IT'S HOW WE CONNECT

TELSTRA CORPORATION LIMITED

Response to the Commission's Draft Report in the Public inquiry to make a final access determination for the Wholesale ADSL service

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CONTENTS

01 EXECUTIVE SUMMARY

Telstra welcomes the opportunity to respond to the Australian Competition and Consumer Commission (**the Commission**) paper *Public inquiry to make a final access determination for the Wholesale ADSL service, Draft Report* (**Draft FAD**).

While the proposed Wholesale ADSL (**WDSL**) price is set at a level sufficient to support existing usage, Telstra is disappointed that the Commission has proposed adopting a cost-based methodology to determine the prices for the WDSL service. Telstra's position remains that a Retail Minus Retail Costs (**RMRC**) methodology would be more appropriate for the pricing of the WDSL service. This is because:

- Congestion on the ADSL network continues to be a problem as traffic continues to grow. Building block models such as the Commission's Fixed Line Services Model (**FLSM**) – which the Commission has adapted to include WDSL – rely upon forecasts of demand and costs to determine the appropriate price(s). In a scenario where there is high growth in demand, such as is currently evident in the ADSL market, there is a significant risk that the forecasts in the FLSM will be incorrect. The prices set using this methodology, therefore, are likely to risk under- or over-recovery of costs should the forecasts be incorrect. Clearly, this is not in the long term interest of end-users (**LTIE**).
- Telstra's retail pricing accounts for congestion, to the extent that regulatory and competitive constraints allow, and a RMRC methodology will ensure that that wholesale prices do too. To the extent that retail prices need to be adjusted in order to address congestion, a RMRC methodology would ensure that the same incentives were passed on to Wholesale customers.

Given these factors, Telstra strongly encourages the Commission to reconsider the methodology that it proposes to adopt for the purpose of determining prices for the WDSL service.

Notwithstanding the fact that Telstra disagrees with the cost based methodology proposed by the Commission, Telstra has reviewed the draft cost model that accompanied the Draft FAD. That review has uncovered a number of issues with the model that Telstra believes should be addressed by the Commission, if it intends to continue to use this model in the FAD. The key issues identified include:

- utilising an incorrect method for forecasting demand; and
- underestimating the Weighted Average Cost of Capital (**WACC**).

If, despite Telstra's strong recommendations to the contrary, the Commission continues to utilise a cost-based methodology for determining WDSL prices, with the FLSM as the cost model, then Telstra believes that the Commission should address these issues in the model.

Further, Telstra is disappointed with the Commission's draft decision not to allow geographic exemptions in the FAD in Exchange Service Areas (**ESAs**) that are competitive. Telstra notes that the Commission has expressed concerns with the threshold for exemption that was suggested by Telstra, which led the Commission to reject Telstra's arguments for the exemptions.

Telstra strongly believes that the Commission could (and should) have analysed the relevant ESAs (289 in total) to assess which ones the Commission did not believe were sufficiently competitive and

removed these from the total. Exemptions could then have been granted for the remaining ESAs, which would be clearly assessed as being competitive. Telstra has illustrated the type of analysis that it believes the Commission should undertake, which, if the Commission adopted the approach illustrated, would reduce the number of ESAs to which exemptions would apply to 167. However, this is merely a suggestion by Telstra, not a definitive set of rules by which to assess the eligibility for exemptions. Telstra strongly believes that the onus is upon the Commission to undertake a similar exercise of its own in order to establish a clear set of criteria against which exemptions can be assessed.

Telstra is also disappointed by the Commission's draft decision to apply the terms of the FAD to Telstra only. If the Commission applies the terms of the FAD to Telstra in areas where there is compelling evidence of competition and Telstra's WDSL service accounts for a very low proportion of the ADSL market, then there is no reason why the FAD cannot be applied to other WDSL providers. Conversely, if the case for exemptions for other WDSL providers in competitive areas can be established, the same principles should, for consistency and competitive neutrality, apply also to Telstra and Telstra should also be exempted in competitive areas.

Further, the Commission states that imposing terms and conditions on non-Telstra providers of WDSL may harm their ability to develop innovative offerings and differentiate themselves from Telstra in order to attract wholesale customers. The Commission fails to recognise that imposing the terms of the FAD upon Telstra could similarly harm its flexibility and ability to innovate. Further, Telstra does not consider that imposing the terms of the FAD on other WDSL providers would be unduly onerous – if the products being offered by those providers are sufficiently differentiated from Telstra's WDSL offering, then it may be that those products are not covered by the service description in any case.

Telstra strongly supports the Commission's draft decision to ensure the supply of WDSL services only with an underlying PSTN service. Telstra agrees with the Commission's assessment that requiring Telstra to provide a wholesale Naked ADSL service would not be in accordance with the statutory criteria, taking into account:

- the way that Telstra provisions ADSL services;
- the likely significant capital costs that would be incurred by Telstra if it were required to change its systems and processes to deliver a wholesale Naked ADSL service; and
- the likely increase in ongoing service assurance costs and increasing fault levels that would result from being required to provision a wholesale Naked ADSL service.

Similarly, Telstra strongly supports the Commission's draft decision not to impose a requirement for additional points of interconnection on Telstra's ADSL network, nor a condition that would allow the local access component of the WDSL service to be unbundled from the AGVC. Telstra welcomes the Commission's recognition that imposing such terms would likely lead to inefficiency and may not promote competition; hence such terms would not be in the LTIE.

Telstra further supports the Commission's draft decision not to backdate the FAD. Telstra also agrees with the Commission's proposal that the FAD should expire on 30 June 2014.

Telstra requests that the Commission undertakes a more holistic review in 2014 of all of the "model" non-price terms as they apply across all the declared services rather than reaching a definitive view of such terms in the context of this WDSL FAD process. Telstra believes this will be necessary to ensure

consistency in relation to common terms and processes that apply across all services and to properly consider whether particular terms are or remain:

- practical;
- proportionate – given the types of risks that must be balanced; and
- reflective of current technical, operational and commercial practice.

To date these terms have necessarily been dealt with on an ad hoc basis in a succession of FADs and it will be timely and appropriate (given the Commission's proposed term for the WDSL FAD aligns with the expiry of the Fixed Services FAD) to consider these issues in an overarching way before reaching a more settled view on which terms will apply in the longer term.

02 INTRODUCTION

1. Telstra welcomes the opportunity to respond to the Commission's *Public inquiry to make a final access determination for the wholesale ADSL service – Draft Report*. This submission provides Telstra's response to the Draft FAD.

2. The remainder of this submission is structured as follows:

   a. Section 3 addresses the draft price terms and conditions proposed by the Commission, including:

      i. the pricing methodology to be utilised in determining pricing for the WDSL service;

      ii. issues identified with the draft cost model; and

      iii. the structure of charges proposed by the Commission for the WDSL service.

   b. Section 4 addresses the Commission's draft decision not to grant geographic exemptions in competitive areas and to apply the FAD to Telstra only;

   c. Section 5 addresses the Commission's draft decision that Telstra should continue to require there to be an underlying PSTN service before a WDSL service can be provisioned;

   d. Section 6 addresses the Commission's draft decision with respect to points of interconnection for the WDSL service;

   e. Section 7 addresses other issues, including the Commission's draft decision not to backdate the WDSL FAD when it is made; and

   f. Section 8 addresses the Commission's proposals in relation to the standard non-price terms and conditions to apply to the WDSL service.

3. In making this submission, Telstra repeats and relies upon the previous submissions that it has made to the Commission during the course of the WDSL declaration inquiry and the current FAD inquiry.[1]

[1] Telstra Corporation Limited, *Response to the Commission's Discussion Paper into whether wholesale ADSL services should be declared under Part XIC of the Competition and Consumer Act 2010,* January 2012.
Telstra Corporation Limited, *Response to the Commission's Discussion Paper into the public inquiry to make a final access determination for the wholesale ADSL service,* April 2012.
Telstra Corporation Limited, *Response to the Commission's Issues Paper (a second discussion paper) into the public inquiry to make a final access determination for the wholesale ADSL service – Non-Price Terms,* August 2012 (a).
Telstra Corporation Limited, *Response to the Commission's Issues Paper (a second discussion paper) into the public inquiry to make a final access determination for the wholesale ADSL service – Pricing to improve customer experience,* August 2012(b).
Telstra Corporation Limited, *Supplementary submission to the Commission's Second Discussion Paper in a public inquiry to make a Final Access Determination for the Wholesale ADSL service – Non-price terms,* October 2012.
Telstra Corporation Limited, *Response & Further Submission on ADSL Congestion,* November 2012.

03 PRICE TERMS AND CONDITIONS

3.1. Introduction

4. Telstra generally welcomes the Commission's Draft FAD for WDSL as the proposed price is set at a level sufficient to support existing usage and prevent a greater level of congestion than would otherwise exist with lower prices during the proposed period of the FAD. However, Telstra remains concerned that, in the longer term, a cost-based pricing approach constrains Telstra's ability to continue to manage congestion and provide a better quality experience to all end users of its ADSL service(s). This is compounded by the fact that the FLSM used to calculate cost-based prices contains errors.

5. Broadband traffic is continuing to grow rapidly and so is congestion at peak times. At the same time, end users have expressed a preference for – and place value upon – a better broadband experience. To deliver a better experience, Telstra has a range of technical options at its disposal to manage congestion in its network. However, technical measures are only part of the equation and, from an LTIE perspective, are often inferior to other options.

6. The other measures that Telstra is able to utilise are price and investment. Telstra continues to invest in enhancing its networks to ensure customers enjoy a high quality service and Telstra's pricing of ADSL plans helps to mitigate against congestion to some extent. However, that extent will be constrained by wholesale prices. Telstra strongly believes that a RMRC approach to determining WDSL prices would ensure that retail and wholesale prices manage congestion to the same extent. In contrast, the Commission's preferred method of cost-based pricing is less effective in allowing Telstra the flexibility to manage congestion.

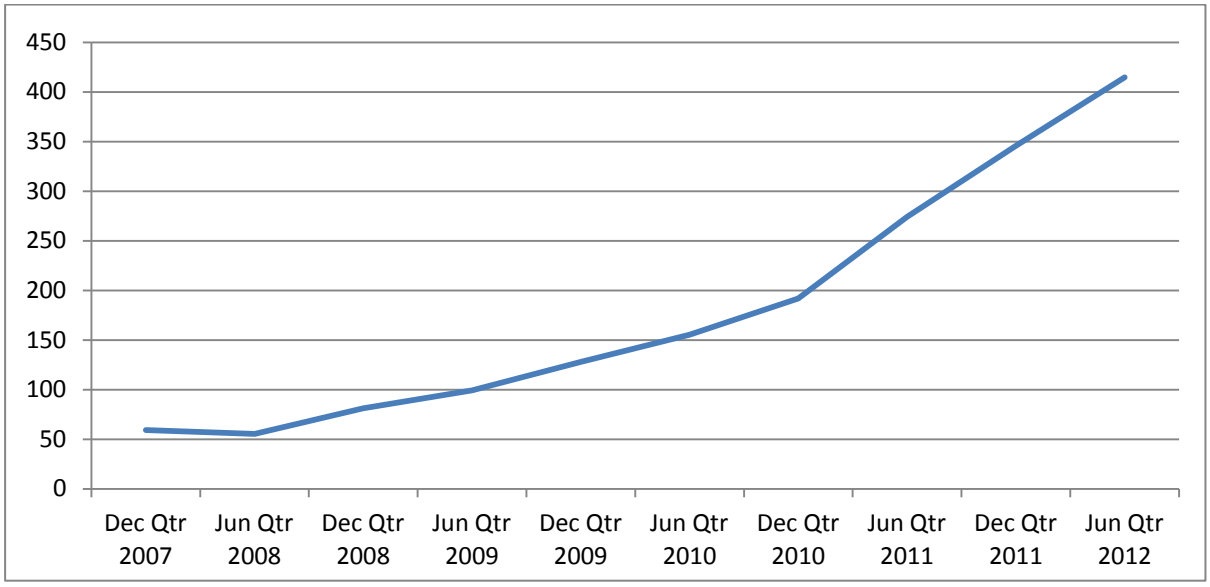
3.2. Broadband traffic continues to grow strongly

7. Evidence indicates that broadband traffic continues to grow strongly. Figure 1 shows that in the six months to June 2012, demand for downloads grew by 20 per cent to 414.5 petabytes. **[c-i-c begins]** [redacted] **[c-i-c ends]**

8. One of the ways in which Telstra assesses the impact of congestion is by calculating the number of SIOs that are performing outside of design limits. To do this, the traffic levels are calculated by dividing the actual traffic by the maximum throughput. A result above the design limits signifies that performance may be affected. As a consequence of the growth in traffic noted above, the number of SIOs that are performing outside of design limits has increased from **[c-i-c begins]** [redacted] **[c-i-c ends]**.[2]

[2] This is an increase in the number of affected SIOs from those contained in Telstra Corporation Limited, *Response & Further Submission on ADSL Congestion*, November 2012, p9.

Figure 1: Industry growth of ISP traffic (petabytes)



Source: Australian Bureau of Statistics, *Internet Activity, Australia*, June 2012

3.2.1. Retail customers place value on a better broadband experience

9. Feedback from customers directly to Telstra and through third parties (such as on online discussion forums) suggest using price to signal congestion.[3]

10. Those comments reflect the analysis in Mackie-Mason and Varian (1994)[4], which demonstrates that congestion prices can help ensure that users who place a high value on an uncongested service have access to it at peak times without the experience becoming congested by users who place a lower value on the service – and that this result is socially optimal.

3.2.2. Telstra is continuously developing and improving measures to deliver a better customer experience

11. As noted in previous submissions, there are three instruments generally available to it with which to manage congestion.[5] These are price, investment and technical measures.

12. To deliver a better customer experience, Telstra already undertakes a range of technical and investment solutions for better managing network performance. These include, but are not limited to:

    a. targeted investment to provide increased backhaul capacity to sites where the DSLAMs are outside design limits. This can be done by directly increasing the backhaul bandwidth capacity for a DSLAM. Another option available is to install a new co-located

[3] Whirpool, "Price increases/discounts/plans", http://forums.whirlpool.net.au/archive/1987495, (accessed 18 March 2013).
[4] Mackie-Mason, J. and Varian, H. (1994) "Pricing Congestible Network Resources", *mimeo*, 11 November.
[5] Telstra Corporation Limited, August 2012b, p5.

DSLAM and migrate many or all of the customers onto the new DSLAM. In the case where customers are migrated to alternative DSLAMs, this also relieves all of the services remaining on the donor DSLAM; and

b. the application of service qualification tests aimed at ensuring that services that are connected are capable of delivering the customer experience reliably and do not exacerbate existing congestion problems, for example, the qualification process for high bandwidth products like Foxtel on T-Box.

13. With regard to the latter point, the breadth of application of these types of technical congestion management tools is something Telstra will need to continue to review if the utility of other tools/instruments becomes more limited.

14. Telstra is continuously trying to improve its congestion management and to that end, is currently undertaking some limited, voluntary trials with retail customers to look at solutions for better managing internet network performance. As the Commission is aware, one of the options being considered in this process is the shaping of specific services in certain circumstances to determine what impact this has on overall customer time critical experiences for real time entertainment.

15. Telstra is also developing a sophisticated network reporting mechanism to identify high volume users on congested DSLAMs so that they can be moved to co-located DSLAMs with spare capacity and with better ability to handle the higher volumes from these users. This not only improves the service for the affected user but also relieves all of the services remaining on the donor DSLAM.

