the ACCC has decided to use NBN Co's WBA price as a benchmark until the regulated pricing for NBN Co has been finalised. NBN Co's WBA Product Catalogue lists the recurring charge for a Traffic Class 4 (TC-4) 25/5 Mbps Peak Information Rate (PIR) AVC at \$27 per month, excluding GST.<sup>64</sup>

Therefore, the ACCC has decided to set a price ceiling of \$27 per service in operation (SIO) per month (excluding GST) for the 25/5 Mbps LBAS product described above.

As noted previously, by specifying the 25/5 LBAS product and its price in this IAD, the ACCC is not restricting LBAS operators from offering other LBAS or ancillary services over their networks, nor does the IAD restrict operators from offering backhaul services between an LBAS network-network interface and an RSP's point-of-presence.

## **8 Non-price terms and other matters in the interim access determination**

The ACCC has previously included NPTCs in the IADs for the declared fixed line services (March 2011), DTCS (April 2011), and wholesale ADSL (February 2012). At the time the ACCC considered that their inclusion would provide certainty for parties in the transitional period for areas covered by the IADs.

The ACCC has followed this approach when considering the content of the NPTCs in the IAD for the LBAS.

In determining the content of the IAD for the LBAS the ACCC has had regard to the NPTCs developed for previous IADs and FADs. The ACCC notes that:

- The NPTCs included in the DTCS FAD is the outcome of the latest public consultation conducted by the ACCC on NPTCs;
- The ACCC considers that the amendments made to the NPTC's for the DTCS FAD are likely to further promote the statutory criteria; and
- It is consistent with the ACCC's past approach to making IADs to adopt the most recent form of NPTCs in the LBAS IAD.

The ACCC has therefore decided to adopt NPTCs for the LBAS IAD based on the terms in the DTCS FAD.

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<sup>64</sup> NBN Co, *WBA Product Catalogue*, 4 April 2012, Price List 1.1, p. 188.

The ACCC recognises that not all NPTCs appearing in the DTCS FAD are relevant to the provision of the LBAS. The ACCC has therefore determined to adopt some (but not all) of the NPTCs in the same form as they appear in the DTCS FAD.

The ACCC has included NPTCs in the LBAS IAD covering the following issues:

- billing and notifications;
- creditworthiness and security;
- general dispute resolution procedures;
- confidentiality; and
- suspension and termination.

The ACCC is of the view that including these NPTCs in the LBAS IAD will provide a fallback position for parties if they cannot agree on commercial terms. In this way the NPTCs will facilitate access to the LBAS.

The ACCC is required to specify an expiry date for an access determination.<sup>65</sup> The ACCC has decided that the LBAS IAD should expire on 30 June 2013. This should allow sufficient time for the finalisation of the LBAS FAD prior to the expiry of the IAD. When the ACCC's makes the LBAS FAD, this IAD is automatically revoked.<sup>66</sup>

## 9 Overall approach to making the IAD

The CCA mandates that the ACCC consider certain criteria when making an access determination. However this requirement does not apply to an IAD.<sup>67</sup>

Nevertheless, in making this IAD, the ACCC has been guided by the object of Part XIC of the CCA, namely to promote the LTIE of carriage services or of services provided by means of carriage services.<sup>68</sup>

This object has three limbs: the promotion of competition, the achievement of any-to any connectivity and the encouragement of economically efficient use of and investment in infrastructure. The ACCC's views on how this object should be interpreted and applied when making an access determination are provided in **Appendix B**.

In addressing particular access terms in this IAD, the ACCC has considered their likely importance to achieving these objectives, and whether it has sufficient information available to it to reasonably specify terms to apply, in the interim period until the FAD is made. The ACCC considered other possible access terms can be addressed through the FAD inquiry process.

The ACCC notes that a number of these considerations are also reflected in **Part A**, where the ACCC has expressed its preliminary views as to the assessment of the proposed regulatory approach for the FAD against the legislative criteria.

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<sup>65</sup> Subsection 152BCF(5) of the CCA.

<sup>66</sup> Subsection 152BCF(9A) of the CCA.

<sup>67</sup> Subsection 152BCA(4) of the CCA.

<sup>68</sup> Section 152AB of the CCA.

### *Competition in markets*

The ACCC considered whether making the IAD would be likely to promote competition in markets for carriage services and services supplied by means of carriage services. In this regard, the ACCC notes the requirement of the Telco Act that provision of the LBAS is to be on a wholesale basis only. Therefore, while the incentive for self preferential or discriminatory behaviour is not precluded, competitive concerns due to the vertical integration of LBAS providers are not significant.

The ACCC notes that in the discussion paper the ACCC referred to two broad markets as relevant to the LBAS FAD, for the purposes of prompting consideration of competition issues. These relevant markets were described as i) the market for the wholesale supply of Layer 2 bitstream services, and ii) the market for the wholesale and retail supply of Layer 3 bitstream services.<sup>69</sup>

As discussed in **Part A**, the ACCC considers that, for the purposes of the LBAS FAD for the initial regulatory period, it is appropriate to consider the product and geographic dimensions of the characteristics or functions of the good or services in both the retail and wholesale markets. The ACCC also notes that it is not required to precisely define the relevant market or markets in which the declared services are supplied. Rather the ACCC considers that it is sufficient to broadly identify the scope of the relevant market or markets that are likely to be affected by the ACCC's regulatory decision. The ACCC is of the view that these considerations are equally applicable to this IAD.

Noting that the ACCC has broadly identified the scope of the market or markets for this LBAS IAD, it considers the relevant markets to be the wholesale and retail markets for the supply of fixed line telecommunications services (including broadband and voice services) in geographic areas serviced by network operators subject to the LBAS declaration. The ACCC notes that the market for providing fixed line telecommunications networks in new or greenfield estates is also likely to be affected by an LBAS IAD.

The ACCC is of the view that reasonable access prices will allow RSPs to enter and compete in retail markets where end-users are serviced by networks subject to the LBAS declaration. Benchmarking against NBN Co's price will ensure that RSPs will not have to pay a price for the 25/5 Mbps service greater than the price for a comparable NBN Co access product in order to compete in retail markets affected by the LBAS declaration. This pricing approach will therefore act to encourage RSPs to enter areas serviced by LBAS operators and promote retail competition in LBAS areas.

At the network level, the NBN benchmarking pricing approach for LBAS means that LBAS providers are likely to continue to compete against NBN Co for greenfields tenders, and will do so under similar regulatory settings for their declared services.

### *Economically efficient use of and investment in infrastructure*

The ACCC considered whether making the IAD would be likely to encourage the economically efficient use of, and economically efficient investment in, the infrastructure by

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<sup>69</sup> Discussion Paper, p. 15.

which listed carriage services are supplied, and any other infrastructure by which listed services are, or are likely to become, capable of being supplied.<sup>70</sup>

In considering this objective, the ACCC must have regard to certain matters, including:<sup>71</sup>

- whether it is technically feasible for the services to be supplied and charged for;
- the legitimate commercial interests of the supplier including the ability to exploit economies of scale and scope;
- the incentives for investment in the infrastructure which the services are supplied and any other infrastructure by which the services are, or are likely to become, capable of being supplied.

The ACCC formed the view that it is technically feasible for the services to be supplied and charged for as per the IAD. In this regard, the IAD's 25/5 Mbps product is consistent with the type of wholesale products that are being supplied over networks subject to (or likely to be subject to) the LBAS declaration. Where an LBAS operator is not currently offering a 25/5 Mbps product as described in the IAD, the ACCC considers that it is likely to be technically feasible for LBAS operators to do so.

The ACCC also considered the legitimate commercial interests of LBAS operators as suppliers of the service and of other suppliers. It has done this by adopting an approach to setting the IAD price terms that does not impose a large regulatory burden on industry and by setting price terms that do not unnecessarily restrict LBAS operators.

With respect to the first point, the ACCC notes that the regulatory burden—and regulatory cost—of establishing cost models for multiple LBAS operators would be significant and disproportionate to the circumstances regarding the current size of the market and of current LBAS operators. The benchmarking approach adopted in the IAD represents a more appropriate regulatory response to LBAS pricing that will still enable access to the LBAS at a regulated reference point.

