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

Public version

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CONTENTS

01 INTRODUCTION

1. Telstra Corporation Limited ("Telstra") welcomes the opportunity to respond to the Commission's 'Public inquiry to make a final access determination for the wholesale Asymmetric Digital Subscriber Line ("**ADSL**") service – Issues Paper' ("**Issues Paper**"). This submission provides Telstra's response to the Issues Paper (which primarily covers non-price terms associated with the provision of the service).

2. This submission is structured as follows:

   a. Section 2 sets out Telstra's responses to issues raised in chapter 6 of the Issues Paper – covering issues associated with the application the SAOs in competitive areas.

   b. Section 3 sets out Telstra's responses to issues raised in chapter 7 of the Issues Paper – covering issues associated with the provision of Naked ADSL.

   c. Section 4 sets out Telstra's responses to issues raised in chapter 8 of the Issues Paper – covering issues associated with the establishment of additional Points of Interconnection for the WDSL service.

   d. Section 5 sets out Telstra's responses to issues raised in chapter 9 of the Issues Paper – covering issues associated with general non-price terms.

   e. Section 6 sets out Telstra's responses to issues raised in chapter 10 of the Issues Paper – covering other issues raised by the Commission.

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

4. At Annexure B, Telstra includes proposed amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD, and identified as Appendix E within the Issues Paper.[1]

[1] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012, Appendix E

02 Competition in the market for DSL services and the application of the Standard Access Obligations

5. Chapter 6 of the Issues Paper addresses the application of the standard access obligations ("**SAOs**"):[2]

> *Before considering specific terms and conditions that could be included in an FAD, it is useful to consider how broadly those terms and conditions could apply. This is because although the ACCC has declared the wholesale ADSL service nationally as supplied by all access providers, it is not necessarily the case that the SAOs and regulated terms and conditions should apply nationally and to all access providers.*

6. In considering the application of the SAOs, the Commission raises a number of issues including whether or not the 289 Exchange Service Areas ("**ESAs**") proposed by Telstra for exemption from the SAOs are an appropriate subset of ESAs, the extent to which effective competition is constraining Telstra in the wholesale and retail markets for Digital Subscriber Line ("**DSL**") services, and whether the application of the SAOs (in these ESAs) could negatively impact on the long term interest of end users ("**LTIE**") and consistent with other statutory criteria.

7. Telstra has already provided significant evidence on these and related matters in its submissions to the Declaration Inquiry[3] and the February Discussion Paper[4]. This section provides further evidence and analysis on the impact of DSLAM-based competition at the retail and wholesale layers of the DSL market, why the 289 ESAs identified by Telstra are a conservative set of ESAs in which to exempt service providers from the SAOs, and why applying the SAOs in the presence of effective competition will significantly increase regulatory risk and is likely to negatively impact on the statutory criteria in s 152AB of the *Competition and Consumer Act 2010* (Cth) ("**CCA**"). In particular, the remainder of this section provides further information on the following issues:

   a. The drivers of competition in the market for DSL services are competitive Digital Subscriber Line Access Module ("**DSLAM**") investments and unconditioned local loop service ("**ULLS**") and line sharing service ("**LSS**")-based services that utilise this infrastructure. The competitive constraints provided by this infrastructure have resulted in clearly effective competition at both the retail and wholesale layers of the DSL market:

      i. Utilisation of competitive DSLAM infrastructure, investment in DSLAMs and related infrastructure and investment and innovation in ULLS and LSS-based services is continuing apace – particularly within the 289 ESAs, notwithstanding the declaration of the Wholesale Asymmetric Digital Subscriber Line ("**WDSL**") service in February 2012 and the ongoing deployment of the NBN.

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[2] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012

[3] Telstra Corporation Ltd, Response to the Commission's Discussion Paper into whether wholesale ADSL services should be declared under Part XIC of the *Competition and Consumer Act 2010*, 19 January 2012

[4] Telstra Corporation Ltd, Response to the Commission's Discussion Paper into the public inquiry to make a final access determination for the wholesale ADSL service, April 2012

ii. Market share and retail price outcomes at the retail layer clearly show that the market for DSL services within the 289 ESAs is effectively competitive. Further, analysis of pricing outcomes shows that Telstra is responding to competition – and extending the benefits of competition beyond the competitive DSLAM footprint.

iii. Competition in the market for WDSL is intensifying, driven by competition directly from ULLS and LSS services (where resale customers are continuing to switch services to unbundled products) as well as competition among providers of WDSL services. The deployment of the NBN is intensifying competition at the wholesale layer of the DSL market.

b. Telstra has set out a conservative set of 289 ESAs, where the overwhelming evidence of competition at both the wholesale and retail layers of the DSL market is clear across these ESAs as a group, as well as at an individual ESA level.

c. The presence of remote customer access network ("**CAN**") cabinet infrastructure (large pair gain systems) has not negatively impacted on competition in the market for DSL services. Large pair gain systems serve only a small minority of end users. The presence of large pair gain systems has not reduced the investment in competitive DSLAMs, nor the take-up of unbundled services. Within the 289 ESAs identified by Telstra, only [c-i-c commences] [redacted][c-i-c ends] of total CAN services in operation ("**SIOs**") are served from large pair gain systems. Further, Telstra does not and cannot differentially bill end users (or wholesale customers serving end users) served by LPGS infrastructure.

d. There is significant risk that the positive outcomes observed would jeopardised if the Commission were to impose the SAOs in areas with effective competition, such as the 289 ESAs. The competitive outcomes in the market for DSL services have emerged due to competitive investment in DSLAMs and related infrastructure. Crucially, these outcomes have emerged with DSL resale services not being declared until February 2012. Comparative assessment of the metropolitan markets for voice services and DSL services should give the Commission pause when considering the potential risks of applying the SAOs in the presence of effective competition.

8. Within Chapter 6 of the Issues Paper, the Commission goes on to ask a series of questions on the application of the SAOs and related issues.[5] Responses to these questions are set out in Annexure A.

2.1. Effective competition in the market for DSL services

9. In the Issues Paper, the Commission sets out the following:[6]

> *One basis for limiting the scope of the application of SAOs owed by access providers in particular ESAs is if that access provider is already subject to competitive constraint.*

[5] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012, Chapter 6
[6] Ibid, p 12

> *Where competition is already effective (and is likely to remain effective), then the application of the SAOs to access providers may not promote competition. This is because the price and other terms and conditions of supply available in the market can already be considered to be competitive.*

10. Telstra remains of the view that the market for DSL services – particularly in metropolitan areas – is intensely competitive. Telstra has already made extensive submissions setting out how ongoing investment in DSLAMs and related infrastructure has enabled competitors to Telstra to rollout out alternative, competitive DSL networks throughout metropolitan (and some regional) areas of Australia. The use of these alternative DSL networks (in conjunction with the ULLS and LSS services) has enabled competitive service providers to effectively compete with Telstra at both the retail and wholesale level in the market for DSL services. In many key respects, the Commission appears to agree with Telstra:[7]

> *The ACCC considers that both ULLS and LSS, used in conjunction with DSLAMs and transmission services, are substitutable for wholesale ADSL. ...*
>
> *... it appears that access seekers "have invested in infrastructure largely to meet growing retail demand for data (broadband) services" because wholesale ADSL and ULLS/LSS can be used interchangeably to supply retail ADSL products to end-users.*

11. Telstra recognises that a range of factors need to be considered in determining whether or not a market is effectively competitive – including the structure, outcomes and performance of the market.[8] The remainder of this section provides evidence on:

    a. How access seekers are continuing to invest in DSLAMs and related infrastructure, and are continuing to offer new and innovative service offerings, with the consequent ongoing decline in WDSL take-up – a trend that has been maintained despite the deployment of the National Broadband Network ("**NBN**").

    b. How market share outcomes and changes in prices from service providers over time reflect the ongoing inroads of competitive pressure.

    c. How competition from self-supply (via ULLS and LSS) and alternative suppliers of resale DSL services is driving competitive market outcomes at the wholesale layer of the DSL services market.

2.2. Deployment of the NBN has not stalled competitive DSLAM-based investments within the 289 ESAs

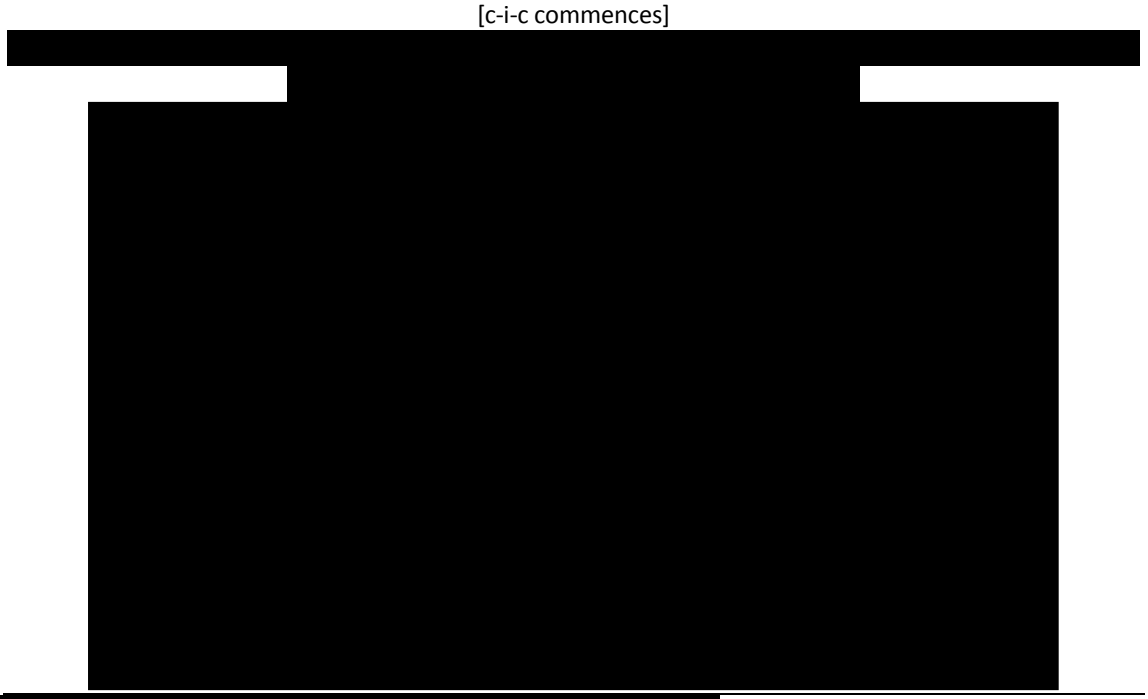
12. Telstra has repeatedly stressed that within the 289 ESAs (and metropolitan areas more generally), demand for WDSL services is continuing to decline due to competition from unbundled services. Competitors to Telstra are continuing to focus on unbundled-based

[7] Ibid, p 13
[8] Ibid, Appendix D

services – both as a direct input to retail services, and as an input to competitive resale products.

13. As illustrated in Figure 2.1, the decline in WDSL services (and the growth in unbundled services) within the 289 ESAs has continued throughout the course of the Commission's Final Access Determination ("**FAD**") Inquiry.

[c-i-c commences]



[c-i-c ends]

14. DSLAM entry is continuing, with infrastructure-based competition intensifying as access seekers expand and deepen their competitive infrastructure presence. Tellingly (and contrary to claims made by access seekers in regulatory settings) the deployment of the NBN has not had an identifiable impact on the continued deployment of DSLAMs and associated infrastructure. Figure 2.2 shows the increase in new competitive DSLAM presences by access seekers, as indicated by the sum of the number of ULLS and LSS access seekers in each ESA in which there is at least one ULLS or LSS access seeker present. As Figure 2.2 shows, since the Australian Government announced that it would construct a (predominantly) FTTP-based NBN in April 2009, access seekers have continued to deploy competitive DSLAMS – expanding and deepening infrastructure-based competition.

[c-i-c commences]

[c-i-c ends]

15. The ongoing deployment of competitive infrastructure within the 289 ESAs is also evidenced in the continued deepening of access seeker competitive capacity within ESAs in which they have already established DSLAM infrastructure. Between March 2012 and August 2012, access seekers within the 289 ESAs installed in excess of [c-i-c commences] [c-i-c ends] additional interconnect ports, to provide ULLS and LSS-based DSL services over their DSLAMs. In total, as at 1 August 2012, access seekers have installed more than [c-i-c commences] [c-i-c ends] interconnect pairs within these 289 ESAs. Over [c-i-c commences] [c-i-c ends] of these pairs are spare, indicating that access seekers have the capacity to serve the entire market for DSL services within these 289 ESAs (given that ULLS and LSS based services already account for around [c-i-c commences] [c-i-c ends] of DSL services in these ESAs) using their existing DSL access infrastructure.

2.3. Market share outcomes within the 289 ESAs

16. In identifying whether or not the conditions within a set of ESAs are effectively competitive, market share outcomes provide another indicator of overall competitive conditions. At a high level, evidence of the relative shares within the 289 ESAs of Telstra retail DSL SIOs [c-i-c commences] [c-i-c ends]), WDSL ([c-i-c commences] [c-i-c ends]) and unbundled services ([c-i-c commences] [c-i-c ends]) provides a strong indicator that retail services based on unbundled lines are likely to be applying a competitive constraint on Telstra supplied wholesale and retail offerings.

17. One limitation of these high level share data is that they do not reveal the relative share between retail service providers. The Herfindahl-Hirschman Index ("**HHI**") has been used by the Commission (and many other regulators) as an indicator of market concentration, providing a touchstone for the degree of retail competition in a market. HHI scores are calculated as the sum of market shares squared.

18. In order to calculate the HHI for the 289 ESAs, Telstra has estimated the retail market shares for the six largest ISPs in the market. Although precise retail market share figures are difficult to calculate (due to the resale of on-net and off-net services acquired by access seekers), Telstra estimates that as at June 2012, within the 289 ESAs the HHI score was approximately [c-i-c commences] [redacted][c-i-c ends]. The market shares used to calculate this score are set out in Figure 2.3 (below).

[c-i-c commences]

[redacted]

[redacted][c-i-c ends]

19. The estimated HHI score of [c-i-c commences] [redacted][c-i-c ends] is only slightly above the Commission's threshold for investigation of mergers activity. Further, the score is significantly lower than calculated HHI scores in other areas of the telecommunications market. For example, the market for mobile telecommunications services in Australia is generally recognised as being highly competitive and estimates of the HHI score typically exceed 3,500. [c-i-c commences] [redacted] [redacted][c-i-c ends]

20. A further indicator of market competitiveness is the rate of customer turnover within a market, as measured by the level of market churn. Churn provides an indication of market contestability, which informs the size of the addressable market and the opportunity for new entrants to win share from incumbent firms.

21. The net quarterly change in SIO figures for WDSL, unbundled lines and Telstra Retail DSL services within the 289 ESAs is readily observable and highlights the vibrant activity in the market. Even so, these figures represent only the tip of the iceberg in terms of the large

numbers of end users that are contestable in these ESAs. Figure 4 shows that growth in unbundled lines is outstripping growth in Telstra retail services (with net Telstra supplied services remaining relatively unchanged since September 2010).

[c-i-c commences]

[redacted]

[redacted][c-i-c ends]

22. However, net change figures will necessarily understate overall market churn, with a significant proportion of churn activity occurring within service types (and net figures only revealing the difference in the number of connections and disconnections occurring within a given period). To address this issue, Telstra has examined churn data for the WDSL service for the three months to June 2012 to provide further insights into the level of churn activity in the market (see Figure 2.5 below):

[c-i-c commences]

[redacted]

[c-i-c ends]

23. Figure 2.5 shows the high degree of activity occurring within the DSL services market. For the 3 months to the end of June 2012, more than [c-i-c commences] [c-i-c ends] services moved to a new WDSL provider, or left a WDSL provider (or were moved to an alternative access service by the same provider). This constitutes around [c-i-c commences] [c-i-c ends] of the average number of total WDSL SIOs for that period. This implies an annual churn activity level of around [c-i-c commences] [c-i-c ends]. It should be noted that these data are for the WDSL service in aggregate (i.e., at a national level) – although the degree of market activity should not be expected to be any less for the 289 ESAs. This provides further evidence of the degree of contestability in the market for DSL services (even beyond the strict confines of the 289 ESAs or metropolitan ESAs more generally).

2.4. End users are benefitting from greater value and lower effective prices for DSL services as well as ongoing service innovation

24. The price and value of services offered to end users is a key measure of the relative competitiveness of a given market. Competition among service providers that leads to ongoing improvement in end user prices (i.e. lower prices, or greater included value at a given price) is, all else equal, in the long term interest of end users and consistent with the other statutory criteria.

25. The key "price change" in the retail broadband market is not price falls for particular services per se, but rather increases in the quantity of the service provided for essentially the same price over time – that is, an improvement in the value of broadband services. It not a

straightforward exercise to fully assess the changes in value offered in the ADSL market over time. ADSL services are clearly not commodities, with all competitors offering packages, bundles and service innovations that are designed to appeal to different market segments and different consumer preferences. Telstra clearly occupies a different market position (and provides a different type of service offer) to an ISP such as Dodo. Similarly, major ISPs including Optus, iiNet, Primus and TPG (as well as Telstra) all adopt slightly different market positions and have traditionally focused on the comparative advantages in order to drive market share. Further, innovations in service offerings – such as Naked ADSL and the inclusion of IPTV and other enhancements to a standard ADSL offering – complicate the comparison of plans between providers and over time. However, although it is difficult to estimate with precision, the value offered by DSL retail plans has clearly increased significantly in recent years.

26. One measure of changes in ADSL plan value is the Commission's DSL internet services price index,[9] which shows that end users are benefiting from ongoing improvements in retail prices, reflected primarily in service providers continuing to offer greater download/upload allowances for a given plan price:[10]

> *In 2010–11, prices for DSL internet services fell by 3.4 per cent. DSL prices continued a downward trend since 2007–08 ... There were no significant changes in nominal DSL plan prices during 2010–11 for most service providers. Most service providers also offered higher data download allowances.*

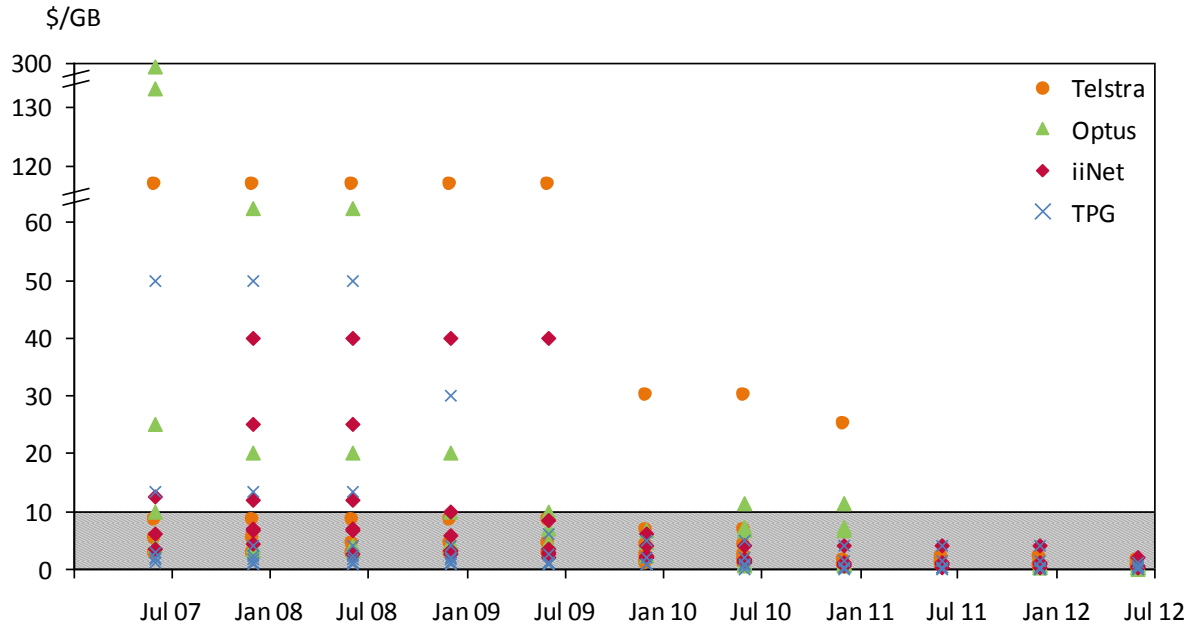
27. To further test whether DSLAM infrastructure and unbundled services have driven competitive price outcomes as one would expect in an effectively competitive market, Telstra has assessed the change in value over time in ISP plans provided over competitive DSLAMs, as well as plans offered by Telstra. The more competitive the market as a whole, one would expect an increase in the value of the average market offer and the degree of variation in value offered by different service providers would be expected to reduce. This would indicate an absence of barriers to competition in the market.

28. Telstra compared data from over 200 ISP plans; comparing the monthly access price and included data quota for ADSL2+ broadband plans advertised each half year from June 2007 to June 2012 for Telstra, iiNet, TPG and Optus. Information was derived from competitor websites and the broadband choice comparison website.[11] For non-Telstra service providers, only "on-net" offers were included (where these offers differed from resale-based offers) – that is, the plans chosen represented the competitive offers of service providers using their own DSLAM equipment.

29. Figure 2.6 shows the changes in effective prices for internet access (measured in dollars per gigabyte of included access quota ("**$/GB**")). Figure 2.6a reproduces a subset of this data for ease of exposition.

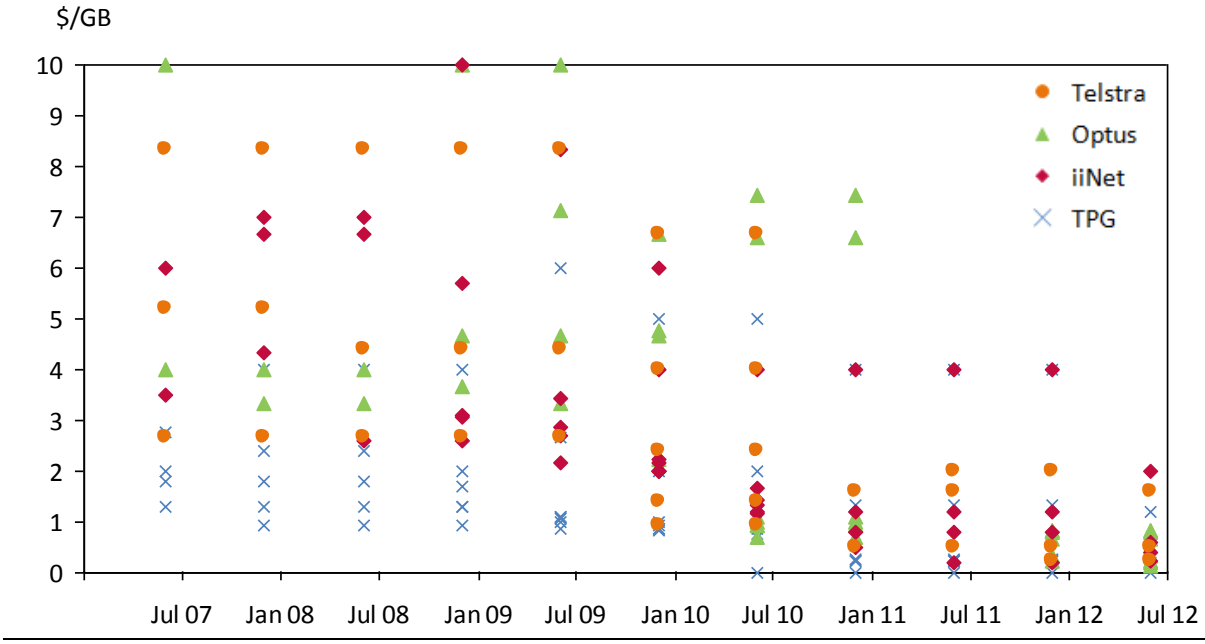
[9] ACCC telecommunications reports 2010-11, p 105
[10] Ibid, p 106
[11] www.internetchoice.com.au

Figure 2.6: Effective price ($) per GB of included data from Telstra, Optus, iiNet and TPG, June 2007 to June 2012



Source: Telstra analysis

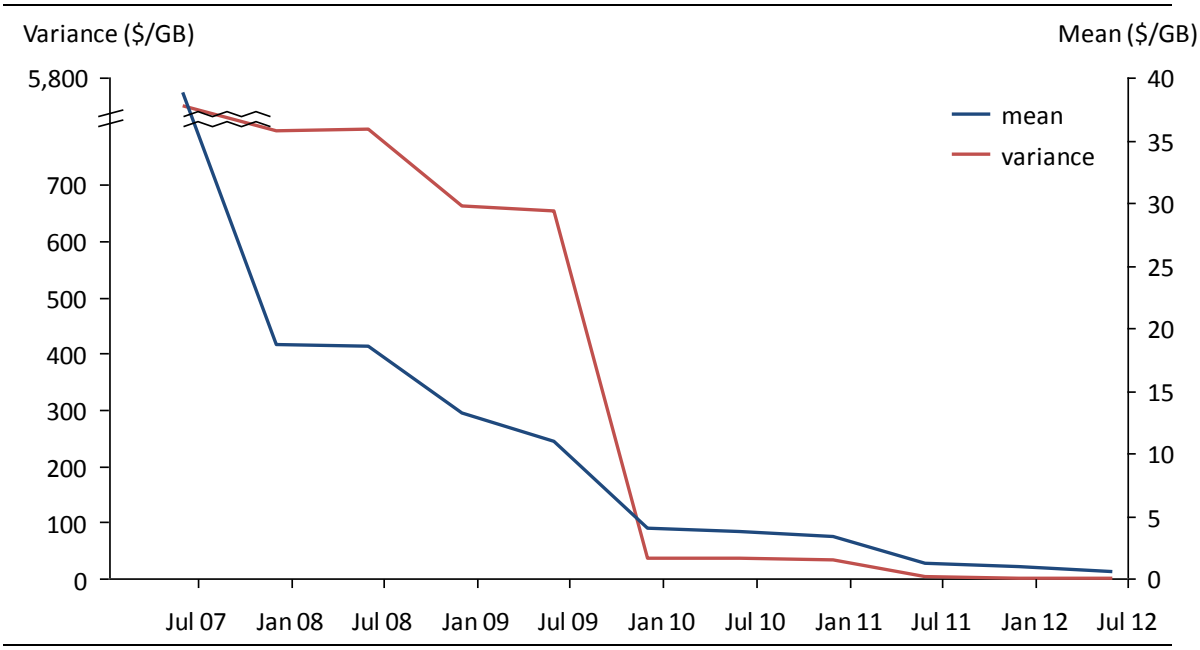
Figure 2.6a: Extract of highlighted section of Figure 6 (above)



Source: Telstra analysis

30. Although highly variable and "noisy", Figures 2.6 and 2.6a clearly show that the range of effective prices ($/GB) on plans available in the market, have reduced in recent years. This is confirmed by Figure 2.7 (below), which shows the mean effective price and the variance of effective prices for plans in the market over time:

Figure 2. 7: Calculated mean and variance for effective price ($) per GB of included data from Telstra, Optus, iiNet and TPG, June 2007 to June 2012



Source: Telstra analysis

31. The analysis shows that greater competitive intensity in the metropolitan market for DSL services has reduced the value "spread" on offers from leading ISPs. Much of the remaining spread observed in the market can be explained by different entry level prices for retail offers. Cheaper monthly access charges (i.e. access prices between $29.95 and $49.95) typically exhibit higher effective $/GB rates than for higher minimum monthly spend offers. The remaining variation can likely be explained by the presence of value added features. As noted above, many ISPs offer additional features and benefits that make like-for-like comparison difficult. These features include unmetered content, the inclusion of CPE with different levels of functionality and the bundling of additional, non-DSL features.

32. Although the above analysis cannot capture the complexity and variety of competitive offers in the market (from either Telstra or other service providers), the trends nevertheless consistently show that Telstra is responding to competition. The above analysis shows that not only have service providers (including Telstra) dramatically reduced the effective $/GB prices end users face in the market, but the variation in effective prices on plans offered by Telstra and other ISPs has also reduced significantly. To the extent Telstra competes by offering value-added services such extended support, security software, video on demand and IPTV services (or other unmetered content), the above analysis is likely to understate the degree to which Telstra has responded to competition.

33. Importantly, Telstra's response to increased DSLAM-based competition has been to increase the included data of its retail plans at a national level. Although infrastructure-based competition is largely focused in metropolitan areas, end users in regional and rural areas also benefit because Telstra markets its offers on *a national basis*. Thus, when Telstra responds to competitor offers (which apply in metropolitan areas), end users in regional and rural areas can also gain access to offers with lower prices and/or higher included value.