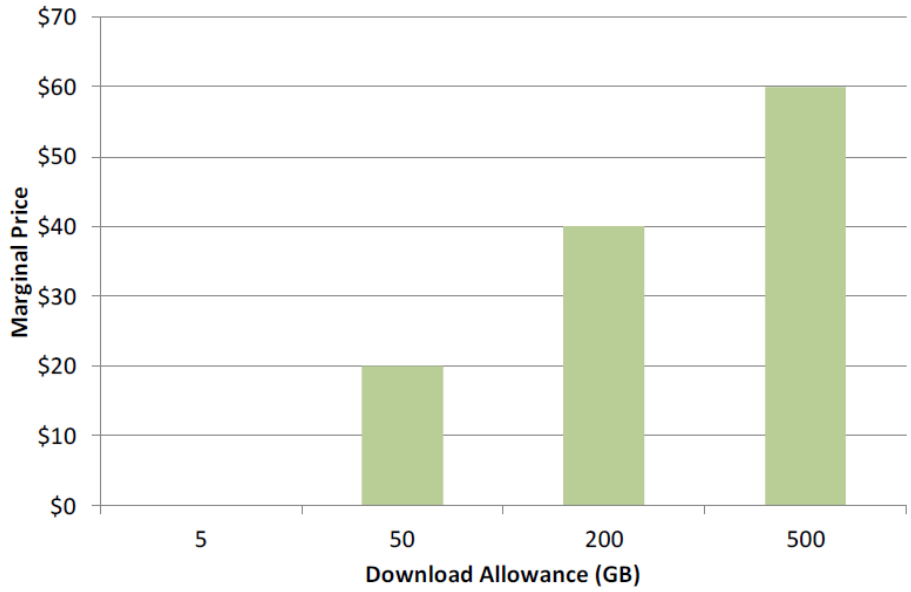
16. As noted, however, technical and investment measures are only part of the equation – the other important part is price.

3.3. Telstra's broadband prices help address congestion through increasing marginal prices

17. The Commission has argued that, as the average price of a gigabyte (**GB**) of download declines as Telstra plan allowances increase, Telstra's *"…retail pricing encourages high data use, which in turn increases traffic on the network"*.[6] However, Telstra does not sell and customers cannot purchase broadband plans by GB. This was the case when dial-up Internet was prevalent but it is not any longer. Figure 2 shows that, in common with most ISPs, Telstra sells – and customers can only purchase – plans with set data allowances and increasing marginal prices if customers choose to increase their consumption beyond their allowance.[7]

[6] Australian Competition and Consumer Commission, *Public inquiry to make a final access determination for the Wholesale ADSL service: Draft Report*, March 2013, p22.
[7] Frontier Economics, *Congestion and Telstra's retail pricing plans*, April 2013, p5.

Figure 2: The marginal price of Telstra's current retail ADSL plans relative to Telstra's 5GB plan



Source: http://www.telstra.com.au/internet/home-broadband-bigpond-elite-plans/

18. Frontier Economics notes that, as consumers face higher prices for higher data use, of itself, this should discourage usage relative to a structure which allowed for no usage charges (a pure fixed charge).[8] It is also noteworthy that Telstra does not offer an unlimited usage plan. Frontier Economics concludes, therefore, that Telstra's current plan pricing cannot be said to encourage network congestion.[9]

19. In addition, if, as the Commission has argued, the diminishing average price for downloads encouraged congestion, we would expect the distribution of services in operation (**SIOs**) to be clustered around the largest plans with the lowest average price per GB. **[c-i-c begins]** [redacted]

[8] ibid p3.
[9] ibid p9.

[c-i-c ends]

20. Even if plans applied constant average prices per GB, Frontier Economics observes that there is no guarantee that demand would diminish.[10] The reason for this result is that for any given average price point that is set, different customers will respond in different ways. Those customers who are currently paying a higher price than the new price point would increase their demand. Meanwhile, those customers who are currently paying a lower price would decrease their demand at the new price point. Ultimately, customers' overall demand will depend upon two factors: (1) their existing plans, and (2) their sensitivity to changes in price. The net impact on total demand is therefore by no means certain.

21. The Commission has also stated that unmetered content on Telstra's network is contributing to congestion.[11] Telstra disagrees with this assertion. As Telstra has previously explained, unmetered content is not the content that is demanded at peak times and in any event, it represents less than [c-i-c begins] ▌ [c-i-c ends] per cent of total traffic on its BigPond network.[12]

3.4. Cost-based pricing is not designed to manage congestion

22. As Telstra has argued in its previous submissions, cost-based pricing is not designed to manage congestion as effectively as RMRC.[13] This is primarily because it cannot account for congestion as it sets prices based on production costs.

23. In congested markets, each end user generates congestion that impacts adversely on other users. It is a fundamental principle of welfare economics that when consumers or firms don't face the true social cost of their actions, such as additional congestion, market outcomes are inefficient.[14] Socially optimal prices are those that account for the impact of congestion on all users. Prices based on production costs may in the future be lower than socially optimal – exacerbating congestion – with adverse consequences for the LTIE.

24. Cost-based pricing can also discourage investment. Contrary to the Commission's claims[15] that cost-based pricing encourages investment and RMRC does not, in reality, RMRC would encourage investment more efficiently by signalling demand for additional investment.[16]

3.5. RMRC is the better method for determining WDSL prices

25. In Telstra's view, there are several reasons why RMRC is the better pricing method for WDSL. In particular, Telstra draws the Commission's attention to two aspects of the market for ADSL that would lead to the conclusion that RMRC should be preferred over a cost-based methodology:

[10] ibid p7.
[11] Australian Competition and Consumer Commission, March 2013, p23.
[12] Telstra Corporation Limited, November 2012, p13.
[13] Telstra Corporation Limited, August 2012b, p13; and Telstra Corporation Limited, November 2012, p10.
[14] Knittel, C.R. and Sandler, R. (2013) "The Welfare Impact of Indirect Pigouvian Taxation: Evidence from Transportation", National Bureau of Economic Research, Working Paper No. 18849. http://www.nber.org/papers/w18849
[15] Australian Competition and Consumer Commission, March 2013, p25.
[16] Mackie-Mason and Varian (1994): p.17.

a. As already noted above, broadband traffic continues to increase rapidly, and congestion also continues to increase; and

b. The market for ADSL services is competitive, particularly in areas where there is infrastructure based competition. (The level of competitiveness of the ADSL market is discussed further in Section 4 of this submission.)

26. Each of these factors is discussed further below.

3.5.1. RMRC is the better method for managing congestion

27. There are several reasons why RMRC is a better pricing method than cost-based pricing for managing congestion. Among its advantages are its responsiveness to changes in demand, utility in the prevention of price squeezes, and relative ease of implementation.

28. The Commission has argued that:

> *"...price measures to address congestion must apply to those whose demand is causing the congestion if they are to be effective: that is, end-users at the retail level should face price signals related to their usage of the network at peak times (when the network is congested). However, market evidence supports a view that congestion management is not a primary objective for retail service providers (RSPs) offering ADSL services in Australia."*[17]

29. Whilst Telstra does not apply time of day charges at present, it does, as discussed earlier, charge increasing marginal prices for increasing data allowances, and this helps manage congestion to some extent.[18] Telstra considers that to the extent that it may wish to implement different retail price structures in the future, RMRC would more readily pass through the resulting price signals, hence enabling Telstra to better manage changing levels of customer demand.

30. The Commission also criticises RMRC on the grounds that:

> *"Being linked to Telstra's retail prices, an access price based on a retail-minus methodology may be subject to greater change over time than cost-based prices. This is because retail price changes could reflect changes in retail market conditions rather than changes in the underlying costs of supplying ADSL services."*[19]

31. Telstra does not agree with the Commission's assessment. It is true that retail prices can and do reflect changes in retail market conditions, but they do also reflect the underlying costs of supplying ADSL services and – to an extent – the costs of congestion. As the Commission is aware, Telstra's retail ADSL customers are spread across a number of ADSL plans, often on 12 or 24 month contracts (with pricing fixed for the term of those contracts). As a result, any retail price changes would be unlikely to lead to short term changes in the average retail yield. Further, as Telstra sets out below, the ADSL market is competitive in a number of geographic

[17] Australian Competition and Consumer Commission, March 2013, p22.
[18] Frontier Economics, April 2013, p9.
[19] Australian Competition and Consumer Commission March 2013, p24.

areas and it is highly unlikely that, in the presence of such effective competition, retail prices would be unrelated to the underlying costs of supplying ADSL services.

32. The Commission has also argued that higher wholesale prices alone would not necessarily contribute to managing network congestion because they could simply result in a price squeeze for Telstra's wholesale customers.[20] This is not correct and is one of the reasons Telstra advocates for the RMRC. As Frontier Economics notes, RMRC allows for congestion prices to be passed through as a means of signalling – and therefore managing – congestion *whilst maintaining the wholesale customers' margin*s, thus avoiding a price squeeze.[21] Under RMRC, if Telstra's retail prices are adjusted to manage congestion, wholesale customers are incentivised to do likewise through a higher wholesale price.

33. As Frontier Economics notes, another advantage to RMRC is the prevention of 'free riding' by access seekers on Telstra's efforts to manage congestion.[22] This is because an RMRC-based WDSL price would reflect any efforts by Telstra to manage congestion through retail pricing, hence ensuring that attempts to manage congestion would be competitively neutral between Telstra and its Wholesale customers.

34. Telstra considers that yet another advantage of RMRC over cost-based pricing is that it is relatively inexpensive and simple to implement. As the Commission notes, *"retail-minus is usually less information-intensive than a cost-based approach and can therefore be suitable for setting a price quickly."*[23] Telstra agrees with this assessment and further notes that the effort required to accurately identify the correct cost-based price is significant and the substantial risks associated with imposing an incorrect price level are much greater than with RMRC.

3.5.1.1. The FLSM is not suited to a service with rapidly growing demand

35. The FLSM sets the revenue requirement for assets used in the provision of fixed line services every five years. The revenue requirement is calculated by summing the four 'building blocks' of operating expenditure, return on capital, return of capital (depreciation), and tax. The return on capital is calculated by multiplying the regulatory asset base by the WACC. The revenue requirement is then divided by the forecast number of SIOs to produce a unit cost of provision.

36. As the revenue requirement is set *ex ante*, if demand grows faster than forecast in the period covered by the FAD, then the wholesale price will have been set too low to recover the revenue required. Consequently, investments required to meet growing demand may be delayed or not fully recovered.

37. This disincentive is the primary reason why building block models, like the FLSM, cannot easily cater for unpredictable changes in demand in dynamic sectors such as broadband.

[20] ibid p23.
[21] Frontier Economic, April 2013, p0.
[22] ibid p11.
[23] Australian Competition and Consumer Commission, March 2013, p24.

3.5.2. RMRC is the better method in the presence of competition

38. Telstra notes that the Commission has raised the following concerns about the RMRC methodology:

    a. that a RMRC methodology could *"build into wholesale ADSL prices any monopoly profits that are included in retail ADSL plans."* and

    b. that *"Telstra could influence the estimated 'retail price' by changing its retail plans or price structures."*[24]

39. Telstra considers that these concerns are misplaced. As set out in Section 4 of this submission, the market for ADSL in a significant number of ESAs is competitive. Further, as the Commission is aware, Telstra prices its retail ADSL plans on a national basis, hence the retail plans that Telstra offers in competitive metropolitan areas – often in response to competition from ULLS and LSS based providers – are also extended to regional areas.

40. Given the level of effective competition in the market for ADSL services, the Commission's concerns are without foundation. Any monopoly profits will have been competed away and it is highly unlikely that Telstra would be able to influence the 'retail price' – any attempt to do so would likely result in a further loss of market share in the competitive ESAs (which account for the largest proportion of ADSL lines).

41. In any case, the presence of dynamic and effective competition in the ADSL market supports the argument for a RMRC methodology. As noted above, building block models like the FLSM do not easily cater for unpredictable changes in demand, which are more likely to occur in a competitive market. Further, a RMRC methodology will ensure that sufficient margins are maintained between retail and wholesale prices to encourage the efficient entry of firms into the market.

3.6. The model used to calculate prices contains errors

42. Notwithstanding the fact that Telstra disagrees with the Commission's draft decision to implement a cost-based methodology, Telstra has reviewed the FLSM that accompanied the Draft FAD. In the time available, Telstra's review has necessarily been high level and as a result, the issues identified below are the key areas of concern that Telstra has identified. It should not, therefore, be assumed that Telstra agrees with other aspects of the FLSM.

43. Telstra has identified that the Commission's FLSM (version 1.2) used to calculate the Draft FAD prices contains a number of errors. These errors include:

    a. Utilising an incorrect method for forecasting demand; and

    b. Understating the Weighted Average Cost of Capital (**WACC**).

[24] ibid p25.

3.6.1. The method for forecasting demand is incorrect

44. The Commission appears to have utilised inconsistent sources of demand for forecasting usage in the FLSM.

    a. For 2010/11, the Commission utilises data pertaining to Telstra Retail only. Specifically, the Commission utilises usage data from the last month of the year divided by BigPond ADSL SIOs in that month.

    b. For 2011/12, however, the Commission utilises an average of the total wholesale and retail ADSL usage divided by wholesale and retail ADSL SIOs. Furthermore, it appears that the Commission has used SIO figures provided by Telstra in its response to the Commission's August 2012 Request for Information, but usage data from Telstra's TEM report for the June 2012 quarter.

3.6.2. The FLSM understates the WACC

45. The ACCC has not changed the market risk premium (**MRP**) in the determination of the WACC from its July 2011 FLSM. In Telstra's view, continued use of a MRP of 6 per cent would seem a low estimation and is not necessarily a reflection of market conditions.

46. Estimates of the market implied MRP are currently above the historic long-term average of 6 per cent for Australia.[25] The Australian Energy Regulator made a MRP determination of 6.5 per cent for the period 1 May 2009 to 1 April 2014. [26]

3.6.3. Other issues identified by Telstra

47. Other issues identified by Telstra in its review of the FLSM include the following.

    a. Hard coding of depreciation costs – the FLSM contains depreciated tax values in "Table 8.2.3: Regulatory Depreciation" that are hard coded rather than calculated values for switching equipment (local) and pair gain systems for the years 2012/13 and 2013/14.

    b. The FLSM incorrectly allocates assets such as DSLAMs to services other than DSL despite the fact these assets are used exclusively to provide DSL. A more appropriate method would allocate DSLAM assets exclusively to DSL and then apply an appropriate allocator for these assets, such as the ratio of WDSL SIOs to the total retail and wholesale DSL SIOs.

    c. **[c-i-c begins]** [redacted] **[c-i-c ends]** It appears that the FLSM accounts for this as it has unitised AGVC/VLAN costs using AGVC/VLAN usage that wholesale customers face a separate charge for.

[25] See NSW Independent Pricing and Regulatory Tribunal *Review of Method for Determining the WACC Dealing with Uncertainty and Changing Market Conditions*, December 2012, p46.
[26] Australian Energy Regulator, *Electricity transmission and distribution network service providers: Statement of the revised WACC parameters (transmission) and Statement of regulatory intent on the revised WACC parameters (distribution)*, May 2009.

3.7. Pricing needs to support the transition to the NBN

48. An important consideration in setting the price level of WDSL is the incentive it provides through price relativities for migration to the NBN. Telstra considers that the price level in the Draft FAD establishes sufficient price relativities to those for comparative NBN services and, therefore, maintains that incentive.