The regulated price ceiling for only the 25/5 Mbps product will not unduly restrict pricing for the 25/5 Mbps product, as the benchmarked price ceiling is above the current wholesale prices of many current LBAS operators. LBAS operators will be able to continue to pursue their pre-existing business plans and should not be artificially restricted from recovering their costs of supplying the LBAS.

The ACCC also considered incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the NBN) by which services are, or are likely to become, capable of being supplied, and the risks involved in making the investment.<sup>72</sup>

As discussed above, the NBN benchmarking pricing approach for LBAS will allow continued competition between NBN Co and LBAS providers in greenfields estates. LBAS providers will have to compete against NBN Co for greenfields tenders, but will do so under similar regulatory settings for the declared services. The ACCC considers that competition

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<sup>70</sup> Subsection 152AB(2) of the CCA.

<sup>71</sup> Subsection 152AB(6) of the CCA.

<sup>72</sup> Subsections 152AB(6) and (7A) of the CCA.

for these estates may help to promote efficient investment in networks and network infrastructure into the future.

*Any-to-any connectivity*

The ACCC considered that the making of the IAD would not have an effect on the achievement of any-to-any connectivity. This is because the IAD deals with commercial terms of access only and does not address issues relating to the interconnection of networks.

## Appendix A: LBAS service description

The local bitstream access service is a point to point service for the carriage of communications in digital form between a **network-network interface** and a **user-network interface** supplied using a **designated superfast telecommunications network** that is:

- (a) a **Layer 2 bitstream service**; and
- (b) a **superfast carriage service**.

This declaration does not apply to services supplied, or capable of being supplied:

- (a) using a specified network; or
- (b) using a specified local access line; or
- (c) by a specified owner of a local access line;

where that network, local access line or owner is the subject of a Ministerial exemption under section 141A or statutory exemption under subsection 141B(3) or 141B(4) of the *Telecommunications Act* and any conditions that apply to the exemption are satisfied.

### Definitions

Where words or phrases used in this declaration are defined in the *Competition and Consumer Act 2010* or the *Telecommunications Act 1997*, they have the meaning given in the relevant Act.

**Layer 2 bitstream service** has the meaning given in section 152AC of the *Competition and Consumer Act 2010*

**designated superfast telecommunications network** has the meaning given in subsection 152AGA of the *Competition and Consumer Act 2010*

a **network-network interface** means an interface provided by an access provider at a **point of interconnection** where the access seeker's telecommunications network can interface to the access provider's **designated superfast telecommunications network**

a **point of interconnection** is a physical point of interconnection which allows the interconnection of facilities in accordance with subsection 152AR(5) of the *Competition and Consumer Act 2010*

**superfast carriage service** has the meaning given in section 152AC of the *Competition and Consumer Act 2010*

a **user-network interface** means an interface located at a physically defined end-user's premises where the access provider's **designated superfast telecommunications network** is present to an end-user

## Appendix B: Legislative framework for access determinations

The telecommunications access regime contained in Part XIC of the *Competition and Consumer Act 2010* (CCA) was amended with effect from 1 January 2011 by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*. The amendments replace the previous negotiate/arbitrate framework with a range of different access mechanisms, including up-front access determinations.

The new access regime enables the Australian Competition and Consumer Commission (ACCC) to set default price and non-price terms in access determinations. The terms and conditions in an access determination will only apply where there are no commercially agreed terms and conditions between the access seekers and access provider. The access determinations create a benchmark which access seekers can fall back on while still allowing parties to negotiate different terms.

Access determinations can be interim or final. Where access determinations specify terms and conditions of access they must include terms and conditions relating to price (or a method of ascertaining a price) and may also contain non-price terms, although this is not compulsory.<sup>73</sup> Compliance with access determinations is a carrier licence condition and a service provider rule.<sup>74</sup> The access determinations do not apply to the extent they are inconsistent with various other instruments and agreements, including access agreements between parties.<sup>75</sup>

### Public inquiry

The access regime requires the ACCC to consider making access determinations for all declared services. For a newly declared service, the ACCC must commence a public inquiry into making an access determination within 30 days after the declaration is made.<sup>76</sup> The ACCC must make a final access determination (FAD) within 6 months of commencing a public inquiry. The ACCC can extend the time frame for making an FAD by up to 6 months.<sup>77</sup>

### Content of access determinations

Section 152BC of the CCA specifies what an access determination may contain. These include, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the standard access obligations (SAOs) provided for in the CCA and terms and conditions of access to a declared service. Access determinations can make different provisions with respect to different access providers or access seekers.<sup>78</sup>

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<sup>73</sup> Subsection 152BC(3) of the CCA.

<sup>74</sup> Sections 152BCO and 152BCP of the CCA.

<sup>75</sup> Section 152BCC of the CCA.

<sup>76</sup> Subsection 152BCI(1) of the CCA.

<sup>77</sup> Subsections 152BCK(2) and (3) of the CCA.

<sup>78</sup> Subsection 152BC(5) of the CCA.



## **Fixed principles provisions**

An access determination may contain a fixed principles provision, which allows a provision in an access determination to have an expiry date after the expiry date of the access determination.<sup>79</sup> Such a provision would allow the ACCC to ‘lock in’ a term so that it would be consistent across multiple access determinations.

## **Varying an access determination**

Section 152BCN allows the ACCC to vary or revoke an access determination. A fixed principles provision cannot be varied or removed unless the access determination sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.<sup>80</sup>

## **Commencement and expiry provisions**

Section 152BCF of the CCA sets out the commencement and expiry rules for access determinations. An access determination must have an expiry date.<sup>81</sup>

## **Criteria to consider when making an access determination**

The ACCC must have regard to the criteria specified in subsection 152BCA(1) of the CCA when making an access determination. These criteria are:

- whether the determination will promote the long-term interests of end users (LTIE) of carriage services or services supplied by means of carriage services
- the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier’s or provider’s investment in facilities used to supply the declared service
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

The subsection 152BCA(1) criteria mirror the repealed section 152CR(1) criteria that the ACCC was required to take into account in making a final determination in an access dispute. The ACCC intends to interpret the subsection 152BCA(1) criteria in a similar manner to that used in access disputes.

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<sup>79</sup> Subsection 152BCD of the CCA.

<sup>80</sup> Subsection 152BCN(4) of the CCA.

<sup>81</sup> Subsection 152BCF(5) of the CCA.

Subsection 152BCA(2) sets out other matters that the ACCC may take into account in making access determinations.

Subsection 152BCA(3) allows the ACCC to take into account any other matters that it thinks are relevant.

The ACCC's initial views on how the legislative criteria in section 152BCA should be interpreted for the access determination process are set out below.

### **Paragraph 152BCA(1)(a)**

The first criterion for the ACCC to consider when making an access determination is 'whether the determination will promote the LTIE of carriage services or of services supplied by means of carriage services'.

The ACCC has previously published a guideline explaining what it understands by the phrase 'LTIE' in the context of its declaration responsibilities.<sup>82</sup> This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for making an access determination for the local bitstream access service (LBAS).

In the ACCC's view, particular terms and conditions promote the interests of end users if they are likely to contribute towards the provision of:

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.<sup>83</sup>

The ACCC also notes that the Australian Competition Tribunal (Tribunal) has offered guidance in its interpretation of the phrase 'LTIE' (in the context of access to subscription television services):

Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary to take the following matters into account when applying the touchstone – the long-term interests of end users:

\*End users: "end users" include actual and potential [users of the service]...

\*Interests: the interests of the 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. ...[T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case ...

\*Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.<sup>84</sup>

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<sup>82</sup> ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act, July 1999*, in particular pp. 31–38.

<sup>83</sup> *ibid.*, p. 33.

<sup>84</sup> *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

To consider the likely impact of particular terms and conditions on the LTIE, the CCA requires the ACCC to have regard to whether the terms and conditions are likely to result in:

- promoting competition in markets for carriage services and services supplied by means of carriage services
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in:
  - the infrastructure by which listed carriage services are supplied, and
  - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.<sup>85</sup>

### ***Promoting competition***

In assessing whether particular terms and conditions will promote competition, the ACCC will analyse the relevant markets to which the declared service is an input and consider whether the terms set in those markets remove obstacles to end users gaining access to carriage services and services supplied by means of carriage services.<sup>86</sup>

Obstacles to accessing these services include the price, quality and availability of the services and the ability of competing providers to provide telephony and broadband services.