2.5. Competition at the wholesale layer within the 289 ESAs

34. In principle, Telstra does not consider that the Commission should look explicitly at outcomes at the wholesale layer of the DSL services market when assessing the overall competitiveness of the DSL market in a given set of ESAs. In making a decision to grant exemption provisions in the FAD, the Commission must take into account the criteria set out in s 152BCA of the CCA which include the LTIE.

35. Section 152AB of the CCA provides that, in determining whether a particular course of action will promote the LTIE the Commission must have regard to (inter alia) the objective of promoting competition in markets for listed services, and the objective of encouraging the economically efficient use of, and investment in, infrastructure. In previous inquiries, the Commission has maintained that the LTIE will be advanced where the terms and conditions of the FADs facilitate the provision of:

    a. goods and services at lower prices;

    b. goods and services of a higher quality; and/or

    c. a greater diversity of goods and services;

    to end users.[12]

36. The CCA does not prescribe the market through which these ends must or even should be achieved. Accordingly, if the Commission is satisfied that the exemptions are promoting the LTIE (by causing lower prices, improved service quality and/or greater choice for consumers), it is unnecessary for the Commission to examine each layer of the market in isolation and satisfy itself that that layer is independently competitive or is achieving these goals. For this reason, the discrete competitiveness of the market for resale services is not strictly relevant to the analysis contemplated by the CCA. In considering the various arguments and allegations put forward by access seekers, the Commission must not lose sight of the foremost criterion which lies at the centre of this Inquiry: the LTIE.

37. Telstra therefore maintains that in assessing whether or not to apply the SAOs to the 289 ESAs (or any other subset of ESAs in which market conditions are considered to be effectively competitive) the Commission needs to consider the competition in the market for ADSL services within those ESAs as a whole, keeping in mind the LTIE.

38. In any event, within the 289 ESAs (and indeed across the broader metropolitan area) the WDSL market is clearly effectively competitive. As with the retail layer, growth in ULLS and LSS services within the 289 ESAs (and metropolitan areas more generally) is providing a strong competitive constraint against Telstra and other resale DSL service providers. This is occurring in the following key ways:

[12] ACCC, Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services - Issues Paper September 2011, p. 19.

a. Primarily, service providers are continuing to switch from resale service to ULLS or LSS services for the supply of DSL services to their end users. For example, the recent acquisition of Internode by iiNet has resulted in Internode end users who were supplied services using Optus and Telstra resale services being migrated to iiNet DSLAM infrastructure (where available). Telstra supplied WDSL services now make up only [c-i-c commences] [redacted][c-i-c ends] of the DSL market within the 289 ESAs. More broadly, Telstra considers that the ongoing move to self-supply DSL services over ULLS or LSS has significantly reduced the market for resale services.

b. In addition to competition from unbundled services, wholesale DSL services are increasingly being offered by DSLAM-based competitors (including Optus, AAPT, NEC and Soul/TPG). As these service providers have expanded and deepened their DSLAM footprint, they have increasingly entered the market as suppliers of resale DSL services.

c. Competitive DSLAM operators are leveraging their expertise in the provision of Naked ADSL at retail to offer these services in addition to standard WDSL services, and broadband and voice bundle services, to resale service customers. Wholesale competitors are also increasingly leveraging their ability to provide related and complementary services when competing for reseller business. For example, Optus routinely includes resale of its mobile networks as part of its offers to resale ISPs.

39. The interaction of the factors outlined above (the ongoing decline in the size of resale market, with the commensurate presence of more resale service providers offering more services) is leading to intense competition for resale service customers – such as Dodo and Exetel that do not generally use their own DSLAM infrastructure for the provision of ADSL services. DSLAM network operators (with in situ capacity) are competing with Telstra Wholesale for the business of resale service customers. [c-i-c commences] [redacted][c-i-c ends]

40. A further factor driving competition in the market for resale ADSL services is the deployment of the NBN. The 'carrot' of future NBN market share is providing further incentive to wholesale competitors seeking to win customers away from Telstra's resale DSL services. [c-i-c commences] [redacted][c-i-c ends]

41. In order to respond to this dynamic competitive environment, Telstra Wholesale has sought to develop innovative service offerings and bundles to retain and win-back resale customer business within the 289 ESAs (and the broader competitive footprint). This has required Telstra

to make offers to resale customers within the competitive areas, which (among other things): [c-i-c commences]

42. [redacted] [c-i-c ends] The end result is that resale service customers with the 289 ESAs (and the broader competitive) footprint are benefiting from lower prices and more innovative service offers from Telstra and other wholesale competitors.

43. Within the Issues Paper (and in previous regulatory processes), the Commission has asserted that granting exemptions could result in Telstra leveraging its market power in other areas. Telstra does not consider this to be a reasonable consideration as:

    a. Telstra faces intense competition in areas in which exemptions are being sought (i.e. the 289 ESAs). Within these ESAs, any resale services customer has the choice of acquiring services from a range of service providers. These alternative service providers compete on the type of service offerings, price and non-price terms

    b. In other areas (areas where the exemptions are not granted), the price for WDSL services will be set by the Commission. Resale service customers will be able access WDSL (as well as Wholesale Line Rental/Local Carriage Service ("**WLR/LCS"**), Public Switched Telephone Network Originating Access ("**PSTN OA**"), ULLS and LSS service – among others) on regulated terms.

44. For these reasons, in the event exemptions were granted in at least the 289 ESAs identified, Telstra would continue to be constrained by intense retail and wholesale competition in the competitive areas and constrained by regulation outside of these areas.

45. In the course of previous inquiries, the Commission and Australian Competition Tribunal have assessed the impact of exemptions on competition at the wholesale layer. In particular, the Commission and the ACT have assessed whether or not, if Telstra were to withdraw supply of a wholesale service, there would be sufficient in-place capacity from DSLAM operators to provide services to existing resale customers. First, it should be clear in the present case that Telstra has no intention of withdrawing supply of WDSL services, having provided the service in the absence of declaration for several years. In any event, within the 289 ESAs access seekers have installed more than [c-i-c commences] [redacted] [c-i-c ends] ports capable of providing ADSL services. Based on current spare capacity, ULLS/LSS access seekers not only have sufficient capacity to support the remaining [c-i-c commences] [redacted] [c-i-c ends] WDSL SIOs in the event Telstra were to withdraw supply, but these access seekers also have sufficient spare capacity to provide services to Telstra's retail end users, if Telstra were to exit the market.

2.6. Alternative subsets of ESAs in which there is evidence of effective competition

46. In its earlier submissions,[13] Telstra set out a number of alternative approaches that the Commission could utilise in assessing whether the SAOs should apply to a given ESA or set of ESAs. The 289 ESAs identified by Telstra in its submission to the Discussion Paper represented those ESAs in which there is at a minimum the joint presence of Optus, iiNet, TPG and Telstra DSLAMs.

47. Market evidence (set out in both this submission and Telstra's earlier submissions) – whether measured by number of entrants (and new entry occurring), level of competitive infrastructure (and ongoing investment), changes in market shares, churn, changes in end user prices and service innovation – all indicates that the structure, conduct and performance of the 289 ESAs are effectively competitive. If anything, Telstra considers that the 289 ESAs are likely a very conservative subset of ESAs for which the Commission should exempt the SAOs.

48. Many of the competitive outcomes and market properties present within the 289 ESAs are also present in other ESA subsets. Figure 2.8 sets out the relative market share outcomes for the 289 ESAs, compared to a number of other potential ESA groupings for which the Commission could exempt the applications of the SAOs.

[c-i-c commences]

[redacted]

[redacted][c-i-c ends]

49. What sets the 289 ESAs apart from other subsets of ESAs that the Commission could exempt from the application of the SAOs is the consistent presence of at least the four largest ADSL service providers (Telstra, Optus, iiNet and TPG) in each of these ESAs, offering a range of retail

[13] 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, 10 April 2012, Chapter 3

and wholesale services to end users and wholesale customers. In addition, the vast majority of ESAs within the 289 have the presence of additional ULLS/LSS acquirers – as set out in Figure 2.9:

[c-i-c commences]

[c-i-c ends]

50. By setting the criteria for inclusion of the 289 ESAs as the presence of at least Telstra, Optus, iiNet and TPG in the market, the Commission can be confident that;

    a. Overall conditions across the 289 ESAs (as a group) will be effectively competitive. Overall market shares, investment, churn, service innovation and changes in prices all point to positive outcomes (at both the retail and wholesale layer) arising from intense competition; and

    b. Within each of the ESAs included, retail end users and wholesale customers of DSL resale services are able to choose services from a range of service providers, including (at a minimum) the largest four firms operating in the market.

51. In summary, the 289 ESAs put forward by Telstra represent a conservative set of ESAs for which the Commission should exempt the application of the SAOs. These ESAs are clearly competitive as a group and when considered on an ESA-by-ESA basis. Although Telstra considers the Commission could deliver greater benefits to the LTIE by seeking to extend the exemption of the SAOs to a broader set of ESAs in which there are potentially a greater number of unrealised benefits from competition, exempting the 289 ESAs proposed by Telstra would ensure end users within these ESAs continue to enjoy the benefits of dynamic competition, whilst reducing the risks associated with unnecessary regulation.

2.7. The presence of large pair gain systems does not impair competition in the DSL market

52. Within the Issues Paper, the Commission asks a series of questions on the impact of large pair gain systems ("**LPGS**") in the market for DSL services, and whether the presence of LPGS needs to be considered in determining whether the SAOs should be applied in a particular set of ESAs.[14]

53. The presence of remote CAN cabinet infrastructure (LPGS) has not negatively impacted on competition in the market for DSL services:

    a. Large pair gain systems serve only a small minority of end users. Within the 289 ESAs identified by Telstra, only [c-i-c commences] [redacted][c-i-c ends] of total CAN SIOs are served from large pair gain systems.

    b. The presence of large pair gain systems has not reduced the investment in competitive DSLAMs, or the take-up of unbundled services.

    c. End users supplied with services from LPGS equipment within the 289 ESAs benefit from Telstra's response (at both the retail and wholesale level) to DSLAM-based competition. Telstra does not have the capability (or the ambition) to bill wholesale customers on a service by service basis, differentiated by whether or not the end user is served by an exchange-based DSLAM or a DSLAM located at a remote cabinet. It would be entirely impractical for Telstra to implement a billing system that provided for a carve-out of end user services supplied using LPGS infrastructure. This was accepted by the Commission and Australian Competition Tribunal in the context of the WLR/LCS and PSTN OA exemption proceedings.

    d. Recent investments by Telstra in improving the quality and range of DSL services available to end users served by remote cabinet infrastructure (the TopHat Project) have reduced the degree of service differentiation experienced by these end users. WDSL customers (and Telstra Retail) can now offer ADSL2+ services to many end users who were previously limited to ADSL headline speeds.

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

54. As Telstra sets out in its submission on price terms,[15] annexed to this submission, the setting of prices for WDSL services is highly complex. Setting prices in the presence of network congestion externalities, dramatic increases in throughput demand and consequent requirements for ongoing investment, mean that setting a regulated price for WDSL is a difficult task. These complexities are compounded in metropolitan areas by the presence of multiple service providers competing at both the retail and wholesale layers of the DSL market. In this environment, the risk of regulatory error in setting access prices is very high.

[14] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012, p 15

[15] Telstra, 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, 24 August 2012

55. If the Commission were to set a regulated access price in the 289 ESAs identified by Telstra (or in any areas in which there is effective competition) there is a significant risk that it will be to the detriment of the LTIE, and inconsistent with the other statutory criteria.

56. Implementing regulated prices in areas where several service providers have made considerable investments (and continue to make these investments) in order to compete in a highly competitive market for wholesale and retail ADSL services is likely to reduce investment incentives and anchor a diverse and dynamic set of service offerings to the price and features of the regulated service.

57. It is unarguable that service providers and access seekers respond to investment and competition signals set out within the Commission's decisions. The Commission's decisions have consequences for investment and competition within affected markets. For example:

    a. A recent submission by TPG provides further insight into the risk of reducing investment incentives by unnecessarily regulating access prices in a competitive market. TPG noted:[16]

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

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

    b. Similarly, the Commission can consider the investment choices made by iiNet, which withdrew from a planned deployment of MSAN (PSTN-emulation voice and DSL capable DSLAMs) in the mid-2000s, citing the fact that changes to regulatory settings and changing price relativities between multiple regulated services negatively impacted the MSAN business case.[17] Rather than compete in the voice market at that time, iiNet focused their investment and competitive activities on DSLAMs (with no PSTN-emulation voice capability) and broadband services.

58. However the clearest example of the impact of regulation on investment and competitive outcomes (and an indication of the likely impacts of applying the SAOs within effectively competitive ESAs), is to compare the market outcomes for DSL services within the 289 ESAs to fixed voice services. Unlike the market for DSL services (where the Commission only declared WDSL in February 2012), the market for fixed voice services has been heavily regulated since

[16] TPG, Inquiry into declaration of wholesale ADSL, 25 January 2012, p 4
[17] See iiNet Investor Presentation 31 October 2006, p.15 available at http://investor.iinet.net.au/IRM/Company/ShowPage.aspx/PDFs/983-10000000/InvestorPresentation

the late 1990s,with a short period between December 2010 and December 2011 in which exemptions applied for a subset of the 289 ESAs.

59. [**c-i-c commences**]

[redacted]

[redacted]**[c-i-c ends]**

60. Figure 2.10 shows that in the same ESAs, with the same competitive infrastructure present, the market outcomes in the market for voice services are dramatically different. Given the presence of the same key competitors, the same level of competitive infrastructure, and the same addressable market, the key difference between the two markets that could explain this dramatic difference in market outcomes is the long-term presence of a regulated resale service (WLR/LCS) in the market for voice services compared to the market for WDSL services, which was only declared for the first time in February 2012.

61. Not only does this comparison highlight the potential downside risk to competitive outcomes if the Commission applies the SAOs for WDSL services within the 289 ESAs – that of service providers taking the low risk (but poor consumer outcome) option of sitting on the resale service rather than investing; it also highlights the potential for improvements to the competitive conditions in the market for voice services if the Commission adopts the forbearance for resale voice services, which was a long-term hallmark of the DSL resale services market.

2.9. Conclusion

62. Competition is the best regulator. The best example of this is the market for ADSL services, which have become effectively competitive through investment and innovation given the Commission's longstanding position of regulatory forbearance in the area, and the absence of a regulated resale service. Forbearance has delivered innovation in services, significant increases in the value offered in the market, significant changes in market shares and ongoing growth in the market.

63. The intensity of competition at the wholesale and retail layers of the ADSL market within the 289 ESAs in which Telstra considers the Commission should exempt from the SAOs, means Telstra is demonstrably constrained in undertaking its pricing and other marketing activities with respect to WDSL services in those areas. In areas where retail and wholesale competition is demonstrably working effectively, unnecessary regulatory intervention (and the associated risks of regulatory error in setting price and non-price terms) now risks undoing these competitive market dynamics:

    a. The presence of regulation is likely to have a chilling effect on competitive investment and reduce innovation and differentiation among all WDSL service providers (including Telstra).

    b. The overhang of regulation (particularly where only applied to Telstra) will restrict Telstra's ability to compete with other wholesale service providers.

    c. Regulation will unnecessarily increase transaction costs and impose unnecessary additional costs on the market.

64. More broadly, regulation imposes practical and adverse effects on business decision making that go beyond the individual service or market segment being regulated. In areas of the market that are already highly competitive, unnecessary regulation will increase the overall level of regulatory uncertainty and risk for telecommunication service providers more broadly. This means that business decisions relating to the supply of both existing and future telecommunications services (fixed, mobile, bundled and unbundled, regulated and non-regulated) must constantly be reviewed against the risk, uncertainty and potential for regulation to be imposed; leading to significantly increased costs. This will invariably lead to suboptimal business, investment and marketing decisions that are inimical to innovation, harmful to competition and contrary to the long term interests of end users. With the deployment of the NBN, and the requirement for service providers to invest and innovate, it is essential that Telstra and other service providers can have confidence that if the conditions exist for effective competition, the Commission will remove or not impose access regulation.

65. The absence of tangible potential benefits from setting regulated price and non terms for WDSL within the 289 ESAs *and* the high likelihood of regulatory error, impairment to incentives to invest, differentiate and innovate and the imposition of unnecessary regulatory

costs, means the Commission should exempt Telstra (and other providers of WDSL services) from the standard access obligations in at least these 289 ESAs.

03 Naked ADSL

66. In the Issues Paper, the Commission has raised the prospect of requiring Telstra to make available a Naked ADSL service to wholesale customers. The Commission set out three possible options:[18]

> *The first option would be to explicitly maintain the current market position whereby an active PSTN service is required on a line before Telstra supplies wholesale ADSL services. As mentioned above, this would preclude access seekers from providing a naked ADSL service based on Telstra wholesale inputs. Telstra has strongly advocated for this option in its submission.*
>
> *The second option would be to include a term providing that an access provider cannot require that the wholesale ADSL service must be provisioned with a PSTN line, or include a term requiring that a wholesale ADSL service is supplied without an associated PSTN line on request by an access seeker. The ACCC refers to this option as 'full unbundling' of the PSTN service from the wholesale ADSL service. Such a term would require Telstra to offer a wholesale ADSL service on a stand-alone basis, however it would not preclude Telstra also offering a bundle of wholesale ADSL and WLR.*
>
> *...*
>
> *A third 'hybrid' option could be to include a term permitting Telstra to implement unbundling by making available a limited telephone line rental service in conjunction with the wholesale ADSL service. Providing a 'stripped back' line rental product could achieve some of the benefits of unbundling while potentially being cheaper and easier to implement than 'full' unbundling*.

67. In effect Telstra considers that the Commission is contemplating either, (1) maintaining the status quo, (2) requiring Telstra to make available a Naked ADSL service to wholesale customers, or (3) requiring Telstra to provide a modified, limited functionality basic access service to be utilised in conjunction with an ADSL service to wholesale customers.

68. In addressing the Commission's Naked ADSL proposal, there are two key points Telstra wishes to make clear:

    a. First, the requirement for an ADSL service to be provided on a line with an active PSTN service is not a commercial bundling construct; rather it is a fundamental aspect of how Telstra has deployed ADSL technology on its network and is integral to how Telstra provisions these services. Telstra provides ADSL services to both retail and wholesale customers as a product provided on top of PSTN services. In this way ADSL services are analogous to long distance calling services or messaging services. Telstra does not forcibly bundle ADSL and PSTN access services. It is simply a technical requirement that

[18] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012, p 28

ADSL services require an active PSTN service on the copper line. It is also a requirement that the end user is connected via an unbroken metallic path to a Telstra DSLAM. The PSTN service is essential for the ordering, provision and management of the ADSL service, in much the same way as a DSLAM is essential for the ADSL service. A requirement to provide Naked WDSL services would require Telstra to undertake significant systems development and process changes.

b. Second, it is unclear that access seekers (or end users) would benefit from the requirement to make such a service available. The existing options available to access seekers through the provision of Telstra supplied WDSL services, as well as ULLS and LSS-based DSL services (either self-supplied, or acquired from other wholesale DSL suppliers) provide access seekers with a wide range of options for the delivery of Naked ADSL services to end users. It is unclear that a requirement for Telstra to develop a new service would significantly increase the competitive options available to access seekers, or end users.

69. Given these limited benefits, it is unreasonable to require Telstra to undertake the significant technical and process developments required to enable the provision of Naked WDSL services on its network and to do so would be contrary to the statutory criteria.

70. A summary of Telstra's key views with respect to the three options raised by the Commission is set out in the Table 3.1:

Table 3.1: Summary of Telstra's views with respect to the options set out in Chapter 7 of the Issues Paper

Option	Summary comments
1 Status Quo	• **Telstra does not require wholesale customers to bundle PSTN and ADSL services.** Currently WDSL acquirers are free to choose to offer their end users a bundle of PSTN voice and ADSL services by acquiring a WLR service in conjunction with WDSL. Only a minority of WDSL services are bundled with the underlying PSTN service in this way. [c-i-c commences] [c-i-c ends] of WDSL SIOs are supplied in conjunction with a PSTN basic access service from the same service provider. The majority [c-i-c commences] [c-i-c ends] of end users supplied a WDSL service do not acquire a bundled PSTN voice service from their DSL supplier. • **There are a number of existing options for service providers to supply Naked ADSL services to their end users**. It is not clear that the absence of a Telstra supplied wholesale Naked WDSL service is significantly reducing end user choice. Over [c-i-c commences] [c-i-c ends] of end users are located within ESAs in which Naked ADSL services are already available. Where access seekers wish to provide their end users with a Naked ADSL service, they are able to provide such a service either by deploying their own DSLAM infrastructure and acquiring a ULLS, or by acquiring a Naked WDSL service from an alternative wholesale DSL supplier, such as Optus.
2. Require Telstra Wholesale to make available a Naked ADSL service	• **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. A requirement to provide Naked WDSL would require significant system and process changes. • **Telstra does not consider that it is within the remit of the Commission in this FAD process to require Telstra to develop a new, naked WDSL service.**

	• **Naked WDSL would increase the costs of service assurance.** 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. • **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. • **A manually provisioned Naked WDSL service could possibly be implemented at a lower capital cost**, however the unit costs of provisioning individual services and the time and complexity involved in the provisioning process would result in Naked ADSL services being far more costly and less attractive consumer services than existing WDSL services (or ULLS/LSS-based alternatives). • **There is unlikely to be significant demand for a Telstra supplied wholesale Naked ADSL service given the existing options available in the market and the likely price of such a service relative.**
3. Require Telstra Wholesale to make available a "stripped back" WLR service to be used in conjunction with a WDSL service	• **Like Option 2, implementing Option 3 would require Telstra to develop and provide a new service – specifically a new WLR-like basic access service.** The implementation of a reduced functionality WLR service would require Telstra to develop a modified version of WLR in which call/network barring features were pre-configured on the service. • **Telstra does not consider that it is within the remit of the Commission in this *WDSL* FAD process to require Telstra to develop a new, *WLR* service.** • **If Telstra were required to supply a new WLR-like service with a limited functionality, the underlying costs of supplying this WLR service would likely be equivalent to the costs of supplying a WLR service.** To the extent that there were any differences in the cost of supplying a restricted functionality WLR service as compared to the usual WLR service, these cost differences would be negligible (if not slightly higher in the case of the restricted service). There is no network feature, infrastructure or other service cost associated with the WLR service that can be avoided by restricting its functionality. • **Currently, WLR acquirers can mimic the reduced functionality suggested by the Commission within the existing WLR service through call/network barring options**. There would be no greater functionality available if Telstra were to pre-provision a WLR service with these call barring features enabled. • **There is unlikely to be significant demand for a limited functionality WLR service, as the price will be similar to current "fully functioning" service.**

71. The remainder of this section details the technical, economic and regulatory issues underpinning Telstra's position with respect to the Commission's Option 2 and Option 3 proposals. Direct responses to the questions posed by the Commission (cross-referencing appropriate material from throughout this submission) are in Annexure A.

3.1. No requirement to provide Naked ADSL

72. As noted by the Commission, Telstra does not currently provide Naked ADSL to itself or to any other party. All ADSL services supplied by Telstra are supplied with an active PSTN service on the line (see further Box 3.1 below). This is a fundamental technical requirement of how Telstra has deployed ADSL (and ADSL2+) technology on its network and how DSL products are "seen" by Telstra's systems. The ordering, provisioning and management of ADSL services is carried out based on ADSL supplied with PSTN service, rather than an independent service. Given this, Naked ADSL is not an active declared service and the SAOs do not apply to it.[19] This in turn means that Telstra is not required to supply Naked WDSL to access seekers.

73. Telstra refutes the Commission's suggestion that the requirement for a PSTN service to be provided with ADSL is simply a 'term or condition of access'.[20] As set out below, the presence of an active underlying PSTN service is integral to the service supplied.

3.2. No power to require Telstra to provide Naked WDSL

74. The Commission has suggested that it could include a term in the FAD requiring Telstra to provide Naked ADSL under s 152BC(3)(d) of the CCA. 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 WDSL is supplied. The Commission has acknowledged Telstra's submission[21] that the uncoupling of ADSL from PSTN would require significant network and systems changes.[22] A list of these changes is included in table 3.2.

75. 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. For example changes would be required to ULLCIS (Telstra's Unconditioned Local Loop Carrier Interface System), which is used for the ordering and provisioning of ULLS services so that ULLCIS could recognise the new Naked WDSL service type in order to facilitate a churn event between a Naked WDSL and ULLS service. Other systems, such as SNRM (Telstra's Subscriber Number Resource Management system), which is used for the provision of specialist services within Telstra (such as Ethernet data services) would also have to be modified to accommodate Naked WADLS. Telstra would likely have to rely on SNRM system as part of the provisioning of a Naked WDSL service (where currently it is not used for the provisioning of ADSL services).

76. Therefore the processes involved in uncoupling WDSL from the underlying PSTN line so as to provide a Naked WDSL service would involve the enhancement and/or extension of facilities

[19] To be an *active* declared service, the service must be provided by Telstra to itself or other persons per s152AR(2) of the *Competition and Consumer Act 2010* (Cth).
[20] Australian Competition and Consumer Commission, *Public inquiry to make a final access determination for the wholesale ADSL service* Issues Paper, July 2012, p 27.
[21] 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: Public version*, 10 April 2012, p 23.
[22] Australian Competition and Consumer Commission, *Public inquiry to make a final access determination for the wholesale ADSL service* Issues Paper, July 2012, p 29.

that are not facilities by means of which the declared service is currently provided.[23] The Commission has no power to require Telstra to extend or enhance those facilities.

77. If, contrary to the above submission, the Commission takes the view that it has jurisdiction to require the provision of Naked WDSL in the FAD, Telstra reiterates its submissions[24] that there are significant end-user benefits in requiring an underlying PSTN service to be supplied with WDSL, as it ensures that Telstra is able to provide a better quality of service. The service quality considerations for Naked WDSL are discussed in greater detail below, in sections 3.4.5 and 3.4.6. In essence, it means that the removal of this requirement would not promote the LTIE or be consistent with the other statutory criteria.

Box 3.1: A note on terminology

It is important to clarify a point that is not made clear in the Commission's Issues Paper. Telstra does not require an access seeker (the customers of WDSL services) to acquire a bundle of WLR (PSTN basic access) and WDSL.

Within the issues paper, the Commission states,[25]

> *During the ACCC's wholesale ADSL declaration inquiry, Telstra submitted that the service description should include the requirement that wholesale ADSL must be purchased with an underlying PSTN service.*

The Commission appears to have misunderstood Telstra's position with respect to the requirement of the presence of an active PSTN service for provision of WDSL services. To be clear, Telstra does not forcibly "bundle" PSTN and WDSL services. End users are free to purchase these services from the same provider, or from alternative providers. From the perspective of a wholesale access seeker, they do not have to acquire WLR services in conjunction with a WDSL service. Only around [c-i-c commences] [redacted][c-i-c ends] of WDSL services are associated with a basic access service supplied by the same service provider. The majority of WDSL services are supplied to end users "unbundled" from the underlying basic service.

The linkage of WDSL and PSTN services with the Telstra network is a matter of network design, system integration and process development. The requirement for WDSL that an end user line has an in place active PSTN service (whether or not purchased in conjunction with the WDSL service), is a fundamental technical requirement. All of Telstra's ADSL services are supplied as products on top of the PSTN service. This is analogous to the provision of long distance calling services; they are provided as an additional selectable feature or product to the PSTN service. They may be provided by different service providers to an end user, but they require the presence of an underlying PSTN basic access service in order to function.

3.3. The provision of ADSL services over Telstra's network

78. The following section provides information on the key technical concepts (service quality, service assurance and service provisioning) relevant to the consideration of how Telstra currently provides ADSL services.

3.3.1. How Telstra currently provides ADSL services

[23] 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].
[24] Telstra's submission to the Commission dated 10 April 2012[24].
[25] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012, p 27

79. The vast majority of services Telstra provides over its copper access network are PSTN services. Telstra's core systems and applications are structured for delivery of a PSTN service. The key functional components of the PSTN basic access service is the ability to provide a national service number and network switch line interface over the copper path. The order processing, allocation and activation of these components is tightly coupled and automated.

80. Telstra supplies a range of products in conjunction with PSTN basic access services – these include local call services, long distance call services, *and ADSL services*. The ordering, provisioning and management of ADSL services is carried out by Telstra's core systems by treating ADSL as a product upon the PSTN service rather than as an independent service. By implementing ADSL on its network in this manner, Telstra has been able to leverage its existing service qualification, assurance and provisioning systems and capitalise on its experience and expertise in providing PSTN services so as to provide a high quality and well performing product in a cost effective manner.

81. In contrast to ADSL services, a minority of services supplied over the PSTN CAN are classified as complex (or special services). These include specialised data services ISDN and SHDSL services. These services are not provisioned by reference to an underlying PSTN service. Business Grade DSL services are an example of a complex service provided over the CAN (see below).