3.8. The structure of price is also important

49. Equally important to the price level is the structure of the price. The allocation of costs between access and AGVC reflects the reality that pricing should focus on managing the faster growing component of the service – usage – rather than access. In this regard, (and notwithstanding Telstra's views regarding the methodology employed by the Commission) Telstra agrees with the Commission's comment that *"Maintaining the AGVC structure, ...provides price signals regarding the use of network capacity."*[27]

50. Telstra also supports the use of zones for access pricing as being reflective of the reality that supplying WDSL services to Zones 2 and 3 is costlier due, for example, to lower population densities and longer distances. This accords with the views that Telstra expressed in its April submission.[28]

51. Telstra notes the Commission's comments that neither Telstra nor access seekers have provided evidence during this inquiry on how significantly costs vary between different geographic zones. However, Telstra refers the Commission to the views expressed in previous reviews, where Telstra has provided such evidence.[29] Telstra will likely update that evidence as part of the 2014 FAD inquiry for the fixed line services and WDSL and as such, Telstra believes it is appropriate that the Commission has not pre-empted that inquiry by changing the geographic structure of charges at this time.

3.9. The scope and level of the ancillary charges is appropriate

52. Telstra agrees with the Commission's decision to only set charges for the following key ancillary charges:

    a. Completed Type A Transfer standard Transfer Request via LOLO/LOLIG where the end user is being migrated from another wholesale ADSL service;

    b. Completed Type B Transfer standard Transfer Request via LOLO/LOLIG where the end user is being migrated from a line sharing service;

    c. All other completed installation or transfer requests; and

    d. Early termination charges.

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[27] Australian Competition and Consumer Commission, March 2013, p72.
[28] Telstra Corporation Limited, April 2012, p24.
[29] Telstra Corporation Limited, *Public inquiry to make Final Access Determinations for the declared fixed line services, Part A of Telstra's response to the Commission's discussion paper*, June 2011, pp65-71.

53. Telstra notes that ancillary charges are generally either one-off charges for changes to a service or charges set to promote appropriate use by Wholesale customers. Telstra agrees that seeking to estimate prices for all possible ancillary charges would lead to a substantially increased regulatory burden. Telstra further welcomes the Commission's decision to retain the prices set in the Interim Access Determination.

3.10. Amendments to the Building Block Model Record Keeping Rule

54. With regard to the proposed amendments to the building block model record keeping rule, Telstra is prepared to cooperate with the Commission in providing the information it requires. **[c-i-c begins]** [redacted] **[c-i-c ends]**

04 APPLICATION OF THE STANDARD ACCESS OBLIGATIONS

55. Telstra is disappointed that in the Draft FAD the Commission has proposed:

    a. That it will not grant exemptions from the Standard Access Obligations (**SAOs**) in areas where there is compelling evidence of competition in the supply of ADSL services; and

    b. That the FAD should apply to Telstra only, i.e. non-Telstra providers of WDSL will not be subject to the FAD.

56. This section sets out Telstra's concerns with respect to these draft decisions. In particular, Telstra draws the Commission's attention to its concerns around the granting of geographic exemptions. By determining not to exempt Telstra from the SAOs to supply WDSL in any ESAs (or group of ESAs), the effective outcome is that the Commission has implicitly set out there are *no* ESAs (or group of ESAs) in which the market for the supply of DSL services are effectively competitive (and hence where exemptions would be in the LTIE). Telstra considers that this outcome is unreasonable and unjustifiable, given the clear market facts related to competitive outcomes in a number of ESAs.

4.1. Geographic exemptions

57. In its Draft FAD, the Commission determined to not grant Telstra exemptions from the SAOs with respect to WDSL in any ESAs (or groups of ESAs). Telstra has a number of concerns with this decision:

    a. The Commission's decision is at odds with the clear and extensive evidence of infrastructure-based competition in the market for DSL services in certain ESAs and groups of ESAs. Telstra has identified 289 ESAs in which there are at least 3 major competitive infrastructure-based providers of DSL services and in which the market outcomes are, in Telstra's view, clearly effectively competitive. Further, there are other groups of ESAs in which the degree of competition is even greater.

    b. The Commission has provided no clear framework or criteria for the assessment of whether or not an ESA (or groups of ESAs) should be made exempt. Without a clear framework for whether or not an ESA (or group of ESAs) should be made exempt, Telstra is concerned that the question of exemptions cannot be fully considered.

    c. In the absence of an overarching framework, the Commission has critiqued the set of 289 ESAs proposed by Telstra on a number of grounds. However, Telstra is concerned that in making these critiques the Commission has failed to articulate why the concerns identified reduce effective competition within these ESAs to such an extent that granting an exemption would not be in the LTIE; and the Commission has not considered placing conditions and limitations on the exemption (including the removal of some ESAs from the proposed set of ESAs).

    d. Further, the Commission does not appear to have considered other ESAs or groups of ESAs in which granting an exemption would be in the LTIE, rather the Commission has

simply assessed the suggested group of 289 ESAs put forward by Telstra and rejected this group as a whole.

e. The end result is that the Commission has applied a "one size fits all" assessment of Telstra's proposed set of 289 ESAs, with no guidance being offered as to the underlying criteria used by the Commission in making that assessment or the relevant thresholds. Consequently there is little guidance offered as to what indicators the Commission would look for to grant an exemption in any ESA (or group of ESAs).

f. Telstra believes that the Commission could (and should) have analysed each of the relevant ESAs (289 in total) to identify and then specify in its decision which ones – if any – the Commission did not believe were sufficiently competitive and thus should not form part of an exemption. Exemptions could then have been granted for the remaining ESAs.

58. Overall, Telstra is concerned that in the absence of a clear criteria for assessing whether or not an ESA (or group of ESAs) should be exempt, it is difficult for Telstra (and other interested parties) to determine whether or not the Commission is likely to consider it in the LTIE to grant exemptions in any given case. Telstra is also concerned that in assessing Telstra's proposed set of 289 ESAs some of the statements and arguments put forward by the Commission appear to discount the merits of exemptions in any ESA.

59. The remainder of this section details Telstra's concerns with the absence of a clear set of criteria and framework from the Commission in determining not to grant exemptions, and an alternative (more conservative) set of criteria that Telstra has presented to illustrate the type of analysis that it believes the Commission could undertake if it chose to set a stricter criteria for exemptions. If the Commission adopted the approach illustrated, applying these criteria would reduce the number of ESAs to which exemptions would apply to 167 (at a minimum). However, this is merely a suggestion by Telstra, not a definitive set of rules Telstra is necessarily advocating as the appropriate criteria by which to assess eligibility for exemptions. Telstra strongly believes that the onus is upon the Commission to undertake a similar exercise of its own to address their stated concerns rather than simply to reject the idea of exemptions outright as it does in the Draft FAD.

4.1.1. The Commission has not articulated a framework or set of criteria in assessing the merits of exemptions

60. In assessing whether or not to grant geographic exemptions in its Draft FAD, the Commission states that it has examined a range of issues that it considers relevant to the LTIE (and other relevant legislative matters). These are:

- *"market structure and the state of competition*.
- *the impact of large pair gain systems on the scope for competition and*
- *efficient use of, and investment in, infrastructure."*[30]

[30] Australian Competition and Consumer Commission, March 2013, p84

61. Telstra outlines below its concerns with the analysis undertaken by the Commission with respect each of these issues. However, Telstra is concerned not only with the issue-by-issue analysis undertaken by the Commission, but also (and more importantly) with the fact the Commission has not provided a *clear, overarching set of criteria or assessment framework* against which the results of the results of the Commission's assessment of the 289 ESAs can be compared. For example, the fact that some ESAs may have a relatively greater proportion of LPGS-affected lines than other ESAs provides little insight into the relative merits of granting an exemption in a given ESA.

4.1.2. Market structure and state of competition

62. In putting forward the group of 289 ESAs, Telstra used stricter and more conservative criteria than that previously adopted by either the Commission[31] or the Australian Competition Tribunal.[32] The criteria that at least the three largest DSLAM-based competitors to Telstra be present in an ESA takes into account the Commission's recent concerns that the presence of actual effective competition (rather than the contestability of an ESA) at both the retail and wholesale layers is relevant in considering whether or not an ESA should be exempt from the SAOs.[33]

63. As set out above, in assessing Telstra's claims, the Commission has not put forward or assessed an alternative benchmark. Rather the Commission has expressed concerns regarding certain observed outcomes within the 289 ESAs suggested by Telstra. These are:

    a. Although the average market share for ULLS and LSS-based services across the 289 ESAs was (and is) in excess of **[c-i-c begins]** [redacted] **[c-i-c ends]**, there is variability in the observed level of competition within the individual ESAs, with some ESAs exhibiting market share for ULLS and LSS services significantly less than the group average.

    b. Telstra remains the largest supplier of retail and wholesale services within these ESAs and in aggregate has a significantly higher market share than its nearest competitor.

    c. Transfer costs for the supply of wholesale services impose significant transaction costs upon access seekers and are likely to impede competition.

4.1.2.1. Differences in the observed level of competition across the 289 ESAs

64. In the Draft FAD, the Commission notes the variation in the level of competition within the group of 289 ESAs put forward by Telstra:

    "Examining the 289 ESAs at a more granular level indicates that market structures and the state of competition vary significantly across them, with a significant proportion being much less competitive than for the 289 ESAs on average."[34]

[31] Australian Competition and Consumer Commission, *Telstra's local carriage service and wholesale line rental exemption applications Final Decision*, August 2008.
[32] Australian Competition Tribunal, Application by AAPT Limited (No 2) [2009] ACompT 6
[33] See ACCC, *Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services, Final Report* December 2011
[34] Australian Competition and Consumer Commission, March 2013, p87.

65. Telstra is concerned that the Commission has failed to observe that its own analysis shows that although some of the 289 ESAs exhibit relatively less competition than the average, it also shows than the many ESAs exhibited very high levels of competition (with the aggregate market share for ULLS and LSS services in some ESAs exceeding **[c-i-c begins]** [redacted] **[c-i-c ends]**). To the extent that a subset of the 289 ESAs were deemed by the Commission to have too low a level of in situ competition for an exemption in those ESAs to be in the LTIE, then the Commission should look to excise those ESAs from consideration and focus on the relatively more competitive subset.

66. Further, although the current state of competition in these ESAs is varied (as measured by ULLS and LSS market shares), this is not necessarily indicative of differences in the relative contestability or the competitive structure of the market.

67. In Telstra's view, *if* the Commission is primarily concerned with the in situ state of competition, then it is open to the Commission to determine a relevant threshold or measure for market competitiveness below which it would not grant an exemption. If however, the Commission remains of the view that contestable conditions (i.e. low barriers to entry, customer churn) are relevant, then it is unclear what the benefit is of assessing only current competitive outcomes.

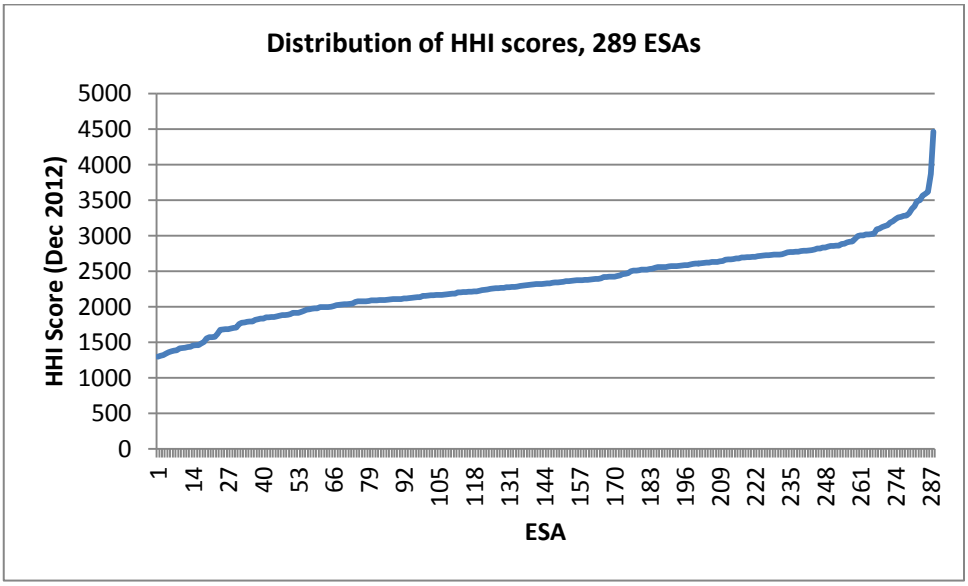
68. It is important to note that a necessary consequence of requiring very high levels of in situ competition for an exemption to be granted is that the Commission is effectively placing greater weight on this issue than the potential benefits of more efficient investment in infrastructure flowing from an exemption being granted. If the Commission only looks to exempt ESAs in which extensive competitive investment has already occurred, it should be expected that there is unlikely to be as significant an increase in investment following the granting of an exemption, than would be the case if a different threshold/set of criteria, that looked more at contestability of an ESA. This issue is considered in further detail later in this section.

4.1.2.2. Telstra's relative share of DSL services compared to competitors

69. The second concern raised by the Commission is that Telstra's market share across the 289 ESAs remains significantly higher than that of its nearest competitors.

70. Telstra is concerned that the Commission is using a simplistic measure of competition in simply comparing Telstra's market share to its nearest rival. In Telstra's view, a simple comparison of the relative size of the largest firm in the market to the next largest firm is unlikely to provide meaningful information to assist the Commission in determining whether or not an exemption should be granted. In contrast, in its August non-price submissions, Telstra identified the Herfindahl-Hirschman Index (HHI) as a widely used tool for the assessment of competitiveness in a market, which uses the market share data for firms. Telstra also provided analysis of the HHI for the 289 ESAs. Although the Commission notes that Telstra provided this (and other analysis) in its submission, the Commission does not appear to have either relied on Telstra's analysis (showing that, in aggregate, the HHI for the 289 ESAs indicates an effectively competitive market) or undertaken its own HHI calculations.

71. Further, the Commission does not appear to have undertaken a more detailed analysis (as it did for the level of ULLS and LSS competition) that would have allowed it to identify any ESAs in which the current level of competition (as measured by the HHI) was significantly less than for the remainder of the group. Conversely, examining the HHI scores for the 289 ESAs individually illustrates how significant the level of competition is in a number of ESAs, as illustrated below.



Source: Telstra

72. Further, even if Telstra were to adopt the approach used by the Commission, Telstra estimates that as at December 2012, there are **[c-i-c begins]** ■ **[c-i-c ends]** ESAs (of the 289) in which Telstra is not the largest supplier of retail DSL services in that ESA.

4.1.2.3. The impact of transaction costs on DSL competition

73. The Commission has determined that the costs of transferring services between WDSL suppliers imposes significant transaction costs on access seekers and that such costs are likely to impede competition. Telstra considers that this finding is contrary to the plain market facts before the Commission and also is counterintuitive given the Commission's decision to exempt non-Telstra WDSL suppliers from the SAOs.

74. The plain market facts, including the level of churn in the market, the persistent decline in the number of Telstra's WDSL SIOs (which account for a mere **[c-i-c begins]** ■ **[c-i-c ends]** of DSL SIOs within the 289 ESAs) and the presence of multiple WDSL providers (including AAPT, Optus and iiNet and others) should cast significant doubt on the Commission's conclusion. In Telstra's view the market evidence is overwhelming that access seekers have the ability to readily switch between means of supply (whether WDSL, LSS or ULLS-based) and service suppliers.