The ACCC is not required to precisely define the scope of the relevant markets in which the declared services are supplied. The ACCC considers that it is sufficient to broadly identify the scope of the relevant markets likely to be affected by the ACCC's regulatory decision.

### ***Any-to-any connectivity***

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end user who is supplied with a carriage service that involves communication between end users is able to communicate, by means of that service, with each other end user who is supplied with the same service or a similar service. This must be the case whether or not the end users are connected to the same telecommunications network.<sup>87</sup>

The ACCC considers that this criterion is relevant to ensuring that the terms and conditions contained in FADs do not create obstacles for the achievement of any-to-any connectivity.

### ***Efficient use of and investment in infrastructure***

In determining the extent to which terms and conditions are likely to encourage the economically efficient use of and investment in infrastructure, the ACCC must have regard to:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:

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<sup>85</sup> Subsection 152AB(2) of the CCA.

<sup>86</sup> Subsection 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] ACompT 3 at [92]; *Telstra Corporation Limited* [2006] ACompT 4 at [97], [149].

<sup>87</sup> Subsection 152AB(8) of the CCA.

- the technology that is in use, available or likely to become available
- whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and
- the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks;
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the National Broadband Network) by which services are, or are likely to become, capable of being supplied, and
- the risks involved in making that investment.<sup>88</sup>

The objective of encouraging the ‘economically efficient use of, and economically efficient investment in ... infrastructure’ requires an understanding of the concept of economic efficiency. Economic efficiency consists of three components:

- productive efficiency – this is achieved where individual firms produce the goods and services that they offer at least cost
- allocative efficiency – this is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs)
- dynamic efficiency – this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

On the issue of efficient investment, the Tribunal has stated that:

...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.<sup>89</sup>

...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.<sup>90</sup>

...access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.<sup>91</sup>

### **Paragraph 152BCA(1)(b)**

The second criterion requires the ACCC to consider ‘the legitimate business interests of the carrier or provider’ when making an FAD.

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<sup>88</sup> Subsections 152AB(6) and (7A) of the CCA.

<sup>89</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

<sup>90</sup> *ibid.* at [164].

<sup>91</sup> *ibid.*

In the context of access disputes, the ACCC considered that it was in the access provider's legitimate business interests to earn a normal commercial return on its investment.<sup>92</sup> The ACCC is of the view that the concept of 'legitimate business interests' in relation to FADs should be interpreted in a similar manner, consistent with the phrase 'legitimate commercial interests' used elsewhere in Part XIC of the CCA.

For completeness, the ACCC notes that it would be in the access provider's legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.<sup>93</sup>

The Tribunal has taken a similar view of the expression 'legitimate business interests'.<sup>94</sup>

### **Paragraph 152BCA(1)(c)**

The third criterion requires the ACCC to consider 'the interests of all persons who have the right to use the service' when making an FAD.

The ACCC considers that this criterion requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.<sup>95</sup> The access seekers' interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete with the access provider in the provision of retail services.<sup>96</sup>

People who have rights to currently use a declared service will generally use that service as an input to supply carriage services, or a service supplied by means of carriage service, to end users.

The ACCC considers that this class of persons has an interest in being able to compete for the custom of end users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.<sup>97</sup>

However, the ACCC does not consider that this criterion calls for consideration to be given to the interests of the users of these 'downstream' services. The interests of end users will already be considered under other criteria.

### **Paragraph 152BCA(1)(d)**

The fourth criterion requires that the ACCC consider 'the direct costs of providing access to the declared service' when making an FAD.

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<sup>92</sup> ACCC, *Resolution of telecommunications access disputes – a guide (revised)*, March 2004, p. 56 (Access Dispute Guidelines).

<sup>93</sup> ACCC, *Access pricing principles—telecommunications*, July 1997, p. 9 (1997 Access Pricing Principles).

<sup>94</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [89].

<sup>95</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [91].

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*

The ACCC considers that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access, and includes the incremental costs of providing access.

The ACCC interprets this criterion, and the use of the term ‘direct costs’, as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal’s approach in an undertaking decision.<sup>98</sup> A contribution to such apportioned costs can also be supported by other criteria.

However, the criterion does not extend to compensation for loss of any ‘monopoly profit’ that occurs as a result of increased competition.<sup>99</sup>

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs criterion ‘is concerned with ensuring that the costs of providing the service are recovered.’<sup>100</sup> The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.<sup>101</sup>

### **Paragraph 152BCA(1)(e)**

The fifth criterion requires that the ACCC consider ‘the value to a party of extensions, or enhancements of capability, whose cost is borne by someone else’ when making an FAD.

In the 1997 Access Pricing Principles, the ACCC stated:

This criterion requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement.

Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.<sup>102</sup>

The ACCC considers that this application of paragraph 152BCA(1)(e) is relevant to making FADs.

### **Paragraph 152BCA(1)(f)**

The sixth criterion requires the ACCC to consider ‘the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility’ when making an FAD.

The ACCC considers that this criterion requires that terms of access should not compromise the safety or reliability of carriage services and associated networks or facilities, and that this has direct relevance when specifying technical requirements or standards to be followed.

The ACCC has previously stated in the context of model non-price terms and conditions (NPTCs), it is of the view that:

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<sup>98</sup> *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

<sup>99</sup> See Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996, p. 44: [T]he ‘direct’ costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

<sup>100</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [92].

<sup>101</sup> *ibid.* at [139].

<sup>102</sup> 1997 Access Pricing Principles, p. 11.

...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.<sup>103</sup>

The ACCC considers that these views will apply in relation to the paragraph 152BCA(1)(f) criterion for the making of FADs.

### **Paragraph 152BCA(1)(g)**

The final criterion of subsection 152BCA(1) of the CCA requires the ACCC to consider ‘the economically efficient operation of a carriage service, a telecommunications network facility or a facility’ when making an FAD.

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.<sup>104</sup>

Consistent with the approach adopted by the Tribunal in considering an undertaking, the ACCC considers that in applying this criterion, it is relevant to consider the economically efficient operation of:

- retail services provided by access seekers using the access provider’s services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.<sup>105</sup>

### **Subsection 152BCA(2)**

Subsection 152BCA(2) of the CCA provides that, in making an access determination that applies to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,<sup>106</sup> take into account:

- the characteristics of those other eligible services;
- the costs associated with those other eligible services;
- the revenues associated with those other eligible services; and
- the demand for those other eligible services.

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in making an access determination, does not consider the declared service in isolation, but

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<sup>103</sup> ACCC, *Model non-price terms and conditions: Final determination*, November 2008, p. 8.

<sup>104</sup> Access Dispute Guidelines, p. 57.

<sup>105</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [94]–[95].

<sup>106</sup> ‘Eligible service’ has the same meaning as in section 152AL of the CCA.

also considers other relevant services.<sup>107</sup> As an example, the Explanatory Memorandum states:

...when specifying the access price for a declared service which is supplied by an access provider over a particular network or facility, the ACCC can take into account not only the access provider's costs and revenues associated with the declared service, but also the costs and revenues associated with other services supplied over that network or facility.<sup>108</sup>

### **Subsection 152BCA(3)**

This subsection states the ACCC may take into account any other matters that it thinks are relevant when making an FAD.

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<sup>107</sup> Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

<sup>108</sup> *ibid.*



## Appendix C: Interim access determination



### Interim Access Determination No. 2 of 2012 (LBAS)

#### *Competition and Consumer Act 2010*

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The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes this interim access determination under section 152BCG of the *Competition and Consumer Act 2010*.

Date of decision: [Insert Date] 2012

.....  
Michael Schaper  
Acting Chairman  
Australian Competition and Consumer Commission

## 1. Application

- 1.1 This instrument sets out an interim access determination in respect of the declared service ('relevant declared service') specified in the table below.