3.3.2. The provision of Business Grade DSL services and other complex services

82. Within the Issues Paper the Commission raises the example of Telstra currently providing Business Grade DSL ("**BDSL**") services without an underlying PSTN service on the line:[26]

> *The ACCC understands, however, that Telstra currently offers symmetric DSL services unbundled from a PSTN service.*

83. The analogy drawn by the Commission is misguided. BDSL services are fundamentally different to ADSL services. Telstra's BDSL service offering is a complex product that uses SHDSL technology, provided using different network infrastructure where the fulfilment and assurance are addressed via manual process support. If Telstra were to supply a Naked ADSL service in the same manner in which it supplies BDSL services, the cost of doing so would reflect the manual interventions at each stage of the service life cycle. More details on how Telstra provides BDSL services, and how this is different than in the case ADSL services is set out in Box 3.2.

[26] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012, p 33

Box 3.2 How the provision of Business Grade DSL services is different to the provision of ADSL services

BDSL is not simply a different commercial construct to mass-market consumer ADSL offerings (or simply a service with a higher level of service support and service level arrangements). BDSL provides symmetrical upstream and downstream speeds and a single service may operate over multiple copper pairs depending upon the service speed and line distance.

BDSL services (although still provided using a DSL variant - SHDSL) utilise different DSLAM infrastructure and different line cards for the supply of the service compared to those used for the supply ADSL and ADSL2+ services. The footprint of the existing technology is limited. The BDSL technology area coverage is significantly smaller than the ADSL technology footprint.

BDSL services cannot be provided with an underlying PSTN service on the same line, although the specialised hardware used to supply these services is capable of replicating certain PSTN features. The BDSL DSLAM technology used by Telstra supplies a wetting current to the line to reduce fault rates that may occur through oxidisation on local loops.

Each step in the ordering, provisioning, assurance and ongoing management of BDSL services is undertaken manually. The labour intensive, manual processes enable Telstra to deliver a high quality service outside of the usual operating parameters of the network (i.e. without the presence of an active PSTN service on the line).

[c-i-c commences]

[redacted] [c-i-c ends]

The above approach is completely different (and significantly more complex and time consuming) than the automated approach used to order and provision ADSL services. In comparison to the above the vast majority of ADSL service orders are completely automated and have very minimal manual intervention.

3.4. Issues related to the provision of Naked WDSL by Telstra

84. The following section sets out the implications for the provision of a Telstra Naked WDSL service.

3.4.1. Cost of providing Naked WDSL

85. If the Commission takes the view that it has jurisdiction to require Telstra to provide Naked WDSL as part of the FAD, it would be both physically complex and costly for Telstra to uncouple WDSL from PSTN so that WDSL could be provided without an underlying active PSTN service.

86. The processes and costs involved in uncoupling WDSL from PSTN are outlined below in this section. If the Commission's FAD required Telstra to provide naked WDSL, 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[27] or of maintaining these extensions to or enhancements of the capabilities of a facility.[28] This means that these significant costs would have to be recovered by Telstra as part of prices set by the Commission for WDSL.

87. The costs for Telstra to deploy Naked WDSL include the upfront costs involved in necessary modifications to systems and process changes, and increments to ongoing operating costs associated with changes to service delivery and assurance. These upfront and ongoing costs are considered below.

3.4.2. Core system changes required for Telstra to provide Naked WDSL services

88. Within the Issues Paper the Commission notes:[29]

> *The technical feasibility of providing the service also raises issues relating to the direct costs of providing access. As Telstra submits its systems cannot support unbundling, there could be substantial costs involved in systems development needed to supply an unbundled service.*

89. If Telstra became a supplier of an active declared Naked WDSL service, a range of core systems and processes would be required to be altered to accommodate the service. There are two broad approaches that Telstra could adopt:

    a. Adjust core systems and processes such that Naked WDSL services can be ordered, provisioned and managed as a mainstream, mass-market service (in a comparable manner to existing wholesale and retail ADSL and PSTN services). From a technical perspective, this approach would involve significant capital costs in order to accommodate Naked WDSL services within Telstra's automated mass market systems and processes.

    b. An alternative approach would be for Telstra to adjust core systems and processes to enable the ordering, provisioning, and management of a Naked WDSL service as a complex service. This approach would likely require lower upfront capital cost and less time to implement, however the recurrent operational costs of ordering, provisioning and managing a complex service are inherently much higher than for Telstra's mass market consumer offerings due to the manual processes involved.

90. The technical and cost issues involved in these two approaches are set out below.

3.4.3. System changes required to provide Naked WDSL services in a comparable manner to existing retail and wholesale ADSL services

91. For Telstra to offer a Naked WDSL service (in a manner equivalent to existing WDSL services) it would require significant systems and process modifications. Telstra would need to modify its

[27] Section 152BCB(1) (f)(i) of the *Competition and Consumer Act 2010* (Cth).
[28] Section 152BCB(1) (f)(ii) of the *Competition and Consumer Act 2010* (Cth).

[29] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012, p 33

core systems and processes to enable WDSL to be provisioned as a separate service that is independent of an underlying PSTN service.

92. A summary of the core systems that would require modification and development in order to accommodate Naked WDSL as a mass market offering (enabling automated ordering, provisioning and management of the service in a manner consistent with existing WDSL services is set out below:

Table 3.2: Overview of key systems that would be impacted if Telstra were required to offer a Naked ADSL service

[c-i-c commences]

[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

[c-i-c ends]

93. The above systems have been identified as part of a high level and preliminary examination of the systems and processes that would require modification, extension and redevelopment in order to accommodate a Naked WDSL service. The above list should not be considered exhaustive and is likely to be conservative. Costs associated with other issues, such as additional training of the field work force and support teams have not been set out.

94. Based on this conservative, high level assessment, the capital costs associated with the modification of these systems is considered likely to be in the order of [c-i-c commences] [c-i-c ends]. Changes to ongoing operating, support and

maintenance costs have not been considered. Importantly costs associated with the technical and service impositions Naked WDSL is likely to place on the network – including service assurance costs and service quality issues and increased complexity of network management – are likely to far exceed these initial development costs. The likely impact of Naked WDSL on Telstra's day-to-day network operations is set out in 3.4.5.

95. Although the amount of investment required to implement the identified system changes is significant, the greater impost would be the time and management effort required to implement these far reaching changes to what is a declining service delivered over legacy platforms and networks. Telstra is currently engaged in a wide ranging review of its systems and processes to facilitate the provision of new services over the NBN. Requiring Telstra to implement Naked WDSL would inevitably impede progress in developing new systems and processes to facilitate the development of such new services.

3.4.4. There is no possibility of cost savings resulting from Telstra supplying a Naked WDSL service

96. Telstra does not consider that either access seekers, or Telstra, would benefit from cost reductions arising from the requirement to provide Naked WDSL services. As the Commission notes, even if Telstra were to supply a Naked WDSL service, access seekers would still be required to pay for the underlying costs of the local loops and CAN infrastructure required to supply the service.

97. If the Commission remains minded to require Telstra to supply a Naked WDSL service – despite the likely significant capex and opex requirements such a service would entail – it would be necessary for the Commission to determine the line cost contribution required for the service.

98. At this time, Telstra does not consider it appropriate to make detailed submissions on the appropriateness of different pricing approaches for a Naked WDSL service. Nevertheless, it is important to consider the following:

    a. Naked ADSL services emerged in Band 2 and Band 1 ESAs in which the price for the underlying input (ULLS) was set lower than the WLR service, which was nationally averaged.

    b. The availability of WDSL services (and, presumably, a new Telstra supplied Naked WDSL service) is far more widespread than is the case for ULLS-based services. Telstra supplies WDSL services in more than 2,000 ESAs. In comparison, ULLS is generally only taken up in a subset of Band 1, 2 and 3 ESAs.

    c. Assuming the Commission applies the same costing methodology for the line component of a Naked WDSL service as it does for the line component of other fixed line access services (WLR and ULLS), then the average cost of the lines upon which a Naked WDSL service could be supplied (which would include lines fed by expensive remote cabinet equipment) would necessarily by higher than for Band 1, 2 and 3 ULLS lines.

    d. If the Commission set a single, national charge for Naked WDSL services, it would invariably result in a line cost component higher than the ULLS price in Band 1, 2 and 3.

99. The key point is that Naked WDSL has emerged in metropolitan areas, where a de-averaged ULLS price has enabled access seekers to offer a competitively priced service. Given that the Commission is focused on the prospect of a Telstra supplied Naked WDSL service being taken up in areas where ULLS-based services are not available (principally in remote and regional areas) the same cost favourable disparities are unlikely.

100. Telstra's preliminary view is that it is unlikely that any of capex and opex costs identified as required for Telstra to provide Naked WDSL could be offset through savings. If Telstra were required to provide a Naked WDSL service, it is unlikely any cost saving could be achieved or PSTN network infrastructure efficiently redeployed in the event end users took up the service.

101. The Commission appears to raise the prospect that if a Naked WDSL service were required to be made available, more efficient use could be made of existing infrastructure:[30]

102. *Currently, end-users on Telstra wholesale ADSL-based services are required to purchase a PSTN service regardless of whether they want a fixed line telephone service. This is unlikely to represent an efficient use of infrastructure as the infrastructure is being utilised for a low value use.* Telstra does not consider this statement to be correct. On the contrary, it is quite clearly inefficient for Telstra to bypass the PSTN infrastructure that is deployed on the network (upon which its network management and service provisioning systems depend), and which is relied on by it ADSL services.

103. From a technical perspective a Telstra supplied Naked WDSL service would involve the disconnection of the Plain Old Telephone Service ("**POTS**") connection or POTS card at the exchange. With the cabling arrangements for ADSL in the exchange, the POTS splitter in the DSLAM is no longer jumpered to the POTS switch and there is only a MDF jumper from the DSLAM to the access line. Even though the PSTN network equipment connected to the end user's line would cease to be utilised, the expense in removing the exchange-based jumpers would be greater than any potential savings or benefits. Further, removing the PSTN equipment would increase the cost and complexity of churning an end user with a Naked WDSL service to a PSTN, PSTN/LSS or PSTN/DSL service combination, if the end user chose to change service providers in the future.

104. Simply put, given the fact that PSTN infrastructure is in place, it would be inefficient and uneconomic to redeploy that infrastructure even if end users did not value it and chose a Naked ADSL service if one were made available. There is no scarcity of PSTN access services such that redeploying certain infrastructure could make basic access services available to other end users who may value it more. Even if that were the case, the nature of PSTN infrastructure would mean that it would be entirely impractical and uneconomic to remove and relocate PSTN exchange hardware in the event Naked WDSL was introduced (particularly as it would likely constitute only a small fraction of SIOs at a given exchange). Simply put, there is no efficiency gain in requiring Telstra to re-develop its network and processes to remove the availability of a service that is already in place.

3.4.5. Ongoing network and service impacts of providing Naked WDSL services

[30] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012, p 32

105. Even if Telstra were to undertake the significant investments required to provide a Naked WDSL service, the provision of these services on the network is likely to have implications for Telstra's management of the PSTN CAN. For example, removing the requirement for an active PSTN service to be underlying WDSL services will likely result in a greater number of line faults on the PSTN CAN.

106. Deterioration of joints in local loops results from corrosion caused by moist air and water ingress to cables. In order to maintain reliable electrical conduction through the joints, the use of a wetting current of several milliamps enables the joint to be remade through the oxide layers that develop, thus maintaining continuity. A further confirmation of this is that lifting and replacing the telephone handset several times is a known measure for rectifying some types of joint problems on ADSL and POTS services.

107. As set out in Box 2, BDSL services, based on SHDSL, utilise DSLAMs with the capability to provide a continuous wetting current from the exchange to a sink in the SHDSL customer modem. However, neither Telstra's ADSL DSLAMs nor the end user ADSL modems are capable of supplying or receiving a wetting current. ADSL services rely on the presence of the underlying PSTN voice service to perform the wetting function.

3.4.6. Impact of Naked ADSL on Service Assurance Costs

108. Service assurance is a critical aspect of service provision. Assurance is the process of monitoring network and service performance on an ongoing basis and responding to specific customer complaints in order to identify and rectify faults. For example, assurance activities include (but are not limited to):

    a. ongoing automated testing of copper access lines (through the testing equipment located in the PSTN switches) – for proactive fault analysis;

    b. ongoing automated testing of ADSL performance on the access line and the backhaul – to identify systematic degradations;

    c. testing and diagnosis of escalated ADSL and POTS faults that may be in the CAN or customer premises;

    d. field work (truck rolls) to carry out more localised and detailed testing at the exchange, customer premises, and intermediate points to identify, locate and repair faults (if possible).

109. Assurance costs are a major component of Telstra's cost of provisioning copper based services.

110. A requirement to provide Naked WDSL services would increase service assurance costs faced by Telstra. As detailed below, 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 WDSL services.

111. In assuring standard WDSL services, Telstra relies on the metallic line testing ("**MLT**") test heads in the exchange PSTN switches to detect and locate many of the most common line faults that affect both the POTS and the ADSL parts of the service.

112. If Telstra were unable to utilise the MLT capabilities of the PSTN equipment, automated assurance and line testing would be limited to the testing capability of Telstra's ADSL DSLAMS. This capability is limited to reporting ADSL service performance parameters, which provides for the identification of only a small subset of line faults that can impact an ADSL service.

113. An alternative approach to line testing in the absence of MLT is to utilise enhanced ADSL based testing capabilities based on reflectometry (also referred to as Single Ended Line Tests ("**SELT**")). SELT uses the ADSL in-band tones to perform reflectometry measurements on the access line. SELT is used by some access seekers who have deployed Naked ADSL over ULLS.

114. SELT technology is available as an additional feature on some DSLAM types. For example, within Telstra's network, ISAM DSLAMs are able to perform these tests, however older DSLAM types such as CMUX and AM31 and AM35 DSLAMs cannot perform these tests.

115. Telstra has investigated the use of SELT for ADSL assurance. However, after extensive testing, Telstra concluded that the main deficiencies of SELT are:

    a. It cannot distinguish between fault conditions and normal non-fault network conditions such as bridged taps.

    b. It is very inaccurate and often wrong on long lines. Unfortunately many more ADSL-affecting faults occur on long lines than on short lines.

    c. A particularly common fault that can dramatically reduce ADSL rate is foreign battery, caused when there is an electrical path to earth via another pair in the cable. It is not possible to pick up this type of fault with SELT as an ADSL test head has no earth reference and fails completely to identify foreign battery.

116. The limitations of SELT are widely recognised. Recently the Broadband Forum, the prime body for xDSL testing standards, has recognised the need for MLT testing with naked xDSL and has developed WT-286 *Testing of Metallic Line Testing (MELT) functionality on xDSL Ports* for that purpose.[31]

117. For the above reasons Telstra continues to rely on the MLT provided by its PSTN switches to identify and locate faults. Without reliable copper testing (and the ability to ask the end users if the telephone still works), Telstra's assurance costs increase significantly. The decision of whether to send field staff to an end user's premises (i.e. a truck roll) is based on a separation of ADSL faults (usually in the customer premises or at higher layers in the equipment) from copper faults in access cables which are usually identified from POTS testing. Without POTS testing Telstra would be required to undertake a greater number of truck rolls as it would not have the ability to determine the location of the fault.

[31] See further, http://www.broadband-forum.org/technical/technicalwip.php.

3.5. The provision of WDSL in conjunction with a restricted WLR service

As an alternative to a requirement to provide Naked WDSL, the Commission also puts forward the option of requiring Telstra to provide a limited functionality WLR service in conjunction with a standard WDSL service, providing a "hybrid" Naked WDSL solution. For the following reasons, Telstra does not consider that the Commission has the power to require Telstra to provide a modified WLR service (in the context of the WDSL FAD process), which would require Telstra to incur significant development costs and would result in a product that can be effectively replicated by options within the existing WLR service.

3.5.1. The Commission's power to require Telstra to provide a modified WLR service

118. As set out above, the Commission's power to require an access provider to extend or enhance the capability of a facility in a FAD is limited to the facilities by means of which ADSL is provided.[32] To require Telstra to provide a modified WLR service would require the extension or enhancement of facilities by means of which WLR and not ADSL is provided**.** Given this, the Commission has no power to require Telstra to make those extensions or enhancements.

119. The requirement to provide a limited functionality WLR service is outside the scope of the WDSL FAD process. In effect the Commission would be requiring Telstra to develop a new wholesale service. More importantly, the Commission would be requiring Telstra to develop a new service where there is already a declared service (WLR) in place, and doing so in the context of a FAD process regarding a different service (WDSL).

3.5.2. Costs of providing a reduced functionality WLR service

120. The Commission notes in the Issues Paper that:[33]

> *The telephone service component of 'Pure DSL' appears similar to Telstra's "InContact" service. This does not include a charge for telephone line costs but allows incoming and emergency calls. This service is currently only available to eligible concession card holders, home customers with outstanding debts, and homeless refuges. The service is only offered where available and technically feasible.*
> *As with 'full' unbundling, if it chose to permit a 'hybrid' unbundling implementation the ACCC would need to ensure that Telstra recovered all relevant costs associated with providing a 'stripped back' line rental product.*

121. Telstra submits that the costs of supplying an InContact-like WLR service would be no less than the current WLR service price.

122. In order to provision InContact, Telstra has been required to modify a significant number of systems and processes (including front of house ordering and customer service processes) in order to pre-provision a number of PSTN network features that restrict the functionality of the service. Fundamentally, the network infrastructure, systems and processes required to provide a full service PSTN basic access service are also required to provide an InContact service.

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[32] See section 152BC(3)(d)
[33] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012, p 29

123. Further, providing an InContact-like service for the purposes of a Hybrid Naked ADSL service would be an inefficient use of dialable number ranges, for which Telstra has to pay the ACMA.

3.5.3. WLR acquirers can already limit the functionality of an end user's WLR service

124. It should be noted that any WLR access seeker could today, if they chose to, provide an analogous service to InContact by limiting the functionality provided to an end user.

125. Wholesale customers are able to apply Network Access Barring to end user services over WLR. By applying particular network access barring codes to an end user's WLR service, a wholesale customer could mimic the functionality of InContact. Supplied in conjunction with a WDSL service, this would allow access seekers to provide a comparable bundled service to that suggested by the Commission in Option 3.

126. The range of call barring options available to wholesale customers are set out in Telstra's Customer Terms:

> *9.1 We offer the following permanent barring options, where it is technically feasible:*
>
> *(a) Emergency – we bar all outgoing calls except calls to 000 and to our customer service numbers;*
> *(b) Local – we bar all outgoing calls except calls to 000, to our customer service numbers, to local calls, to 1800 numbers, to 13 numbers and to make an operator assisted reverse charge call (if you are in the extended zone, you can also make calls within the extended zone and to your community service town); or*
> *(c) Local and Operator Assisted – we bar all outgoing calls except calls to 000, to our customer service numbers, to local calls, to 1800 numbers, to 13 numbers and to operator assisted calls (including reverse charge calls); or*
> *(d) 1800 – we bar all outgoing calls except calls to 000, to our customer service numbers, to 1800 numbers or operator assisted reverse charge calls; or*
> *(e) International barring – we bar outgoing international direct calls (including 0011, 0015 and 0018); or*
> *(f) Operator Assisted barring – we bar outgoing operator assisted calls (reverse charge calls remain available); or*
> *(g) Premium call barring: we bar outgoing calls to InfoCall 190 numbers; or*
> *(h) International and Operator Assisted Barring: we bar international direct calls (0011, 0015 and 0018) and operator assisted calls (reverse charge calls are still available); or*
> *(i) International and Premium Barring: we bar international direct calls (0011, 0015 and 0018) and outgoing calls to InfoCall 190 numbers.*

127. Telstra is not aware of WLR customers currently offering their end users reduced functionality WLR services by implementing these network barring features.

3.6. Likely demand for a Telstra Wholesale-supplied Naked ADSL service or a limited functionality WLR, WDSL bundle

128. Telstra does not consider that the likely demand for a either a Naked WDSL service or an "Option 3" service bundle is likely to be significant. This is because:

a. Telstra has no plans or intentions to deploy a retail Naked ADSL service. Therefore the take-up of the service will be limited to non-Telstra retail end users.

b. Access seekers already have access to the ULLS, which enables them to provide a Naked ADSL service to end users. Further, and as noted by the Commission, ULLS acquirers offer resale Naked ADSL services to third party service providers.

c. Almost [c-i-c commences] [c-i-c ends] of all end users with a WDSL-based service are in ESAs in which access seekers have deployed competitive DSLAM infrastructure. These end users could already acquire a Naked ADSL service if they wished to. WDSL Therefore the most likely market for a Telstra supplied Naked ADSL service will be for end users outside of the competitive footprint. In the case of end users with WDSL-based services outside of the competitive DSLAM footprint, this is fewer than [c-i-c commences] [c-i-c ends] end users as at June 2012.

d. In areas where Naked ADSL services have been deployed and are available, only a small fraction of end users with a DSL service have taken a Naked ADSL service. In areas where Naked ADSL services are available a clear majority of end users choose to acquire their DSL services in conjunction with a Telstra PSTN basic access service – through a combination of either LSS and PSTN basic access or Telstra ADSL and PSTN basic access. Even among end users who acquire ULLS-based services, Naked ADSL is only acquired by a minority, with the majority of end users supplied with a PSTN-emulated voice service along with their ADSL service.

e. Further, end users who acquire WDSL services typically do not bundle this service with the underlying PSTN service. Only a minority of end users with a WDSL service are also supplied with a WLR service from the same service provider ([c-i-c commences] [c-i-c ends] as at June 2012). The breakdown of WDSL services by basic access provider is set out in the following table:

[c-i-c commences]

[c-i-c ends]

These figures call into question the likely demand for a Naked WDSL service, which requires end users to either do without a voice service or have it provided as a VoIP service from their same service provider (as the provider of their ADSL service).

f. As Telstra notes in section 3.5.3, WLR customers can already choose to limit the functionality of their end users' basic access services. Telstra is not aware of any wholesale customer that offers a reduced functionality WLR service to their end users. It

is therefore unclear that there would be any more than negligible demand for a pre-provisioned reduced functionality WLR service.

g. The deployment of the NBN will result in the accelerated decline in take-up of WDSL services (and PSTN CAN-based services in general) as end users transition to the new access network as it is rolled out.

04 Points of Interconnection for the Wholesale DSL service

129. In the Issues Paper, the Commission considers that requiring Telstra to provide interconnection for WDSL services at an additional number of locations may be in the LTIE. The Commission (in considering submissions from interested parties to the Discussion Paper) sets out three broad approaches to the provision of PoIs for WDSL services (on Telstra's DSL network):

    a. The first approach is the status quo – that is, the centralised network topology of 14 PoIs (2 in each state capital, as well as Canberra) currently deployed by Telstra that reflects the fundamental network architecture it uses for the supply of ADSL;

    b. The second approach proposed is for the Commission to specify Points of Interconnect ("**PoIs**") that may be different from those that are currently deployed by Telstra. This would require Telstra to reengineer its ADSL network to provide for a highly decentralised PoI model, such as the 121 PoI locations used by NBN Co; and

    c. The third approach raised would require Telstra to establish an additional PoI for a particular WDSL access seeker at a particular point in the network, at the request of that access seeker.

130. For a number of reasons Telstra considers that adopting either of the Commission's proposals, set out in (b) or (c), would result in an inefficient use of, and investment in, infrastructure, would (if required) increase the costs of supplying WDSL services generally (as well as Telstra's retail DSL services) and would increase Telstra's overall costs of managing its network and this would not be in the LTIE or consistent with the statutory criteria. At the same time, Telstra does not think that the range of possible benefits set out by the Commission from increasing the number of WDSL PoIs is likely to be realised.

131. The remainder of this section provides:

    - an overview of the essential network equipment required to provide a DSL service (either to BigPond end users or to wholesale ISPs);

    - an overview of Telstra's ADSL network, from the DSLAMs to the current POIs and connections to wholesale customers' networks and the principles of Telstra's network design; and

    - The issues involved if Telstra were required to provision new PoIs at more distributed points in the network including the costs for additional equipment, additional transmission, development of new routing solutions, and development of new systems solutions.

4.1. Telstra's ADSL network architecture and the provision of WDSL services

132. Within this section, Telstra sets out the essential network elements it uses to provide ADSL services to both itself (i.e. BigPond end users) and WDSL customers – in particular those network elements that must be present between an end user and a PoI in order to provide a

WDSL service. Evidence is then set out showing the reasons why Telstra's relatively small number of PoIs represents an efficient network design.

4.1.1. Essential network elements required for the provision of a ADSL service

133. Understanding the relative efficiency of a network topology and how changes (such as additional PoIs) may impact on network performance and the costs requires a fundamental understanding of the essential network elements required to provide services and the characteristics of these network elements. In broad terms (and at a highly simplified level) the essential network elements required to deliver an ADSL service are:[34]

    a. An unbroken metallic telecommunications wire connecting the end user's premises to a 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 operational support system ("**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 customer's 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 OSS and business support system ("**BSS**"), both of which are necessary to enable the individual network elements to interoperate with each other.

4.1.2. It is not possible to unbundle a WDSL service

134. Although it is not entirely clear, throughout the Issues Paper, the Commission appears to consider that a WDSL service is a combination of an access service from the DSLAM to the end user and a backhaul service from the DSLAM to the ISP. On the basis of such an understanding the Commission appears to suggest that the service could be split to allow interconnection closer to the end user DSLAM (without requiring the duplication of higher network elements).

135. This appears to reflect a fundamental misunderstanding of how ADSL networks operate and how ADSL services are supplied. An ADSL service is an end-to-end service providing a connection from the end user's premises to an ISP's network at a PoI. It is entirely different from unbundled services such as ULLS and LSS, which simply provide access to infrastructure,

[34] Statement of [c-i-c commences] [redacted][c-i-c ends] paras 20, 49

requiring access seekers to deploy their own equipment to provide a service (such as ADSL) on that infrastructure.

136. Simply put, it is not possible to "unbundle" a WDSL service in order to allow interconnection between the DSLAM and the BRAS/IGR. ADSL 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. [35] The essential network "smarts" required for the provision of a WDSL service reside in the BRAS devices in the network.[36] In addition to a BRAS device, an IGR is required to split the traffic to an appropriate point of interconnection in the network.[37] In addition to providing routing and traffic management services, IGRs provide the physical port infrastructure necessary for a PoI.

137. Therefore, irrespective of where the PoI is located, (and as set out in section 4.1.1) the following network elements must sit between an end user and the interconnecting service provider's network:[38]

    a. An unbroken local loop;

    b. A DSLAM;

    c. A BRAS; and

    d. An IGR – with necessary transmission links connecting each of these network elements as well as necessary OSS and BSS systems

138. Without any of these elements, it is not possible to provide an ADSL service. By way of example, the information transmitted from the DSLAM to the rest of the network is simply an aggregated stream of end user ADSL signals. Without input from a BRAS device, these signals contain no routing or session information ("header" information) required to route the end user traffic to the relevant ISP's network. Similarly, without an IGR device there is no physical location at which an ISP (BigPond or a WDSL customer) can interconnect with the ADSL network in order to pick up the traffic and provide services to its end users.

139. Therefore in addressing the Commission's proposals, it is essential to understand that there is no reduction in the type or required number of BRAS or IGR network elements by increasing the number of PoI locations. If anything, many more network elements and additional transmission capacity would be required, relative to the centralised PoI scenario,[39] giving rise to the reduction in the use of those network elements and a loss of efficiency (increasing costs).

140. The only alternative to re-deploying or adding additional BRAS and IGR equipment in order to establish a greater number of PoIs would be to "trombone" network traffic from existing PoIs

[35] Statement of [c-i-c commences] [redacted] [c-i-c ends] para 57
[36] Statement of [c-i-c commences] [redacted] [c-i-c ends] para 36
[37] Statement of [c-i-c commences] [redacted] [c-i-c ends] paras 39, 40
[38] Statement of [c-i-c commences] [redacted] [c-i-c ends] paras 20, 57
[39] Statement of [c-i-c commences] [redacted] [c-i-c ends] para 61

to additional points in the network. Tromboning is clearly an inefficient use of network infrastructure.[40]

141. If access seekers do wish to unbundle the constituent elements of a WDSL service, they are able to do so through ULLS and LLS, which provide access seekers with the ability and right to "interconnect" to the Telstra PSTN CAN at the local exchange level for the purposes of providing DSL and other services to their end users. The significant ongoing growth in the take up of unbundled services relative to WDSL services highlights the fact that many access seekers, in a significant number of ESAs have chosen to deploy their own DSL networks, bypassing Telstra's WDSL services.