75. Further, if the Commission is concerned that any WDSL provider is able to exert market power over its current WDSL customers – due to the uneconomic transactions costs in switching suppliers – it is uncertain why the Commission has exempted non-Telstra providers of WDSL

services from the SAOs and the requirement to supply the service at the FAD price and non-price terms.

4.1.3. The impact of large pair gain systems on the scope for competition

76. In Telstra's view, the Commission's reasoning with respect to the presence of LPGS infrastructure both overstates (significantly) the potential for LPGS to negatively impact on the competitive constraint provided by ULLS and LSS services with respect to Telstra supplied WDSL services and provides no guidance as to what (if any) level of LPGS presence the Commission would consider acceptable in the context of exemptions.

77. For the reasons set out in its August submission[35], Telstra does not consider the mere presence of LPGS infrastructure within ESAs in which there is already a significant in situ competitive DSLAM presence is likely to materially compromise the competitive constraint ULLS and LSS-based services place on Telstra-supplied WDSL within that ESA.

78. However, to the extent that the Commission considers that the presence of LPGS infrastructure does limit the competitive constraint placed on Telstra-supplied WDSL by ULLS and LSS-based services, Telstra considers that the Commission should determine an appropriate threshold below which the presence of LPGS in a given ESA is unlikely to impact on the efficacy of granting an exemption in that ESA.

4.1.4. Efficient use of, and investment in, infrastructure

79. Within the Draft FAD, the Commission has considered the likely impact of granting an exemption on the efficient use of, and investment in, infrastructure within the 289 ESAs (by both Telstra and access seekers) as compared to the case without the exemption. The Commission determined that:

> *"Having regard to all of these considerations, the ACCC is of the view that giving effect to geographic exemptions is unlikely to better promote efficient investment in competitive infrastructure or reduce incentives to make efficient use of existing infrastructure. "*[36]

80. The Commission considered that the growth of competitive DSLAM investments has slowed in recent years, with the Commission stating:

> *"The ACCC expects that a similar analysis of the 289 ESAs would find a more pronounced reduction in the growth of access seeker density because the narrower footprint of 289 ESAs, which by definition all contain at least three access seekers, is likely to be more mature and saturated than the full DSLAM footprint."*[37]

81. In Telstra's view, this concern is a consequence of only seeking to apply exemptions to those ESAs in which significant competitive investments have already been made. As Telstra set out earlier in this section, by only examining ESAs in which there is already a high level of in situ

[35] Telstra Corporation Limited, August 2012a, p75.
[36] Australian Competition and Consumer Commission, March 2013, p92
[37] ibid p91

competition (within each of the 289 ESAs, there are at least 3 competitive DSLAM operators (not including Telstra)), the Commission is necessarily limiting the likelihood of exemptions leading to significant improvements in competition in those ESAs.

82. This is not a justification for not granting exemptions. By recognising effective competition in the market for ADSL services and removing unnecessary regulation, exemptions in these ESAs are likely to reduce distortions in the market and facilitate more effective competition than would otherwise be the case. However, in setting a high hurdle for in situ competition, the Commission is effectively trading-off the certainty that competition within these ESAs is clearly effective (and hence regulation is unnecessary and granting exemptions is very low risk) with the loss of potential benefits if the Commission were to adopt a less conservative criteria and include a greater number of ESAs.

4.1.5. The Commission has not fully considered alternative ESAs (or groups of ESAs)

83. The Commission states in the Draft FAD, that although (in its view) it is appropriate to declare the WDSL service on a national basis:

> *...in considering the scope of the application of the SAOs that could apply, the ACCC considers that competition can be accurately assessed by examining a geographic region narrower than a national market. The ACCC's view is that the ESA, or groupings of ESAs, are an appropriate basis on which to perform this analysis.*[38]

84. Telstra agrees that a sub-national analysis that takes into account the variation in competitive conditions and outcomes in different ESAs is more likely to promote the LTIE than a blanket approach that is likely to lead to the application of unnecessary regulation.[39] However, the Commission has not undertaken the necessary analysis of competition at the ESA (or group of ESAs) level, nor has the Commission set out a clear framework in order to undertake this sub – national, ESA-level analysis.

85. Telstra is concerned that within the Draft FAD, the Commission has only examined the merits of exempting or not exempting the 289 ESAs that Telstra suggested should be made exempt. Based on the Draft FAD, the Commission does not appear to have fully examined whether a subset of these 289 ESAs, or any other set of ESAs are effectively competitive and therefore that granting an exemption would be in the LTIE.

86. By determining not to exempt Telstra from the SAOs to supply WDSL in any ESAs (or group of ESAs), the effective outcome is that the Commission has implicitly set out there are *no* ESAs (or group of ESAs) in which the market for the supply of ADSL services are effectively competitive (and hence where exemptions would be in the LTIE). Telstra does not consider that this outcome is reasonable given the clear market facts related to competitive outcomes in a number of ESAs.

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[38] ibid p78.

[39] This approach is consistent with comments made by the Chairman of the Commission, Rod Simms, who recently set out the Commission's view of "regulation as a last resort" in a speech to the National Press Club..*"We believe strongly in the benefits of competition, and as a regulator we see its inadequacies and see regulation as a last resort".*(emphasis added). See further http://www.accc.gov.au/speech/economic-philosophy-and-the-accc-and-we-are-all-economic-philosophers

87. The Commission cannot be satisfied that the FAD will be in the LTIE or otherwise meet the statutory criteria in section 152BCA of the CCA if the FAD sets price and non-price terms for the supply of services in ESAs in which there is effective competition. The Commission itself has previously recognised that:

    a. the continued declaration of a service *"is not likely to promote competition or the LTIE where competition in the relevant markets is determined to be 'effective'."*[40]*;* and

    b. *"…where a service remains declared when there is effective competition in the provision of that service, declaration can reduce efficient investment more broadly in the market. This is on the basis that it can maintain reliance on the main supplier in the market, thus reducing efficient investment by access seekers in utilising alternative suppliers or service and hence the ongoing investment in infrastructure by these alternative suppliers. This in turn can be deleterious to maintaining competition and in delivering service diversity to end users in the longer term…"*[41]

88. As Telstra has identified, there are a large number of ESAs in which the market evidence clearly points to the presence of effective competition in the market for DSL services – evidenced by the presence of multiple, competing retail and wholesale DSL service providers; the small (and declining) share of SIOs served by Telstra-supplied WDSL services, and the high the aggregate market share of DSLAM-based providers. As noted earlier, Telstra estimates there are at least [**c-i-c begins**] [redacted] [**c-i-c ends**] ESAs in which Telstra is not the largest retail service provider and in which, the vast majority of DSL services are supplied using ULLS and LSS-based services.

89. To this end, the Commission does not appear to have considered limitations or conditions on the application of exemptions either within the 289 ESAs suggested by Telstra, or in an alternative subset of ESAs, in order to satisfy itself that the exemption would be in the LTIE. Given the Commission's concerns about not all ESAs within the 289 ESA group being as competitive and contestable as market data would suggest for the group in aggregate, it would be open to the Commission to remove these outliers by specifying additional criteria. For example, if the Commission is concerned that a subset of the 289 ESAs put forward by Telstra have relatively lower ULLS and LSS market shares than the average, then these could be excluded from the group. Similarly, if the Commission is concerned that a subset of the ESAs has a relatively higher proportion of LPGS-affected lines, then these ESAs could also be excluded. The fact that the Commission has not considered reducing the set of ESAs, or in some other manner setting limitations or conditions on the exemptions is, in Telstra's view, a major flaw in the Commission's analysis.

90. To illustrate the fact that the Commission's apparent concerns with respect to the level of competition and LPGS-affected lines in some of the 289 ESAs could be addressed through suitable limitations and conditions, Telstra has presented an example criteria. The following table shows market data for 167 ESAs in which *all* of the following criteria are met:

[40] Australian Competition and Consumer Commission, *Telstra's domestic transmission capacity service exemption applications – Final Decision*, November 2008, p57.
[41] Australian Competition and Consumer Commission, *Transmission Capacity Service, Review of the Declaration for the Domestic Transmission Capacity Service – Final Report,* April 2004, p45.

a. Optus, iiNet and TPG (at a minimum) have a competitive DSLAM presence;

b. the minimum combined market share for ULLS and LSS-based services is **[c-i-c begins]** [redacted] **[c-i-c ends]**;

c. the maximum proportion of lines served by LPGS is **[c-i-c begins]** [redacted] **[c-i-c ends]**; and

d. the maximum HHI score is 2500.

[c-i-c begins]

[c-i-c ends]

91. A list of the 167 ESAs is attached at Annexure A.

92. As the table shows, a stricter set of criteria that seeks to remove outliers from the original set of 289 ESAs results in a remaining set of ESAs in which the overall level of competition is significantly greater than for the 289 ESA set, while also ensuring that even the least competitive ESAs within the remaining set are clearly competitive across each measure.

93. Although Telstra remains of the view that the original set of 289 ESAs represent a conservative set of ESAs in which there is clearly effective competition in the market for DSL services, the above example shows the Commission could introduce additional criteria to address their stated concerns and reduce the scope of the exempt area.

4.2. Carrier-specific exemptions

94. Telstra is disappointed that the Commission has decided to exempt from the SAOs other providers of WDSL. In its April submission, Telstra expressed the view that to the extent that the SAOs apply to WDSL in particular geographic areas, they should apply to all access providers. Telstra's views remain as set out in its April submission.[42]

95. The basis of the Commission's decision appears to be that:

a. Non-Telstra access providers are already sufficiently constrained by competition from Telstra;

b. Telstra is the dominant provider of WDSL services nationally and is likely to retain that position for the foreseeable future;

c. The Commission has not been provided with any evidence that non-Telstra access seekers are engaging in anti-competitive behaviour; and

d. Imposing terms and conditions on non-Telstra providers will reduce their incentives to invest in infrastructure or innovations, which will have detrimental impacts upon

[42] Telstra Corporation Limited, April 2012, p20.

competition in ADSL markets (both wholesale and retail) and on the efficient use of, and investment in, infrastructure.

96. As in April 2012, Telstra believes that neither (b) nor (c) above are relevant to the Commission's assessment. In relation to point (b), the Commission's finding that Telstra's ADSL network significantly exceeds that of other providers may be true on a national level – but it ignores the fact that in metropolitan areas several providers operate networks of a comparable size to Telstra. In areas in which access seekers have installed DSLAM-based infrastructure the market for ADSL services exhibits quite different characteristics and outcomes, compared to areas in which access seekers have chosen to not install competitive infrastructure. For example, looking at the 167 ESAs in 4.1.5 above, on average the share of broadband lines supplied using Telstra's WDSL service is **[c-i-c begins]** [redacted] **[c-i-c ends]**. If the SAOs were to apply to those ESAs where Telstra's WDSL market share is so low, then Telstra believes that the SAOs should also apply to other WDSL providers.

97. Furthermore, it is irrelevant that the Commission has not received complaints from acquirers in respect of other access providers' terms and conditions of access.

98. With regard to the Commission's other reasoning, Telstra does not understand the rationale that imposing terms and conditions on non-Telstra providers of WDSL may harm their ability to develop innovative offerings and differentiate themselves from Telstra in order to attract wholesale customers. Imposing the terms of the FAD upon Telstra could similarly harm its flexibility and ability to innovate. The statutory criteria do not allow the Commission to give a "leg up" to Telstra's competitors over Telstra.

99. Further, Telstra does not consider that imposing the terms of the FAD on other WDSL providers would be unduly onerous – if the products being offered by those providers are sufficiently differentiated from Telstra's WDSL offering, then it may be that those products are not covered by the service description in any case.

100. Given all of the above, and for consistency and competitive neutrality, Telstra strongly believes that the Commission should reconsider its draft decision to grant carrier-specific exemptions from the SAOs.

05 NAKED ADSL

101. Section 8 of the Commission's Draft FAD sets out its proposal that the FAD should not contain a term that allows a WDSL service to be provided without an underlying PSTN service. Telstra strongly supports this draft decision, which it believes should be carried through to the FAD.

102. As the Commission is aware (and has accepted in the Draft FAD) the requirement for an underlying PSTN service is not, as others have argued, a commercial bundling construct; rather, it is a function of Telstra's network architecture. The facts around Telstra's network architecture are set out in detail in Telstra's August submission[43], where Telstra explained that it provides ADSL services to both retail and wholesale customers on top of PSTN services. Telstra's systems and processes are set up to deliver ADSL in this way and any changes to the requirement for an underlying PSTN service would entail significant systems development and process changes. Telstra agrees with the Commission's assessment that requiring such changes to be made would not be consistent with the statutory criteria.

103. Telstra's views with respect to the introduction of a Naked ADSL service remain as set out in its August submission and its supplementary October submission.[44] For the avoidance of doubt, Telstra's key views with respect to this issue are summarised below.

5.1. A requirement to provide Naked ADSL would require significant system and process changes

104. Telstra does not supply Naked ADSL to either itself or to wholesale customers. A requirement to provide a Naked ADSL service would require Telstra to develop and provide a new service. Currently all ADSL services supplied by Telstra are ordered, provisioned and managed by reference to an underlying active PSTN service. As such, a requirement to provide Naked ADSL would require significant system and process changes.

105. In its August and October submissions, Telstra set out that it had conducted a high level review of the systems changes that would need to be made in order to be able to provide a Naked ADSL service. The cost of making those systems changes alone was estimated to be in the range **[c-i-c begins]** [redacted] **[c-i-c ends]**. Telstra has reviewed those cost estimates again and continues to believe that this estimated range is correct. Indeed, Telstra's recent review highlighted that the systems costs of implementing a Naked ADSL service for wholesale only would be in the region of **[c-i-c begins]** [redacted] **[c-i-c ends]**, which is consistent with the previous estimate.

5.2. No power to require Telstra to offer a Naked ADSL service

106. Telstra notes the ACCC's draft view[45] that its powers are broad enough to include a term in a FAD requiring an access provider to offer a fully unbundled or hybrid WDSL service. Telstra disagrees with this view and for the following reasons:

[43] Telstra Corporation Limited, August 2012a.
[44] Ibid, and Telstra Corporation Limited, October 2012.

a. The Commission had suggested (in its July issues paper[46]) that it could include a term in the FAD requiring Telstra to provide Naked ADSL under section 152BC(3)(d) of the Competition and Consumer Act 2010 (Cth). That section gives the Commission power to require an extension or enhancement of the capability of a facility but only to the extent that the facility is one by means of which wholesale ADSL is supplied.

b. A number of the changes that would need to be implemented in order to achieve this are changes to systems that are not related to the provision of ADSL. Examples of these changes were set out in Telstra's August submission.[47]

c. Therefore the processes involved in uncoupling ADSL from the underlying PSTN line so as to provide a Naked ADSL service would involve the enhancement and/or extension of facilities that are not facilities by means of which the declared service is currently provided.[48] The Commission has no power to require Telstra to extend or enhance those facilities.

5.3. Naked DSL would increase the costs of service assurance and would likely lead to a greater number of line faults

107. All of Telstra's network management protocols, network management experience and tools and assets are built upon the CAN being primarily utilised for the provision of PSTN services. The presence of the PSTN service enables Telstra to utilise its automated line testing and assurance infrastructure. Without the ability to carry out metallic line test (MLT) on end user access lines, Telstra's ability to detect, manage and restore network faults is significantly compromised.