Declared service	Expiry of declaration	Title of interim access determination	Applicable schedules
Local bitstream access service (LBAS)	No expiry	Interim Access Determination No. 2 of 2012 (LBAS)	1–7

Note:

- From 1 January 2011:
  - a carrier licence held by a Carrier is subject to a condition that the Carrier must comply with any access determinations that are applicable to the Carrier; and
  - a Carriage Service Provider must comply with any access determinations that are applicable to the provider.
- An Access Provider and Access Seeker may enter into an Access Agreement relating to a declared service. An access determination has no effect to the extent to which it is inconsistent with an access agreement: section 152BCC of the *Competition and Consumer Act 2010*.

## 2. Definitions and interpretation

- 2.1 Schedule 7 applies to the interpretation of this instrument. The Schedules form part of this instrument.

## 3. Commencement and duration

- 3.1 This interim access determination commences on the day it is published.
- 3.2 Unless sooner revoked, this interim access determination remains in force up until and including 30 June 2013.

Note:

- An access determination may come into force on a day which is earlier than the day the determination is made: subsections 152BCF(1) and 152BCF(2) of the *Competition and Consumer Act 2010*.
- An interim access determination is revoked when the final access determination comes into force: subsection 152BCF(9A) of the *Competition and Consumer Act 2010*.

## 4. Terms and conditions of access

- 4.1 If a Carrier or Carriage Service Provider is required to comply with any or all of the standard access obligations as defined in the *Competition and Consumer Act 2010* in respect of the declared service, the Carrier or Carriage Service Provider must comply with those obligations on the terms and conditions set out in this clause 4.2

Note: The terms and conditions in an interim access determination apply only to those terms and conditions where terms and conditions on that matter in an Access Agreement cannot be reached, no special access undertaking is in operation setting out terms and conditions on that matter and no binding rules of conduct have been made setting out terms and conditions on that matter: section 152AY of the *Competition and Consumer Act 2010*.

Note: Pursuant to section 152BC(4A) of the *Competition and Consumer Act 2010* the LBAS access determination cannot:

- provide that any or all of the standard access obligations, referred to in section 152AR of the *Competition and Consumer Act 2010*, are not applicable to a Carrier or Carriage Service Provider (either unconditionally or subject to conditions or limitations); or
- restrict or limit the application to a Carrier or Carriage Service Provider of any or all of the standard access obligations referred to in section 152AR of the *Competition and Consumer Act 2010*.

4.2 If a Carrier or Carriage Service Provider is required to supply the declared service to a service provider, the Carrier or Carriage Service Provider is also required to supply the wholesale products defined in clause 4.3:

- (a) at a price no greater than that specified in Schedule 1; and
- (b) on the non-price terms and conditions specified in Schedule 2-6.

4.3 A Carrier or Carriage Service Provider, if it is required to supply the declared service, is required to supply upon request the following wholesale product/s:

- (a) A LBAS with the following characteristics (25/5 Mbps):
  - i) a downstream data transfer rate of 25 megabits per second (peak information rate)
  - ii) an upstream data transfer rate of 5 megabits per second (peak information rate)
  - iii) residential-grade service characteristics
  - iv) use of a data port (user-network interface - e.g. Ethernet connector) on the network termination device at the end-user's premises

Note: For the avoidance of doubt, the declared service, and therefore the wholesale product/s defined in clause 4.3, does not include backhaul between a network-network interface and a service provider's point-of-presence.

4.4 Nothing in this interim access determination restricts a Carrier or Carriage Service Provider that is required to supply the declared service from supplying additional wholesale products to those defined in clause 4.3.

Note: Examples of additional products include, but are not limited to, unbundled voice services, unbundled data services, data services with different peak information rates and backhaul services from the Carrier or Carriage Service Provider's network-network interface to an RSP's point of presence.

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## **Schedule 1 – Price terms for the local bitstream access service (LBAS)**

- 1.1 For the duration of this interim access determination for the relevant declared service, the monthly access price per Service In Operation (SIO) is:

<b>Cl. 4.3 - Defined product</b>	<b>Charge per port per month</b>
25/5 Mbps	\$27.00

## Schedule 2 – Billing and Notifications

- 2.1. The Access Seeker's liability to pay Charges for the Service to the Access Provider arises at the time the Service is supplied by the Access Provider to the Access Seeker, unless the parties agree otherwise.
- 2.2. The Access Seeker must pay Charges in accordance with this IAD, including but not limited to this Schedule 2.
- 2.3. The Access Provider must provide the Access Seeker with an invoice each Month in respect of Charges payable for the Service unless the parties agree otherwise.
- 2.4. The Access Provider is 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 2.5, no more than six Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld).
- 2.5. The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and the provisions of any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to billing.
- 2.6. Subject to any Billing Dispute notified in accordance with this IAD, an invoice is payable in full 30 Calendar Days after the date the invoice was issued or such other date as agreed between the parties. The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider. All amounts owing and unpaid after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day authorised dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5 percent.
- 2.7. In addition to charging interest in accordance with clause 2.6 or exercising any other rights the Access Provider has at law or under this IAD, where an amount is outstanding and remains unpaid for more than 20 Business Days after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this IAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.

- 2.8. Unless the parties otherwise agree, there is no setting-off (i.e. netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise the administration and financial costs, the parties must consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.
- 2.9. The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice. Nothing in this clause 2.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
- 2.10. If the Access Seeker believes a Billing Dispute exists, it may invoke the Billing Dispute Procedures by providing written notice to the Access Provider (Billing Dispute Notice). A Billing Dispute must be initiated only in good faith.
- 2.11. Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal or regulatory proceedings in relation to any Billing Dispute.
- 2.12. If a Billing Dispute Notice is given to the Access Provider by the due date for payment of the invoice containing the Charge which is being disputed, the Access Seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved. Otherwise, the Access Seeker must pay the invoice in full in accordance with this IAD (but subject to the outcome of the Billing Dispute Procedures).
- 2.13. Except where payment is withheld in accordance with clause 2.12, the Access Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.
- 2.14. A Billing Dispute Notice must be given to the Access Provider in relation to a Charge within six Months of the invoice for the Charge being issued in accordance with 2.6.
- 2.15.
  - (a) The Access Provider must acknowledge receipt of a Billing Dispute Notice within two Business Days by providing the Access Seeker with a reference number.
  - (b) Within five Business Days of acknowledging a Billing Dispute Notice under clause 2.15(a), the Access Provider must, by written notice to the Access Seeker:
    - (i) accept the Billing Dispute Notice; or
    - (ii) reject the Billing Dispute Notice if the Access Provider reasonably considers that:

- A. the subject matter of the Billing Dispute Notice is already being dealt with in another dispute;
- B. the Billing Dispute Notice was not submitted in good faith; or
- C. the Billing Dispute Notice is incomplete or contains inaccurate information.

(c) If the Access Provider fails to accept or reject the Billing Dispute Notice within five Business Days of acknowledging the Billing Dispute Notice under clause 2.15(a), the Access Provider is taken to have accepted the Billing Dispute Notice.

2.16. The Access Seeker must, as early as practicable and in any case within five Business Days after the Access Provider acknowledges a Billing Dispute Notice, provide to the other party any further relevant information or materials (which was not originally provided with the Billing Dispute Notice) on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

Without affecting the time within which the Access Provider must make the proposed resolution under clause 2.17, the Access Provider may request additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution pursuant to clause 2.17. This additional information may be requested up to 10 Business Days prior to the date on which the Access Provider must make the proposed resolution under clause 2.17. The Access Seeker must provide the requested information within five Business Days of receiving the request. If the Access Seeker fails to do so within five Business Days, the Access Provider may take the Access Seeker's failure to provide additional information into account when making its proposed resolution.

2.17. The Access Provider must try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of accepting a Billing Dispute Notice under clause 2.15 (or longer period if agreed by the parties), by notifying the Access Seeker in writing of its proposed resolution of a Billing Dispute. That notice must:

- (a) explain the Access Provider's proposed resolution (including providing copies where necessary of all information relied upon in coming to that proposed resolution); and
- (b) set out any action to be taken by:
  - (i) the Access Provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or
  - (ii) the Access Seeker (e.g. payment of the disputed Charge).