4.1.3. Telstra's existing network and PoI architecture represents an efficient network design

142. Telstra's ADSL network is described in the statement of [c-i-c commences] [redacted][c-i-c ends], attached. In broad terms, the key elements present in Telstra's DSL network are common with other DSL networks operated by service providers in Australia and overseas.[41] In simple terms, the Telstra ADSL network comprises:

    a. Access elements – PSTN copper loops connecting the end user's premises to DSLAM devices located either in exchange buildings or located in remote CAN cabinets (depending on the underlying topology of the PSTN CAN);

    b. DSLAM devices to communicate with end user ADSL modems and aggregate ADSL traffic from a number of end-users to a transmission path;

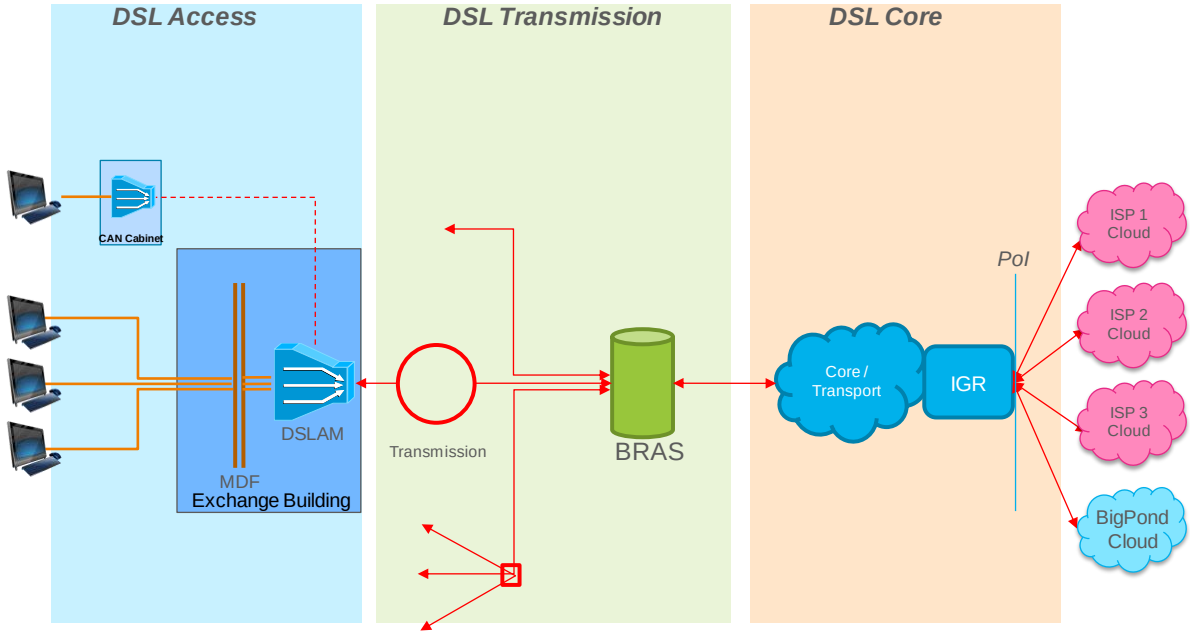
    c. Transmission elements – used to aggregate and efficiently transport DSL traffic from DSLAMs to their associated BRAS devices. The transmission of data between DSLAMs and BRAS devices will typically involve a number of transmission elements and aggregation devices as the traffic is sent between the highly disaggregated access elements and the centralised BRAS devices; and

    d. Centralised, high capacity and highly redundant core elements (including IGRs) – which enables efficient interconnection to other networks (i.e. BigPond and WDSL customer networks).

143. A stylised representation of Telstra's DSL network is set out below in Figure 4.1:

[40] Statement of [c-i-c commences] [redacted][c-i-c ends] para 62
[41] Statement of [c-i-c commences] [redacted][c-i-c ends] para 63

Figure 4.1: Stylised representation of Telstra's DSL network, highlighting different network elements



144. The following key facts are relevant:

a. Telstra provides ADSL services to end users (whether retail end users or the end users of WDSL customers) in more than 2,800 ESAs, using more than 14,000 DSLAM devices. The number of DSLAMs required to provide services at a given ESA will vary from a single DSLAM to over 100, and depends on the number of end users served from that ESA, and the topology of the PSTN CAN.[42] If a significant proportion of end users within the ESA are served from remote cabinets, then (typically) a greater number of DSLAMs will be required than if customers in an ESA were only served from an exchange building.[43] A variety of DSLAM types are used in the network, including ATM-based DSLAMs and Ethernet-based DSLAMs.[44]

b. Depending on the type of DSLAM and the location of the DSLAM, traffic from it may traverse a number of different transmission elements and transmission types (for example, ATM and Ethernet-based transmission infrastructure, direct fibre and ring-fibre systems) prior to reaching the BRAS device associated with that DSLAM.[45]

c. Telstra employs around [c-i-c commences] [redacted][c-i-c ends] BRAS devices in the network. Different BRAS devices are used to support ATM-based DSLAMs (A-BRAS devices) and Ethernet-based DSLAMs (E-BRAS devices). BRAS devices are located in [c-i-c commences] [redacted][c-i-c ends] exchange buildings.[46]

[42] Statement of [c-i-c commences] [redacted][c-i-c ends] paras 27, 29
[43] Statement of [c-i-c commences] [redacted][c-i-c ends] para 29
[44] Statement of [c-i-c commences] [redacted][c-i-c ends] paras 30 - 32
[45] Statement of [c-i-c commences] [redacted][c-i-c ends] para 46
[46] Statement of [c-i-c commences] [redacted][c-i-c ends] para 37

d. Telstra employs around [c-i-c commences] [redacted] [c-i-c ends] devices in the network. [c-i-c commences] [redacted] [c-i-c ends].[47]

145. In deploying ADSL services, Telstra has adhered the following principles:[48]

a. Provide access to DSL services to end users connected to the PSTN where economically feasible.

b. Utilise traffic engineering principles to dimension the route carrying packet data to facilitate the efficient aggregation of end user traffic for carriage on higher capacity transmission and network elements (see further Box 4.1).

c. Ensure redundancy of core network elements to provide for service resilience and continuity in the event of element failure.

146. A highly aggregated, centralised core (and, therefore centralised PoIs) is efficient because it enables Telstra and WDSL customers to take advantage of the properties of DSL traffic (which is highly bursty and amenable to aggregation) and insights from Queuing Theory, which suggests that in conditions like those present in DSL networks, a single larger queue (or network element/transmission pipe) will be more efficient and less amenable to congestion than a series of smaller parallel elements, even if in aggregate those elements have an equivalent capacity to the single large element.[49] This critical concept is explained further in Box 4.1.

[47] Statement of [c-i-c commences] [redacted] [c-i-c ends] para 41
[48] Statement of [c-i-c commences] [redacted] [c-i-c ends] para 56
[49] Statement of [c-i-c commences] [redacted] [c-i-c ends] para 42

Box 4.1 Queuing theory, aggregation and efficient network design of an ADSL network

It is a general principle of network design and in particular packet network design, that the aggregation of highly variable traffic (where practicable) will be more efficient and cost effective than the use of a disaggregated network topology.

This principle is underpinned by a finding arising from the mathematics of Queuing Theory. A key insight for the deployment of data networks that is provided by Queuing Theory is that where traffic is highly variable (i.e., a customer's peak throughput is much higher than average throughput) and "bursty" (that is, even the aggregate traffic does not flow evenly) then data from a given number of end users will be more efficiently transported (i.e. require less transmission capacity per customer) when aggregated onto a single transmission element, than if the same data were transmitted over a series of smaller transmission channels.

The following example helps to illustrate how this concept works in practice.

- Consider first Case A; suppose there are 10 DSLAMs, each connected to its own 10Mbps transmission link. Also suppose that these DSLAMs serve 10 customers each. Finally, assume that each customer is provisioned with a service that provides a maximum of 5Mbits/s throughput on the access ADSL line, and that each customer uses on average 0.25Mbps over the busy hour (i.e. each customer on average accesses at 5Mbps for 5% of the time). Given these assumptions, the average utilization of each 10Mbps link will be only 25%.
- Given the bursty nature of DSL traffic, customers connected to these DSLAMs are unlikely that each will send or receive data at the same time. However due to the relatively small transmission capacity on each DSLAM, just 2 customers seeking to download content at the same time could fully utilise the transmission capacity at the DSLAM. If more than 2 users sought to access data at this time, they would experience reduced throughput. For example, if 3 users accessed data at the same time, their throughput would drop from 5Mbpsto 3.33Mbps. The probability that 3 or more customers access at once is approximately 1.4% (based on Poisson statistics with mean = 0.5 customers accessing the link at any given time).
- Now consider Case B, where the same 100 customers are served by a single DSLAM, with a transmission capacity of 100Mbps. In this example, it would take 30 customers to cause a reduction in download rate to 3.33Mbps as occurs in Case A when only 3 customers seek access simultaneously.
- The chances of 30 customers all using the network at the exact same time, are much less than for 3 customers as in Case A (recalling that these low probability events are roughly Poisson rather than Normally distributed). Therefore even though the aggregate capacity of the single, large capacity DSLAM/link in Case B is equivalent to the sum of capacity across the 10 smaller capacity DSLAM/links in Case A, the chances of an end user experiencing reduced throughput are much less when the single large DSLAM/link is used. In fact, the 100 Mbps link in Case B could carry 380 customers and still have only a 1.4% probability of 30 or more simultaneous accesses. This equates to an increase in relative efficiency by a factor more than 3.

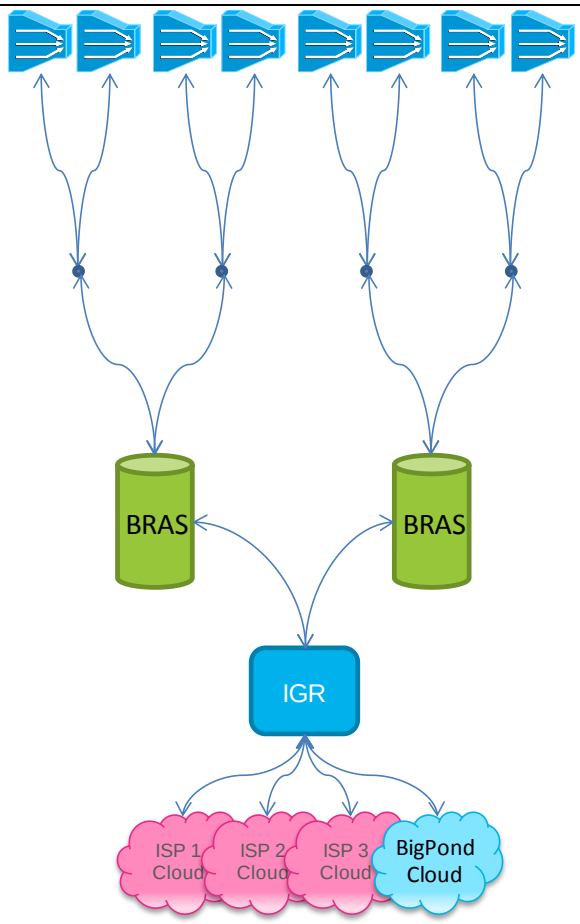
Although a highly simplified example, the above helps to illustrate why operators of DSL networks (including Telstra) seek to aggregate traffic from DSLAMs to progressively higher capacity links and network elements. This example also illustrates two important aspects of traffic engineering:

- The necessary task of dimensioning network elements with sufficient headroom to accommodate the peak download rate required by customers is relatively easier for high capacity elements than for lower capacity elements.
- In dimensioning networks, the average usage – rather than the nominal maximum access rate – of the network by end users in busy hour periods is the critical factor. As average usage by customers increases, greater network capacity is required to accommodate peak demand.

147. Figure 4.2 below provides an alternative view of Telstra's ADSL network. Again, this is a highly stylised representation, and abstracts from the complexity of the actual network to illustrate the aggregated network architecture.

148. The figure illustrates that there are many more DSLAMs in the network than BRAS devices (and more BRAS devices than IGRs).[50] BRAS devices have a capacity for many thousands of DSL end users. This is not a unique or particular feature of the BRAS devices Telstra has deployed within its network. Irrespective of the BRAS manufacturer or model, BRAS devices are designed to accommodate traffic from multiple DSLAMs.[51] Similarly, IGR devices are designed to accommodate traffic from multiple BRAS devices.[52]

Figure 4.2: Stylised representation of Telstra's DSL network, highlighting aggregation of network traffic from access to core



149. There are several advantages of this network design for both Telstra (as service provider) and WDSL customers:

[50] Statement of [c-i-c commences] [redacted] [c-i-c ends] paras 35, 39
[51] Statement of [c-i-c commences] [redacted] [c-i-c ends] para 35
[52] Statement of [c-i-c commences] [redacted] [c-i-c ends] para 39

a. By taking advantages of the aggregation properties of DSL traffic (see Box 4.1), Telstra is able to employ relatively fewer BRAS and IGR devices in the network, than if a more disaggregated network structure was used;[53]

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) to provide their end users with WDSL-based services in anyone of more than 2,800 ESAs; and

d. Access seekers also gain efficiencies from high capacity PoI locations that would be lost if a greater number of PoIs was used.[54]

4.2. Alternative PoI arrangements

150. This section sets out Telstra's views on the alternative PoI arrangements raised by the Commission in the Issues Paper – establishing a greater number of more geographically disaggregated PoIs (such as the 121 used by the NBN Co), or establish PoIs, on demand, for a given access seeker.

4.2.1. Geographically disaggregated PoIs

151. Within the Issues Paper the Commission raises the prospect of extending the required number of PoI locations to 121 – matching the locations used by the NBN Co:[55]

> *Providing additional points of interconnection for the wholesale ADSL service could also encourage investment in transmission infrastructure which can also be used to interconnect with the NBN (provided such points of interconnection are not additional to those 120 points of interconnection provided for the NBN network).*

152. In Telstra's view the assessment of where NBN Co should establish PoIs for an as yet to be built network, serving no customers and no end users, is an entirely different proposition and not at all relevant to the consideration of whether Telstra should be required to re-engineer its network from a highly efficient, centralised PoI structure to a decentralised PoI structure. Not only would this require extensive changes to how Telstra supplies DSL services to itself and others, but wholesale customers would be required to make extensive changes to their own networks in order to acquire the service.

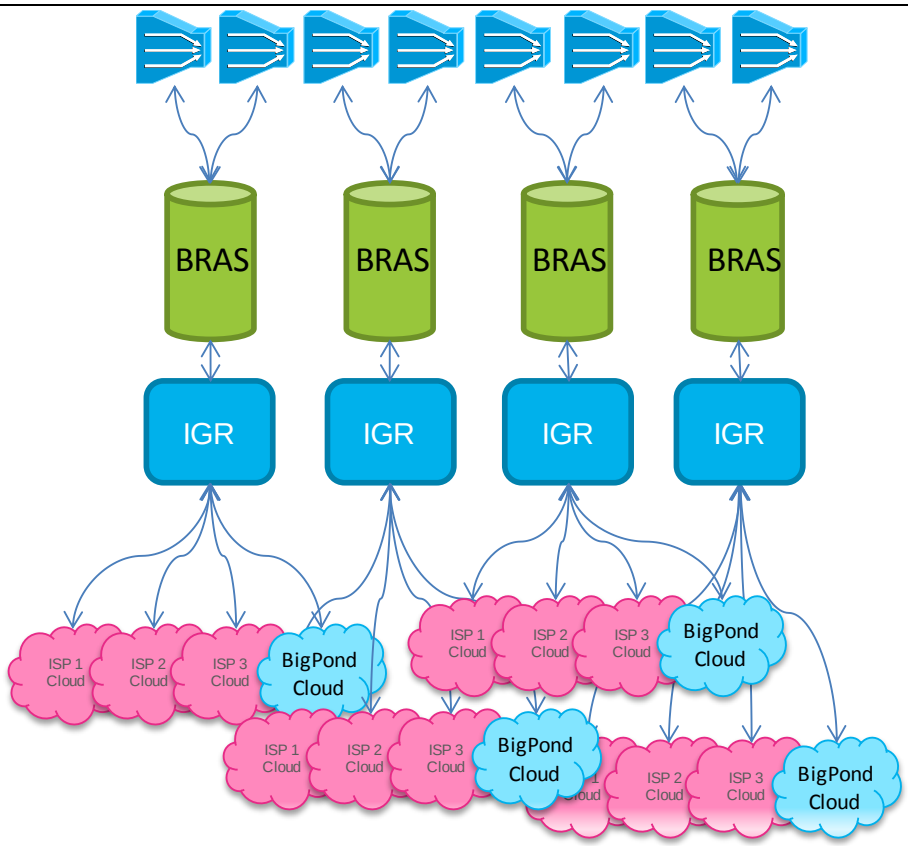
[53] Statement of [c-i-c commences] [redacted] [c-i-c ends] paras 35, 39, 61, 62
[54] Statement of [c-i-c commences] [redacted] [c-i-c ends] para 61
[55] ACCC, Public inquiry to make a final access determination for the wholesale ADSL service - Issues Paper, July 2012, p 37

153. As noted in section 4.1.3, currently Telstra is able to provide ADSL services using only around [c-i-c commences] [redacted][c-i-c ends] BRAS devices on the network and less than [c-i-c commences] [redacted][c-i-c ends] IGR devices, providing around 3 million end user services to Telstra's retail ISP (BigPond) and WDSL customers at 14 PoI locations.[56] This is a highly efficient network architecture, which ensures both high utilisation and redundancy of core network elements and provides ISPs with an efficient means of accessing end users located in more than 2,800 ESAs from a limited number of PoI locations.

154. Reengineering the network to provide a greater number of PoI locations would require moving these BRAS and IGR devices closer to the end user DSLAMs. This would require the deployment of a far greater number of BRAS and IGR devices than is currently required in the network and it would necessarily reduce utilisation rate of these devices, meaning that Telstra would be required to install more BRAS and IGR devices to provide DSL services to itself and wholesale customers.

155. Figure 4.3 represents the Telstra ADSL network if Telstra were required to establish a higher number of PoIs (such as at the 121 NBN Co PoI locations)

Figure 4.3: Stylised representation of Telstra's DSL network if Telstra were required to establish a greater number (for example 121) of PoIs



[56] Statement of [c-i-c commences] [redacted][c-i-c ends] paras 37, 41

156. Not only would a greater number of PoIs result in Telstra incurring significant capital costs and incremental opex requirements to service a less efficient network design, a dispersed PoI topology would also result in greater costs and complexity for access seekers to access WDSL services:

    a. The inefficiency of deploying more dispersed PoIs would be compounded given that WDSL customers (and BigPond) have deployed their network facilities to interconnect at Telstra's present PoI locations. WDSL customers and Telstra BigPond would have to deploy more extensive networks in order to reach end users served by the new PoIs.

    b. Telstra supplies WDSL services to more than [c-i-c commences] [c-i-c ends] access seekers. Only a minority of these access seekers (possibly as few as three) would have network presence at each of these 121 PoIs. Requiring access seekers to interconnect at a greater number of more dispersed PoIs (e.g. 121) would require additional investments from access seekers, and would likely limit the availability of the service to only larger service providers.

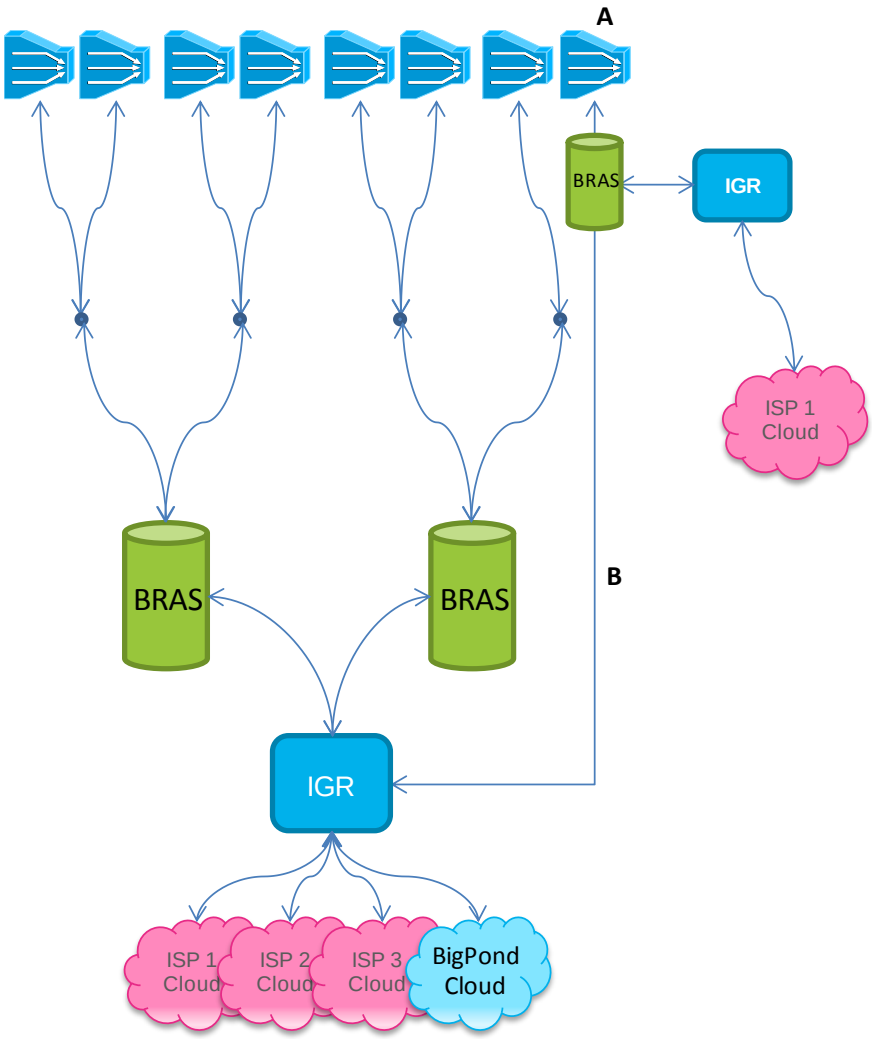
    c. Access seekers would also necessarily have to purchase a greater number of PoI connections and (in aggregate) a greater amount of AGVC/V-LAN capacity in aggregate to provide their end users with an equivalent level of service as experienced under present conditions.

    d. Further, requiring Telstra to establish additional PoIs for WDSL at the same locations as NBN Co's proposed PoIs, would mean that access seekers wishing to acquire both WDSL and NBN-based services, would require need to manage transmission network impacts of the uneven migration of their end users from WDSL to NBN services for over 121 transmission links (in effect it would be double this number, as each access seeker would require transmission link to interconnect at the Telstra PoI, as well as a second link for the NBN Co PoI in each location). This would present a significant engineering and traffic management challenge for any ISP.

4.2.2. Establishing additional PoIs at the request of an access seeker

157. As an alternative to a requirement for Telstra to establish a number of additional PoIs, the Issues Paper also raises the prospect of Telstra providing an additional PoI to a given access seeker on demand. The impact of this option on Telstra's ADSL network is illustrated in Figure 4.4:

Figure 4.4: Insertion of additional PoI to serve ISP 1 end users located within a given ESA



158. The following would result from establishing a new PoI at ESA A for the ISP 1 (as illustrated in Figure 4.4):

    a. Telstra would have to deploy BRAS device(s) at ESA A in order to authenticate and terminate end user sessions for DSLAMs located in ESA A. Depending on the PSTN CAN/DSLAM topology within ESA A, it is likely that at least two BRAS devices would be required, an A-BRAS and an E-BRAS, as there may be a mix of both ATM and Ethernet DSLAMs within ESA A.

    b. The BRAS devices used by Telstra have a high capacity and would be significantly underutilised if deployed as above. Telstra estimates that a smaller BRAS device, more suitable for this task, would cost in the order of [c-i-c commences] [redacted] [c-i-c ends] to deploy. These costs do not include development costs. It should be noted however, that

precise estimates for the cost of deploying a BRAS for such a unique use case are difficult to determine.[57]

c. The BRAS devices installed would be required to have sufficient capacity to process all end user traffic served from DSLAMs within ESA A. Although only ISP 1 is seeking to access the network at this point, it is not possible to "split out" ISP 1 traffic, without the DSLAM traffic being connected to a BRAS.

d. All DSLAM traffic from ESA A would then be carried from the BRAS to an IGR device installed in ESA A to enable ISP 1 to interconnect to the network and to allow other traffic to be rerouted to the rest of the network. The IGR devices used by Telstra have a high capacity and would be significantly underutilised if deployed as above. Telstra estimates that a smaller capacity IGR would likely to cost in the order of [c-i-c commences] [redacted][c-i-c ends] to deploy. These costs do not include development costs. It should be noted however, that precise estimates for the cost of deploying an IGR for such a unique use case are difficult to determine.

e. Depending on the existing utilisation of space, power and air-conditioning within ESA A, additional capex costs may be required to establish the PoI at ESA A.

f. ISP 1 would be required to purchase AGVC/V-LAN capacity at ESA A in order to transmit traffic to and from the IGR. Relative to the amount of AGVC/V-LAN capacity required to provide a given quality of service for ISP 1's end users when aggregated to 14 PoIs (potentially each serving tens of thousands of ISP 1 end users), ISP 1 would require a significantly greater amount of AGVC/V-LAN capacity per end user when interconnecting at ESA A (see further Box 1).

g. All other traffic for other ISPs and BigPond served from DSLAMs in ESA A would continue to be routed to the existing PoIs. However, due to the fact that this traffic has already been "groomed" by the BRAS devices at ESA A, this traffic will not be able to share common aggregated transmission paths with un-groomed traffic from other ESAs. As illustrated in Figure 15, Telstra will be required to establish a new transmission path (labelled "B") to transmit ESA A traffic to the existing IGRs/PoI. This would be an inefficient investment in transmission infrastructure.

h. The establishment of the new PoI results in inefficient bypass of existing network elements. For example, the requirement to re-route traffic for Telstra retail and other ISPs will result in reduced efficiency in the utilisation of existing transmission infrastructure.[58]

i. ISP 1 would still have to maintain a presence at existing PoIs in order to pick up end user traffic served from other ESAs.

159. As the above points make clear, in terms of network engineering (and overall efficiency of service delivery), the establishment of additional PoIs closer to the end user DSLAM to serve only a subset of WDSL customers is an expensive, complex and inefficient solution.

[57] Statement of [c-i-c commences] [redacted][c-i-c ends] para 57
[58] Statement of [c-i-c commences] [redacted][c-i-c ends] paras 61, 62

160. [c-i-c commences]

[redacted]

[c-i-c ends]

05 General non-price terms and conditions

161. In this section, Telstra makes submissions in respect of the proposed non-price terms for a WDSL FAD and responds to the Commission's questions in section 9. For this purpose, Telstra has provided proposed amendments to Appendix E of the Issues Paper as set out in Annexure B of this document, together with explanations for those proposed amendments. In addition, Telstra makes some specific comments relating to the proposed non-price terms within this submission. Despite Appendix E of the Issues Paper not containing a definitions section, Telstra has made submissions on (and proposed amendments to) the relevant definitions from the DTCS FAD, on the basis that the Commission intended to include those definitions in Appendix E and that their exclusion was a mere oversight.

5.1. Billing and Notifications

Key points:

1. The terms of the FAD should only apply to the charges set out in the FAD.
2. Billing Disputes should be clearly and narrowly defined, given that the Commission proposes that Access Seekers may withhold payment if a Billing Dispute is notified.
3. Access Providers should be able to take immediate action to recover unpaid amounts as a debt due.

5.1.1. Definition of "Charge"

162. In order to ensure that the FAD covers the charges intended to be covered, the definition of "Charge" should be more narrowly defined. "Charge" should be confined to a charge set out in the FAD. That is because charges not the subject of the FAD will be covered by commercial agreements between the parties. In this regard, Telstra notes that the New Zealand Commerce Commission's Standard Terms Determination for Chorus' Unbundled Copper Local Loop Network Service – UCLL General Terms Public Version dated 7 November 2007 (UCLL Terms) similarly limit the definition of "Charge" to "all or (as the context requires) any amounts payable by the Access Seeker under the UCLL Terms." Similarly, the Wholesale Broadband Agreement ("**WBA**") limits "Charges" to those set out in the relevant components of the WBA (being the Price List or TTAS Product Description).

163. The remainder of the submission assumes that the above amendments to the definition of "Charge" will be made.

5.1.2. Definition of "Billing Dispute"

164. Telstra maintains that the definition of "Billing Dispute" should be confined to a dispute about an alleged inaccuracy, omission or error in a Charge in an invoice. Although the Commission

stated in the DTCS context that "a narrower definition may unnecessarily restrict the application of these terms",[59] to the extent that the dispute relates to something outside the proposed definition of Billing Dispute, the Access Seeker may avail itself of the general dispute resolution process in Schedule 4. Further, the proposed amendment in fact removes any uncertainty as to which disputes fall within the remit of the Billing Dispute procedures and those which are subject to the general dispute resolution procedures in Schedule 4. In addition, such an amendment is consistent with both the definition of "Billing Dispute" in the WBA, which defines a "Billing Dispute" as a dispute regarding "an error"[60] in an invoice and the UCLL Terms which defines an "Invoice Dispute" as a dispute regarding "a manifest error in either the Charges in an invoice or in the calculation of the amount of an invoice".[61] For the reasons indicated in at the beginning of this section, it is also important that this only relates to a Charge as limited in those paragraphs.