108. Over time, the removal of the PSTN service is also likely to lead to a greater number of line faults. The presence of wetting current provided by PSTN equipment, mitigates the effects of oxidisation build up that can lead to line faults. Telstra has observed that in the absence of an active PSTN service, the number of line faults increases and evidence was presented to support this in Telstra's October submission.[49]

109. Service assurance is a critical aspect of service provision and assurance costs are a major component of Telstra's cost of provisioning copper based services. A requirement to provide Naked ADSL services would increase the service assurance costs faced by Telstra. This is because Telstra would be unable to utilise its existing automated assurance systems and standard processes (as these are dependent on the presence of an active PSTN service). This would result in higher ongoing costs of providing Naked ADSL services. For the avoidance of doubt, Telstra has not estimated these higher ongoing costs, which are not included in the upfront costs detailed above. As set out in its October submission, in order to properly estimate the costs of providing a wholesale Naked ADSL service, Telstra would need to

[45] Australian Competition and Consumer Commission, March 2013, p113.
[46] Australian Competition and Consumer Commission, *Public inquiry to make a final access determination for the wholesale Asymmetric Digital Subscriber Line service – Issues Paper*, July 2012.
[47] Telstra Corporation Limited, August 2012a.
[48] Extensions to systems are enhancements or extensions to facilities, see for example, Rares J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission and Another* [176] FCR 153, [99] – [102].
[49] Telstra Corporation Limited, October 2012.

undertake a full scale scoping exercise, which would take time and impose costs upon Telstra.[50]

110. Given the above, Telstra welcomes the Commission's draft view that maintaining the status quo will promote the reliability of Telstra's WDSL services supplied over its current network.

5.4. The demand for a wholesale Naked ADSL service is likely to be limited

111. Telstra believes that there is unlikely to be significant demand for a Telstra supplied wholesale Naked ADSL service given the existing options available in the market – Naked ADSL services are already available via ULLS and from other WDSL providers – and the likely price of such a service relative to those alternative options.

112. The processes and costs involved in uncoupling ADSL from PSTN were outlined above in this section. If the Commission's FAD required Telstra to provide naked ADSL, it could not do so if that requirement would in turn require Telstra to bear an unreasonable amount of the cost of extending or enhancing the capability of a facility[51] or of maintaining these extensions to or enhancements of the capabilities of a facility.[52] This means that these significant costs would have to be recovered by Telstra as part of prices set by the Commission for WDSL.

113. Telstra is pleased that the Commission has acknowledged that it is not unreasonable that Telstra would seek to recover the relevant costs of providing a Naked ADSL service. Telstra agrees with the Commission's assessment that any regulated access charge for a Naked ADSL product would likely allow for the recovery of Telstra's upfront capital costs and ongoing operational costs to provide such a service. Further, Telstra agrees that these costs would likely be passed on to end users.

114. Taking into account that over 70% of end users are located within ESAs in which Naked ADSL services are already available and the likely price of a Naked wholesale ADSL service, Telstra also agrees with the Commission's assessment that Telstra may not achieve economies of scale in the provision of such a service. Further, including a term in the FAD is unlikely to provide pricing advantages for access seekers.

115. Given all of the above, Telstra strongly supports the Commission's draft decision not to include a term in the FAD requiring Telstra to provide a wholesale Naked ADSL service.

[50] Telstra Corporation Limited, October 2012.
[51] Section 152BCB(1) (f)(i) of the *Competition and Consumer Act 2010* (Cth).
[52] Section 152BCB(1) (f)(ii) of the *Competition and Consumer Act 2010* (Cth).

06 POINTS OF INTERCONNECTION FOR THE WDSL SERVICE

116. Section 9 of the Draft FAD sets out the Commission's draft view that it will not include a term in the FAD that requires Telstra to either:

    a. Deploy additional Points of Interconnection (**POIs**) in the network; or

    b. Allow the local access component of the WDSL service to be provided separately from the backhaul component.

117. Telstra strongly supports the Commission's draft decision and concurs with its assessment that the inclusion of such terms in the FAD would be inconsistent with the statutory criteria.

118. As the Commission notes in the Draft FAD, Telstra has provided a considerable amount of detail regarding the architecture of its current network that is used to provide ADSL services.[53] In particular, Telstra's August submission set out the different components of the network that are required in order to provide ADSL services. As the Commission is aware, there are a number of network elements that are essential to the provision of an ADSL service, including:

    a. An unbroken metallic telecommunications wire connecting the end user's premises to a Digital Subscriber Line Access Module (**DSLAM**);

    b. A DSLAM device to communicate with the end user's DSL modem and aggregate end user DSL traffic to a transmission path for carriage to higher network elements;

    c. A Broadband Remote Access Server (**BRAS**) device to aggregate output from multiple DSLAMs, authenticate and terminate end user sessions (by referencing information in OSS databases) and forward traffic to the appropriate Internet Gateway Router (**IGR**);

    d. An IGR device to aggregate traffic from multiple BRASs, and deliver traffic to ISP networks (for example, Telstra's BigPond network or to WDSL customers' networks). IGRs are able to serve as POI locations for interconnection to DSL networks by ISPs;

    e. Sufficient transmission (typically fibre optic cable) capacity is required; and

    f. The availability of an operational support system (**OSS**) and business support system (**BSS**), both of which are necessary to enable the individual network elements to interoperate with each other.

119. As the Commission has recognised, it is not possible to 'unbundle' a WDSL service in order to allow interconnection between the DSLAM and the BRAS/IGR. DSL traffic cannot be split or separated at a DSLAM. The DSLAM is not capable of providing any of the header information required for authenticating and terminating end user sessions. The essential network 'smarts' required for the provision of a WDSL service reside in the BRAS devices in the network. In addition to a BRAS device, an IGR is required to split the traffic to an appropriate point of

[53] See Telstra Corporation Limited, August 2012a; and Telstra Corporation Limited, October 2012.

interconnection in the network. In addition to providing routing and traffic management services, IGRs provide the physical port infrastructure necessary for a POI.

120. Further, Telstra reiterates that its centralised architecture is efficient. This is because:

a. By taking advantage of the aggregation properties of DSL traffic, Telstra is able to employ relatively fewer BRAS and IGR devices in the network, than if a more disaggregated network structure was used;

b. By not fully aggregating traffic to a single POI/core network location, Telstra is able to maintain redundancy and ensure service continuity (through traffic balancing) in the event of equipment failure at a POI location;

c. Access seekers (and Telstra BigPond) are not required to deploy network equipment at a greater number of POI sites – only requiring a presence at 7 POIs (at least one in each capital city, plus Canberra) to provide their end users with WDSL-based services in any one of more than 2,800 ESAs; and

d. Access seekers and Telstra also gain scale efficiencies from high capacity POI locations that would be lost if a greater number of POIs was used.

121. The Commission has recognised that requiring Telstra to re-engineer its network would result in a loss of the efficiency described above and would require Telstra to incur significant costs. These costs would arise as a result of the deployment of additional equipment in the network and an increase in Telstra's overall costs of managing its network. Telstra agrees with the Commission's assessment that re-engineering Telstra's network in the manner that had been contemplated would be unlikely to encourage the economically efficient use of and investment in infrastructure.

122. Telstra notes that the Commission has stated that it would be reasonable for Telstra to recover the costs associated with implementing further POIs in the charges for the WDSL service and that this would likely lead to increased prices for end users. Telstra agrees with this conclusion.

123. Given the above, Telstra reiterates that it strongly supports the Commission's draft conclusion with respect to POIs for the WDSL service. Telstra strongly believes that making the changes that had been contemplated would be inconsistent with the statutory criteria.

07 OTHER ISSUES

7.1. Commencement and expiry of the FAD

124. Telstra welcomes the Commission's conclusion in the Draft FAD that the FAD should not be backdated. Telstra concurs with the Commission's assessment that there are no factors present which indicate that such backdating should occur.

125. As stated in its August 2012 submission, Telstra continues to believe that certainty and price stability for industry will be aided by the Commission maintaining a consistent approach to issues such as backdating across all FADs. In this regard, the Commission's proposal is consistent with the position that it has taken in other FADs, most recently DTCS.

126. Telstra agrees with the Commission's proposed expiry date for the WDSL FAD, that is, 30 June 2014. As noted by the Commission, this will allow the pricing for WDSL to be reviewed in conjunction with the Fixed Line Services; an approach that Telstra considers to be appropriate.

08 STANDARD NON-PRICE TERMS AND CONDITIONS

8.1. The importance of aligning key non-price terms and conditions across the declared services

127. Telstra understands that the Commission's approach to setting non-price terms in the Draft Decision has been to use as a starting point the amended version of the *Model Non-Price Terms and Conditions Determination* set out in the domestic transmission and capacity service Final Access Determination (**DTCS Terms**), and to:

- amend several aspects of these DTCS Terms where it considers this appropriate for reasons specific to the Wholesale ADSL (WDSL) service; and
- only set FAD terms for what it considers to be the "key" non-price terms (rather than a "full" or broader set of supply terms).

128. Telstra broadly supports the approach taken by the Commission, particularly to the extent it recognises and reflects that there is now a long history of successful negotiation and implementation between access providers and access seekers of broader supply terms for regulated services, beyond the scope of the provisions mandated by relevant Final Access Determinations.

129. In relation to the amendments the Commission has made to the DTCS Terms in formulating the draft provisions relating to the WDSL service, however, Telstra notes that while the Commission has adopted several of Telstra's submissions regarding appropriate non-price terms for the WDSL service, it has rejected the majority of these.

130. Telstra maintains that its previous WDSL FAD submissions contain suitable and commercially prudent suggestions regarding appropriate WDSL non-price terms, and strike an appropriate balance between the interests of the Access Provider and Access Seekers. Accordingly, this submission reiterates Telstra's position on many of the suggestions not accepted by the Commission to date, and provides new information in support of these suggestions where this has been possible.

131. In preparing this submission, Telstra has also been mindful that the Commission will be undertaking a broader review of declared services in 2014 (the 2014 process), and that this 2014 process provides an opportunity to ensure that supply terms are made consistent between all services to the extent feasible.

132. To date, determination of mandatory supply terms in the context of FAD processes has necessarily occurred in an 'ad hoc' manner, and tight timeframes and commercial imperatives surrounding each of those processes has often resulted in pricing aspects being a major focus for participants. Indeed, the Commission expressly noted in its July 2011 Final Report regarding relevant Fixed Services (WLR, LCS, OA, TA, ULLS and LSS) that it was not then in a position to reach a final view on the non-price terms given the time constraints it faced relating to that process, and the opportunities for a broader review of the terms in a broad cross-services context has obviously been limited since. Accordingly, a process of review and

adjustment to relevant non-price terms as part of the 2014 process can be expected to be welcomed by industry participants.

133. Amongst other benefits, utilising the 2014 process to achieve greater consistency between non-price terms and conditions for WADSL services and other similar or related wholesale services will ensure:

    a. a rational and coherent system for dealing with fundamental matters such as billing, creditworthiness, dispute resolution procedures, confidentiality, and suspension and termination;

    b. clarity to Access Seekers with respect to their entitlements and obligations when utilising wholesale services; and

    c. a reduction in administrative and compliance costs borne by access providers as a result of the streamlining non-price terms and conditions, which will ultimately benefit end-users.

134. It is noted that in relation to Access Providers, these benefits can extend to parties beyond Telstra if the Commission accepts Telstra's view that the WDSL FAD terms be applied to all providers of WDSL services. In any case, the above points highlight that consistency is also very much in the interests of Access Seekers.

135. In this context, Telstra believes that it is important that any position the Commission adopts in relation to non-price terms and conditions in the context of the current WDSL FAD process be preliminary in nature, and communicated to industry in a way that reflects this. More specifically, Telstra urges the Commission to:

    - ensure that the WDSL FAD expressly provides, and is developed by the Commission that in a way that reflects, that the non-price terms apply until 30 June 2014 only; and

    - commit to engage in a substantive consultation and reassessment process regarding non-price terms and conditions for all declared services (including WDSL) in totality, as part of the 2014 process, so that industry participants have an opportunity to provide considered submissions on relevant matters that the Commission can take into account before finalising its views.

136. As flagged above, relevant matters will naturally include the benefits of consistency of relevant terms across services, but will also extend to what is practical, proportionate and prudent in the technical and commercial telecommunications environment that exists at the time of the review (which will obviously differ in many aspects from the environment that existed when many of the current 'model' terms were first adopted). Telstra notes that the Commission has itself noted the importance of considering the non-price terms in this context.

137. In suggesting that the Commission commit to a 'holistic' review of the non-price terms across all declared services as part of the 2014 process, Telstra recognises that the Commission is limited in terms of what it could achieve regarding consistency of supply terms across services within the confines of the current WDSL FAD inquiry. Additionally, Telstra considers that there are a number of areas where it is important to implement amendments to the Commission's

proposed terms of supply relating to WDSL that the Commission can then flow through to other declared services during the 2014 process.

138. These matters, and others relating to the non-price terms of WDSL supply that are newly arisen due to the most recent proposals of the Commission, or which Telstra considers are absolutely fundamental to the Access Provider / Access Seeker relationship, are addressed in the following section of this submission. As noted above, whilst Telstra considers that the remainder of its proposed terms and conditions, as set out in Annexure B to its submission dated 24 August 2012[54], strike a commercial and equitable balance between the interests of Access Seekers and Telstra as Access Provider, as well as being consistent with the long-term interests of end-users ("**LTIE**") (for the reasons set out in the 24 August submissions and summarised in Annexure A to this submission), it does not press those terms for the sake of consistency with the other FADs, so long as those terms are reconsidered as part of the Commission's 2014 review.

8.2. Schedule 2: Billing and Notification

139. Telstra sought amendments to clause 2.7 in its previous submissions. The Commission has not accepted those amendments in its Draft Decision.

140. The Commission stated that it is important that billing and notification terms do not create obligations that deter potential Access Seeker entry into the market. In other competitive markets, suppliers generally give a time period to pay (varying from between 7 and 30 days) with no equivalent provisions preventing recovery. In the telecommunications sector, this is evident in the Wholesale Broadband Agreement ("**WBA**") in which non-payment by the Customer by the due date triggers NBN Co's ability to exercise a variety of rights in respect of recovery and NBN Co is able to exercise such rights as soon as such amounts become overdue. Thus the concern of the Commission that the removal of this term will deter entry is misconceived. This is further demonstrated by the fact that Access Seekers have entered into the market and acquired services from Telstra in the market despite the absence of such a term in any of Telstra's commercial arrangements.

141. Therefore, clause 2.7 should be amended to enable Telstra to take immediate action to recover an unpaid amount from an Access Seeker as a debt due if the Access Seeker has failed to pay the full amount within the 30 Calendar Day payment period . The requirement that the Access Seeker's debt "remains unpaid for more than 20 Business Days" before recovery action can be commenced should be deleted from the clause.

142. Pursuant to clause 2.6, an Access Seeker has 30 Calendar Days to pay an invoice. This 30 Calendar Day period affords the Access Seeker a sufficient period of time to identify and rectify any relevant issues in respect of the invoice. In circumstances where a Billing Dispute has not been raised, the requirement that the Access Provider wait an additional 20 Business Days before commencing recovery action goes beyond what is reasonably required to protect the interests of Access Seekers and is contrary to the legitimate business interests of the Access

[54] In respect of Schedule 10 – Changes to Operating Manuals, Telstra refers to its submission to the Public Inquiry to Make Final Access Determinations for the Declared Fixed Line Services, Part B of Telstra's Response to the Commission's Discussion Paper (3 June 2011) and the amendments to the relevant provisions set out in Schedule B.1, "Proposed Amendments to Draft FAD and Non-Price Terms".