If the Access Provider reasonably considers that it will take longer than 30 Business Days after accepting a Billing Dispute Notice to provide a proposed resolution, then the Access Provider may request the Access Seeker's consent



to an extension of time to provide the proposed resolution under this clause 2.17 (such consent not to be unreasonably withheld).

2.18. If the Access Seeker does not agree with the Access Provider's decision to reject a Billing Dispute Notice under clause 2.15 or the Access Provider's proposed resolution under clause 2.17, it must object within 15 Business Days of being notified of such decisions (or such longer time agreed between the parties). Any objection lodged by the Access Seeker with the Access Provider must be in writing and state:

- (a) what part(s) of the proposed resolution it objects to;
- (b) the reasons for objection;
- (c) what amount it will continue to withhold payment of (if applicable);  
and
- (d) any additional information to support its objection.

If the Access Seeker lodges an objection to the proposed resolution under this clause, the Access Provider must, within 5 Business Days of receiving the objection, review the objection and

- (e) provide a revised proposed resolution (Revised Proposed Resolution in this Schedule 2); or
- (f) confirm its proposed resolution.

2.19. Any:

- (a) withdrawal, adjustment or refund of the disputed Charge by the Access Provider; or
- (b) payment of the disputed Charge by the Access Seeker (as the case may be),

must occur as soon as practicable and in any event within one Month of the Access Provider's notice of its proposed resolution under clause 2.17 or its Revised Proposed Resolution under clause 2.18 (as applicable), unless the Access Seeker escalates the Billing Dispute under clause 2.22. If the Access Provider is required to make a withdrawal, adjustment or refund of a disputed Charge under this clause but its next invoice (first invoice) is due to be issued within 48 hours of its proposed resolution under clause 2.17 or its Revised Proposed Resolution under clause 2.18 (as applicable), then the Access Provider may include that withdrawal, adjustment or refund in the invoice following the first invoice notwithstanding that this may occur more than one Month after the Access Provider's notice of its proposed resolution or Revised Proposed Resolution.

2.20. Where the Access Provider is to refund a disputed Charge, the Access Provider must pay interest (at the rate set out in clause 2.6) on any refund.

Interest accrues daily from the date on which each relevant amount to be refunded was paid to the Access Provider, until the date the refund is paid.

2.21. Where the Access Seeker is to pay a disputed Charge, the Access Seeker must pay interest (at the rate set out in clause 2.6) on the amount to be paid. Interest accrues daily from the date on which each relevant amount was originally due to be paid to the Access Provider, until the date the amount is paid.

2.22. If:

(a) the Access Provider has not proposed a resolution according to clause 2.17 or within the timeframe specified in clause 2.17, or

(b) if the Access Seeker having first submitted an objection under clause 2.18 is not satisfied with the Access Provider's Revised Proposed Resolution, or the Access Provider's confirmed proposed resolution, within the timeframes specified in clause 2.18,

the Access Seeker may escalate the matter under clause 2.23. If the Access Seeker does not do so within 15 Business Days after the time period stated in clause 2.17 or after being notified of the Access Provider's Revised Proposed Resolution under clause 2.18(e) or confirmed proposed resolution under clause 2.18(f) (or a longer period if agreed by the parties), the Access Seeker is deemed to have accepted the Access Provider's proposed resolution made under clause 2.17 or Revised Proposed Resolution under clause 2.18(e) or confirmed proposed solution under clause 2.18(f) and clauses 2.20 and 2.21 apply.

2.23. If the Access Seeker wishes to escalate a Billing Dispute, the Access Seeker must give the Access Provider a written notice:

(a) stating why it does not agree with the Access Provider's Revised Proposed Resolution or confirmed proposed resolution; and

(b) seeking escalation of the Billing Dispute.

2.24. A notice under clause 2.23 must be submitted to the nominated billing manager for the Access Provider, who must discuss how best to resolve the Billing Dispute with the Access Seeker's nominated counterpart. If the parties are unable to resolve the Billing Dispute within five Business Days of notice being given under clause 2.23 (or such longer period as agreed between the parties) the Billing Dispute must be escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart who must meet in an effort to resolve the Billing Dispute.

2.25. If the Billing Dispute cannot be resolved within five Business Days of it being escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart under clause 2.24 (or such longer period as agreed between the parties):

(a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation

must be conducted in accordance with the mediation guidelines of the ACDC and concluded within three Months of the proposal (unless the parties agree to extend this timeframe); or

- (b) if the parties either do not agree to proceed to mediation within five Business Days of being able to propose the appointment of a mediator under clause 2.25(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal or regulatory proceedings to resolve the matter.

- 2.26. The parties must ensure that any person appointed or required to resolve a Billing Dispute takes into account the principle that the Access Seeker is entitled to be recompensed in circumstances where the Access Seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end-user an amount which is the subject of a Billing Dispute (a Backbilling Loss), provided that:
- (a) such principle applies only to the extent to which the Billing Dispute is resolved against the Access Provider; and
  - (b) such principle applies only to the extent to which it is determined that the Backbilling Loss was due to the Access Provider unnecessarily delaying resolution of the Billing Dispute.
- 2.27. Each party must continue to fulfil its obligations under this IAD while a Billing Dispute and the Billing Dispute Procedures are pending.
- 2.28. All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause 2.24 (or their respective nominees).
- 2.29. There is a presumption that all communications between the parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.
- 2.30. If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that three or more out of any five consecutive invoices for a given Service are incorrect by 5 percent or more, then, for the purposes of clause 2.20, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 2.6, plus 2 percent. The remedy set out in this clause 2.30 is without prejudice to any other right or remedy available to the Access Seeker.

## Schedule 3 – Creditworthiness and security

- 3.1. 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 3.2, the Security (as be determined having regard to clause 3.3 and as may be varied pursuant to clause 3.4) in respect of amounts owing by the Access Seeker to the Access Provider under this IAD.
- 3.2. (a) The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the Security specified in clause 3.1 for a period of six Months following (but not including) the date on which the last of the following occurs:
- (i) cessation of supply of the Service or Services under this IAD, and
  - (ii) payment of all outstanding amounts under this IAD.
- (b) Notwithstanding clause 3.2(a), the Access Provider has no obligation to release the Security if, at the date the Access Provider would otherwise be required to release the Security under clause 3.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.
- 3.3. The Security (including any varied Security) may only be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services, and be of an amount and in a form which is reasonable in all the circumstances. As a statement of general principle the amount of any Security is calculated by reference to:
- (a) the aggregate value of all Services likely to be provided to the Access Seeker under this IAD over a reasonable period; or
  - (b) the value of amounts invoiced in respect of the Service but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this IAD).

For the avoidance of doubt, any estimates, forecasts or other statements made or provided by the Access Seeker may be used by the Access Provider in determining the amount of a Security.

- 3.4. Examples of appropriate forms of Security, having regard to the factors referred to in clause 3.3, may include without limitation:
- (a) fixed and floating charges;

- (b) personal guarantees from directors;
- (c) Bank Guarantees;
- (d) letters of comfort;
- (e) mortgages;
- (f) a right of set-off;
- (g) a Security Deposit; or
- (h) a combination of the forms of security referred to in paragraphs (a) to (g) above.

If any Security is or includes a Security Deposit, then:

- (i) the Access Provider is not obliged to invest the Security Deposit or hold the Security Deposit in an interest bearing account or otherwise; and
- (j) the Access Seeker is prohibited from dealing with the Security Deposit or its rights to that Security Deposit (including by way of assignment or granting of security).

If any security is or includes a Bank Guarantee and that Bank Guarantee (Original Bank Guarantee) has an expiry date which is the last day by which a call made be made under a Bank Guarantee, the Access Seeker must procure a replacement Bank Guarantee for the amount guaranteed by the Original Bank Guarantee no later than two months prior to the expiry date of the Original Bank Guarantee, such replacement Bank Guarantee to have an expiry date of no less than 14 months from the date of delivery of the replacement Bank Guarantee.