165. The current definition of "Billing Dispute" in the Interim Access Determination ("**IAD**") is unclear as to what it may cover, and is excessively broad in its potential scope, for two reasons.

166. First, the words "or an invoice" could be interpreted as covering charges which are not the subject of the FAD. Any billing dispute in relation to such charges should be covered by the commercial agreements in place between the parties and should not be dealt with by the FAD. This should be clarified in order to avoid uncertainty between the parties as to which terms apply to which services. Such uncertainty is not in the interests of either the Access Provider or the Access Seeker.

167. Second, it is arguable that the words "relating to a Charge" could include issues which should be subject to the general dispute resolution procedures in Schedule 4, not the Billing Dispute Procedures. The intent of the process should be to discourage inaccurate bills rather than encourage other disputes to be dealt with under this process. Given that an Access Seeker is entitled to withhold payment if it initiates a Billing Dispute (under clause 2.12), the circumstances in which it is entitled to do so should be limited to those set out above.

168. This amendment is consistent with the statutory criteria as the Access Provider's direct costs of providing access will increase if the Access Provider faces the risk of having to wait longer to recover invoiced amounts. For the same reasons, the current drafting is not in the Access Provider's legitimate business interests.

5.1.3. Taking action for unpaid amounts

169. Clause 2.7 should be amended so that an Access Provider does not have to wait 20 Business Days before taking action to recover an unpaid amount as a debt (in addition to any other rights that the Access Provider may have). Telstra wishes to emphasise that clause 2.6 of the IAD provides the Access Seeker with 30 Calendar Days in which to pay the invoice. Thus, in circumstances where a billing dispute has not been raised, the additional 20 Business Days' waiting time proposed in the IAD is contrary to the Access Provider's legitimate interest in the timely recovery of payment for services provided.

[59] Commission, *FAD for the DTCS – Explanatory Statement*, June 2012, p 49.
[60] WBA, cl B5.2
[61] UCLL Terms, cl 17.1.

170. The Access Provider's direct costs of providing access will increase if the Access Provider faces the risk of having to wait to recover invoiced amounts. Unless the other statutory criteria weigh in favour of the clause as drafted, the clause will not be consistent with the statutory criteria. However, the clause is not in the Access Provider's legitimate business interests. It is reasonable for the Access Provider to expect that it is to be paid invoiced amounts in a timely manner and if that does not occur, the Access Provider is entitled to seek to recover such sums without further delay. The ability to promptly recover invoiced amounts reduces the risk of non-payment and ultimately promotes the LTIE by enabling the efficient investment in infrastructure.

171. Furthermore, the right to take immediate action to recover unpaid amounts as a debt due and payable immediately is consistent with the terms required by NBN Co in its WBA and by BT in its Master Services Agreement for the Provision of Wholesale Products and Services dated 29 May 2009 ("**BT's MSA**").[62]

5.1.4. Responses to issues raised by the Commission

34. For the purpose of the wholesale ADSL FAD, are amendments required to the timeframe in clause 2.4 of Appendix E? If so, should the timeframes in clause 2.4 of Appendix E be consistent with the TCP Code? What if a new code is registered that provides a different timeframe?

172. Telstra submits that amendments to the timeframe in clause 2.4 of Appendix E are unnecessary and impractical. The timeframe of "no more than six Months" is subject to clause 2.5, which requires compliance with any applicable industry standard made by ACMA. Accordingly, even if a new code is registered with a different timeframe, the current drafting of the FAD accommodates any possible changes and as such, amendments are not required.

35. For the purpose of the wholesale ADSL FAD, should the timeframe for raising billing disputes be made consistent with the TIO timeframe?

36. For the purpose of the wholesale ADSL FAD, are amendments required to the timeframe in clause 2.14 of Appendix E

173. Telstra submits that the timeframe in clause 2.14 of Appendix E should not be extended beyond the 6 month period currently outlined in the clause, as this is neither necessary nor conducive to the timely resolution of billing disputes. In this regard, Telstra rejects the concerns raised by Herbert Geer[63] and AAPT[64] with respect to the TIO complaints procedure, because the inability of an Access Seeker to raise a billing dispute with a third party, (i.e. the Access Provider) will not affect the Access Seeker's personal obligation to provide all information and documentation in its control relevant to a dispute to the TIO for the purposes of investigating a complaint between the Access Seeker and its customer.[65] If the TIO requires further information from third parties, it will be able to obtain that information separately.[66]

[62] See WBA cl B4.4. Similarly, cl 5.4 of BT's MSA reserves BT's right to take action, without further notice, to recover on an unpaid amount.
[63] Herbert Geer submission in response to the February FAD Discussion Paper, p 14.
[64] AAPT submission in response to the February FAD Discussion Paper, p 11.
[65] See clause 5.1 of the TIO Constitution.
[66] Ibid.

37. For the purpose of the wholesale ADSL FAD, are further refinements required to clauses 2.4 and 2.16 in Appendix E?

174. Telstra submits that the Commission should not make further refinements to clauses 2.4 and 2.16 of Appendix E, as the concerns raised by Optus and Herbert Geer in relation to the relevant Model Terms clauses have been addressed.[67] That is, unlike clause A.5 of the Model Terms, clause 2.4 of Appendix E does not provide an exception for the billing of new services and unlike clause A.17, clause 2.16 provides set timeframes for the provision of information relevant to a dispute by the parties.

38. Is there a drafting inconsistency between clauses 2.6 and 2.12 in Appendix E? If so, what amendments are required to ensure consistency between these two clauses in the wholesale ADSL FAD?

175. Telstra submits that there is no drafting inconsistency between clauses 2.6 and 2.12 of Appendix E. Clause 2.6 is expressed as subject to clause 2.12, and both clauses make clear that disputed charges may be withheld if a billing dispute notice is given to the Access Provider by the due date for payment. Further, the second sentence of clause 2.6 (which is where the alleged inconsistency raised by Herbert Geer arises) is in fact targeted at a separate issue, providing that an Access Seeker "may not deduct, withhold or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any conditions to the payment" unless otherwise agreed by the Access Provider. That is, the sentence clearly addresses separate claims or issues between the parties to the invoice in question, providing that these claims or issues shall not impact upon the payment of the relevant invoice, and does not apply to billing disputes properly notified prior to the due date payment. Further clarification with respect to these clauses is not required.

5.2. Creditworthiness and security

Key points:

- Supply should be conditional upon the provision of Security, in order to mitigate the Access Provider's financial exposure and risk.
- The Access Provider should have the right to determine the amount and form of Security (provided that it acts reasonably in doing so).
- The circumstances in which the Access Provider may require the alteration of Security should be consistent with commercial practice.
- In order to determine the amount and form of Security, the Access Provider should have the flexibility to determine what information constitutes Ongoing Creditworthiness Information in respect of the Access Seeker.

5.2.1. Supply not conditional on provision of Security

[67] See Issues Paper, pp 41-42.

176. Telstra submits that supply should be conditional upon the provision of Security, in order to mitigate the Access Provider's financial exposure and risk. The proposed clause is inconsistent with both the statutory criteria and the CCA, which provides an exception to the SAOs in circumstances where the Access Seeker is not creditworthy. It is also out of step with normal commercial practice in that both the UCLL Terms and the WBA provide that supply is conditional upon provision of security.[68] Similarly, BT's MSA states that provision of a Service under the MSA is subject to the access seeker meeting and complying with BT's Wholesale Credit Vetting Policy.[69] Accordingly, Telstra considers that clause 3.1 should be amended to provide that, before the supply of the Service under the FAD to an Access Seeker, the Access Seeker must provide Security to the Access Provider.

177. Subsection 152BCB(1)(g)(i) of the CCA provides that the Commission must not make a FAD which would have the effect of requiring an Access Provider to provide an Access Seeker with access to a declared service if there are reasonable grounds to believe that the Access Seeker would fail, to a material extent, to comply with the terms and conditions on which the Access Provider provides, or is reasonably likely to provide, that access. Subsection 152BCB(2)(a) provides that one such ground is evidence that the Access Seeker is not creditworthy. Similar provisions also appear in s 152AR of the CCA, which makes it clear that the Access Provider need not supply the Service in those circumstances. If provision of access is not conditional upon the provision of Security, this would oblige the Access Provider to provide access, even if it has evidence that the Access Seeker is not creditworthy. Thus, the Commission cannot make the FAD so as to have that effect.

178. Further, an Access Provider should be able to assess, before supplying a Service, whether or not an Access Seeker creates an unacceptable credit risk. If the Access Seeker does create such a risk, the Access Provider should be entitled to obtain Security to mitigate that risk before any supply commences. If the Access Provider does not have this option under the current IAD terms, it will have to wait a substantial period before suspending under clause 6.2. This is because the Access Provider would request the Security at the time that supply is commenced under the FAD. The Access Provider would then have to wait for the provision of Security by the Access Seeker, and only after it becomes apparent that the Access Seeker has failed to provide the Security could the Access Provider issue a Suspension Notice under clause 6.2 and commence the 10 Business Day Remedy Period which may lead to suspension. During all of this time, under the Commission's proposed wording the Access Provider would be obliged to supply the Service to the Access Seeker, which exposes the Access Provider to an unacceptable and significant credit risk.

179. Further, in light of the significant financial exposure an Access Provider faces if "upfront" security is not required, Telstra submits that a mechanism needs to be included in the WDSL FAD to protect it in the event that security is never supplied by providing for a right to immediately suspend supply. Telstra's submissions in relation to such a term are set out in section 5.5.

180. Telstra's suggested amendment is consistent with the statutory criteria as:

[68] See WBA cl A2.2 and UCLL Terms cl 7.1.
[69] BT's MSA cl 3.6(c).

- it is not in the Access Provider's legitimate business interests to supply services when there is no security in place. That is because it increases the Access Provider's financial exposure and risk should the Access Seeker not pay;

- the current clause in the IAD does not promote efficient investment in infrastructure because it reduces the certainty that the Access Provider has in recouping its investment costs of providing access. This is also not in the LTIE; and

- in considering the interests of Access Seekers, Telstra submits that requiring security before supply of the Service is neither unnecessary nor excessive particularly given that an Access Provider is subject to significant financial exposure without any security. Rather, it is in line with normal commercial practice.

5.2.2. Amount and form of security

181. Clauses 3.1 and 3.3 should be amended so that the Access Provider can determine the amount and form of Security to be provided by the Access Seeker so long as that amount and form is reasonably necessary to protect the legitimate interests of the Access Provider and is reasonable in all the circumstances.

182. Such an amendment is necessary because clause 3.3 in the IAD does not make clear who, out of the Access Seeker and the Access Provider, can determine the amount and form of Security. Given that it is the Access Provider that both bears the financial exposure and risk of supplying the Service to an Access Seeker, and assesses the Access Seeker's creditworthiness, the Access Provider is in the best position to determine the amount and form of Security necessary to mitigate its financial exposure and risk. For example, a security deposit could be the appropriate form of Security for a particular type of Access Seeker, but not others. Provided that the form and amount of Security is reasonable in the circumstances, Telstra submits that such a determination should not be subject to agreement between the parties.

183. Further, the proposed amendment that the form and amount of Security be reasonable in the circumstances addresses any concerns that an Access Provider may determine an amount and form of Security which an Access Seeker cannot provide or which is otherwise unreasonable.

184. Telstra disagrees with the requirement in proposed clause 3.3 that security "may only be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services". Such a provision is inconsistent with section 152BCB(g)(i) of the CCA, because that provision precludes access determinations from requiring an Access Provider to supply a service in circumstances in which it has reasonable grounds to believe that the Access Seeker is not creditworthy. Accordingly, such a provision would be of no effect.[70] It is also entirely inconsistent with normal commercial practice to require an Access Provider to have objectively "reasonable" grounds to doubt that an Access Seeker is able to pay for the services in order for it to require a security to be paid. Such a requirement would also place an unnecessary administrative burden on an Access Provider.

[70] See WBA cl A2.2 and UCLL Terms cl 7.1

185. The amendments set out in this section are consistent with the statutory criteria as it is not in the Access Provider's legitimate business interests for its financial exposure and risk to be covered by Security which is of an inadequate form and/or amount. For the reasons set out above, Access Providers are less likely to invest in infrastructure if their investment is not covered by an appropriate amount and form of Security.

5.2.3. Alteration of security

186. There are a number of circumstances in which it would be appropriate for an Access Provider to require the alteration of the Security held by an Access Seeker. However, clause 3.5 as currently drafted is too restrictive in the circumstances in which it entitles the Access Provider to do so. Thus, clause 3.5 is out of step with commercial practice.

187. The IAD limits an 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**") 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.

188. Other circumstances which, in commercial practice, entitle the Access Provider to require an alteration of Security include, for example, if an Access Seeker significantly increases the amount of WDSL services supplied to it by the Access Provider under the FAD. In that regard, clause 6(d) of NBN Co's Credit Policy dated 21 November 2011 ("**WBA Credit Policy**") provides that a Credit Review Event occurs when (among other things) there is, or in NBN Co's reasonable opinion there is likely to be, a substantial increase in the amount of Charges payable by a customer under the WBA. That Credit Review Event results in NBN Co requiring a change in the customer's existing security. Similarly, BT's Wholesale Credit Vetting Policy provides that credit vetting is triggered if (among other things) a customer has ordered or forecast more than the available credit threshold.

189. In such circumstances, the existing Security will be insufficient to secure the new or increased risk and it would be entirely reasonable for the Access Provider to require alteration of the existing Security. Similarly, if an Access Seeker fails to comply with the terms and conditions of a particular type of Security, an Access Provider may need to alter the form of that Security in order to ensure that the Security sufficiently covers the Access Provider's financial exposure and risk. For example, if an Access Seeker sells property which is subject to a floating charge in favour of the Access Provider, the Access Provider should be entitled to require an alteration of the Security so as to cover its financial exposure and risk.

190. Pursuant to subsection 152BCB(1)(g) of the CCA, the Commission cannot make a FAD that would have the effect of requiring an Access Provider to provide access where the Access Seeker is not creditworthy. One such piece of evidence of creditworthiness is that the Access Seeker provides (and continues to provide) adequate Security. It follows that the current drafting of clause 3.5 should be amended to reflect the protection that should be afforded to the Access Provider.

191. Such an amendment is consistent with the statutory criteria as it is not in the Access Provider's legitimate business interests for its financial exposure and risk to be insufficiently covered by Security. Further, Access Providers are - understandably - less likely to invest in infrastructure if their investment is insufficiently covered by Security.

5.2.4. Meaning of ongoing creditworthiness information

192. Clause 3.8 should be amended to provide that OCI includes, in addition to those types of information already set out, 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.

193. Such an amendment is needed because some smaller Access Seekers may not be able to provide the types of OCI listed in clause 3.8 (e.g. because they do not have audited balance sheets or profit and loss statements, only management prepared ones). In addition, in light of the fact that Access Seekers come in different shapes and sizes, it is unhelpful to set out an exhaustive list of the types of information which constitute OCI. Rather, it is preferable - and consistent with commercial practice - for the Access Provider and the Access Seeker to have the flexibility to determine which information is the most appropriate for the assessment of that Access Seeker's creditworthiness. Further, in light of how quickly an Access Seeker's creditworthiness could change in today's volatile economic environment, relying on a previous year's audited balance sheet (for example) may not reflect an Access Seeker's creditworthiness as accurately as a current, management prepared balance sheet. Accordingly, clause 3.8 should allow the Access Provider to request "any other information reasonably required to assess the Access Seeker's creditworthiness". In that regard, the WBA Credit Policy does not restrict the type of information or evidence to which NBN Co will have regard in considering a customer's credit rating. Rather, clause 3 of the WBA Credit Policy ("Credit Evidence") provides that "NBN Co may request further information or evidence in respect of Customer's credit rating in any form from Customer" [emphasis added].

194. This amendment is consistent with an Access Provider's assessment of the creditworthiness of an Access Seeker being based on the best available information, so that the Access Provider determines an appropriate form and amount of Security (or altered Security, as the case may be).

195. Such an amendment is consistent with the statutory criteria as it is not in an Access Provider's legitimate business interests or in the interests of Access Seekers for the Access Provider to have either no - or little - information available to it to assess the Access Seeker's creditworthiness. If the Access Provider cannot satisfactorily assess the creditworthiness of the Access Seeker, it could result in the Access Provider supplying services with inadequate Security or being forced to increase the amount of the Security to a level beyond what it would otherwise require.

5.2.5. Confidentiality undertaking for Ongoing Creditworthiness Information

196. Telstra agrees that an Access Seeker's confidential information should be protected. However, clause 3.9 is unnecessary and should be deleted. That is because any such confidential OCI would fall within the definition of "Confidential Information" and therefore attracts the protection of Schedule 5.

197. If, however, clause 3.9 is to be retained, in light of the above, it should be amended so that only third parties accessing the Access Seeker's confidential information are required to give a confidentiality undertaking to the Access Seeker. That is because the Access Provider's employees would already be subject to confidentiality obligations as part of their contract of employment and in any event, would be bound by the confidentiality obligations imposed by the Access Provider.

198. In relation to the form of any such confidentiality undertaking, Telstra has proposed amendments to ensure that the confidentiality undertaking in Schedule 5 is used (subject to the amendments suggested by Telstra).

199. These amendments are consistent with the statutory criteria as it is not in the Access Provider's legitimate business interests to execute confidentiality undertakings if it is not necessary to do so. This would increase direct costs.

5.3. General dispute resolution procedures

5.3.1. Amendments proposed by Telstra

200. Telstra agrees with the majority of the provisions in Schedule 4 of the IAD.

201. However, Telstra proposes some amendments to Schedule 4 in order to ensure that:

- the application of the general dispute resolution procedures in Schedule 4 is appropriately confined to the terms and conditions of the FAD; and
- the appropriate dispute resolution procedure (i.e. either the Billing Dispute Procedures in Schedule 2 or the general dispute resolution procedures in Schedule 4) is used to resolve the dispute.

202. Telstra's proposed amendments are set out in Annexure B.

5.3.2. Responses to issues raised by the Commission

43. For the purpose of the wholesale ADSL FAD, should a timeframe be included in Appendix E, clause 4.9? If so, what should the timeframe be?

203. Telstra agrees that a specific timeframe in clause 4.9 could provide additional clarity to the parties. However, Telstra submits that any such timeframe should be consistent with the timeframe in clause 4.4(a) for the possible resolution of the dispute by the parties' nominated managers. Given that clause 4.4(a) provides for possible resolution of the dispute by the parties' nominated managers within 10 business days, Telstra submits that an obligation under clause 4.9 to provide information within 5 business days of notification of the dispute (at the latest) will ensure that the nominated managers receive all relevant information with sufficient time for them to consider that information and ideally resolve the dispute within the 10 business day period in clause 4.4(a).

5.4. Confidentiality provisions

Key points:

- Clause 7 of the confidentiality undertaking should be deleted.
- Disclosure of confidential information should not be confined to disclosure for the purposes of the FAD, as this may be unduly restrictive.

5.4.1. Disclosure of Confidential Information

204. Telstra submits that the words "for the purposes of this FAD" should be removed from clause 5.5(a) due to the possible limitations that the words impose. Restricting the use of Confidential Information in clause 5.5(a) to the purposes of the FAD fails to recognise that the supply arrangement with respect to the particular service may not be the only supply arrangement in place between the parties. Telstra submits that the words "reasonably required" alone are sufficient to govern appropriate disclosure of Confidential Information to the persons listed in clause 5.5(a).

205. The remainder of Telstra's proposed amendments to the confidentiality provisions are set out in Annexure B.

206. Telstra's proposed amendments promote both certainty for the parties and the efficient use and disclosure of information. Such outcomes are essential in ensuring that services are provided in the most efficient manner, minimising direct costs and promoting the legitimate business interests of the Access Provider.

5.4.2. Responses to issues raised by the Commission

46. Do you consider it impractical to destroy confidential information stored in back-up systems? If so, for the purpose of the wholesale ADSL FAD, what amendments are required to clause 7 of Annexure 1 of Schedule 5 in Appendix E?

207. Telstra submits that clause 7 of the confidentiality undertaking ought to be deleted on the basis that it does not reflect how most businesses now store their information. Most systems, including back-up systems, do not allow the destruction of documents or information. Thus, in practice, it will be impossible for a party to either delete or return all copies of the relevant information. Further, given that there is an ongoing obligation of confidence in the confidentiality undertaking, the information will attract protection beyond the occurrence of any of the scenarios outlined in clause 7. Accordingly, the clause should be removed in light of the fact that compliance with such a clause by most, if not all, parties would be impossible.

208. It is not in the interests of the parties to be subject to an obligation that they cannot perform, especially given the consequences of non-compliance with the FADs. Therefore, the proposed deletion is in the interests of both the Access Provider and the Access Seeker.

5.5. Communications with end users

5.5.1. Responses to issues raised by the Commission

49. Is there any ambiguity under clause F.2(a) regarding marketing by the access provider to the access seeker's end-user? If so, does clause F.3(a) resolve this ambiguity?

209. Telstra does not believe there is any ambiguity under clause F.2(a) regarding marketing by the access provider to the access seeker's end-user.

50. Does the record keeping requirement under clause F.4 impose a cost burden upon parties? If so, what amendments are required to clause F.4 to alleviate this cost burden?

210. Telstra has no comment.

51. Should the ACCC include terms and conditions relating to communications with end-users in the FAD?

52. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as they currently stand in the 2008 Model Terms with regards to communications with end-users?

53. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

211. Telstra submits that terms and conditions relating to communications with end-users should not be included in the wholesale ADSL FAD. This is because those terms are already covered by commercial agreements between the parties and no disputes in relation to those terms have been raised. However, if the Commission decides to include terms and conditions relating to communications with end-users in the FAD, Telstra makes the submissions below.

212. Telstra submits that Clause F.2 of the 2008 Model Terms should be amended so that it allows an Access Provider to communicate with an Access Seeker's end users not only "in" an Emergency, but also in preparation for or following an Emergency. For example, if, following an Emergency, an Access Provider carries out repairs, it may need to communicate with an Access Seeker's end users after the Emergency to confirm that the repair was successful.

213. Telstra also proposes some amendments to Schedule F of the 2008 Model Terms so that an Access Seeker's obligations in, or in connection with, an Emergency are clear. That is because it is not only an Access Provider who will need to act in, or in connection with, an Emergency; the Access Provider will often need the assistance of an Access Seeker (for example, by providing an Access Provider with end user information or assisting the Access Provider to comply with disaster and Emergency management plans). Such clarification will avoid disputes at a time when it is not in anyone's interest for a dispute to occur.

214. Clause F.2 of the 2008 Model Terms should clarify which information an Access Provider can and cannot communicate to an Access Seeker's end user if their Service(s) is to be suspended or terminated. The communication of such information is necessary to ensure that:
    a. an end user is able to acquire services from an alternative service provider, and thus have continuity of supply; and
    b. an Access Provider is not wrongly blamed by the end user when it is advised that his or her service has been disconnected due to the Access Provider suspending or terminating the service.

215. However, to allay any concerns of Access Seekers, an Access Provider should not be able to inform the end user of the reasons for the suspension or termination of supply of their Service(s), or suggest or recommend an alternative service provider. In addition, in order to ensure that any such communications are appropriate, the Access Provider should be required to inform the Access Seeker that they have contacted their end user, and should copy the Access Seeker on any written communications. This amendment will aid the efficient operation of a Service and is also in the Access Provider's legitimate business interests.

216. Further, Telstra proposes that Clause F.3 of the 2008 Model Terms should be amended so that the limitations on the Access Provider only apply on and from the time that the Access Provider becomes aware that the person initiating the communication is an end user of an Access Seeker. Given that the end user may contact the Access Provider's front of house staff, unless the end user identifies him or herself as an end user of an Access Seeker or that fact becomes obvious during the communication, the Access Provider's front of house staff will not know that he or she is an end user of an Access Seeker. The clause as currently drafted is contrary to the statutory criteria, because it is not in the Access Provider's legitimate business interests to be subjected to an obligation in circumstances in which it does not know if it is complying.

217. Telstra attaches as Schedule 2 its proposed amendments to the 2008 Model Terms with regards to communications with end-users.

5.6. Suspension and termination

Key point:

The Access Provider should have the right under Schedule 6 to immediately suspend the supply of the Service in circumstances where it is legitimate and necessary to do so.

5.6.1. Circumstances giving rise to an immediate right to suspend

218. Telstra submits that clause 6.1 should include immediate rights of suspension in circumstances where the Access Seeker breaches a "key" security or creditworthiness obligation in Schedule 3. For example, if the Access Seeker fails to provide an altered Security if required by the Access Provider to do so, or if the Access Seeker fails to maintain the Security (consistent with the UCLL Terms and WBA).[71]

219. Telstra considers that a right to immediately suspend supply of the Service to the Access Seeker is appropriate in such circumstances for the following reasons.

220. First, the Access Seeker is already given a significant period of time to discharge certain of these obligations elsewhere in the IAD. For example, the Access Seeker is given 15 Business

[71] BT's MSA cl 3.6(c). 7.2 of the UCLL Terms provides that the access provider may immediately suspend supply if the pre-requisites to supply (which include provision of security) have not been, or are no longer, satisfied. Similarly, clause A2.3(b) of the WBA provides that if a customer breaches any of the Supply Conditions (which includes failing to comply with the Credit Policy including providing Credit Evidence or a Financial Security where required under that policy), NBN Co may immediately suspend supply.

Days within which to provide OCI, and 20 Business Days within which to provide altered Security. Thus, if the Access Seeker does not discharge its obligations within those time periods, it is reasonable for the Access Provider to be concerned about the likelihood of the Access Seeker remedying the breach at all, let alone within a remedy period.

221. Second, the Access Provider's financial exposure and risk if the Access Seeker does not discharge its financial obligations is likely to be so significant as to justify immediate suspension.

222. None of the circumstances set out above are trivial and they have the potential to expose the Access Provider to substantial financial risk. Thus, in order to protect the Access Provider's legitimate business interests, a right to suspend supply of the Service to the Access Seeker immediately should be available in such circumstances. Telstra notes that, as an Access Seeker, it would ordinarily expect the imposition of these rights by an Access Provider.

223. It is not in the Access Provider's legitimate business interests to be prevented from suspending supply in the above circumstances, as those circumstances increase the Access Provider's risk. Those increased risks will in turn increase direct costs. Those costs are not currently being recovered, as commercial agreements generally include, as a matter of commercial practice, an immediate right of suspension in those circumstances. The Commission should not impose those costs without considering how those costs will be recovered in the price of WDSL. In addition, the current clause in the IAD does not promote efficient investment in infrastructure because an Access Provider will not invest in infrastructure if doing so exposes it to unacceptable levels of risk.

5.6.2. Responses to issues raised by the Commission

54. For the purpose of the wholesale ADSL FAD, are amendments required to clause 6.2 of Appendix E to ensure the interests of access seekers are balanced with the legitimate business interests of the access provider?

224. Telstra proposes a number of amendments to clause 6.2 as set out in Annexure B to this submission. However, Telstra does not consider that amendments to clause 6.2 are required in line with the submissions of Optus and Herbert Geer summarised in the Issues Paper. For example, contrary to Optus' submission, a failure to pay due to Billing Disputes does not constitute a failure to pay under the FAD. Therefore, the concerns raised are already adequately addressed in the current schedule 6 of Appendix E to the Issues Paper. That is, Telstra submits that the provisions in schedule 6 of Appendix E (factoring in Telstra's proposed amendments as set out in this submission) adequately balance the interests of Access Seekers against the legitimate business interests of the Access Provider, particularly in light of the serious consequences for the Access Provider if any of the Suspension Events in clause 6.2 are engaged.

5.7. Liability and indemnity

Key points:

- It is unnecessary to include liability and indemnity provisions in the FAD. However, if the Commission is minded to do so, it should:
  - include a $1 million minimum general liability cap; and
  - include a term relating to liability for losses arising from the broadcast, use, transmission, communication or making available of any material.

5.7.1. It is unnecessary to include liability and indemnity provisions in the FAD

225. Telstra submits that, consistent with the Commission's previous view, the inclusion of liability (risk allocation) provisions in the FAD is unnecessary. The allocation of capital risks is adequately (and more appropriately) managed via commercial agreements, rather than attempting a "one size fits all" approach. Commercial negotiation allows parties to determine an appropriate framework for risk allocation and apportionment. This ensures that the legitimate business interests of carriers and carriage services providers, as well as the "interests of all persons who have rights to use the declared services", are best promoted.[72]

5.7.2. The liability cap is set too low for some Access Seekers

226. Clause 7.1 of Appendix E limits liability to the aggregate amount paid or payable by an Access Seeker to an Access Provider for Services provided by the Access Provider under the FAD in a 12 month period.