Provider in the timely recovery of invoiced amounts. This delay exposes the Access Provider to substantial risk, which is likely to increase the Access Provider's direct costs of providing access, contrary to the statutory criteria.

143. Telstra's proposed amendment to clause 2.7 is consistent with the statutory criteria as it facilitates the timely recovery of invoiced amounts and reduces the level of risk faced by the Access Provider. The reduction in risks of non-recovery and increased certainty which would likely result from such amendments would encourage efficient investment in the relevant infrastructure and would promote the legitimate business interests of the Access Provider.

144. Further, such amendments would be consistent with the terms required by BT in its Master Services Agreement for the Provision of Wholesale Products and Services (29 May 2009).

8.2.1. Billing Dispute Procedures applicable to multiple incorrect invoices

145. Telstra sought the deletion or amendment of clause 2.30 in its previous submissions. The Commission has retained clause 2.30 and has not accepted Telstra's proposed amendments to clause 2.30 in its Draft Decision.

146. The Commission stated that clause 2.30 provides incentives for the Access Provider to produce accurate billing information and to rectify errors in a timely manner, and that this will help to prevent unnecessary disruptions to the business activities of Access Seekers and other users of the WADSL service. However, this is also true if interest is payable on any incorrect amount. Furthermore, the Access Provider, like many other commercial enterprises, has incentives to provide accurate bills. Dealing with inaccuracies and complaints about inaccuracies takes up a substantial amount of administrative resources and is costly, not to mention that it has a deleterious effect on the relationship between the parties, which may also have significant cost consequences.

147. Clause 2.30 does not strike an appropriate balance between the interests of the Access Provider and Access Seekers and should be deleted. This is because:

- Access Seekers have no incentive to raise billing dispute in a timely fashion or to cooperate with the Access Provider and ensure a timely resolution of a Billing Dispute; and

- the Access Provider may be penalised even in circumstances where it is attempting to resolve, for example, a system problem, as rapidly as possible.

148. Telstra acknowledges the importance of adequately incentivising the Access Provider to provide accurate billing information. However, other provisions of Schedule 2 (such as clause 2.10, clause 2.12 and clause 2.20) already provide sufficient incentives for the Access Provider to issue accurate invoices. Further, the legitimate business interests of the Access Provider require factors such as the cause of the inaccuracy and the nature of remediation measures that are currently underway to be taken into account in this context. The deletion of clause 2.30 is consistent with the statutory criteria and strikes a more appropriate balance between the interests of the Access Seeker and the interests of the Access Provider.

149. Alternatively, the clause should be amended to provide that:

- Only Billing Dispute Procedures should properly result in a finding that invoices are incorrect, given that the outcome of any other dispute resolution procedures will not impact on the accuracy of invoices.

- Clause 2.30 does not apply if the inaccuracy in the invoices was caused by an error that was unknown to the Access Provider at the time of issuing the relevant invoices or the Access Provider has agreed to rectify any incorrect invoices. It is inappropriate to penalise the Access Provider for an error of which it was not aware. Further, the Access Seeker should not be permitted to take advantage of the clause in circumstances where the error is being rectified, but the process of rectification will take time to implement.

- If three or more of any five consecutive Billing Disputes initiated by the Access Seeker are resolved against the Access Seeker through the Billing Dispute Procedures, then the interest payable under clause 2.21 on any disputed and unpaid Charges shall be at the rate set out in clause 2.6, plus 2% (without prejudice to any other right or remedy available to the Access Provider). This amendment will ensure that the parties behave appropriately and discharge their obligations to each other in good faith.

8.3. Schedule 3: Creditworthiness and Security

8.3.1. Condition precedent to supply

150. Telstra sought amendments to Schedule 3 to make supply conditional on the provision of Security. The Commission has not accepted Telstra's proposed amendments in its Draft Decision, stating that it does not consider it necessary to make the amendment as it believes that the Access Provider is afforded sufficient protection against the risk of not being paid by the Access Seekers under the current terms of Schedule 3.

151. Telstra disagrees. On its current terms, Schedule 3 exposes the Access Provider to significant financial risk, as it does not enable the Access Provider to request Security before commencing supply, even if it has evidence that the Access Seeker is not creditworthy. By contrast, the WBA provides that, if required, security is a pre-condition of supply by NBN Co.

152. Schedule 3 should be amended to provide that supply is conditional on the provision of Security, in light of the significant financial exposure faced by the Access Provider in the absence of Security.

153. Telstra considers that the proposed amendments are consistent with normal commercial practice and are necessary to protect the legitimate business interests of the Access Provider.

8.3.2. Amount and form of Security

154. Telstra sought amendments to clauses 3.1 and 3.3 to enable the Access Provider to determine the amount and form of Security to be provided by an Access Seeker, so long as that amount and form is reasonably necessary to protect the legitimate business interests of the Access

Provider and is reasonable in all the circumstances. The Commission has not accepted Telstra's proposed amendments in its Draft Decision.

155. The Commission stated that it does not consider it necessary to allow the Access Provider to determine the amount and form of Security, as it believes that the Access Provider is afforded sufficient protection against the risk of not being paid by the Access Seekers under the current terms of Schedule 3.

156. Telstra disagrees. On its current terms, clause 3.3 does not make clear who (out of the Access Seeker and the Access provider) can determine the amount and form of Security to be provided by the Access Seeker.

157. By contrast, the WBA Credit Policy allows NBN Co to choose the amount and terms of security (although the form is determined by the customer, from a pre-determined list).

158. Telstra submits that the Access Provider is in the best position to determine the amount and form of Security necessary to mitigate its financial risk in respect of a particular Access Seeker. For example, in the context of a new Access Seeker with which the Access Provider is not familiar, the Access Provider faces a high level of risk and financial exposure, in light of the potential for extremely high monthly charges to be incurred. In addition, in practice these provisions give the Access Provider the flexibility to take into account the particular Access Seeker's circumstances and security policies in choosing a form of security that the Access Seeker is able to provide. For example, Telstra has recently accommodated the concerns of a number of Access Seekers and in certain circumstances Access Seekers have been able to take out a debtors' insurance policy (on satisfactory terms) rather than provide a traditional form of security, such as a Bank Guarantee.

159. Clauses 3.1 and 3.3 should be amended to enable the Access Provider to determine the amount and form of Security to be provided by an Access Seeker, provided that the amount and form is reasonably necessary to protect the legitimate business interests of the Access Provider and is reasonable in all the circumstances. The inclusion of the standard of reasonableness ensures that the application of the clause as amended will strike an appropriate balance between the interests of the Access Provider and those of Access Seekers. Such amendments are consistent with normal commercial practice and will ensure that the Access Provider is not exposed to unnecessarily high levels of financial risk, particularly when dealing with new Access Seekers.

8.3.3. Alteration of Security

160. Telstra sought amendments to clause 3.5 to enable the Access Provider to require an alteration of Security in a broader range of circumstances. The Commission stated that it does not consider it necessary to allow the Access Provider to require the Access Seeker to alter the amount of Security in additional circumstances, as it believes that the Access Provider is afforded sufficient protection against the risk of not being paid by the Access Seekers under the current terms of Schedule 3.

161. Telstra disagrees. On its current drafting, clause 3.5 limits the Access Provider's right to alter the Security of an Access Seeker to the following three circumstances:

- if an Access Seeker provides ongoing creditworthiness information ("**OCI**") to the Access Provider and, as a result of that OCI, an Access Provider reasonably requires an alteration to the Security;

- if an Access Seeker fails to provide OCI; and

- if an Access Seeker fails to provide altered Security as required.

162. Clause 3.5 is too restrictive, as it does not enable the Access Provider to require an alteration of Security in other circumstances where this is necessary to protect the legitimate business interests of the Access Provider. For example, where an Access Seeker significantly increases the amount of Services acquired, the right to review Security is necessary in order to ensure that an adequate level of protection is afforded to the Access Provider, in line with normal commercial practice. This is consistent with the terms of the WBA.

163. Telstra submits that clause 3.5 should be amended to require the alteration of Security in a broader range of circumstances, as set out in new sub-clause 3.5(c) in Annexure B to Telstra's submission dated 24 August 2012.

8.3.4. Confidentiality undertaking for OCI

164. Clause 3.9 is unnecessary and should be deleted, given that any confidential information would already attract the protection of Schedule 5. However, if clause 3.9 is retained, it should be amended to provide that only third parties accessing the Access Seeker's confidential information are required to give a confidentiality undertaking to the Access Seeker. This amendment is appropriate because the Access Provider's employees would already be subject to confidentiality obligations pursuant to their contract of employment and would be bound by the confidentiality obligations imposed on the Access Provider.

8.4. Schedule 4: General Dispute Resolution Procedures

165. Telstra sought amendments to clauses 4.1 and 4.2 in its previous submissions. The Commission did not accept those amendments in its Draft Decision.

166. The Commission stated that it considers that the terms of Schedule 4 achieve a balance between the legitimate business interests of the Access Provider and those of the Access Seeker, as the obligations and rights in the terms apply equally to both the Access Seekers and the Access Provider.

167. Telstra submits that the current terms require further amendment to facilitate efficient resolution of disputes and fail to provide sufficient protection of the legitimate business interests of the Access Provider. As such, the terms as drafted fail to strike an appropriate balance between the interests of the Access Provider and those of Access Seekers.

168. Amendments should be made to clause 4.1 to ensure that:

- the appropriate dispute resolution procedures (i.e. either the Billing Dispute Procedures set out in Schedule 2, or the general dispute resolution procedures in Schedule 4) are used to resolve the dispute; and

- the Access Seeker is precluded from initiating both a Billing Dispute and a Non-Billing Dispute in relation to the same subject matter.

169. Given that clause 2.12 permits an Access Seeker to withhold payment of a disputed charge until such time as a Billing Dispute has been resolved, it is important to ensure that there is sufficient clarity as to the application of the Billing Dispute Procedures. Where Billing Dispute Procedures are improperly invoked, this will lead to substantial administrative costs and delays in recovery of amounts due.

170. Further, where an arbiter is appointed to determine the dispute pursuant to the Australian Commercial Dispute Centre ("**ACDC**") Domestic Arbitration Rules, as proposed by the Commission in the Draft Decision, a number of procedural steps are required to be followed. Compliance with these procedural steps will take some time to work through and will further delay the resolution of the dispute. As a result, the current drafting of clauses 4.1 and 4.2 enables an Access Seeker to improperly notify a Billing Dispute, with significant delays in determining whether or not it is a Billing Dispute (before the substance of the dispute is addressed). This may lead to the withholding of funds and a significant delay in resolving the merits of the dispute.

171. Telstra's proposed amendments to clauses 4.1 and 4.2 (as set out in Annexure B to Telstra's submission dated 24 August 2012) will promote regulatory certainty and the efficient allocation of resources in respect of the resolution of disputes, which will indirectly promote the LTIE. Such amendments would strike an appropriate balance between the legitimate business interests of the Access Provider and those of the Access Seeker.

8.5. Schedule 5: Confidentiality

172. In its previous submissions, Telstra proposed that a new sub-clause should be inserted into clause 5.5 to clarify the scope of permissible disclosures of Confidential Information in connection with its structural separation undertaking ("**SSU**"). The Commission did not accept this proposed amendment in its Draft Decision.

173. The Commission stated that it may undermine the legitimate interests of Access Seekers to unnecessarily broaden the scope of the permitted use of the Confidential Information, the current terms of Schedule 5 achieve the right balance as to what limited use can be made of such information, and that the additional sub-clause proposed by Telstra is unnecessary as such disclosures are already covered under sub-clause 5.5(g).

174. Telstra disagrees. The widening of the scope of permitted disclosures of information is necessary as there are a number of circumstances where disclosure should be made which are unlikely to be covered by sub-clause 5.5(g). An example is where a regulatory authority or other Government body makes an informal request for information from the Access Provider, without issuing a lawful and binding directive to produce such information. It is likely to be administratively costly and to cause unnecessary delay if the Access Provider is required to

obtain consent from the Access Seekers on each occasion when such a request is made. Further, it is not desirable that each such request be made in the form of a section 155 notice, in light of the formality of such a notice and the heightened obligations that such a notice would impose on the Access Provider. Another example is where Telstra provides information pursuant to the SSU.

175. Therefore, an additional sub-clause should be inserted into clause 5.5, to provide that the Access Provider may use or disclose Confidential Information of the Access Seeker to the extent that is necessary in accordance with a reporting obligation or request from a regulatory authority or any other Government body in connection with the Access Provider's SSU. The proposed text of this clause is set out as sub-clause 5.5(j) in Annexure B to Telstra's submission dated 24 August 2012.

176. Telstra submits that the proposed amendment should be adopted by the Commission as it will serve to clarify the scope of permitted disclosures and to protect the legitimate business interests of the Access Provider, consistent with the statutory criteria.

8.6. Schedule 6: Suspension and Termination

8.6.1. Requirement for judicial finding of contravention

177. In its Draft Decision, the Commission amended sub-clause 6.2(b) to limit suspension rights to circumstances where a Court has determined (and the decision is not subject to an appeal) that the Access Seeker's use of its Facilities in connection with any Service supplied to it by the Access Provider is in contravention of any law. The Commission stated that this amendment was required to clarify the meaning of sub-clause 6.2(b) and to better reflect the purpose of the provision.

178. Telstra submits that this amendment is unworkable and should not be adopted in the FAD. The requirement for a judicial determination will impose unnecessary delay and may expose the Access Provider to ongoing breach of law. This is contrary to the legitimate business interests of the Access Provider and may also be contrary to the interests of the Access Seeker. For example, in circumstances where there is suspected fraudulent use of a service, that service should be suspended immediately.

8.6.2. Categories of services suspended

179. In its previous submissions, Telstra sought amendments to sub-clause 6.2(f), to make clear that the Access Provider may suspend the supply of any service until a Suspension Notice is complied with or the Suspension Event otherwise ceases to exist. The Commission did not accept this proposed amendment in its Draft Decision.

180. The Commission stated that the proposed amendment would significantly expand the right of the Access Provider to suspend and terminate services and would impose significant costs and burdens on the Access Seeker.

181. Telstra disagrees. On its current drafting, sub-clause 6.2(f) fails to strike an appropriate balance between the legitimate business interests of the Access Provider and those of Access Seekers. Further, it does not reflect normal commercial practice, which would require the suspension of all services supplied to an Access Seeker (rather than suspension of specific services acquired by an Access Seeker) in circumstances such as financial distress.

182. Sub-clause 6.2(f) should be amended to make clear that Telstra may suspend supply of any service until a Suspension Notice is complied with or the Suspension Event otherwise ceases to exist, in order to protect its legitimate business interests and to mitigate its exposure to risk.

8.6.3. Requirement for a valid notification of Billing Dispute

183. In its previous submissions, Telstra sought amendments to clause 6.3 to clarify that the application of sub-clause 6.2(a) is only excluded where a Billing Dispute has been validly notified by the Access Seeker to the Access Provider. The Commission did not accept this proposed amendment, as it considered the proposed amendment to be unnecessary on the basis that the clause already makes clear that it only applies to Billing Disputes notified in accordance with the Billing Dispute Procedures set out in the FAD.