If the Access Seeker fails to procure a replacement Bank Guarantee, then in addition to any other of the Access Provider's rights under this IAD, the Access Provider may, at any time in the month prior to the expiry date of the Bank Guarantee, make a call under the Bank Guarantee for the full amount guaranteed. The amount paid to the Access Provider pursuant to a call on the Bank Guarantee will become a Security Deposit.

- 3.5. The Access Provider may from time to time where the circumstances reasonably require, request Ongoing Creditworthiness Information from the Access Seeker to determine the ongoing creditworthiness of the Access Seeker. The Access Seeker must supply Ongoing Creditworthiness Information to the Access Provider within 15 Business Days of receipt of a request from the Access Provider for such information. The Access Provider may, as a result of such Ongoing Creditworthiness Information, having regard to the factors referred to in clause 3.3 and subject to clause 3.7, reasonably require the Access Seeker to alter the amount, form or the terms of the Security (which may include a requirement to provide additional security), and the Access Seeker must provide that altered Security within 20 Business Days of being notified by the Access Provider in writing of that requirement.

- 3.6. The Access Seeker may from time to time request the Access Provider to consent (in writing) to a decrease in the required Security and/or alteration of the form of the Security. The Access Provider must, within 15 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors referred to in clause 3.3). The Access Provider may request, and the Access Seeker must promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 3.6.
- 3.7. If the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 3, the Access Seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the Access Provider and that there has been no material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider. If there has been a material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider, the Access Seeker must disclose the nature and effect of the change to the Access Provider at the time the information is provided.
- 3.8. For the purposes of this Schedule 3, **Ongoing Creditworthiness Information** means:
- (a) a copy of the Access Seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);
  - (b) a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker must co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the Access Seeker's creditworthiness. To that end, the Access Seeker agrees to procure written consents (as required under the *Privacy Act 1988* (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the Access Provider to:
    - (i) obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;
    - (ii) disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and
    - (iii) obtain and use a consumer credit report;
  - (c) a letter, signed by the company secretary or duly authorised officer of the Access Seeker, stating that the Access Seeker is not insolvent and not under any external administration (as defined in the *Corporations Act*

2001 (Cth)) or under any similar form of administration under any laws applicable to it in any jurisdiction; and

- (d) the Access Seeker's credit rating, if any has been assigned to it.
- 3.9. The Access Seeker may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.
- 3.10. Subject to this Schedule 3, the parties agree that a failure by the Access Seeker to provide the warranties set out in clause 3.7 or to provide Ongoing Creditworthiness Information constitutes:
- (a) an Event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) of the Access Seeker and the Access Seeker must provide that altered Security within 15 Business Days after the end of the period set out clause 3.5(a);  
or
  - (b) a breach of a material term or condition of this IAD.
- 3.11. Any disputes arising out of or in connection with Schedule 3 must be dealt with in accordance with the procedures in Schedule 4. Notwithstanding that a dispute arising out of or in connection with Schedule 3 has been referred to the procedures in Schedule 4 and has not yet been determined, nothing in this clause 3.11 or Schedule 4 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 6.

## Schedule 4 – General dispute resolution procedures

- 4.1. If a dispute arises between the parties in connection with or arising from the terms and conditions set out in this IAD for the supply of the Service, the dispute must be managed as follows:
  - (a) in the case of a Billing Dispute, the dispute must be managed in accordance with the Billing Dispute Procedures; or
  - (b) subject to clause 4.2, in the case of a Non-Billing Dispute, the dispute must be managed in accordance with the procedures set out in this Schedule 4.
- 4.2. To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless the Access Provider otherwise determines, that Non-Billing Dispute must be resolved in accordance with the Billing Dispute Procedures. The Access Provider may seek a determination from an independent third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent or third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access Provider. For the purposes of this clause 4.2, the independent third party may include an arbiter from the Australian Commercial Disputes Centre (ACDC).
- 4.3. If a Non-Billing Dispute arises, either party may, by written notice to the other, refer the Non-Billing Dispute for resolution under this Schedule 4. A Non-Billing Dispute must be initiated only in good faith.
- 4.4. Any Non-Billing Dispute notified under clause 4.3 must be referred:
  - (a) initially to the nominated manager (or managers) for each party, who must endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 4.3 or such other time agreed by the parties; and
  - (b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within a further five Business Days to refer the Non-Billing Dispute to an Expert Committee under clause 4.11, or by written agreement submit it to mediation in accordance with clause 4.10.
- 4.5. If:
  - (a) under clause 4.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation; or,



- (b) under clause 4.10(f), the mediation is terminated; and
  - (c) after a period of five Business Days after the mediation is terminated as referred to in paragraph (b), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise) either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.
- 4.6. A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:
- (a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 4.5; or
  - (b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable).
- 4.7. Each party must continue to fulfil its obligations under this IAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 4 are pending.
- 4.8. All communications between the parties during the course of a Non-Billing Dispute are made on a without prejudice and confidential basis.
- 4.9. Each party must, as early as practicable after the notification of a Non-Billing Dispute pursuant to clause 4.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).
- 4.10. Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 4.4(b):
- (a) any agreement must include:
    - (i) a statement of the disputed matters in the Non-Billing Dispute; and
    - (ii) the procedure to be followed during the mediation,and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;
  - (b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the provisions of this clause 4.10. In the event of any inconsistency between them, the provisions of this clause 4.10 prevail;

- (c) it must be conducted in private;
- (d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator must:
  - (i) have an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
  - (ii) have an appreciation of the competition law implications of his/her decisions; and
  - (iii) not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
- (e) the parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who will attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation;
- (f) it must terminate in accordance with the ACDC Guidelines;
- (g) the parties must bear their own costs of the mediation including the costs of any representatives and must each bear half the costs of the mediator; and
- (h) any agreement resulting from mediation binds the parties on its terms.

4.11. The parties may by written agreement in accordance with clause 4.4(b), submit a Non-Billing Dispute for resolution by an Expert Committee (**Initiating Notice**), in which case the provisions of this clause 4.11 apply as follows:

- (a) The terms of reference of the Expert Committee are as agreed by the parties. If the terms of reference are not agreed within five Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee is deemed to be terminated.
- (b) An Expert Committee acts as an expert and not as an arbitrator.
- (c) The parties are each represented on the Expert Committee by one appointee.
- (d) The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 4.10(d)(i), (ii) and (iii).
- (e) Each party must be given an equal opportunity to present its submissions and make representations to the Expert Committee.

- (f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.
- (g) Unless the parties agree otherwise the parties must ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.
- (h) If the dispute is not resolved within the timeframe referred to in clause 4.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
- (i) The Expert Committee has the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.
- (j) The Expert Committee must give written reasons for its decision.
- (k) A decision of the Expert Committee is final and binding on the parties except in the case of manifest error or a mistake of law.
- (l) Each party must bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties must each bear half the costs of the independent member of the Expert Committee.

4.12 Schedule 4 does not apply to a Non-Billing Dispute to the extent that:

- (a) there is a dispute resolution process established in connection with, or pursuant to, a legal or regulatory obligation (including any dispute resolution process set out in a Structural Separation Undertaking)
- (b) a party has initiated a dispute under the dispute resolution process referred to in clause 4.12(a), and
- (c) the issue the subject of that dispute is the same issue in dispute in the Non-Billing Dispute.