227. This means that the liability of Access Seekers who acquire few services is capped at a very small amount. However, even Access Seekers who acquire relatively few services can cause damage to an Access Provider's Network and equipment which is either not of a minimal amount or which has potentially wide ranging consequences. It is possible for Access Seekers to insure themselves against liability for such damage and most Access Seekers do so. While, for larger acquirers, it is appropriate to limit liability by reference to the value of Services acquired, the inclusion of a $1 million minimum liability cap is necessary to ensure that the Access Provider can recover losses caused by small acquirers (that would not be covered by the property indemnity contained in clause 7.4).

    This issue is exacerbated in the first 12 month period in which an Access Seeker acquires services. That is because an Access Seeker could order a small number of services, cause a substantial amount of damage, and seek an alternative supplier of services following this. In those circumstances, the Access Provider's liability would be substantial and the amount it could recover from the Access Seeker minimal. For example, the actions of a small ISP could have – and has had - significant impact on Telstra's network and the supply of services.

[72] Refer to sections 152BCA(1)(b) and (c) of the CCA.

228. The inclusion of liability caps of this nature is standard commercial practice. For example, the WBA includes much higher minimum liability caps for both NBN Co and Customers. A minimum liability cap of $5 million (for Customers with average monthly billings of less than $5 million) applies.[73]

5.7.3. Schedule 7 should include an additional term

229. Telstra submits that an additional clause should be added to Schedule 7 of the IAD, addressing losses arising from the broadcast, use, transmission, communication or making available of any material.

230. The IAD does not contain a provision which deals with this issue. Telstra considers that the inclusion of this additional provision is necessary to "close the gaps" in Schedule 7 and ensure that the FAD provides for a comprehensive liability regime.

231. The clause described above is a standard commercial term. For example, clause E3.6 of the WBA relates to liability for the use of material.

5.8. Ordering and provisioning and changes to operating manuals

Key point:

Terms relating to ordering and provisioning and changes to operating manuals are not necessary and should not be included in the FAD.

5.8.1. Responses to issues raised by the Commission

59. Should the ACCC include terms and conditions relating to ordering and provisioning in the FAD? How should these terms be included?

60. Should the ACCC include terms and conditions relating to changes to operating manuals in the FAD? How should these terms be included?

232. Telstra agrees with the Commission that provisions relating changes to operating manuals, and ordering and provisioning, do not need to be addressed in the wholesale ADSL FAD given the lack of historical access disputes in respect of these provisions.

61. For the purpose of the wholesale ADSL FAD, should the ACCC replicate the relevant terms in the SSU with regards to ordering and provisioning?

233. Telstra submits that it is unnecessary to include terms relating to ordering and provisioning and changes to operating manuals in a WDSL FAD, as the concerns outlined in the Issues Paper are already addressed by the relevant provisions of the SSU. Further, Telstra submits that the Commission should not attempt to replicate relevant SSU terms in a WDSL FAD. As noted by the Commission, such an approach carries the risk that it "may change the nature of the commitment and be impractical to administer",[74] and in circumstances where the relevant

[73] See clauses E2.3(a) and E2.4(a) of the WBA.
[74] Issues Paper, p 49.

obligations are already binding on Telstra, will lead to unnecessary dual regulation and increased compliance costs. This approach will increase the direct costs of providing access, is contrary to the legitimate business interests of the Access Provider, and will adversely impact upon efficient investment and the LTIE.

5.9. Network upgrade and modernisation

Key point:

Network upgrade and modernisation provisions are not necessary and should not be included in the FAD.

5.9.1. Responses to issues raised by the Commission

62. Should the ACCC include terms and conditions relating to network modernisation and upgrade provisions in the FAD? Please take into account any overlap with similar terms in the SSU in your response.

63. If you consider terms and conditions relating to network modernisation and upgrade provisions should be included in the FAD, how do you consider specific clauses should be drafted?

234. Telstra submits that terms relating to network upgrade and modernisation are unnecessary and should not be included in a WDSL FAD. As the Commission points out,[75] Telstra is already required to comply with the relevant obligations in the SSU. Further, the attempted inclusion of the relevant provisions carries the risk that the nature of the obligations will be changed and will therefore be difficult to administer. In circumstances where the relevant obligations are already binding on Telstra, this will lead to unnecessary dual regulation and increased compliance costs for no discernible benefit to Access Seekers. This approach will increase the direct costs of providing access, is contrary to the legitimate business interests of the Access Provider, and will adversely impact upon efficient investment and the LTIE.

[75] Issues Paper, p 50.

5.10. Backdating and Other Issues

5.10.1. Backdating

235. Telstra welcomes the Commission's preliminary view that it is not minded to backdate the wholesale ADSL FAD. The Commission states that it may depart from this position if there is any evidence to suggest that regulatory gaming has occurred while the IAD is in effect, however, Telstra believes that there is no such evidence. As the Commission and industry are aware, Telstra implemented the IAD in an open and transparent manner, including through clause 18.3(d) of Telstra's SSU, and all wholesale ADSL customers who wished to take advantage of the IAD pricing have elected to do so.

236. In any event, backdating the FAD for wholesale ADSL would be inconsistent with the Commission's previous stance in relation to the other declared services. Backdating was not implemented in the recent DTCS FAD, nor was it implemented in the fixed line services FADs, where the Commission commented:

> *To provide certainty and price stability for industry, the prices set in interim access determinations (IADs), made in March 2011, will continue to apply from 1 January 2011 until 30 June 2011.*[76]

237. Telstra believes 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.

06 OTHER ISSUES FOR CONSIDERATION IN THIS INQUIRY

238. Telstra notes that the Commission is considering some other issues as part of this FAD inquiry process and while it is not seeking views on these issues at this time, Telstra has provided below some observations that may assist the Commission in reaching its IAD. Telstra will respond more fully on these issues following the IAD.

6.1. Restrictions on resale

239. Telstra's views regarding the inclusion of a reseller clause in the FAD remain as set out in its April submission to the Commission,[77] that is, that it is important that resellers are subject to Telstra's terms and conditions of access to ensure Telstra's network and the supply of its wholesale ADSL service are not compromised in any way and, if they are compromised, that remedial action is promptly taken. The purpose of including a reseller clause in Telstra's commercial agreements was to ensure that resellers were subject to Telstra's terms and conditions of access, not for the purpose of impeding or restricting resale of Telstra's wholesale ADSL service.

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[76] ACCC, *Inquiry to make final access determinations for the declared fixed line services, Final report,* July 2011, p7.
[77] 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, p24.

240. Telstra notes that in its discussion paper, the Commission appears to recognise the concerns that Telstra raised in its April response. In light of that, Telstra wishes to draw to the Commission's attention the standard reseller clause that is included with the current generic wholesale ADSL schedule.

> 9 Resale
> 9.1 [Customer] may re-supply DSL-L2IG Services to a Reseller only if, subject to paragraph 5.4 of this Part B and excluding [Customer]'s obligations under Part C, [Customer]:
> (a) procures each Reseller's compliance with this Agreement as if the Reseller was [Customer]; and
> (b) in particular, ensures that each Reseller does not do or omit to do anything, which if done or omitted by [Customer], would constitute a breach of this Agreement.
> 9.2 [Customer] may provide Telstra Documents to a Reseller to the extent that it is necessary to support:
> (a) [Customer]'s supply of the DSL-L2IG Service to the Reseller; and
> (b) the Reseller's compliance with the Reseller's obligations to [Customer] and to Telstra contemplated by this Agreement.

Notes:
The reference to Part C in the above extract is a reference to the pricing provisions.
The clause 5.4 referred to above is as follows:
5.4 For the purposes of Broadband Transfer, Telstra and [Customer] must treat each End User as if the End User has a contract with [Customer] (where [Customer] or Reseller is the LSP), or will have a contract with [Customer] (where [Customer] or Reseller is the GSP).

241. Telstra believes that this reseller clause allows Telstra to ensure that its network and supply of its wholesale ADSL service are not compromised. Furthermore, in Telstra's view, the above reseller clause does not restrict competition. If the Commission determines to include a reseller clause in the FAD, then Telstra believes that it should adopt the above wording.

6.2. Business grade services

242. Telstra notes the Commission's preliminary view that it does not intend to include non-price terms and conditions regarding the supply of business grade services in the FAD. Telstra endorses this view and refers the Commission to its April submission for its views on this matter.[78]

6.3. Commencement and expiry date of the FAD

243. Telstra's views remain as set out in its April submission to the Commission,[79] that is, that the FAD should commence 21 days after the date on which it is published by the Commission and that it should expire on 31 July 2014 (hence aligning with the expiry date for the fixed line services FADs).

244. Telstra notes that the Commission states that one option would be to set a five year term for the FAD, but review the price terms at an earlier date. If the Commission is minded to adopt such an approach, Telstra strongly believes that the Commission must take into account the need for industry to have certainty and predictability.

[78] Ibid, p25.
[79] Ibid, p28.

Annexure A
Answers to the Commission's Questions

Chapter 6: Scope of the application of the standard access obligations	
1. Do you agree with the approach to considering the need for backdating of a FAD that is reflected above?	Telstra agrees with the Commission's approach to not backdate the FAD. See section 5.10.1
2. Telstra has proposed one way a term or condition exempting certain geographic areas could be delineated. The ACCC seeks submissions on Telstra's proposed test and submissions on alternative measures of where competition is effective.	Telstra has proposed a highly conservative set of conditions (the joint presence in an ESAs of the four largest DSLAM operators) for the 289 ESAs it has put forward as an example of where the Commission should exempt service providers from the application of the SAOs. See section 2.6
3. Are there any limits, other than large pair gain systems, on the substitutability of ULLS and LSS-based services for wholesale ADSL?	ULLS and LSS-based services are an effective substitute for resale ADSL services. The ongoing shift from resale-based services to ULLS/LSS-based services in areas where ULLS/LSS-based service are presence provides compelling evidence of their substitutability (see further sections 2)
4. To what extent does the use of LPGS in the CAN limit the competitive constraint posed by infrastructure based alternatives?	LPGS do not limit the competitive constraint of ULLS/LSS-based services (particularly within the 289 ESAs). See section 2.7
5. How should the ACCC take into account the existence of LPGS in making terms and conditions for the wholesale ADSL service?	As set out in section 2.7, the Commission, consistent with the approach of the Australian Competition Tribunal, should recognise that as the presence of LPGS does not limit the competitive constraints imposed by ULLS and LSS-based services within the 289 ESAs, there is no need to make terms or conditions to address the presence of LPGS.
6. *Telstra:* What forward-looking plans does Telstra have regarding the use of pair gain systems on the CAN?	LPGS systems were been deployed in the CAN at a time when it was considered a best practice approach for the cost effective extension of PSTN services to end users. Telstra has no plans to expand the use of LPGS in the network at this time. With respect to ADSL services provided to end users served by LPGS, Telstra has recently undertaken a program of works ("TopHat") to improve the availability of ADSL services and the quality of these services for these end users.
7. What market evidence is there that the availability of substitutes has acted as a competitive constraint on Telstra's terms and conditions in relation to the wholesale ADSL service in particular ESAs?	Telstra faces significant competition within the 289 ESAs from ULLS and LSS-based services (both from the self-supply of DSL using these services and through ULLS/LSS acquirers competing in the market for resale services). See further section 2.5.
8. If the FAD was to provide a geographic exemption in ESAs that have attracted a higher degree of infrastructure-based investment, do you consider that Telstra would be likely to: (a) charge prices for wholesale ADSL that are above competitive levels in all ESAs?	In the event exemptions were granted in at least the 289 ESAs identified, Telstra would continue to be constrained by intense retail and wholesale competition in the competitive areas and constrained by regulation outside of these areas. Telstra therefore could not charge prices for wholesale ADSL that are above competitive levels in all ESAs, nor engage in inefficient price discrimination, nor impose anti-competitive terms and conditions of supply. See further section 2.5.

(b) engage in inefficient price discrimination? (c) impose anti-competitive terms and conditions of supply? If so, what terms? Please provide evidence in support of your response.	
9. Some submissions consider that geographic exemptions could affect market outcomes in other geographic areas. How so?	Telstra disagrees with the proposition that exemptions could affect market outcomes in areas in which regulation still applied (see response to question 8, and section 2.5 more generally).
10. What does market shares and the market conduct of non-dominant network providers indicate about the degree of competitive constraint non-dominant network providers face?	All retail and wholesale ADSL service providers (whether Telstra or other service providers) are constrained by competition within the 289 ESAs. See further section 2.
11. Would applying the SAOs to non-dominant network providers promote competition? How would a term exempting non-dominant network providers from the SAOs promote competition?	In the presence of effective competition (as is the case within the 289 ESAs – and more broadly), the SAOs should not be applied to any service provider. In areas where the Commission does determine to apply the SAOs, they should be applied to all service providers. To do otherwise would introduce further distortions to the ADSL services market.
12. How would terms and conditions providing geographic exemptions or carrier-specific exemptions affect the efficient use of existing infrastructure by access seekers and access providers?	The competitive conditions in the market for ADSL services observed in the 289 ESAs (and the metropolitan areas more broadly) have been delivered in an environment of regulatory forbearance. Providing exemptions (to all service providers) in areas in which there is effective competition removes maintains conditions that have delivered ongoing investment and innovation and removes the risk of a reversal in these competitive market outcomes. See further section 2.8.
13. The ACCC considers that the application of the SAOs would not have a material negative effect on the deployment of competing DSLAMs and that where it is efficient to do access seekers will continue to invest in DSLAMs. The ACCC seeks any relevant submissions on this view.	Telstra disagrees with this view. There is considerable risk in maintaining heavy handed access regulation in the presence of effective competition (such as in the 289 ESAs) . See section 2.8.
14. *Access seekers:* Do you intend to still use existing DSLAMs? Will you decommission any DSLAMs if the SAOs apply to Telstra in particular ESAs? In those ESAs where you have existing infrastructure, will you supply retail ADSL based on your own DSLAM infrastructure or based on wholesale ADSL inputs?	Not applicable
15. *Access seekers:* What are you current plans to invest in DSLAM and other infrastructure? In the context of considering geographic exemptions, submitters should consider their likely investment within the existing competitive footprint and/or at ESAs that have a number of access-seekers	Not applicable

present rather than expansion of the competitive footprint.	
16. Is the *application of the SAOs* to Telstra in particular ESAs likely to reduce Telstra's incentives to efficiently invest in infrastructure?	Yes. The application of the SAOs increases the regulatory risks faced by Telstra in investing to provide ADSL services. See further section 2.9.
17. How would exemptions (geographic or carrier-specific) affect the legitimate business interests of access providers (including potential access providers) and the access providers' investments in facilities?	Exemptions would in effect in maintain the competitive market conditions that have developed within the 289 ESAs. Exemptions would enable service providers to compete, invest and innovate, without the overhang of regulatory risk, which risks reversing the competitive market outcomes currently observed. See further sections 2.5, 2.8 and 2.9).
18. *Access providers (DSLAM network operators):* Do you currently supply wholesale ADSL services to third parties?	Not applicable
19. *Access providers (DSLAM network operators):* What would be the direct costs associated with providing access to the declared service to others upon reasonable request? For example, costs associated in provisioning and billing the service to access seekers. To what extent do you currently incur these costs?	Not applicable
20. The ACCC seeks information on: (a) Whether the costs involved in supplying and charging for the services are reasonable or likely to become reasonable; and (b) the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks.	Within the 289 ESAs, the prices set for wholesale (and retail) ADSL services are set in a clearly competitive environment. The competitive pricing of services (and competition among service providers) have led to the positive outcomes observed within the 289 ESAs. See section 2.5, and section 2 more generally.
21. What are the costs of switching between wholesale ADSL providers?	There is a high level of churn in the market for ADSL services. Observation of net movements and churn between service providers (and the ongoing changes in market shares observed in the market) suggest that moving between wholesale ADSL providers, or from wholesale ADSL to self-supplying services through unbundled access is low cost. See further sections 2.3 and 2.5
22. If you currently acquire wholesale ADSL services from a provider other than Telstra, are you concerned about the application of the SAOs to that carrier provided in areas where those obligations apply to Telstra?	Not applicable
Chapter 7: Bundling with PSTN services	
23. Do you agree with the ACCC's preliminary assessment of the benefits of unbundling the PSTN service from the wholesale ADSL service?	No. Telstra considers that the Commission's characterisation of the relationship between Telstra's PSTN service and ADSL products is inaccurate. The necessary changes required to implement a Naked ADSL service on Telstra's network would result in significant costs (see section 3.4.1) and impair Telstra's ability to manage its network (see

	sections 3.4.5 and 3.4.6). These factors would diminish any potential benefits arising from the provision of such a service. Further, Telstra questions the potential market (given existing services and the likely costs) of a Telstra supplied Naked WDSL product (see section 3.6).
24. Do you consider that a 'hybrid' option would have the same potential to promote competition as 'full' unbundling?	Neither of the approaches suggested by the Commission would significantly promote completion in the market (see section 3.6). Further, the costs of either proposal far exceed any potential benefits (see section 3 generally).
25. What proportion of your total ADSL SIOs are attributable to a naked ADSL product?	None. Telstra does not supply Naked ADSL services to itself (as a retail ISP) or to wholesale customers.
26. Would 'full' unbundling result in any economic efficiency gains?	No. Telstra considers that the Commission's characterisation of the relationship between Telstra's PSTN service and ADSL products is inaccurate (see sections 3.1 to 3.3). A requirement to provide a Naked WDSL service would result in significant costs to Telstra (see section 3.4.1) and impair Telstra's ability to manage its network (see sections 3.4.5 and 3.4.6). Further, there are no likely cost savings or efficiency gains arising from this proposal (see section 3.4.4).
27. Would a 'hybrid' unbundling approach result in any economic efficiency gains?	No. The requirement to provide a "hybrid" service would require Telstra to incur significant development costs. Further, access seekers already have the option of replicating the features of a hybrid service (namely, a reduced functionality PSTN basic access service) through the existing WLR service (see section 3.5.3).
28. *Telstra:* What specific core systems/platform limitations prevent Telstra from offering a naked ADSL service?	Telstra has deployed ADSL as a product on top of the PSTN service. As such, all core systems that are used in the ordering, assurance, deployment, management and reporting of ADSL services rely on the presence of the PSTN FNN. See section 3.4.3 for a list of some of the systems that would be required to be modified to accommodate this proposal.
29. To what extent do you consider that 'full' unbundling or the 'hybrid' option takes into account the considerations under s. 152BCA?	Telstra's considerations of the issues associated with being required to supply a Naked ADSL service, or a hybrid service with respect to the statutory criteria are set out in section 3.
30. What are your experiences with regards to the effect on the quality of service without a PSTN service on the line?	See section 3.4.5 and 3.4.6.
31. *Access seekers*: What system modifications were undertaken to enable a naked ADSL service to be provided? What costs were involved in the systems development process?	Not Applicable. However it is critical that the Commission appreciate that as the underlying network operator it faces different costs and service issues, than acquirers of ULLS services that deploy Naked ADSL. In the presence of line faults, it is ultimately Telstra's responsibility to locate, diagnose and rectify the fault (where possible). The absence of the metallic line test capability (where no underlying PSTN active service on the line) significantly increases Telstra's assurance costs. See section 3.4.6
Chapter 8: Points of interconnection for the wholesale ADSL service	
32. What are the likely costs and benefits associated with establishing additional points of interconnection?	Telstra does not consider there are any tangible benefits from establishing additional points of interconnection for Telstra's WDSL service, however the costs associated with establishing additional points of interconnection would be substantial (and impact on all network users). See section 4.

33. *Transmission network operators*: Would you use your transmission networks to transport wholesale ADSL data should additional points of interconnection be specified for the wholesale ADSL service? Would you invest further in transmission networks if the wholesale ADSL FAD provided for additional points of interconnection for the wholesale ADSL service?	Not Applicable.
Chapter 9: General non-price terms and conditions	
34. For the purpose of the wholesale ADSL FAD, are amendments required to the timeframe in clause 2.4 of **Appendix E**? If so, should the timeframes in clause 2.4 of **Appendix E** be consistent with the TCP Code? What if a new code is registered that provides a different timeframe?	See section 5.1.4.
35. For the purpose of the wholesale ADSL FAD, should the timeframe for raising billing disputes be made consistent with the TIO timeframe?	See section 5.1.4.
36. For the purpose of the wholesale ADSL FAD, are amendments required to the timeframe in clause 2.14 of **Appendix E**?	See section 5.1.4.
37. For the purpose of the wholesale ADSL FAD, are further refinements required to clauses 2.4 and 2.16 in **Appendix E**?	See section 5.1.4.
38. Is there a drafting inconsistency between clauses 2.6 and 2.12 in **Appendix E**? If so, what amendments are required to ensure consistency between these two clauses in the wholesale ADSL FAD?	See section 5.1.4.
39. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to billing and notification?	See section 5.1.
40. If you consider amendments should be made, how do you consider specific clauses should be redrafted?	See Annexure B.
41. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to creditworthiness and security?	See section 5.2.

42. If you consider amendments should be made, how do you consider specific clauses should be redrafted?	See Annexure B
43. For the purpose of the wholesale ADSL FAD, should a timeframe be included in **Appendix E**, clause 4.9? If so, what should the timeframe be?	See section 5.3.2
44. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to general dispute resolution procedures?	See section 5.3.1.
45. If you consider amendments should be made, how do you consider specific clauses should be redrafted?	See Annexure B.
46. Do you consider it impractical to destroy confidential information stored in back-up systems? If so, for the purpose of the wholesale ADSL FAD, what amendments are required to clause 7 of Annexure 1 of Schedule 5 in **Appendix E**?	See section 5.4.2.
47. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to confidentiality?	See section 5.4.1.
48. If you consider amendments should be made, how do you consider specific clauses should be redrafted?	See Annexure B
49. Is there any ambiguity under clause F.2(a) regarding marketing by the access provider to the access seeker's end-user? If so, does clause F.3(a) resolve this ambiguity?	See section 5.3
50. Does the record keeping requirement under clause F.4 impose a cost burden upon parties? If so, what amendments are required to clause F.4 to alleviate this cost burden?	Telstra has no comment.
51. Should the ACCC include terms and conditions relating to communications with end users in the FAD?	See section 5.5.1.
52. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as they currently stand in the 2008 Model Terms with regards to communications with end-users?	See section 5.5.1.
53. If you consider amendments should	See section 5.5.1.

be made, how do you consider specific clauses should be redrafted?	
54. For the purpose of the wholesale ADSL FAD, are amendments required to clause 6.2 of **Appendix E** to ensure the interests of access seekers are balanced with the legitimate business interests of the access provider?	See section 5.6.2.
55. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to suspension and termination?	See section 5.6.2.
56. If you consider amendments should be made, how do you consider specific clauses should be redrafted?	See Annexure B
57. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to liability and indemnity?	See section 1.
58. If you consider amendments should be made, how do you consider specific clauses should be redrafted?	See Annexure B
59. Should the ACCC include terms and conditions relating to ordering and provisioning in the FAD? How should these terms be included?	See section 5.8.1.
60. Should the ACCC include terms and conditions relating to changes to operating manuals in the FAD? How should these terms be included?	See section 5.8.1
61. For the purpose of the wholesale ADSL FAD, should the ACCC replicate the relevant terms in the SSU with regards to ordering and provisioning?	See section 5.8.1.
62. Should the ACCC include terms and conditions relating to network modernisation and upgrade provisions in the FAD? Please take into account any overlap with similar terms in the SSU in your response.	See section 5.9.1.
63. If you consider terms and conditions relating to network modernisation and upgrade provisions should be included in the FAD, how do you consider specific clauses should be drafted?	See section 5.9.1.

Annexure B
Proposed amendments to the non-price terms

IT'S HOW WE CONNECT

SCHEDULE 1

PROPOSED AMENDMENTS TO DRAFT WADSL NON-PRICE TERMS

Schedule 2 – Billing and Notifications

2.1 The Access Seeker's liability to pay Charges for the Service to the Access Provider arises at the time the Service is supplied by the Access Provider to the Access Seeker, unless the parties agree otherwise.

2.2 The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 2.

2.3 The Access Provider must provide the Access Seeker with an invoice each month in respect of Charges payable for the Service unless the parties agree otherwise.

2.4 The Access Provider is entitled to invoice the Access Seeker for previously uninvoiced Charges or Charges which were understated in a previous invoice, provided that:

(a) the Charges to be retrospectively invoiced can be reasonably substantiated to the Access Seeker by the Access Provider; and

(b) subject to clause 2.5, no more than six Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld).

2.5 The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the Telecommunications Act 1997 (Cth) and the provisions of any applicable industry code registered pursuant to Part 6 of the Telecommunications Act 1997 (Cth) in relation to billing.

2.6 Subject to any Billing Dispute notified in accordance with this FAD, an invoice is payable in full 30 Calendar Days after the date the invoice was issued or such other date as agreed between the parties. The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider. All amounts owing and unpaid after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day authorised dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5 percent.

2.7 In addition to charging interest in accordance with clause 2.6 or exercising any other rights the Access Provider has at law or under this FAD, where an amount is outstanding and remains unpaid ~~for more than 20 Business Days~~ after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this FAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.

Explanation for amendments to clause 2.7 - In relation to this amendment, please refer to section 5.1.3 (Taking action for unpaid amounts) of the submissions.

2.8 Unless the parties otherwise agree, there is no setting-off (i.e. netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise the administration and financial costs, the parties must consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.

2.9 The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice. Nothing in this clause 2.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.

2.10 If the Access Seeker believes a Billing Dispute exists, it may invoke the Billing Dispute Procedures by providing written notice to the Access Provider (Billing Dispute Notice). A Billing Dispute must be initiated only in good faith.

2.11 Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal or regulatory proceedings in relation to any Billing Dispute.

2.12 If a Billing Dispute Notice is given to the Access Provider by the due date for payment of the invoice containing the Charge which is being disputed, the Access Seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved. Otherwise, the Access Seeker must pay the invoice in full in accordance with this FAD (but subject to the outcome of the Billing Dispute Procedures).

2.13 Except where payment is withheld in accordance with clause 2.12, the Access Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.

2.14 A Billing Dispute Notice must be given to the Access Provider in relation to a Charge within six Months of the invoice for the Charge being issued in accordance with 2.6.

2.15

(a) The Access Provider must acknowledge receipt of a Billing Dispute Notice within two Business Days by providing the Access Seeker with a reference number.

(b) Within five Business Days of acknowledging a Billing Dispute Notice under clause 2.15(a), the Access Provider must, by written notice to the Access Seeker:

(i) accept the Billing Dispute Notice; or

(ii) reject the Billing Dispute Notice if the Access Provider reasonably considers that:

A. the subject matter of the Billing Dispute Notice is already being dealt with in another dispute;

B. the Billing Dispute Notice was not submitted in good faith; or

C. the Billing Dispute Notice is incomplete or contains inaccurate information.

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

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

Without affecting the time within which the Access Provider must make the proposed resolution under clause 2.17, the Access Provider may request additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution pursuant to clause 2.17. This additional information may be requested up to 10 Business Days prior to the date on which the Access Provider must make the proposed resolution under clause 2.17. The

Access Seeker must provide the requested information within five Business Days of receiving the request. If the Access Seeker fails to do so within five Business Days, the Access Provider may take the Access Seeker's failure to provide additional information into account when making its proposed resolution.

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

(a) explain the Access Provider's proposed resolution (including providing copies where necessary of all information relied upon in coming to that proposed resolution); and

(b) set out any action to be taken by:

(i) the Access Provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or

(ii) the Access Seeker (e.g. payment of the disputed Charge).

If the Access Provider reasonably considers that it will take longer than 30 Business Days after accepting a Billing Dispute Notice to provide a proposed resolution, then the Access Provider may request the Access Seeker's consent to an extension of time to provide the proposed resolution under this clause 2.17 (such consent not to be unreasonably withheld).

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

Explanation for above amendment to clause 2.18 – The time limit for objections by the Access Seeker should be limited to five Business Days as this will ensure the efficient resolution of Billing Disputes while still providing the Access Seeker with sufficient time to consider the Access Provider's decision.

(a) what part(s) of the proposed resolution it objects to;

(b) the reasons for objection;

(c) what amount it will continue to withhold payment of (if applicable); and

(d) any additional information to support its objection.

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

(e) provide a revised proposed resolution (Revised Proposed Resolution in this Schedule 2); or

(f) confirm its proposed resolution.