184. Telstra reiterates that clause 6.3 should be amended to clarify that the application of sub-clause 6.2(a) is only excluded where a Billing Dispute has been *validly* notified by the Access Seeker to the Access Provider. From time to time, a Billing Dispute is submitted otherwise than in good faith. In such circumstances, it is contrary to the legitimate business interests of the Access Provider for the operation of the remedies under clause 6.2(a) to be excluded pursuant to clause 6.3. The application of clause 6.3 should be limited to circumstances where there is a genuine Billing Dispute in respect of the monies payable. It is not sufficient to protect the legitimate business interest of the Access Provider that the application of clause 6.3 is qualified by reference to the use of the Billing Dispute Procedures.

8.6.4. Requirement to complete remedial action during Remedy Period

185. In its previous submissions, Telstra sought amendments to sub-clause 6.5(d)(c) (described as sub-clause 6.5(d)(iii) in Annexure B to Telstra's submission dated 24 August 2012), to clarify that remedial action should be completed (not merely initiated) during the Remedy Period. The Commission did not accept this proposed amendment, stating that the proposed amendment would significantly expand the right of the Access Provider to suspend and terminate services and would impose significant costs and burdens on the Access Seeker.

186. On its current drafting, sub-clause 6.5(d)(c) fails to provide adequate protection to the legitimate business interests of the Access Provider, as it merely requires the Access Seeker to instigate remedial action during the specified timeframe, but does not require such action to be completed in any timeframe. As such, it is not a remedy period as it does not provide sufficient certainty as to the extent of remediation required by the Access Seeker during the Remedy Period. In fact, so long as the Access Seeker instigates remedial action in this timeframe it is never required to complete this action. As currently drafted, this provision increases the level of risk faced by the Access Provider. By contrast, under the WBA, a default must be fully remedied within the timeframe specified in the default notice.

187. Telstra submits that sub-clause 6.5(d)(c) should be amended to clarify that remedial action should be completed (not merely initiated) during the Remedy Period. Mere initiation of remedial action should not stop the process. The proposed amendment strikes an appropriate balance between the legitimate business interests of the Access Provider and those of Access Seekers.

8.6.5. Immediate suspension for irremediable breach of material obligation

188. In its previous submissions, Telstra sought the inclusion of an additional sub-clause in clause 6.5, to enable the Access Provider to immediately cease supply where the Access Seeker has breached a material obligation under the FAD and that breach is incapable of being remedied. The Commission did not accept this proposed amendment, as it considered that it would significantly expand the right of the Access Provider to suspend and terminate services and would impose significant costs and burdens on the Access Seeker.

189. Telstra disagrees. The right to cease supply in response to a material breach that is not capable of being remedied reflects an industry standard approach. That is because it is inappropriate and unnecessary to provide the Access Seeker with a remedial timeframe in which to rectify a breach of this nature. For example, under the WBA, NBN Co can exercise remedial rights of suspension and termination in circumstances where a default is incapable of remedy.

190. An additional sub-clause should be inserted into clause 6.5, as set out in new sub-clause 6.5(e) in Annexure B to Telstra's submission dated 24 August 2012. Consequential amendments should also be made to the remainder of clause 6.5, to clarify that the Access Provider may cease supply of the Service at any time after the irremediable breach or where the suspension has continued for a period of three months or more.

8.7. Schedule 7: Liability and Indemnity

191. In its previous submissions, Telstra sought amendments to clause 7.1 to impose a minimum liability cap of $1 million on all Access Seekers, regardless of the amount of services acquired. The Commission did not accept this proposed amendment in its Draft Decision and stated that there was insufficient information currently available to enable it to specify liability caps in the FAD. Further, it stated that the terms of Schedule 7 will protect the legitimate interests of the Access Seeker and Access Provider equally as they are reciprocal terms and are designed so as not to expose parties to excessive commercial risks by specifying appropriate limitations on liability.

192. Telstra notes that the Commission has specified liability caps in clause 7.1 based on the aggregate amount payable for the Services during the preceding 12 month period. Telstra submits that clause 7.1 should be amended to provide a minimum liability cap of $1 million, regardless of the amount of services acquired by the Access Seeker. On its current drafting, clause 7.1 limits an Access Seeker's liability by reference to the aggregate amount payable to the Access Seeker in respect of the service. As a result, the liability of Access Seekers who acquire relatively few services is capped at a very small amount. There are currently a significant number of Access Seekers who acquire substantially less than $1 million of services from Telstra. Despite acquiring relatively few services, given the shared nature of the WADSL

infrastructure, such Access Seekers have the potential to cause substantial damage to an Access Provider's network and equipment. As such, the terms do not provide sufficient protection to the legitimate business interests of the Access Provider and may expose it to substantial commercial risks in certain circumstances.

193. The inclusion of a liability cap as proposed would be consistent with standard commercial practice and would strike an appropriate balance between the interests of the Access Provider and those of Access Seekers. By contrast, the WBA includes a minimum liability cap for both NBN Co and Access Seekers of $5 million.

8.8. Schedule 8: Communications with End-users

8.8.1. Communications via the Retail Business Unit

194. In its Draft Decision, the Commission amended sub-clause 8.2(a) to provide that the Access Provider may only communicate and deal with an Access Seeker's end-users pursuant to that sub-clause through its Retail Business Unit. The Commission considered that sub-clause 8.2(a) was not intended to allow an Access Seeker to communicate with end-users other than through its Retail Business Unit. Further, to the extent that an Access Provider needs to communicate with end-users in relation to its wholesale operations, the Commission stated that sub-clause 8.2(c) provides an adequate mechanism for such communications.

195. The Commission's amendment to sub-clause 8.2(a) should not be adopted in the FAD. There are likely to be a range of circumstances in which it would be legitimate for the Access Provider to communicate with end-users in relation to goods or services which it supplies (or has previously supplied) to him or her via a business unit other than its Retail Business Unit. For example, in the event of a network fault, the network services business unit may need to communicate directly with end-users for the purposes of assessing the extent of impairment of the network or providing information as required.

196. Sub-clause 8.2(a) as amended is unnecessarily restrictive in light of such situations and is contrary to the legitimate business interests of the Access Provider. Furthermore, given the potential for overlap between sub-clause 8.2(a) and 8.2(c), it is unclear whether clause 8.2(a) would operate so as to prevent the Access Provider from communicating with end users of an Access Seeker in the event of a network fault. Telstra submits that the primary concern to be addressed in sub-clause 8.2(a) should be to clarify that the Access Provider is prevented from communicating with end users of an Access Seeker via its Wholesale Business Unit but that it may do so via its retail business unit or its network services business unit. There is no equivalent restriction on communications between Access Seekers and their end-user customers.

197. Telstra submits that sub-clause 8.2(a) should not be amended as proposed by the Commission in the Draft Decision. Alternatively, sub-clause 8.2(a) should be amended to permit other relevant business units (such as the network services business unit) to contact end-users where appropriate.

8.8.2. Resellers

198. In its previous submissions, Telstra sought the inclusion of an additional clause in Schedule 8 which required Access Seeker to ensure that any Reseller of the service does not do or omit to do anything which, if done or omitted by the Access Seekers, would constitute a breach of the FAD. The Commission did not accept this proposed amendment in its Draft Decision.

199. The Commission stated that it considered Telstra's proposed new clause would impose a burden on Access Seekers which is unnecessary to protect the legitimate business interests of the Access Provider.

200. Telstra disagrees. It submits that the additional clause (set out as clause F.Y in Annexure B to Telstra's submission dated 24 August 2012) should be included in Schedule 8 of the FAD. The additional clause reflects the fact that, in many cases, there is not a direct relationship between the Access Seeker and the ultimate end-user of a Service. Where one or more resellers are interposed between the Access Seeker and the end user, additional measures need to be taken to ensure that obligations imposed on the Access Seeker flow through to the end-user. In many cases, Access Seekers are the only parties able to ensure that resellers comply with their obligations.

201. The obligation on Access Seekers pursuant to the proposed clause F.Y only extends to taking action "so far as is reasonably practicable". It does not impose an absolute obligation on Access Seekers to assume liability for acts of Resellers (or similar). As such, the proposed clause strikes an appropriate balance by protecting the legitimate business interests of the Access Provider without imposing an unreasonable burden on Access Seekers.

8.9. Schedule 9: Network Modernisation and Upgrade

202. In its previous submissions, Telstra submitted that provisions relating to network upgrade and modernisation are unnecessary and should not be included in the FAD, in light of the fact that Telstra is already required to comply with such obligations under the SSU. The Commission did not accept this submission.

203. Telstra reiterates that it is unnecessary to include provisions relating to network upgrade and modernisation in the FAD, given that such provisions are already included in the SSU. It is contrary to the legitimate business interests of the Access Provider to impose dual regulation pursuant to both the FAD and the SSU in respect of the same subject matter. The inclusion of such provisions in the FAD is likely to increase compliance costs for the Access Provider without a corresponding benefit to Access Seekers or end-users. As such, it is not consistent with the statutory criteria.

204. Further, the inclusion of clause 9.18 does not provide satisfactory protection to the Access Provider against dual regulation under the FAD and the SSU. Clause 9.18 states that "the Access Provider is taken to have complied with clause 9.10 if it has complied with subparagraph 11.1(a) in Schedule 4 of the Structural Separation Undertaking." As such, its application is limited to the scope of clause 9.10, which sets out the requirement for the Access Provider to provide the Access Seeker with a written three year Coordinated Capital Works Program forecast. It does not extend to other obligations imposed on the Access Seeker pursuant to Schedule 9.

205. If the Commission includes Schedule 9 in the FAD, clause 9.18 should be amended to apply to the Access Seeker's obligations under Schedule 9 generally. Telstra proposes that clause 9.18 (if retained) should be amended to provide as follows:

9.18 The Access Provider is taken to have complied with Schedule 9 if it has complied with clauses 10, 11, 12 and 13 of Schedule 4 of the Structural Separation Undertaking.

8.10. Schedule 10: Changes to Operating Manuals

8.10.1. Inclusion of terms in respect of changes to operating manuals

206. The Commission has included Schedule 10 in the FAD, stating that the terms of Schedule 10 achieve the right balance between the interests of the Access Provider and those of Access Seekers.

207. Telstra considers that it is unnecessary and problematic to include terms and conditions relating to changes to operating manuals in the FAD, given:

a. the lack of historical access disputes in respect of these provisions; and

b. the fact that the scope of clause 10.1 of Schedule 10 is currently unclear in terms of specifying what range of documents are caught by the relevant provisions. As currently drafted, the words "Operational documents concerning the Service" in clause 10.1 may arguably be interpreted broadly and thereby given a broader meaning than would ordinarily be expected to apply in the context of this Schedule - given the Schedule's heading refers to "operating manuals". Telstra produces a range of documentation regarding operational processes which relate to the WDSL Service which includes a range of Customer facing documentation (such as Ordering and Provisioning Manuals, Operations and Maintenance Manuals, technical specifications, Business Rules, Acceptable Usage Policy, etc) as well as a range of purely internal documentation that is never sent to customers. Telstra presumes that the intention is not to capture internal documentation but as noted above this is by no means clear. Furthermore, setting out a separate process for changes to operating manuals in the non-price terms has the effect that Telstra may well end up needing to maintain two sets of different documentation, one of which relates to Access Seekers the amendment of which is governed by the provisions of the relevant access agreement, and the other which needs to be amended in accordance with Schedule 10 to the FAD.

208. If in the alternative, Schedule 10 is included in the FAD, Telstra submits that certain amendments are required in order to protect the legitimate business interests of the Access Provider – including a clear and appropriately narrow definition of the "Operational documents" to which relevant clauses in the schedule apply, and the further changes discussed below.

8.10.2. Process for amendment of operational documents

209. Pursuant to sub-clause 10.1(a)(ii), operational documents concerning the Service may be amended by the Access Provider from time to time, subject to the Access Provider allowing the

Access Seeker to provide comments during the notice period on the proposed amendments and giving reasonable consideration to any comments which the Access Seeker has made on the proposed amendments.

210. If clause 10.3 is retained, Telstra submits that clause 10.1 should be amended to clarify the interaction of clauses 10.1 and 10.3. Clause 10.1 should provide that operational documents may be amended "notwithstanding that the Access Seeker may be seeking to invoke clause 10.3".

8.10.3. Provision of new operational documents to Access Seekers

211. Clause 10.2 should be amended to remove the requirement that an Access Provider provide each Access Seeker with a copy of a new operational document. Instead, it should be sufficient that the Access Provider makes a copy of such document available to the Access Seeker (for example, by publication online).

212. Telstra's proposed amendment is consistent with Telstra's current approach in respect of wholesale services, including providing notifications of amendments to operational documents for the WADSL service, whereby documents are available online via the Telstra Wholesale Customer Portal. It is also consistent with NBN Co's approach of making its amended operational documents available via the NBN Co website.

213. The proposed amendment accords with industry practice and will promote the legitimate business interests of the Access Provider without undermining the interests of Access Seekers.

8.10.4. Dispute resolution procedures

214. Clause 10.3 is unnecessary and should be deleted. Clause 10.1 already provides that the Access Seeker is to have a reasonable opportunity to comment on the Access Provider's proposed amendment and that the Access Provider is to give reasonable consideration to such comments.

215. In the alternative, rather than dispute resolution provisions, Telstra considers that detrimental changes to operating manuals could be dealt with by giving longer notice periods to Access Seekers who are materially adversely affected. This will balance the interests of Access Seekers and the Access Provider by enabling the Access Seeker to alter its practices without preventing the Access Provider from making the necessary changes.

216. If clause 10.3 is to be retained, the circumstances in which the dispute resolution procedures are invoked should be subject to the following constraints.

217. First, the dispute resolution procedures should only be invoked on an objective (rather than subjective basis). Such an amendment to clause 10.3 is justified in light of the effect that such a dispute could have on the whole industry, as well as the associated costs and administrative burden. In addition, such an amendment would be consistent with other provisions of the Draft Decision which incorporate an objective element (such as clauses 2.9 and 3.1).

218. Second, in determining whether or not the proposed amendment is unreasonable, regard should be had to, among others, two factors:

- the legitimate business interests of the Access Provider in ensuring that the terms and conditions (and Access Provider processes) relating to the Service supplied to more than one Access Seeker are consistent; and
- the impact of the amendment across all Access Seekers (not just a particular Access Seeker).

219. Third, clause 10.3 should state that the dispute resolution procedures must be invoked within 15 Business Days of receiving the notice set out in sub-clause 10.1(a). Such an amendment to clause 10.3 is justified in light of the fact that the Access Provider will need to know as soon as possible, and before any proposed changes come into effect, that there is an issue with what is being proposed. This will allow the Access Provider to defer making the changes, if necessary.

8.10.5. Summary of proposed amendments to Schedule 10

220. To summarise, if the Commission insists on retaining Schedule 10 and clause 10.3 (notwithstanding Telstra's view that Schedule 10 should be omitted), we consider the Schedule should at a minimum be amended to read as follows:

10.1 Notwithstanding that the Access Seeker may be seeking to invoke clause 10.3, operational documents concerning the Service may be amended:

(a) by the Access provider from time to time to implement or reflect a change to its standard processes, subject to:

(i) giving 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and a marked-up copy of the proposed new operational document that clearly identifies all amendments; and

(ii) allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and giving reasonable consideration to any comments which the Access Seeker has made on the proposed amendments; and

(b) otherwise, by agreement of the parties.