## Schedule 5 – Confidentiality provisions

- 5.1. Subject to clause 5.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:
- (a) use or copy such Confidential Information except as set out in this IAD; or
  - (b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.
- 5.2. For the avoidance of doubt, information generated within the Access Provider's Network as a result of or in connection with the supply of the relevant Service to the Access Seeker or the interconnection of the Access Provider's Network with the Access Seeker's Network (other than information that falls within paragraph (d) of the definition of Confidential Information) is the Confidential Information of the Access Seeker.
- 5.3. The Access Provider must upon request from the Access Seeker, disclose to the Access Seeker quarterly aggregate traffic flow information generated within the Access Provider's Network in respect of a particular Service provided to the Access Seeker, if the Access Provider measures and provides this information to itself. The Access Seeker must pay the reasonable costs of the Access Provider providing that information.
- 5.4. Subject to clauses 5.5 and 5.10, Confidential Information of the Access Seeker may be:
- (a) used by the Access Provider:
    - (i) for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;
    - (ii) for the purposes of supplying Services to the Access Seeker;
    - (iii) for the purpose of billing; or
    - (iv) for another purpose agreed to by the Access Seeker; and
  - (b) disclosed only to personnel who, in the Access Provider's reasonable opinion require the information to carry out or otherwise give effect to the purposes referred to in paragraph (a) above.
- 5.5. A party (**Disclosing Party**) may to the extent necessary use and/or disclose (as the case may be) the Confidential Information of the other party:
- (a) to those of its directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential

Information is reasonably required to be disclosed for the purposes of this IAD;

- (b) to any professional person for the purpose of obtaining advice in relation to matters arising out of or in connection with the supply of a Service under this IAD;
- (c) to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;
- (d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this IAD, provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party so that the other party has an opportunity to protect the confidentiality of its Confidential Information.
- (e) as required by law provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information, except that no notice is required in respect of disclosures made by the Access Provider to the ACCC under section 152BEA of the CCA;
- (f) with the written consent of the other party provided that prior to disclosing the Confidential Information of the other party:
  - (i) the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party;
  - (ii) if required by the other party as a condition of giving its consent, the Disclosing Party must provide the other party with a confidentiality undertaking in the form set out in Annexure 1 of this Schedule 5 signed by the person or persons to whom disclosure is to be made; and
  - (iii) if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 5.6;
- (g) in accordance with a lawful and binding directive issued by a regulatory authority;
- (h) if reasonably required to protect the safety of personnel or property or in connection with an Emergency;
- (i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted.

5.6. Each party must co-operate in any action taken by the other party to:

- (a) protect the confidentiality of the other party's Confidential Information;  
or
  - (b) enforce its rights in relation to its Confidential Information.
- 5.7. Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction or disclosure.
- 5.8. Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the Disclosing Party that the Confidential Information is or will be correct.
- 5.9. Each party acknowledges that a breach of this Schedule 5 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this Schedule 5.
- 5.10. If:
- (a) the Access Provider has the right to suspend or cease the supply of the Service under:
    - (i) Schedule 6 due to a Payment Breach
    - (ii) under clause 6.8; or
  - (b) after suspension or cessation of supply of the Service under this IAD, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment
- then the Access Provider may do one or both of the following:
- (a) notify and exchange information about the Access Seeker (including the Access Seeker's Confidential Information) with any credit reporting agency or the Access Provider's collection agent; and
  - (b) without limiting clause 5.10, disclose to a credit reporting agency:
    - (i) the defaults made by the Access Seeker to the Access Provider; and
    - (ii) the exercise by the Access Provider of any right to suspend or cease supply of the Service under this IAD.

## 5.11. Annexure 1 of Schedule 5

### Confidentiality undertaking form

*[Amend where necessary]*

#### CONFIDENTIALITY UNDERTAKING

I, \_\_\_\_\_ of [employer's company name] ([**undertaking company**]) undertake to [full name of party who owns or is providing the confidential information as the case requires] ([**Provider**]) that:

- 1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking (**Confidential Information**) that is in my possession, custody, power or control.
- 2 I acknowledge that:
  - (a) this Undertaking is given by me to [Provider] in consideration for [Provider] making the Confidential Information available to me for the Approved Purposes (as defined below);
  - (b) all intellectual property in or to any part of the Confidential Information is and will remain the property of [Provider]; and
  - (c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [undertaking company] in relation to the Confidential Information except as expressly provided in this Undertaking.
- 3 I will:
  - (a) only use the Confidential Information for:
    - (i) the purposes listed in Attachment 2 to this Undertaking; or
    - (ii) any other purpose approved by [Provider] in writing;  
**(the Approved Purposes)**;
  - (b) comply with any reasonable request or direction from [provider] regarding the Confidential Information.
- 4 Subject to clause 5, I will not disclose any of the Confidential Information to any other person without the prior written consent of [Provider].
- 5 I acknowledge that I may disclose the Confidential Information to which I have access to:

- (a) any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:
  - (i) the person to whom disclosure is proposed to be made (**the person**) is notified in writing to [Provider] and [Provider] has approved the person as a person who may receive the Confidential Information, which approval shall not be unreasonably withheld;
  - (ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [Provider]; and
  - (iii) a signed undertaking of the person has already been served on [Provider];
- (b) if required to do so by law; and
- (c) any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(a) for the Approved Purpose.

6 I will establish and maintain security measures to safeguard the Confidential Information that is in my possession from unauthorised access, use, copying, reproduction or disclosure and use the same degree of care as a prudent person in my position would use to protect that person's confidential information.

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;
- (b) my ceasing to be employed or retained by [undertaking company] (provided that I continue to have access to the Confidential Information at that time); or
- (c) my ceasing to be working 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.

8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:

- (a) which is in the public domain; or
- (b) which has been obtained by me otherwise than from [Provider] in relation to this Undertaking;



provided that the information is in the public domain and/or has been obtained by me by reason of, or in circumstances which do not involve any breach of a confidentiality undertaking or a breach of any other obligation of confidence in favour of [Provider] or by any other unlawful means, of which I am aware.

9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that [Provider] may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to [Provider] at law or in equity.

10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to [Provider] of the Confidential Information pursuant to paragraph 7 above.

Signed: \_\_\_\_\_ Dated: \_\_\_\_\_

Print name: \_\_\_\_\_

## **ATTACHMENT 1**

Any document, or information in any document provided by [provider] to [undertaking company] which [provider] claims is confidential information for the purposes of this Undertaking.

**ATTACHMENT 2**

**[Approved purpose(s)]**

## Schedule 6 – Suspension and termination

6.1. The Access Provider may immediately suspend the supply of a Service or access to the Access Provider's Network, provided it notifies the Access Seeker where practicable and provides the Access Seeker with as much notice as is reasonably practicable:

- (a) during an Emergency; or
- (b) where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider's Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency; or
- (c) where, in the reasonable opinion of the Access Provider, the Access Seeker's Network or equipment adversely affects or threatens to affect the normal operation of the Access Provider's Network or access to the Access Provider's Network or equipment (including for the avoidance of doubt, where the Access Seeker has delivered Prohibited Traffic onto the Access Provider's Network); or
- (d) where an Event set out in clauses 6.8(a) to (i) occurs;

and is entitled to continue such suspension until (as the case requires) the relevant Event or circumstance giving rise to the suspension has been remedied.

6.2. If:

- (a) the Access Seeker has failed to pay monies payable under this IAD;
- (b) the Access Seeker's use of:
  - (i) its Facilities;
  - (ii) the Access Provider's Facilities or Network; or
  - (iii) any Services supplied to it by the Access Providers,

is in contravention of any law; or

- (c) the Access Seeker breaches a material obligation under this IAD,

**(Suspension Event)** and:

- (d) as soon as reasonably practicable after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:
  - (i) citing this clause;
  - (ii) specifying the Suspension Event that has occurred;

- (iii) requiring the Access Seeker to institute remedial action (if any) in respect of that Event; and
- (iv) specifying the action which may follow due to a failure to comply with the notice,

**(Suspension Notice)** and:

- (e) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 6.2, the **Remedy Period**),

the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable after the expiry of the Remedy Period:

- (f) refuse to provide the Access Seeker with the Service:
  - (i) of the kind in respect of which the Suspension Event has occurred; and
  - (ii) a request for which is made by the Access Seeker after the date of the breach,

until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist; and

- (g) suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed.

6.3. For the avoidance of doubt, subclause 6.2(a) does not apply to a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this IAD.

6.4. In the case of a suspension pursuant to clause 6.2, the Access Provider must reconnect the Access Seeker to the Access Provider's Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider must do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.