2.19 Any:

(a) withdrawal, adjustment or refund of the disputed Charge by the Access Provider; or

(b) payment of the disputed Charge by the Access Seeker (as the case may be),

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

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

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

2.22 If

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

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

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

Explanation of amendments to clause 2.22

Telstra considers that allowing the Access Seeker 15 Business Days in which to decide whether or not to notify a Billing Dispute is unnecessarily long and that 5 Business Days is more appropriate. The revised time period reflects the fact that the Access Seeker is likely to be withholding potentially large sums of money from the Access Provider, and the fact that the timely resolution of Billing Disputes is preferable for both the Access Provider and the Access Seeker.

Telstra considers that 5 Business Days (with a possible extension) gives an Access Seeker sufficient time to review and consider the proposed resolution 9and other supporting material) and decide whether or not to escalate the Billing Dispute. having the shorter default period together with the ability for a possible extension to be granted, where reasonable, strikes the appropriate balance between ensuring

that such matters are resolved as quickly as possible and allowing for the fact that some matters might be more complicated and take longer to resolve than other. It is also consistent with the other clauses which allow that, on occasion, it might be necessary for a longer period to be agreed.

Thus, the proposed amendments strike an appropriate balance between ensuring that Billing Disputes are resolved in a timely manner, and ensuring that an Access Seeker has sufficient time to review and consider the Access Provider's proposed resolution and decide whether or not to escalate the Billing Dispute.

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

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

(b) seeking escalation of the Billing Dispute.

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

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

(a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation must be conducted in accordance with the mediation guidelines of the ACDC and concluded within three Months of the proposal (unless the parties agree to extend this timeframe); or

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

2.26 The parties must ensure that any person appointed or required to resolve a Billing Dispute takes into account the principle that the Access Seeker is entitled to be recompensed in circumstances where the Access Seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end-user an amount which is the subject of a Billing Dispute (a Backbilling Loss), provided that:

(a) such principle applies only to the extent to which the Billing Dispute is resolved against the Access Provider; and

(b) such principle applies only to the extent to which it is determined that the Backbilling Loss was due to the Access Provider unnecessarily delaying resolution of the Billing Dispute.

2.27 Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.

2.28 All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause 2.24 (or their respective nominees).

2.29 There is a presumption that all communications between the parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.

Clause 2.30 – Telstra considers that clause 2.30 should be deleted. Although the Commission proposes to retain clause 2.30 on the basis that it "adequately incentivises the access provider to provide accurate billing information", the following provisions in Schedule 2 already provide sufficient and proportionate discouragement to the Access Provider from issuing incorrect invoices:

- clause 2.10 provides that an Access Seeker is entitled to invoke the Billing Dispute Procedures;
- clause 2.12 provides that an Access Seeker is entitled to withhold payment of the disputed Charge until the Billing Dispute is resolved; and
- clause 2.20 provides that interest is payable on any amount refunded to the Access Seeker.

If the Commission does not wish to delete the clause, in the alternative Telstra considers the following amendments should be made to the clause:

2.30 If it is determined by the Billing Dispute Procedures~~, any other dispute resolution procedure,~~ or by agreement between the parties, that:

In the alternative to deleting clause 2.30, the clause should be amended as follows:

Explanation for above amendment to clause 2.30 - This amendment is necessary because only the Billing Dispute Procedures should properly result in a finding that invoices are incorrect. The outcome of other dispute resolution procedures will not impact upon the accuracy of invoices.

(a) three or more out of any five consecutive invoices for a given Service are incorrect by 5 percent or more; and~~,~~

(b) the reason or basis for the inaccuracy of those invoices is the same,

~~01~~ ***Explanation for above amendment to clause 2.30*** – This amendment ensures that the operation of the clause is limited to situations where the Access Provider is aware of the inaccuracy.

then, for the purposes of clause 2.20, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 2.6, plus 2 percent. The remedy set out in this clause 2.30 is without prejudice to any other right or remedy available to the Access Seeker.

This clause 2.30 does not apply if:

(c) the inaccuracy in the invoices was caused by an error and that error was unknown to the Access Provider at the time of issuing the relevant invoices; and

(d) the Access Provider has agreed to rectify any incorrect invoices.

Explanation for above amendment to clause 2.30 - Telstra considers that this amendment is reasonable because the Access Seeker should not be able to take

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advantage of the clause in circumstances where the error is being rectified and the Access Provider has implemented a process to ensure that correct invoices are rendered but such a process will take time to implement. it is inappropriate to penalise the Access Provider for an error of which it is not aware.

Furthermore, unless the clause is triggered only if the Access Provider is aware of that error, an Access Seekers will have an incentive not to notify a Billing Dispute until after clause 2.30 is triggered (i.e. until after three consecutive invoices are inaccurate) in order to take advantage of the higher interest rate payable by the Access Provider under clause 2.30.

If three or more out of any five consecutive Billing Disputes initiated by the Access Seeker under this FAD are resolved against the Access Seeker through the Billing Dispute Procedures, then for the purposes of clause 2.21 the interest the Access Seeker must pay on any disputed Charges found to be payable shall be the rate set out in clause 2.6, plus 2%. The remedy set out in this clause 2.30 shall be without prejudice to any other right or remedy available to the Access Provider.

Explanation for above amendment to clause 2.30 - This amendment ensures that the parties behave appropriately and discharge their obligations to each other. In order for the terms to be more balanced, similar penalty interest should be payable by the Access Seeker (as is payable by the Access Provider under clause 2.30) if three out of five consecutive billing Disputes are resolved against it. That is because such a trigger would likely evidence bad faith on the part of the Access Seeker more than is the case on the part of the Access Provider under the current clause 2.30. If clause 2.30 is to remain, it is reasonable that a similar measure should be introduced to deter the inappropriate use of such provisions by the Access Seeker.

Schedule 3 – Creditworthiness and security

Explanation for amendments to clause 3.1 -

Telstra proposes that in clause 3.1:

(a) the provision of Security should be a precondition to the supply of a Service under the FAD (please see section 1.2.1 (Supply not conditional upon provision of Security) of the submissions); and

(b) the Access Provider should determine the amount and form of Security (please see section 1.2.2 (Amount and Form of Security) of the submissions) subject to the limitations in clause 3.3.

Option 1 - Security as a precondition for supply. Please refer to section 5.2.1 (Supply not conditional upon provision of Security) of the submissions.

3.1 Unless otherwise agreed by the Access Provider, the Access Seeker, prior to the supply of a Service under this FAD, must (at the Access Seeker's sole cost and expense) provide Security to the Access Provider. The Security must be: ~~and~~

(a) maintained~~,~~ on terms and conditions reasonably required by the Access Provider;

(b) maintained for the period set out in ~~and subject to~~ clause 3.2; and

(c) in the amount and form determined by the Access Provider having regard to the matters set out in clauses 3.3 and 3.4.~~, the Security (as be determined having regard to clause 3.3 and as may be varied pursuant to clause 3.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.~~

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Explanation for amendments to clause 3.1(b) and (c): This amendment clarifies the interaction of clause 3.1 with clauses 3.2, 3.3 and 3.4.

Option 2 - If the Commission decides that Security should not be a precondition for supply, then Telstra proposes the following clause 3.1 which clarifies the interaction of clause 3.1 with clauses 3.2, 3.3 and 3.4.

Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide the Security to the Access Provider. The Security must be:

(a) maintained on terms and conditions reasonably required by the Access Provider;

(b) maintained for the period set out in clause 3.2; and

(c) in the amount and form determined by the Access Provider having regard to the matters set out in clauses 3.3 and 3.4.

3.2

~~1.1.~~(a) The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the Security

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specified in clause 3.1 for a period of six Months following (but not including) the date on which the last of the following occurs:

(i) cessation of supply of the Service under this FAD, and

(ii) payment of all outstanding amounts under this FAD.

~~1.2.~~(b) Notwithstanding clause 3.2(a), the Access Provider has no obligation to release the Security if, at the date the Access Provider would otherwise be required to release the Security under clause 3.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.

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3.3 The Security (including any ~~varied~~ altered or modified Security) may only be requested when it is reasonably necessary to protect the legitimate business interests of the ~~where an~~ Access Provider ~~has reasonable grounds to doubt the Access Seeker's ability to pay for services,~~ and shall be of an amount and in a form which is reasonable in all the circumstances~~. As a statement of general principle the amount of any Security is calculated by reference to~~ having regard to:

Explanation for above amendments to clause 3.3 - Please refer to section ~~1.2.2~~5.2.2 (Amount and form of Security) of the submissions.

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(a) the aggregate value of all Services likely to be provided to the Access Seeker under this FAD over a reasonable period; or

(b) the value of amounts invoiced in respect of the Service but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).

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

3.4 Examples of appropriate forms of Security, having regard to the factors referred to in clause 3.3, may include without limitation:

(a) fixed and floating charges;

(b) personal guarantees from directors;

(c) Bank Guarantees;

(d) letters of comfort;

(e) mortgages;

(f) a right of set-off;

(g) a Security Deposit; or

(h) a combination of the forms of security referred to in paragraphs (a) to (g) above.

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

(i) the Access Provider is not obliged to invest the Security Deposit or hold the Security Deposit in an interest bearing account or otherwise; and

(j) the Access Seeker is prohibited from dealing with the Security Deposit or its rights to that Security Deposit (including by way of assignment or granting of security).

If any security is or includes a Bank Guarantee and that Bank Guarantee (Original Bank Guarantee) has an expiry date which is the last day by which a call made be made under a Bank Guarantee, the Access Seeker must procure a replacement Bank Guarantee for the amount guaranteed by the Original Bank Guarantee no later than two months prior to the expiry date of the Original Bank Guarantee, such replacement Bank Guarantee to have an expiry date of no less than 14 months from the date of delivery of the replacement Bank Guarantee.
If the Access Seeker fails to procure a replacement Bank Guarantee, then in addition to any other of the Access Provider's rights under this FAD, the Access Provider may, at any time in the month prior to the expiry date of the Bank Guarantee, make a call under the Bank Guarantee for the full amount guaranteed. The amount paid to the Access Provider pursuant to a call on the Bank Guarantee will become a Security Deposit.

3.5

(a) The Access Provider may from time to time where the circumstances reasonably require, request Ongoing Creditworthiness Information from the Access Seeker to determine the ongoing creditworthiness of the Access Seeker. The Access Seeker must supply Ongoing Creditworthiness Information to the Access Provider within 15 Business Days of receipt of a request from the Access Provider for such information.

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(b) The Access Provider may, as a result of such Ongoing Creditworthiness Information, having regard to the factors referred to in clause 3.3 and subject to clause 3.7, reasonably require the Access Seeker to alter the amount, form or the terms of the Security (which may include a requirement to provide additional security), and the Access Seeker must provide that altered Security within 20 Business Days of being notified by the Access Provider in writing of that requirement.

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(c) In addition to clause 3.5(b), the Access Provider may reasonably require the Access Seeker to alter the amount, form or terms of Security (which may include a requirement to provide additional Security) if;

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(i) the Access Seeker fails to comply with the terms and conditions of any Security provided to the Access Provider;

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(ii) the Access Seeker fails to restore (within five Business Days) the value of the existing Security in circumstances where the Access Provider exercises its rights in respect the Security (or part of it);

(iii) the Access Seeker has committed two or more Payment Breaches in any six Month period;

(iv) the Access Seeker applies for a new Service or increases the value of its existing Services by 20% or more,

and the Access Seeker must provide that altered Security within 20 Business Days of a written request being made by the Access Provider.

Explanation for amendments clause 3.5 - It is proposed that clause 3.5 should be broken up into three subparagraphs, each dealing with a separate issue. The proposed new clause 3.5(c) sets out additional triggers for requesting an altered Security. For an explanation of this proposed new clause 3.5(c) please refer to section ~~1.2.3~~ 5.2.3 (Alteration of Security) of the submissions.

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3.6 The Access Seeker may from time to time where circumstances reasonably require request the Access Provider to consent (in writing) to a decrease in the ~~required~~ amount of the Security and/or alteration of the form of the Security. The Access Provider must, within 15 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors referred to in clause 3.3). The Access Provider may request, and the Access Seeker must promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 3.6.

Explanation for amendments to clause 3.6 - The first amendment, consistent with clause 3.5(a), limits the frequency of requests to ensure that they are made only when there is a reasonable basis for them.

3.7 If the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 3, the Access Seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the Access Provider and that there has been no material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider. If there has been a material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider, the Access Seeker must disclose the nature and effect of the change to the Access Provider at the time the information is provided.

3.8 For the purposes of this Schedule 3, **Ongoing Creditworthiness Information** means:

(a) ~~a copy~~ copies of the Access Seeker's most recent management prepared (and if available the most recent annual audited):

(i) statement of cash flow;

(ii) ~~published audited~~ balance sheet; ~~and published audited~~

(iii) profit and loss statement

~~1.3.~~ (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);

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~~(a)~~(b) a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker must co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the Access Seeker's creditworthiness. To that end, the Access Seeker agrees to procure written consents (as required under the *Privacy Act 1988* (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the Access Provider to:

(i) obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;

(ii) disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and

(iii) obtain and use a consumer credit report;

~~(b)~~(c) a letter, signed by the company secretary or duly authorised officer of the Access Seeker, stating that the Access Seeker is not insolvent and not under any external administration (as defined in the *Corporations Act 2001* (Cth)) or under any similar form of administration under any laws applicable to it in any jurisdiction; and

(d) the Access Seeker's credit rating, if any has been assigned to it; and~~.~~

(e) any other information reasonably required by the Access Provider to assess the Access Seeker's creditworthiness.

Explanation for amendments to clause 3.8 - Please refer to section 5.2.4 (Meaning of Ongoing Creditworthiness Information) of the submissions.

Clause 3.9 below should be deleted, but if not, it is proposed that the clause be amended as marked up below.

Please refer to section 5.2.5 (Confidentiality undertaking for Ongoing Creditworthiness Information) of the submissions.

3.9 The Access Seeker may require a confidentiality undertaking in the form set out in Annexure 1 of Schedule 5 (Confidentiality provisions) of this FAD to be given by any ~~person~~ third party having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.

Subject to this Schedule 3, the parties agree that:

(a) a failure by the Access Seeker to provide the warranties set out in clause 3.7 or to provide Ongoing Creditworthiness Information constitutes:

(i) an event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) of the Access Seeker and the Access Seeker must provide that altered Security within 15 Business Days after the end of the period set out clause 3.5(a); ~~or~~and

Explanation for proposed new clause 3.9(a)(i): The Access Provider should have the ability to choose one or both of subclauses (i) and (ii) in (a) and (b) as a remedy, rather than having to choose one or the other.

(ii) breach of a material term or condition of this FAD.

Explanation for proposed new clause 3.9(a)(ii) -

The Access Provider should have the ability to choose one or both of subclauses (i) and (ii) in (a) and (b) as a remedy, rather than having to choose one or the other.

(b) a failure by the Access Seeker to maintain the Security under clause 3.1, to provide an altered Security in accordance with clause 3.5 or 3.10(a)(i) or the occurrence of any event set out in clause 3.5(c)(i) to 3.5(c)(iii) constitutes:

(i) an event entitling the Access Provider to immediately suspend the supply of the Service(s) to the Access Seeker under clause 6.X; and

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(ii) a breach of a material term or condition of this FAD for the purposes of clause 6.1(c).

Explanation for proposed new clause 3.9(b) – This amendment is necessary to give effect to proposed new clause 6.X. Further, clause 3.10(b) provides certainty to the parties as to the meaning of the words "breach of a material term or condition" in clause 6.1(c).

3.10 Any disputes arising out of or in connection with Schedule 3 must be dealt with in accordance with the procedures in Schedule 4. Notwithstanding that a dispute arising out of or in connection with Schedule 3 has been referred to the procedures in Schedule 4 and has not yet been determined, nothing in this clause 3.10 or Schedule 4 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 6.

Schedule 4 – General dispute resolution procedures

4.1 If a dispute arises between the parties in connection with or arising from the terms and conditions set out in this FAD for the supply of the Service, the dispute must be managed as follows:

(a) in the case of a Billing Dispute, the dispute must be managed in accordance with the Billing Dispute Procedures; or

(b) subject to clause 4.2, in the case of a Non-Billing Dispute, the dispute must be managed in accordance with the procedures set out in this Schedule 4.

The Access Seeker cannot initiate both a Non-Billing Dispute and a Billing Dispute in relation to the same subject matter.

Explanation for amendments to clause 4.1 -

The ~~first~~ amendment above ensures that only disputes concerning the terms and conditions of the FAD are governed by the dispute resolution procedures in the FAD. To the extent that other disputes arise about terms not set out in the FAD, these will be covered by the relevant commercial agreement between the parties.

The second amendment ensures that the parties are precluded from initiating both the Billing Dispute and Non-Billing Dispute procedures simultaneously, or from using one after the other, in relation to a dispute concerning the same subject matter.

Please refer to section 5.3 of the submissions.

4.2 To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless otherwise determined, that Non-Billing Dispute must be resolved in accordance with the Billing Dispute Procedures. If ~~T~~the Access Provider provides written notice to the Access Seeker that a ~~may seek a determination from an independent third party on whether a~~ dispute initiated by the Access Seeker as a Billing Dispute is, in the Access Provider's reasonable opinion, a Non-Billing Dispute, then the dispute shall be deemed to be a Non-Billing Dispute and the Access Seeker must~~. If the independent or third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to~~ pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access Provider. ~~For the purposes of this clause 4.2, the independent third party may include an arbiter from the Australian Commercial Disputes Centre (**ACDC**).~~

Explanation for amendments to clause 4.2 - The Access Provider should have the ability, acting reasonably, to determine that a dispute initiated as a Billing Dispute is in fact a Non-Billing Dispute. It is not practicable to have an independent third party determine that question, as issues such as the selection of an appropriate person and the procedure to be followed will unduly protract the determination of the issue. Such a process would also be costly, and would raise issues as to who is to pay those costs. This is essentially a preliminary step to the resolution of a dispute, which should be resolved quickly and cost effectively. Given the ability of the Access Seeker to withhold the payment of any amounts owing under the FAD by initiating a Billing Dispute, the Access Seeker should not

be able to do so in circumstances where the dispute is in substance a Non-Billing Dispute. Thus, the Access Provider should be entitled to make this determination, acting reasonably.

4.3 If a Non-Billing Dispute arises, either party may, by written notice to the other containing sufficient details of the dispute, refer the Non-Billing Dispute for resolution under this Schedule 4. A Non-Billing Dispute must be initiated only in good faith.

Explanation for the amendment to clause 4.3

This amendment ensures that a party receiving a Non-Billing Dispute is provided with sufficient information to enable them to comply with the timeframe specified in clause 4.9. If an Access Seeker notifies a dispute but does not indicate the specific nature of the dispute, an Access Provider would not be able to provide relevant materials in 5 Business Days and the matter would be unlikely to be resolved within 10 Business Days.

4.4 Any Non-Billing Dispute notified under clause 4.3 must be referred:

(a) initially to the nominated manager (or managers) for each party, who must endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 4.3 or such other time agreed by the parties; and

(b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within a further five Business Days to refer the Non-Billing Dispute to an Expert Committee under clause 4.11, or by written agreement submit it to mediation in accordance with clause 4.10.

4.5 If:

(a) under clause 4.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation; or,

(b) under clause 4.10(f), the mediation is terminated; and

(c) after a period of five Business Days after the mediation is terminated as referred to in paragraph (b), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise) either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.

4.6 A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:

(a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 4.5; or

(b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable).

4.7 Each party must continue to fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 4 are pending.

4.8 All communications between the parties during the course of a Non-Billing Dispute are made on a without prejudice and confidential basis.

Each party must, as early as practicable, and within 5 Business Days at the latest, after the notification of a Non-Billing Dispute pursuant to clause 4.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

Explanation for above amendments to clause 4.9 - Please refer to section 5.3.2 of the submissions.

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4.9 Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 4.4(b):

(a) any agreement must include:

(i) a statement of the disputed matters in the Non-Billing Dispute; and

(ii) the procedure to be followed during the mediation,

and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;

(b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the provisions of this clause 4.10. In the event of any inconsistency between them, the provisions of this clause 4.10 prevail;

(c) it must be conducted in private;

(d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator must:

(i) have an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);

(ii) have an appreciation of the competition law implications of his/her decisions; and

(iii) not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;

(e) the parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who will attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation;

(f) it must terminate in accordance with the ACDC Guidelines;

(g) the parties must bear their own costs of the mediation including the costs of any representatives and must each bear half the costs of the mediator; and

(h) any agreement resulting from mediation binds the parties on its terms.

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

(a) The terms of reference of the Expert Committee are as agreed by the parties. If the terms of reference are not agreed within five Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee is deemed to be terminated.

(b) An Expert Committee acts as an expert and not as an arbitrator.

(c) The parties are each represented on the Expert Committee by one appointee.

(d) The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 4.10(d)(i), (ii) and (iii).

(e) Each party must be given an equal opportunity to present its submissions and make representations to the Expert Committee.

(f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.

(g) Unless the parties agree otherwise the parties must ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.

(h) If the dispute is not resolved within the timeframe referred to in clause 4.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.

(i) The Expert Committee has the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.

(j) The Expert Committee must give written reasons for its decision.

(k) A decision of the Expert Committee is final and binding on the parties except in the case of manifest error or a mistake of law.

(l) Each party must bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties must each bear half the costs of the independent member of the Expert Committee.

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

(a) there is a dispute resolution process established in connection with, or pursuant to, a legal or regulatory obligation (including any dispute resolution process set out in a Structural Separation Undertaking)

(b) a party has initiated a dispute under the dispute resolution process referred to in clause 4.12(a), and

(c) the issue the subject of that dispute is the same issue in dispute in the Non-Billing Dispute.

Schedule 5 – Confidentiality provisions

5.1 Subject to clause 5.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:

(a) use or copy such Confidential Information except as set out in this FAD; or

(b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.

5.2 For the avoidance of doubt, information about the Service supplied to the Access Seeker that is generated within the Access Provider's Network as a result of or in connection with the supply of the relevant Service to the Access Seeker or the interconnection of the Access Provider's Network with the Access Seeker's Network (other than information that falls within paragraph (d) of the definition of Confidential Information) is the Confidential Information of the Access Seeker.

Explanation of proposed amendments to clause 5.2 - The first amendment is necessary because not all information which is generated within the Access Provider's Network which satisfies the conditions of clause 5.2 as currently drafted will be confidential information of the Access Seeker. Only information concerning WDSL supplied to the Access Seeker that is generated in this way should be considered the Confidential Information of the Access Seeker.

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5.3 The Access Provider must upon request from the Access Seeker, disclose to the Access Seeker quarterly aggregate traffic flow information generated within the Access Provider's Network in respect of a particular Service provided to the Access Seeker, if the Access Provider measures and provides this information to itself. The Access Seeker must pay the reasonable costs of the Access Provider providing that information.

5.4 Subject to clauses 5.5 and 5.10, Confidential Information of the Access Seeker may be:

(a) used by the Access Provider:

(i) for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;

(ii) for the purposes of supplying Services to the Access Seeker;

(iii) for the purpose of billing; or

(iv) for another purpose agreed to by the Access Seeker; and

(b) disclosed only to personnel who, in the Access Provider's reasonable opinion require the information to carry out or otherwise give effect to the purposes referred to in paragraph (a) above.

5.5 A party (**Disclosing Party**) may to the extent necessary use and/or disclose (as the case may be) the Confidential Information of the other party:

(a) to those of its directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential Information is reasonably required to be disclosed ~~for the purposes of this FAD~~;

Explanation for above amendment to clause 5.5(a) - Please refer to section 5.4.1 (Disclosure of Confidential Information) of the submissions.

(b) to any professional person for the purpose of obtaining advice in relation to matters arising out of or in connection with the supply of a Service under this FAD;

(c) to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;

(d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this FAD, provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party so that the other party has an opportunity to protect the confidentiality of its Confidential Information;

(e) as required by law provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information, except that no notice is required in respect of disclosures made by the Access Provider to the ACCC under section 152BEA of the CCA;

(f) with the written consent of the other party provided that, prior to disclosing the Confidential Information of the other party:

(i) the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party;

(ii) if required by the other party as a condition of giving its consent, the Disclosing Party must provide the other party with a confidentiality undertaking in the form set out in Annexure 1 of this Schedule 5 signed by the person or persons to whom disclosure is to be made; and

(iii) if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 5.6;

(g) in accordance with a lawful and binding directive issued by a regulatory authority;

(h) if reasonably required to protect the safety of personnel or property or in connection with an emergency;

(i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted;~~.~~

(j) in the case of the Access Provider, in accordance with a reporting obligation or request from a regulatory authority or any other Government body in connection with the Access Provider's Structural Separation Undertaking; or

~~1.4.~~ ***Explanation for above amendment to clause 5.5(j)*** - The Access Provider should be able to disclose Confidential Information to a regulator or government body in response to a request for information relating to a Structural Separation Undertaking.

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(k) in the case of the Access Provider, in response to a request from a regulatory authority or any other Government body in connection with interception capability (as that term is used in Chapter 5 of the Telecommunications (Interception and Access) Act 1979 (Cth)) relating to a Service provided by the Access Provider to the Access Seeker under this Agreement.

Explanation for above amendment to clause 5.5(k) - The Access Provider should be able to disclose Confidential Information to a regulator or government body in response to a request for information relating to interception capability.

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

(a) protect the confidentiality of the other party's Confidential Information; or

(b) enforce its rights in relation to its Confidential Information.

5.7 Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction or disclosure.

5.8 Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the Disclosing Party that the Confidential Information is or will be correct.

5.9 Each party acknowledges that a breach of this Schedule 5 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this Schedule 5.

5.10 If:

(a) the Access Provider has the right to suspend or cease the supply of the Service under:

(i) Schedule 6 due to a Payment Breach

(ii) under clause 6.7; or

(b) after suspension or cessation of supply of the Service under this FAD, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment

then the Access Provider may do one or both of the following:

(a) notify and exchange information about the Access Seeker (including the Access Seeker's Confidential Information) with any credit reporting agency or the Access Provider's collection agent; and

(b) without limiting clause 5.10, disclose to a credit reporting agency:

(i) the defaults made by the Access Seeker to the Access Provider; and

(ii) the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD

Annexure 1 of Schedule 5

Confidentiality undertaking form

[Amend where necessary]

CONFIDENTIALITY UNDERTAKING

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

1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking (**Confidential Information**) that is in my possession, custody, power or control.

2 I acknowledge that:

(a) this Undertaking is given by me to [Provider] in consideration for [Provider] making the Confidential Information available to me for the Approved Purposes (as defined below);

(b) all intellectual property in or to any part of the Confidential Information is and will remain the property of [Provider]; and

(c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [undertaking company] in relation to the Confidential Information except as expressly provided in this Undertaking.

3 I will:

(a) only use the Confidential Information for:

(i) the purposes listed in Attachment 2 to this Undertaking; or

(ii) any other purpose approved by [Provider] in writing;

(**the Approved Purposes**);

(b) comply with any reasonable request or direction from [provider] regarding the Confidential Information.

4 Subject to clause 5, I will not disclose any of the Confidential Information to any other person without the prior written consent of [Provider].

5 I acknowledge that I may disclose the Confidential Information to which I have access to:

(a) any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:

(i) the person to whom disclosure is proposed to be made (**the person)** is notified in writing to [Provider] and [Provider] has approved the person as a person who may receive the Confidential Information, which approval shall not be unreasonably withheld;

(ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [Provider]; and

(iii) a signed undertaking of the person has already been served on [Provider];

(b) if required to do so by law; and

(c) any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(a) for the Approved Purpose.

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

~~7 Except as required by law and subject to paragraph 10 below, within a reasonable time after whichever of the following first occurs:~~

~~(a) termination of this Undertaking;~~

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

~~(c) my ceasing to be working for [undertaking company] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [undertaking company]);~~

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~~I will destroy or deliver to [Provider] the Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the Confidential Information in my possession, custody, power or control.~~

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Explanation for above amendment to paragraph 7 – Please refer to section 5.4.2 (Form of Confidentiality Undertaking) of the submissions.

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

(a) which is in the public domain; or

(b) which has been obtained by me otherwise than from [Provider] in relation to this Undertaking;

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

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

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

Explanation for above amendment to paragraph 10 – This is a consequential amendment as a result of the proposed deletion of paragraph 7 above.

Signed: _____ Dated: _____

Print name: _____

ATTACHMENT 1

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

ATTACHMENT 2

[Approved purpose(s)]

Schedule 6 – Suspension and termination

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

(a) during an Emergency; or

(b) where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider's Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency;

(c) where, in the reasonable opinion of the Access Provider, the Access Seeker's Network or equipment adversely affects or threatens to affect the normal operation of the Access Provider's Network or access to the Access Provider's Network or equipment (including for the avoidance of doubt, where the Access Seeker has delivered Prohibited Traffic onto the Access Provider's Network);

(d) where the Access Seeker has failed to provide the Security to the Access Provider under clause 3.1 within 10 Business Days after the commencement of the supply of the Service to the Access Seeker;

(e) where an event set out in clauses 6.7(a) to (i) occurs;

~~(d)~~(f) where the Access Seeker fails to maintain the Security, fails to provide altered Security, or fails to vary or replace an existing Security in circumstances where it is required to do so under this FAD,

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

Explanation for above amendments to clause 6.1 - Please refer to section 5.6.1 (Circumstances giving rise to a right to suspend) of the submissions.