10.2 Upon completion of the process set out in clause 10.1, the Access Provider must make a copy of the new operational document available to the Access Seeker.

10.3 Where operational documents concerning the Service are amended in accordance with clause 10.1 and the amendments are unreasonable having regard to (amongst other things):

(i) the legitimate interest of the Access Provider in ensuring the terms and conditions relating to the Service supplied to more than one Access Seeker are consistent; and

(ii) the impact of the amendment across all Access Seekers who acquire the Service, including whether the amendment will deprive Access Seekers of a fundamental part of the bargain they obtained under this FAD;

the Access Seeker may seek to have the matter resolved in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD, provided that the Access Seeker provides notice of the dispute under clause 10.3 of this FAD within 15 Business Days of receiving the notice referred to in clause 10.1(a).

09 ANNEXURE A – 167 ESAs

ESA Code	ESA Name	State
ABON	ALBION	QLD
ACOT	ASCOT	QLD
ASCT	ASCOT	VIC
ASOT	ASCOT	WA
BALC	BALACLAVA	VIC
BALG	BALGOWLAH	NSW
BALM	BALMAIN	NSW
BATM	BATMAN	VIC
BKWD	BLACKWOOD	SA
BLAC	BLACKTOWN	NSW
BLBN	BLACKBURN	VIC
BLCN	BELCONNEN	ACT
BMBA	BULIMBA	QLD
BOND	BONDI	NSW
BOTA	BOTANY	NSW
BOXL	BOX HILL	VIC
BRUK	BRUNSWICK	VIC
BWER	BULWER	WA
CAUL	CAULFIELD	VIC
CBRG	COBURG	VIC
CHAT	CHATSWOOD	NSW
CHDE	CHERMSIDE	QLD
CHLT	CHARLOTTE	QLD
CHPL	CHAPEL HILL	QLD
CLAY	CLAYTON	VIC
CMLL	CAMBERWELL	VIC
COOG	COOGEE	NSW
CPHL	CAMP HILL	QLD
CPRO	COORPAROO	QLD
CRBY	CANTERBURY	VIC
CREM	CREMORNE	NSW
CRYD	CROYDON	SA
CTAM	CHELTENHAM	VIC
CTON	CARLTON	VIC
CVIC	CIVIC	ACT
CWOD	COLLINGWOOD	VIC
CYSH	CITY SOUTH	NSW
DALL	DALLEY	NSW
DAND	DANDENONG	VIC
DEEW	DEE WHY	NSW

ESA Code	ESA Name	State
DNCT	DONCASTER EAST	VIC
DONC	DONCASTER	VIC
EAST	EAST	NSW
EDGE	EDGECLIFF	NSW
EDSN	EDISON	QLD
EDWN	EDWARDSTOWN	SA
EKEW	EAST KEW	VIC
ELSK	ELSTERNWICK	VIC
ELTM	ELTHAM	VIC
EMPS	EIGHT MILE PLAINS	QLD
EWOD	ELWOOD	VIC
EXHN	EXHIBITION	VIC
EZBH	ELIZABETH	SA
FLNF	FLINDERS	SA
FREN	FRENCHS FOREST	NSW
FSRY	FOOTSCRAY	VIC
FTON	FLEMINGTON	VIC
GBRH	GREENSBOROUGH	VIC
GLEB	GLEBE	NSW
GLLG	GLENELG	SA
GNGE	GOLDEN GROVE	SA
GUGA	GLENUNGA	SA
HARB	HARBORD	NSW
HAWN	HAWTHORN	VIC
HDBG	HEIDELBERG	VIC
HETH	HEATHERTON	VIC
HGTT	HIGHETT	VIC
HMKT	HAYMARKET	NSW
HNLY	HENLEY BEACH	SA
HORN	HORNSBY	NSW
HTLL	HARTWELL	VIC
JREE	JAMBOREE HEIGHTS	QLD
KEWE	KEW	VIC
KNST	KENT	NSW
KYNG	KOOYONG	VIC
LANE	LANE COVE	NSW
LCHE	LUTWYCHE	QLD
LIVE	LIVERPOOL	NSW
LNYN	LANYON	ACT
LONS	LONSDALE	VIC
MALV	MALVERN	VIC

ESA Code	ESA Name	State
MANL	MANLY	NSW
MARO	MAROUBRA	NSW
MASC	MASCOT	NSW
MCHN	MITCHELTON	QLD
MDBY	MODBURY	SA
MGAT	MOUNT GRAVATT	QLD
MITM	MITCHAM	VIC
MLEY	MORLEY	WA
MLND	MORELAND	VIC
MNKA	MANUKA	ACT
MOSM	MOSMAN	NSW
MRAC	MERRIMAC	QLD
MWSN	MAWSON	ACT
NALE	NORTH ADELAIDE	SA
NCOE	NORTHCOTE	VIC
NDAH	NUNDAH	QLD
NEWT	NEWTOWN	NSW
NMEL	NORTH MELBOURNE	VIC
NMKT	NEWMARKET	QLD
NPAR	NORTH PARRAMATTA	NSW
NRWD	NORWOOD	SA
NRYD	NORTH RYDE	NSW
NSYD	NORTH SYDNEY	NSW
NWFM	NEW FARM	QLD
OAKL	OAKLEIGH	VIC
PDTN	PADDINGTON	QLD
PEND	PENDLE HILL	NSW
PENN	PENNANT HILLS	NSW
PETE	PETERSHAM	NSW
PIER	PIER	WA
PITT	PITT	NSW
PMEL	PORT MELBOURNE	VIC
PRDS	PARADISE	SA
PROT	PROSPECT	SA
PRTN	PRESTON	VIC
PTAD	PORT ADELAIDE	SA
PYMB	PYMBLE	NSW
QUAK	QUAKERS HILL	NSW
RAND	RANDWICK	NSW
RCMD	RICHMOND	VIC

ESA Code	ESA Name	State
REDF	REDFERN	NSW
RIVT	RIVERTON	WA
RSVR	RESERVOIR	VIC
RWOD	RINGWOOD	VIC
SALB	ST ALBANS	VIC
SCLN	SCULLIN	ACT
SCOY	SCORESBY	VIC
SEMC	SEMAPHORE	SA
SEVE	SEVEN HILLS	NSW
SGHL	SPRING HILL	QLD
SILV	SILVERWATER	NSW
SLAC	SLACKS CREEK	QLD
SMEL	SOUTH MELBOURNE	VIC
SOAK	SOUTH OAKLEIGH	VIC
SOPT	SOUTHPORT	QLD
SPLE	SPRINGVALE	VIC
SRWD	SHERWOOD	QLD
SSBY	SALISBURY	QLD
STIC	STIRLING	SA
STKA	ST KILDA	VIC
STLE	ST LEONARDS	NSW
STMF	ST MARYS	SA
STPE	ST PETERS	SA
SURF	SURFERS PARADISE	QLD
SYRA	SOUTH YARRA	VIC
THGP	THE GAP	QLD
TRAK	TOORAK	VIC
TUTT	TUART HILL	WA
TWOG	TOOWONG	QLD
TYHO	TALLY HO	VIC
UNDE	UNDERCLIFFE	NSW
UNLY	UNLEY	SA
VICP	VICTORIA PARK	WA
VLLY	VALLEY	QLD
WAVE	WAVERLEY	NSW
WAYM	WAYMOUTH	SA
WDVL	WOODVILLE	SA
WESA	WEST ADELAIDE	SA
WETH	WETHERILL PARK	NSW
WHLL	WHEELERS HILL	VIC
WIRC	WINDSOR	VIC

ESA Code	ESA Name	State
WLGG	WOLLONGONG	NSW
WLTE	WELLINGTON	WA
WOBB	WOOLLOONGABBA	QLD
YRGA	YERONGA	QLD
ZMRE	ZILLMERE	QLD

010 ANNEXURE B – Standard non-price terms and conditions

Schedule 2: Billing and Notification

- **Use of general dispute resolution provisions in the FAD**

  Amendments should be made to clause 4.1 to ensure that only disputes concerning the terms and conditions of the FAD are governed by the FAD's dispute resolution procedures.

- **Definition of Charge**

  The definition of "Charge" for the purposes of Schedule 2 should be amended to clarify that it is limited to a charge set out in the FAD. Charges that are not the subject of the FAD will be covered by commercial agreements between the parties.

- **Definition of Billing Dispute**

  The definition of "Billing Dispute" should be amended to clarify that it is limited to a dispute about an alleged inaccuracy, omission or error in a Charge or invoice issued by the Access Provider to the Access Seeker.

- **Timeframe for backbilling**

  The Commission has amended the timeframe for backbilling for consistency with the TCP Code. This is unnecessary as clause 2.4 is already subject to clause 2.5 (which requires compliance with any applicable industry standard made by ACMA).

- **Inconsistency between clause 2.6 and clause 2.12**

  The Commission has amended clause 2.6 to address a perceived inconsistency between clauses 2.6 and 2.12. No such amendments are required as there is no inconsistency between these clauses.

- **Timeframe for notification of objection to a Billing Dispute Notice**

  The timeframe during which an Access Seeker must notify the Access Provider that it objects to a Billing Dispute Notice under clause 2.18 should be amended to five Business Days. This amendment will ensure efficient resolution of Billing Disputes while providing the Access Seeker with sufficient time to consider the Access Provider's decision.

- **Timeframe for notification of a Billing Dispute**

  The timeframe during which an Access Seeker must notify the Access Provider of a Billing Dispute under clause 2.22 should be amended to five Business Days (or such longer period of up to 10 Business Days which the Access Seeker may request and which the Access Provider must either accept or reject, acting reasonably). The current timeframe of 15 Business Days is unnecessarily long, in light of the need for timely resolution of disputes and the fact that the Access Seeker may be withholding large sums of money from the Access Provider during this period.

Schedule 3: Creditworthiness and Security

- **Reviews of Security**

  Clause 3.6 should be amended to limit the Access Seeker's right to request reviews of security to situations "where circumstances reasonably require" such a review, in order to limit the frequency of such requests and to ensure that they are only made in circumstances where there is a reasonable basis.

- **Meaning of OCI**

  Some smaller Access Seekers may not be able to provide the types of OCI listed in clause 3.8 (for example, where they do not have audited balance sheets). Clause 3.8 should be amended to clarify that OCI includes management prepared balance sheets, profit and loss statements or cash flow statements and any other information reasonably required by the Access Provider to assess the Access Seeker's creditworthiness.

- **Remedies for failure to provide required warranties**

  Clause 3.10(a) should be amended to enable the Access Provider to choose one or both of the remedies in sub-clause 3.10(a)(i) and the proposed sub-clause 3.10(b) (described as sub-clause 3.9(b) in Annexure B to Telstra's submission dated 24 August 2012).

Schedule 4: General Dispute Resolution Procedures

- **Content of written notice in Non-Billing Dispute**

  Clause 4.3 should be amended to require that the written notice given by one party to another in a Non-Billing Dispute contain sufficient details of the dispute. This will ensure that the party receiving the notice can comply with the timeframe set out in clause 4.8.

- **Timeframe for providing relevant materials**

  Telstra considers that clause 4.9 should be amended to require parties to a Non-Billing Dispute to provide each other with any relevant materials on which they intend to rely within five Business Days of the notification of a dispute. As noted by the Commission in the Draft Decision, the introduction of a timeframe will provide clarity and certainty to parties regarding their obligations. However, a five Business Day timeframe will ensure that nominated managers can consider all relevant information prior to the expiry of the 10 Business Day period in which nominated managers must endeavour to resolve the dispute under clause 4.4(a).

Schedule 5: Confidentiality Provisions

- **Disclosure of Confidential Information in respect of request for information relating to interception capability**

  An additional sub-clause should be inserted into clause 5.5 to provide that the Access Provider is permitted to disclose Confidential Information in response to a request from a regulatory

authority or any other Government body in connection with interception capability relating to a Service provided by the Access Provider to the Access Seeker.

Schedule 6: Suspension and Termination

- **Duration of suspension**

  Sub-clause 6.2(g) should be amended to clarify that the Access Provider may suspend the provision of the Service until the Suspension Notice is complied with or the Suspension Event otherwise ceases to exist.

- **Timeframe for giving Breach Notice**

  Sub-clause 6.5(d)(b) should be amended to remove the requirement that an Access Provider give a Breach Notice within 20 Business Days of becoming aware of the breach. Instead, the clause should require that such notice be given as soon as reasonably practicable after becoming aware of the breach, as the provision of a fixed timeframe for the giving of the Breach Notice limits the ability of the parties to attempt to commercially resolve a dispute before a Breach Notice is issued.

Schedule 7: Liability and Indemnity

- **Inclusion of provisions in respect of liability and indemnity**

  It is unnecessary to include terms and conditions relating to liability and indemnity in the FAD as such matters are more appropriately addressed by commercial arrangements.

- **Notice and Conduct of Defence of third party claims**

  Clause 7.12 should be amended to require the Innocent Party to give the Indemnifying Party notice of any third party claim that is the subject of an indemnity under Schedule 7. The Indemnifying Party may then notify the Innocent Party that the Indemnifying Party is to be given the full conduct of the defence of any claim by a third party, to the extent that the claim is the subject of an indemnity under Schedule 7. It is normal commercial practice for Innocent Parties to conduct proceedings in such circumstances and it would be inappropriate to compel the Indemnifying Party to conduct the full defence.

- **Cooperation in defence of third party claims**

  An additional clause should be inserted into Schedule 7 to provide that, where the Indemnifying Party has been given conduct of the defence of a third party claim under clause 7.13, the Innocent Party must provide all cooperation which the Indemnifying Party considers reasonably necessary to conduct the defence. The amendment reflects standard commercial practice in the circumstances.

Schedule 8: Communication with End-Users

- **Inclusion of provisions in respect of communication with end-users**

It is unnecessary to include terms and conditions relating to communications with end-users in the FAD as such matters are generally already covered by commercial arrangements and no disputes have been raised in relation to those terms.

- **Access Seeker's obligations in an Emergency**

  An additional clause should be inserted into Schedule 8, imposing various obligations on an Access Seeker to facilitate appropriate management of an Emergency. The proposed additional clause is set out as clause F.X in Annexure B to Telstra's submission dated 24 August 2012.

- **Nature of information communicated**

  Clause 8.2 should be amended to clarify the nature of information which the Access Provider can and cannot communicate to an Access Seeker's end-user, in circumstances where their service is to be suspended or terminated. This is necessary as the Access Provider will need to communicate information to an Access Seeker's end-user if their Service is to be suspended or terminated, in order to ensure that:

  (a) the end-user has continuity of supply; and

  (b) the Access Provider is not wrongly blamed for disconnection of the Service.

- **Commencement of restriction on communications**

  Clause 8.3 should be amended to clarify that the limitations on the Access Provider communicating with end-users apply on and from the time when the Access Provider becomes aware that the person initiating the communication is an end-user of the Access Seeker. This change is necessary as, in many circumstances, an Access Provider's front of house staff will not know that an end-user is a customer of an Access Seeker until the end-user identifies himself or herself as such.

- **Special relationship or special arrangements**

  Sub-clause 8.6(a) should be amended to clarify the meaning of a "special relationship" or "special arrangements" with another party as those terms are potentially uncertain.

- **Attribution of fault**

  Clause 8.7 should be amended clarify that it is not limited to circumstances involving communication with an end-user, but applies to communications generally. Further, sub-clause 8.7(a) should be amended to clarify that the reference to "other circumstances[s]" includes termination of a Service.