6.5. If:

- (a) an Access Seeker ceases to be a Carrier or Carriage Service Provider; or
- (b) an Access Seeker ceases to carry on business for a period of more than 10 consecutive Business Days or
- (c) in the case of an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or
- (d) an Access Seeker breaches a material obligation under this IAD, and:

- (i) that breach materially impairs or is likely to materially impair the ability of the Access Seeker to deliver Listed Carriage Services to its customers; and
  - (ii) the Access Seeker has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and
  - (iii) the Access Seeker fails to institute remedial action as specified in the Breach Notice within 10 Business Days after receiving the Breach Notice (in this clause 6.5, the **Remedy Period**),
- (e) the supply of the Service(s) to the Access Seeker has been suspended pursuant to the terms and conditions of this IAD for a period of three months or more,

the Access Seeker may cease supply of the Service under this IAD by written notice given to the first-mentioned party at any time after becoming aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be).

6.6. A party must not give the other party both a Suspension Notice under clause 6.2 and a Breach Notice under clause 6.5 in respect of:

- (a) the same breach; or
- (b) different breaches that relate to or arise from the same act, omission or Event or related acts, omissions or Events;

except:

- (c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 6.2 in respect of a Suspension Event and the Suspension Event has not been rectified by the Access Seeker within the relevant Remedy Period specified in clause 6.2; and
- (d) where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 6.5(d)(ii), time period for the purposes of clause 6.5(d)(ii) will be 20 Business Days of the expiry from the time available to remedy the Suspension Event.

6.7. For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 6.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause 6.5.

6.8. Notwithstanding any other provision of this IAD, either party may at any time immediately cease the supply of the Service under this IAD by giving written notice of termination to the other party if:

- (a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other party; or

- (b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other party; or
- (c) a holder of an encumbrance takes possession of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or
- (d) the other party is or is likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
- (e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or
- (f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of three Months; or
- (g) the other party breaches any of the terms of any of its loans, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to the supply of the Service under this IAD; or
- (h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
- (i) anything analogous or having a substantially similar effect to any of the Events specified above occurs in relation to the other party.

6.9. The cessation of the operation of this IAD:

- (a) does not operate as a waiver of any breach by a party of any of the provisions of this IAD; and
- (b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.

6.10. Without prejudice to the parties' rights upon termination of the supply of the Service under this IAD, or expiry or revocation of this IAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this IAD by the Access Seeker which are periodic in nature and have been paid for the Service for a period extending beyond the date on which the supply of the Service under this IAD terminates, or this IAD ceases to have effect, subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in Schedule 4 of this IAD.

## Schedule 7 – Interpretation and definitions

### *Interpretation*

In this IAD, unless the contrary intention appears:

- (a) the singular includes the plural and vice versa;
- (b) the words "including" and "include" mean "including, but not limited to"; and
- (c) terms defined in the CCA or the *Telecommunications Act 1997* have the same meaning.

### *Definitions*

“**ACCC**” means the Australian Competition and Consumer Commission;

“**Access Agreement**” has the same meaning as given to that term in section 152BE of the CCA;

“**Access Provider**” has the same meaning as given to that term in subsection 152AR(2) of the CCA;

“**Access Seeker**” has the same meaning as given to that term in section 152AG of the CCA;

“**ACDC**” means the Australian Commercial Disputes Centre Limited;

“**ACDC Guidelines**” means the mediation guidelines of the ACDC in force from time to time;

“**ACMA**” means the Australian Communications and Media Authority;

“**Billing Dispute**” means a dispute relating to a Charge or an invoice issued by the Access Provider to the Access Seeker;

“**Billing Dispute Notice**” means a notice given pursuant to clause 2.10;

“**Billing Dispute Procedures**” means the procedures set out in clauses 2.10 to 2.29;

“**Business Day**” means any day other than Saturday or Sunday or a day which is a gazetted public holiday in the place concerned;

“**Calendar Day**” means a day reckoned from midnight to midnight;

“**Calendar Month**” means a period commencing at the beginning of any day of a named month and ending:

- (a) at the end of the day before the corresponding day of the next named month; or
- (b) if there is no such corresponding day – at the end of the next named month;



“**CCA**” means the *Competition and Consumer Act 2010* (Cth);

“**Charge**” means a charge for the supply of the Service;

“**Confidential Information**” means all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form and whether coming into existence before or after the commencement of this IAD) relating to or developed in connection with or in support of the Service supplied under this IAD (the “**first mentioned party**”) but does not include:

- (a) information which is or becomes part of the public domain (other than through any breach of this IAD);
- (b) information rightfully received by the other party from a third person without a duty of confidentiality being owed by the other party to the third person, except where the other party has knowledge that the third person has obtained that information either directly or indirectly as a result of a breach of any duty of confidence owed to the first mentioned party; or
- (c) information which has been independently developed or obtained by the other party; or
- (d) information about Services supplied by the Access Provider (including where that information is generated by the Access Provider) that has been aggregated with other information of a similar or related nature, such that the Access Seeker cannot be identified by the information or any part of it.

“**Data transfer rate**” means the average number of bits per second transferred from a data source to a data destination;

“**Disclosing Party**” has the meaning set out in clause 5.5 in Schedule 5 of this IAD;

“**Emergency**” means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war-like action) which:

- (a) endangers or threatens to endanger the safety or health of persons; or
- (b) destroys or damages, or threatens to destroy or damage property,

being an emergency which requires a significant and co-ordinated response;

“**Event**” means an act, omission or event relating to or arising out of this IAD or part of this IAD;

“**Expert Committee**” means a committee established under clause 4.11;

“**IAD**” means this Interim Access Determination for the LBAS;

“**Initiating Notice**” has the meaning as set out in clause 4.11 of Schedule 4;

“**Listed Carriage Service**” has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth);

**“LBAS”** means local bitstream access service declared under section 152AL(3) of the CCA;

**“Mbps”** means megabits per second;

**“Month”** means a Calendar Month;

**“Network”** of a party, means that party’s system, or series of systems, that carries, or is capable of carrying communications by means of guided or unguided electromagnetic energy;

**“Network-network interface”** has the meaning given in the service description of the local bistream access service declaration. This means, ‘an interface provided by an access provider at a point of interconnection where the access seeker’s telecommunications network can interface to the access provider’s designated superfast telecommunications network’;

**“Non-Billing Dispute”** means a dispute other than a Billing Dispute;

**“Ongoing Creditworthiness Information”** has the meaning as set out in clause 3.8 of Schedule 3 of this IAD;

**“Party”** means a party to this IAD;

**“Point of interconnection”** has the meaning given in the service description of the local bistream access service declaration. This means, ‘a physical point of interconnection which allows the interconnection of facilities in accordance with subsection 152AR(5) of the *Competition and Consumer Act 2010*’;

**“Representative”** of a Party means each of that party’s directors, officers, employees, agents, contractors, advisers and representatives, but does not include that Party’s end-users or the other Party;

**“Residential-grade service characteristics”** means entry-level characteristics (e.g. service level agreements) that are appropriate for supplying a service to residential end-users. The characteristics of the supplied LBAS product should reflect any relevant industry standards.

**“Security Deposit”** means any sum of money deposited by the Access Seeker with the Access Provider, from time to time, for the purposes of fulfilling in whole or in part the requirement under this IAD that the Access Seeker provide Security to the Access Provider;

**“Security”** means the amount and form of security required to be provided to the Access Provider in respect of the provision by the Access Provider of the LBAS under Schedule 3’

**“Service”** means the LBAS.

**“Suspension Event”** has the meaning set out in clause 6.2 of Schedule 6;

**“Suspension Notice”** has the meaning set out in clause 6.2 of Schedule 6;

**“Structural Separation Undertaking”** means:

- (a) an undertaking given by Telstra under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which comes into force in accordance with section 577AB, and any amendment to that undertaking which comes into force in accordance with subsection 577B(6); and
- (b) a migration plan approved by the ACCC under Subdivision B of Division 2 of Part 33 of the *Telecommunications Act 1997* (Cth) which, pursuant to subsection 577BE(5), forms part of the undertaking referred to in paragraph (a), and any amendment to that plan which is approved by the ACCC in accordance with section 577BF,

and includes all binding schedules, annexures and attachments to such documents;

**“User-network interface”** has the meaning given in the service description of the local bistream access service declaration. This means, ‘an interface located at a physically defined end-user’s premises where the access provider’s designated superfast telecommunications network is present to an end-user’.