6.2. If:

(a) the Access Seeker has failed to pay monies payable under this FAD;

(b) the Access Seeker's use of:

(i) its Facilities;

(ii) the Access Provider's Facilities or Network; or

(iii) any Service supplied to it by the Access Providers,

(iv) is in contravention of any law; or

(c) the Access Seeker breaches a material obligation under this FAD

(**Suspension Event**) and:

(d) as soon as reasonably practicable after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:

(i) citing this clause;

(ii) specifying the Suspension Event that has occurred;

(iii) requiring the Access Seeker to institute remedial action (if any) in respect of that event; and

(iv) specifying the action which may follow due to a failure to comply with the notice,

(**Suspension Notice**) and:

(e) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 6.1, the **Remedy Period**),

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

(f) refuse to provide the Access Seeker with the Service:

~~(i) of the kind in respect of which the Suspension Event has occurred; and~~

~~(ii) a request for which is made by the Access Seeker after the date of the breach,~~

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

(g) suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist..

Explanation for above amendments to clause 6.2(f) to (g) - The suspension of the supply of the Service should not be limited in time to Services supplied after the date of breach. Where a Suspension Event is subsisting, the right of suspension should apply to *any* supply of the Service to the Access Seeker, and not just to any requests for supply made after the date of breach.

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6.3. For the avoidance of doubt, subclause 6.1(a) does not apply to a Billing Dispute that has been validly notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.

Explanation for amendment to clause 6.3 - This amendment ensures that a failure to pay monies owing under the FADs will not constitute a "Suspension Event" only where the Access Seeker has properly complied with the Billing Dispute Procedures in the FADs.

6.4. In the case of a suspension pursuant to clause 6.1, the Access Provider must reconnect the Access Seeker to the Access Provider's Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider must do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.

6.5. If:

(a) an Access Seeker ceases to be a carrier or carriage service provider; or

(b) an Access Seeker ceases to carry on business for a period of more than 10 consecutive Business Days or

(c) in the case of an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or

(d) an Access Seeker breaches a material obligation under this FAD, and:

(i) that breach materially impairs or is likely to materially impair the ability of the Access Provider to deliver Listed Carriage Services to its customers; and

(ii) the Access Provider has given a written notice to the first-mentioned party as soon as reasonably practicable after ~~within 20 Business Days of~~ becoming aware of the breach (**Breach Notice**); and

Explanation for amendment to clause 6.5(d)(ii) - In relation to the second amendment, consistent with clause 6.1 above, there should not be a fixed timeframe for the giving of a Breach Notice because this limits the ability of the parties to attempt to commercially resolve a dispute before a Breach Notice is issued..

~~1.5.~~

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(iii) the Access Seeker fails to ~~institute~~ complete the remedial action as specified in the Breach Notice within 10 Business Days after receiving the Breach Notice (in this clause 6.4, the **Remedy Period**), or

Explanation for amendments to clause 6.5(d)(iii) - this amendment clarifies that the remedial action should be completed, and not merely commenced, by the end of the Remedy Period. In addition, consistent with clause 6.1(e) above, the Remedy Period should be 10 Business Days.

~~1.6.~~

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(e) the Access Seeker has breached a material obligation under this FAD and that breach is incapable of being remedied; or

Explanation for proposed new clause 6.5(e) - The Access Provider should have the right to immediately cease to supply where the Access Seeker commits a material breach which is incapable of being remedied. It does not make sense to have a remedial period applying to a material breach of this nature.

~~02~~

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~~(e)~~(f) the supply of the Service(s) to the Access Seeker has been suspended pursuant to the terms and conditions of this FAD for a period of three months or more,

the Access Provider may cease supply of the Service under this FAD by written notice given to the first-mentioned party at any time after becoming aware of the cessation, reasonable grounds ~~or~~, expiry of the Remedy Period specified in the Breach Notice, the irremediable breach, or where the suspension has continued for a period of three Months or more (as the case may be).

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Explanation for amendments to 6.5 - This is a consequential amendment which covers the scenarios in proposed clause 6.1(e) and existing clause 6.1(f) above.

6.6. A party must not give the other party both a Suspension Notice under clause 6.1 and a Breach Notice under clause 6.4 in respect of:

(a) the same breach; or

(b) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events;

except:

(c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 6.1 in respect of a Suspension Event and the Suspension Event has not been rectified by the Access Seeker within the relevant Remedy Period specified in clause 6.1; and

(d) where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 6.45(d)(ii), the time period for the purposes of clause 6.45(d)(ii) will be 20 Business Days from the expiry of the time available to remedy the Suspension Event, rather than 20 Business Days from the date the Access Provider becomes aware of the breach.

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Explanation for amendment to clause 6.6(d) - If Telstra's proposed amendments to clause 6.5(d)(ii) above are not accepted, this amendment clarifies that the time limitation in clause 6.5(d)(ii) will not operate to prevent the issuing of a Breach Notice in the circumstances contemplated by subparagraphs (c) and (d).

6.7. For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 6.1 in respect of a breach before giving a Breach Notice in respect of that breach under clause 6.4.

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

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

(b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other party; or

(c) a holder of an encumbrance takes possession of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or

(d) the other party is or is likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or

~~(d)~~(e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or

~~(e)~~(f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of three Months; or

~~(f)~~(g) the other party breaches any of the terms of any of its loans, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to the supply of the Service under this FAD; or

~~(g)~~(h) the other party seeks or is granted protection from its creditors under any applicable legislation; or

~~(h)~~(i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

6.9. The cessation of the operation of this FAD:

(a) does not operate as a waiver of any breach by a party of any of the provisions of this FAD; and

(b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.

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

Schedule 7 – Liability and indemnity

7.1. Subject to clause 7.2, each Party's liability in respect of:

(a) any Liability (other than the Liability referred to in clause 7.1(b~~c~~)) arising in the 12 month period commencing on the date of the first supply of the Service under this FAD is limited to the greater of:

(i) the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in that initial 12 month period; and

(ii) $1 million.

(b) ~~(c)(b)~~ any Liability (other than the Liability referred to in clause 7.1(a~~c~~)) arising in any subsequent 12 month period commencing on any anniversary of the date of the first supply of the Service under this FAD is limited to the greater of:

(i) the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in the 12 month period immediately prior to that anniversary; and~~.~~

(ii) $1 million.

Explanation for amendments to clause 7.1– Please refer to section 5.7.2 of Telstra's submission.

For the purposes of this clause 7.1, Liability arises when the act or omission giving rise to the Liability occurs, not when any claim is made by a party under this FAD in connection with that Liability.

7.2 The liability limitation in clause 7.1 does not apply to the Access Seeker's liability to pay the Charges for the Service provided under this FAD, or the Parties' indemnification obligations under clauses 7.3 and 7.4.

7.3 Each Party indemnifies the other Party against all Loss arising from the death of, or personal injury to, a Representative of the other Party, where the death or personal injury arises from:

(a) an act or omission that is intended to cause death or personal injury; or

(b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

7.4 Each Party indemnifies the other Party against all Loss arising from any loss of, or damage to, the property of the other party (or the property of a representative of the other Party), where the loss or damage arises from:

(a) an act or omission that is intended to cause loss or damage to property; or

(b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

7.5 Each Party indemnifies the other Party against all Loss arising from a claim by a third person against the Innocent Party to the extent that the claim relates to a negligent act or omission by the first Party or by a Representative of the first Party.

7.6 The Access Seeker indemnifies the Access Provider against all Loss arising from the reproduction, broadcast, use, transmission, or communication or making available of any material (including data and information of any sort) by the Access Seeker, its Representatives, or an end-user of the Access Seeker using the Service.

Explanation for new clause 7.6 –Please refer to section 5.7.3 of Telstra's submission.

7.~~6~~7 Subject to clauses 7.3 and 7.4, a Party has no Liability to the other Party for or in respect of any consequential, special or indirect Loss or any loss of profits or data.

7.~~8~~7 A Party has no Liability to the other Party for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any end-user of a Party or any other third person who is not a Representative of a Party.

7.~~9~~8 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 7 to the extent that the liability the subject of the indemnity claim is the direct result of:

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(a) a breach of this FAD;
(b) an act intended to cause death, personal injury, or loss or damage to property; or
(c) a negligent act or omission;
by the Innocent Party.

7.~~10~~9 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 7 or for in respect of a claim brought against the Innocent Party by an end-user of the Innocent Party, or a third person with whom the Innocent Party has a contractual relationship, to the extent that the Loss under such claim could have been excluded or reduced (regardless of whether such a Liability actually was excluded or reduced) by the Innocent Party in its contract with the end-user or third person.

7.~~11~~10 The Innocent Party must take all reasonable steps to minimise the Loss it has suffered or is likely to suffer as a result of an event giving rise to an indemnity under this Schedule 7. If the Innocent Party does not take reasonable steps to minimise such Loss then the damages payable by the Indemnifying Party must be reduced as is appropriate in each case.

7.~~12~~11 A Party's liability to the other Party for Loss of any kind arising out of the supply of the Service under this FAD or in connection with the relationship established by it is reduced to the extent (if any) that the other Party causes or contributes to the Loss. This reduction applies whether the first Party's liability is in contract, tort (including negligence), under statute or otherwise.

7.~~13~~12 The Innocent Party must give the Indemnifying Party notice of any third party claim that is the subject of any indemnity under this Schedule 7. The Indemnifying Party may then notify the Innocent Party that the Indemnifying Party is to ~~must~~ be given 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 ~~clause 7.3 or 7.4~~this Schedule 7, including, subject to the Indemnifying Party first obtaining the written consent (which must not be unreasonably withheld) of the Innocent Party to the terms thereof, the settlement of such a claim.

Explanation for above amendments to clause 7.13 – The first and second amendments clarify that an Indemnifying Party *may* (but is not required to) conduct the defence of a third party claim against an Innocent Party, upon receiving notice of that claim. In circumstances where the Indemnifying Party has only indemnified the Innocent Party against a small proportion of the loss claimed by the third party, it is inappropriate to compel the Indemnifying Party to conduct the full defence of the Innocent Party. It is normal commercial practice for Innocent Parties to conduct proceedings in such circumstances.

The third and fourth amendments make it clear that clause 7.13 applies in respect of *all* liability claims which are the subject of an indemnity under Schedule 7 (not solely claims contemplated by clauses 7.3 and 7.4), but only to the extent that the claim is the subject of an indemnity – otherwise the Indemnifying Party would have a right to conduct the entirety of the claim even though it was providing an indemnity for only a small proportion of it.

7.14 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.

Explanation for new clause 7.14 – This amendment complements the amended clause 7.13 and provides additional protection for Indemnifying Parties. If an Indemnifying Party is given the conduct of the defence against a third party claim, it is critical that the Innocent Party assists the Indemnifying Party by (for example) providing all relevant documentation, making witnesses available to give evidence, making no admissions relating to any allegations raised (without the consent of the Indemnifying Party) and assisting in the conduct of negotiations. The inclusion of such a clause is standard commercial practice: see, for example, clause 13.4 of the BT Master Services Agreement.

SCHEDULE 2

PROPOSED AMENDMENTS TO 2008 MODEL TERMS - COMMUNICATIONS WITH END USERS

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F – Communications with end users

F.1. The Access Provider may communicate and deal with an Access Seeker's end-users as expressly provided in clauses 8.2 to 8.4 and as otherwise permitted by law.

F.2. Subject to clause 8.3, the Access Provider may communicate and deal with the Access Seeker's end-users:

~~•~~(a) in relation to goods and services which the Access Provider currently supplies or previously supplied to the end-user;

~~2.1.1.~~(b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;

~~2.1.2.~~(c) where the Access Provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;

~~2.1.3.~~(d) in a manner or in circumstances agreed by the parties; or

~~2.1.4.~~(e) in or in connection with an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property

(f) if the Access Provider has a right to suspend or terminate the Access Seeker's Service, to inform the end-user that:

(i) its Service has been, will be or may be suspended or terminated on a specified time or date; and

(ii) if the Access Seeker's Service is being terminated, the end-user may wish to transfer to another service provider before that time or date to ensure they continue to receive the Service,

and if the Access Provider contacts the end-user under clause 12.2(f), the Access Provider:

(iii) must notify the Access Seeker (either individually or as part of a collective notification) of this and if reasonably practicable, prior to making contact with the end-user;

(iv) must copy the Access Seeker on any correspondence or other information or advice which is given to the end-user in writing;

(v) must not disclose the reasons for the suspension or termination of the Access Seeker's service unless otherwise directed by the Access Seeker; and

~~2.1.5.~~ (vi) must not recommend or suggest an alternative service provider.

Explanation for amendments in new clause 8.2(f) - Please refer to sections **5.5** (Communications with end users) of the submissions.

Proposed new clause - Please refer to section **5.5** (Communications with end users) of the submissions.

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F.X The Access Seeker:

(a) authorises the Access Provider to contact and deal with end-users in an Emergency and in connection with the testing or fault remediation of a service provided for the purpose of Emergency management or disaster planning;

(b) if applicable, appoints each of its end users as its agent to activate or to add, remove or change a Service for that end-user in an Emergency;

(c) will give the Access Provider all assistance (including provision of information and access to records) as required by the Access Provider for the purposes of connecting Services or remedying service faults in an Emergency;

(d) must maintain and make available to the Access Provider on request account numbers, services, Emergency contact details and service details (including exchange information, cable pair information, the address of the end user premises and the location of the Service within the premises) in relation to a Service provided for the purpose of Emergency management or disaster planning, and end-users of that service; and

(e) must comply with applicable national, state and local disaster and Emergency management plans and assist the Access Provider to comply with such plans.

F.3. If:

(a) an end-user of the Access Seeker initiates a communication with the Access Provider and the Access Provider is or becomes aware that the communication is in relation to goods and/or services supplied to that end- user by the Access Seeker, the Access Provider must:

~~2.1.5.1.~~(i) advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services with the Access Seeker; and

~~2.1.5.2.~~(ii) not engage in any form of marketing or discussion of the Access Provider's goods and/or services;

(b) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end- user by the Access Provider, the Access Provider may engage in any form of marketing or discussion of the Access Provider's goods and/or services; and

(c) an end-user of the Access Seeker initiates a communication with the Access Provider and the Access Provider is or becomes aware that the communication is in relation to goods and/or services supplied to that end- user by the Access Provider and the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services with the Access Seeker, but may otherwise engage in any form of marketing or discussion of the Access Provider's goods and/or services.

Explanation for amendments to clause 8.3 - Please refer to section **5.5** (Communications with end users) of the submissions.

F.4 Where a party communicates with the end-user of the other party, that first mentioned party must, where practicable, make and maintain records of that communication with the other party's end-user in circumstances where that communication discusses anything concerning the other party's goods or services with the end-user. For the

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avoidance of doubt, the obligation in this paragraph does not include a requirement to provide such records to the other party (however such a requirement may arise pursuant to any dispute resolution procedure).

F.5. For the purposes of clauses 8.2 to 8.4, a "communication" shall include any form of communication, including without limitation telephone discussions and correspondence.

F.6. Neither party may represent that:

(a) it has any special relationship with or special arrangements with the other party (including any representations relating to the provision of special pricing or services);

Explanation for amendment to clause 8.6(a) - This amendment provides greater clarity in relation to the concept of a special relationship/arrangement.

(b) there are no consequences for an end-user when an end-user signs an authority to transfer their accounts or services;

Explanation for amendment to clause 8.6(b) - Telstra assumes that the original drafting of this clause contained an error as there are, in fact, consequences for an end user in transferring their accounts or services. The most obvious being that the service provider will be different, so it is likely that there will be different services and product sets, and different levels of customer service available to that end user.

(c) a Service has any characteristics or functionality other than as specified in a relevant standard form of agreement or the service description for the Service or in any specifications, collateral or brochures published in relation to the Service; or

~~2.1.6.~~ (d) the other party participates in the provision of the first mentioned party's services, provided that a party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other party.

F.7. ~~Where a party communicates with an end-user of either party, the first mentioned~~ Each party shall ensure that it does not attribute to the other party:

Explanation for amendments to clause 8.7 above - Telstra considers that this clause should apply not only where a party communicates to the end-user of another party but more broadly. For example, the clause should also prevent a party from attributing fault or blame to the other party on their website.

~~2.1.7.~~ (a) blame for a ~~F~~fault or other circumstance (including termination of a Service); or

Explanation for amendments to clause 8.7(a) -

In relation to the first amendment, "Fault" is defined as a fault which is the responsibility of the Access Provider, whereas this clause should cover a broader concept.

The second amendment includes "termination of a Service" as an example of "other circumstance".

(b) the need for maintenance of a Network; or

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(c) the suspension of a Service,

provided that this requirement does not require a party to engage in unethical, misleading or deceptive conduct.

Proposed new clause - It is important when considering the respective obligations of the parties to appreciate that often there will not be a direct relationship between the Access Seeker and the ultimate end user of a Service. Often there will be a reseller interposed between the two, or even a reseller chain. In order to ensure that the obligations imposed on an Access Seeker flow through to those who have the direct relationship with the ultimate end user, it is necessary that the Access Seeker, so far as is reasonably possible, ensures that its resellers do not engage in any inappropriate behaviour. For example, if a reseller puts something on its website incorrectly blaming the Access Provider for the occurrence of a particular event, the Access Provider should be able to approach the Access Seeker who has the direct relationship with that reseller, and ask them to have the offending message removed. For that reason, the proposed clause below obliges Access Seekers to put in place mechanisms to prevent their resellers from engaging in any conduct which, if performed by the Access Seeker, would constitute a breach of the FADs. Please also refer to the new of definition of "Resellers" in Schedule 1.

F.Y The Access Seeker must, so far as is reasonably practicable, ensure that any Reseller of Services that the Access Seeker acquires from the Access Provider does not do or omit to do anything which, if done or omitted by the Access Seeker, would constitute a breach of the FADs.

F.8. This Schedule 8 shall be subject to any applicable industry standard made by the ACMA pursuant to Part 6 of the Telecommunications Act 1997 (Cth) and any applicable industry code registered pursuant to Part 6 of the Telecommunications Act 1997 (Cth) in relation to communications or dealings with end-users.

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SCHEDULE 3

TELSTRA'S PROPOSED SUBMISSIONS AND AMENDMENTS TO THE "INTERPRETATION AND DEFINITIONS" SCHEDULE OF FROM THE DTCS FAD.

~~1.~~ Interpretation and definitions

Interpretation

In this FAD, unless the contrary intention appears:

(a) the singular includes the plural and vice versa;

(b) the words "including" and "include" mean "including, but not limited to"; and

(c) terms defined in the CCA or the *Telecommunications Act 1997* have the same meaning.

Definitions

"ACCC" means the Australian Competition and Consumer Commission;

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

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

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

"ACDC" means the Australian Commercial Disputes Centre Limited;

"ACDC Guidelines" means the mediation guidelines of the ACDC in force from time to time;

"ACMA" means the Australian Communications and Media Authority;

~~**"After Hours"** means outside Business Hours;~~

Explanation for deletion of definition of "After Hours" - This term is not used in the draft FAD.

Bank Guarantee means an irrevocable and unconditional undertaking by a financial institution (acceptable to the Access Provider) carrying an Australian banking licence, requiring the financial institution to pay on demand whether by one or more requests.

Explanation for new definition of "Bank Guarantee" - The term "Bank Guarantee" is used in clause 3.4 but not defined.

"Billing Dispute" means a dispute relating to any alleged inaccuracy, omission, or error in relation to a Charge or in an invoice issued by the Access Provider to the Access Seeker;

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Explanation for new definition of "Billing Dispute" - Please refer to section 5.2.2.2 (Definition of "Billing Dispute") of the submissions.

"**Billing Dispute Notice**" means a notice given pursuant to clause 2.10, in a form and containing the particulars or information reasonably required by the Access Provider;

Explanation for new definition of "Billing Dispute Notice" - The FAD should provide guidance on the form and content of the Billing Dispute Notice. A consistent form of notice will be administratively easier to work with for both parties and will assist the Access Provider in responding in a timely manner. To this end, the Access Provider will require the notice to be accompanied by information such as the Service affected, the invoice(s) to which the Billing Dispute Notice relates, the account and the amount(s) disputed, and the basis of the dispute etc. Bearing in mind that the Access Provider has a finite period within which to resolve the dispute, this amendment, along with clause 2.16, will ensure that the Access Provider receives all relevant information either at the time of receiving the Billing Dispute Notice, or (where clause 2.16 applies) very shortly thereafter.

"Billing Dispute Procedures" means the procedures set out in clauses 2.10 to 2.29;

~~**"Business Hours"** means 8.00 am to 5.00 pm Monday to Friday, excluding a day which is a gazetted public holiday in the place where the relevant transaction or work is to be performed;~~

Explanation for deletion of definition of "Business Hours" - This term is not used in the draft FAD.

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

"Calendar Day" means a day reckoned from midnight to midnight;

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

(a) at the end of the day before the corresponding day of the next named month; or

(b) if there is no such corresponding day — at the end of the next named month;

~~**"Capital City"** means Sydney, Melbourne, Brisbane, Adelaide, Perth, Darwin, Hobart or Canberra;~~

Explanation for deletion of definition of "Capital City" - This term is not used in the draft FAD.

~~**"Capital City Boundary"** means, in respect of a Capital City, the collective boundary of all ESAs that are served by a Capital City Exchange;~~

~~Note: Maps showing each Capital City Boundary can be found in the document entitled "Route Category Workbook" available on the Australian Competition and Consumer Commission website (www.accc.gov.au).~~

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***Explanation for deletion of definition of "Capital City Boundary"* -** This term is not used in the draft FAD.

~~**"Capital City Exchange"** means:~~

~~(a) in the case of Sydney, an Exchange located within 50 kilometres of the City South Exchange;~~

~~(b) in the case of Melbourne, an Exchange located within 45 kilometres of the Kooyong Exchange;~~

~~(c) in the case of Brisbane, an Exchange located within 25 kilometres of the Edison Exchange;~~

~~(d) in the case of Adelaide, an Exchange located within 25 kilometres of the Waymouth Exchange;~~

~~(e) in the case of Perth, an Exchange located within 30 kilometres of the Wellington Exchange;~~

~~(1) in the case of Darwin, an Exchange located within 10 kilometres of the Nightcliff Exchange;~~

~~(g) in the case of Hobart, an Exchange located within 6 kilometres of the Bathurst Exchange;~~

~~in the case of Canberra, an Exchange located within 15 kilometres of the Barton Exchange;~~

***Explanation for deletion of definition of "Capital City Exchange"* -** This term is not used in the draft FAD.

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

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

"Charge" means a charge set out in this FAD for the supply of the Service by the Access Provider to the Access Seeker under this FAD;

***Explanation for new definition of "Charge"* -** Please refer to section 1.1.1 (Definition of "Charge") of the submissions.

"Confidential Information" means all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form and whether coming into existence before or after the commencement of this FAD) relating to or developed in connection with or in support of the Service supplied under this FAD (the **"first**

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mentioned party") but does not include:

(a) information which is or becomes part of the public domain (other than through any breach of this FAD or a breach of any other obligation of confidence in favour of the provider of the Confidential Information or by any other unlawful means of which the acquirer of the confidential information is aware);

(b) information rightfully received by the other party from a third person without a duty of confidentiality being owed by the other party to the third person, except where the other party has knowledge that the third person has obtained that information either directly or indirectly as a result of a breach of any duty of confidence owed to the first mentioned party; or

(c) information which has been independently developed or obtained by the other party; or

(d) information about Services supplied by the Access Provider (including where that information is generated by the Access Provider) that has been aggregated with other information of a similar or related nature, such that the Access Seeker cannot be identified by the information or any part of it.

Explanation for amendments to definition of "Confidential Information" - In relation to the amendments to subparagraph (a) of the definition, Telstra submits that these additional protections, which appear in the FADs for the declared fixed line services, should be included as they ensure that the public domain exception cannot be misused by any party to avoid confidentiality obligations.

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"Disclosing Party" has the meaning set out in clause 5.5 in Schedule 5 of this FAD;

"Emergency" means a national security alert or an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic, vandalism, theft or war-like action) which:

(a) endangers or threatens to endanger the safety or health of persons; or

(b) destroys or damages, or threatens to destroy or damage

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

Explanation for amendment to definition of "Emergency" -

The first amendment makes clear that "Emergency" includes, for example, activation of the government's "Emergency Alert" notification system.

The second amendment has been made in order to bring the definition of "Emergency" into line with the definition in a previous, publicly available FD.

~~**"Emergency Network Modernisation and Upgrade"** means a Major Network Modernisation and Upgrade that is required and is reasonably necessary and a proportionate response to address an Emergency~~

Explanation for deletion of definition of "Emergency Network Modernisation and Upgrade" - This term is not used in the draft FAD.

~~**"Equivalent Period of Notice"** means a period of notice commencing at the time that the Access Provider has approved and allocated the capital expenditure or otherwise approved and made a decision to commit to a Major Network Modernisation and Upgrade;~~

Explanation for deletion of definition of "Equivalent Period of Notice" - This term is not used in the draft FAD.

~~**"ESA"** means a geographic area generally serviced by a single Exchange;~~

Explanation for deletion of definition of "ESA" - This term is not used in the draft FAD.

~~**"Event"** means an act, omission or event relating to or arising out of this FAD or part of this FAD;~~

Explanation for deletion of definition of "Event" - This term is not used in the draft FAD.

~~**"Exp[ ]"** means the mathematical exponential function;~~

Explanation for deletion of definition of "Exp[]" - This term is not used in the draft FAD.

~~**"Exchange"** means a building owned or operated by the Access Provider in which telephone switching or other equipment of an Access Provider or Access Seeker has been installed for use in connection with a telecommunications network;~~

Explanation for deletion of definition of "Exchange" - This term is not used in the draft FAD.

"Expert Committee" means a committee established under clause 4.11;

"FAD" means this Final Access Determination for the DTCS;

~~**"Fault"** means:~~

- ~~a failure in the normal operation of a Network or in the delivery of the Service; or~~
- ~~any issue as to the availability or quality of the Service supplied to an end-user via the Access Seeker, notified by the end-user to the Access Seeker's help desk, that has been reasonably assessed by the Access Provider as being the Access Provider's responsibility to repair;~~

Explanation for deletion of definition of "Fault" - This term is not used in the draft FAD.

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~~**"General Notification"** has the meaning set out in clause 8.1;~~

~~**"Individual Notification"** has the meaning set out in clause 8.1 of Schedule 8;~~

"Initiating Notice" has the meaning as set out in clause 4.11 of Schedule 4;

"Indemnifying Party" means the Party giving an indemnity under this FAD;

~~**"Intercapital"** means a route from an ESA within a Capital City Boundary to an ESA within another Capital City Boundary;~~

Explanation for deletion of definition of "Intercapital" - This term is not used in the draft FAD.

"Innocent Party" means the Party receiving the benefit of an indemnity under this FAD;

"Liability" (of a party) means any liability of that party (whether in contract, in tort, under statute or in any other way and whether due to negligence, wilful or deliberate breach or any other cause) under or in relation to this FAD, or part of this FAD or in relation to any Event or series of related Events;

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

"Loss" includes liability, loss, damage, costs, charges or expenses (including legal costs);

~~**"Major Network Modernisation and Upgrade"** means a modernisation or upgrade that:~~

~~(a) involves changes or upgrades to the network interface protocols used to provide a transmission rate of 2.048 Megabits per second or above;~~

~~(b) requires the removal/relocation of the DTCS provided from Exchange buildings and the establishment of a new P01 (or relocation of an existing POI) for the DTCS; or~~

~~(c) results in a Service no longer being supplied or adversely affects the quality of that Service (or any services supplied by an Access Seeker to their end-users using the Service), but does not mean, or include, an Emergency Network Modernisation Upgrade or an NBN related upgrade;~~

Explanation for deletion of definition of "Major Network Modernisation and Upgrade" - This term is not used in the draft FAD.

~~**"Metropolitan"** means a route that is wholly within a Capital City Boundary, but does not include a Tail-End route;~~

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Explanation for deletion of definition of "Metropolitan" - This term is not used in the draft FAD.

"Month" means a calendar month;

~~**"NBN Co"** means NBN Co Limited (ACN 136 533 741), as it exists from time to time (even if its name is later changed);~~

Explanation for deletion of definition of "NBN Co" - This term is not used in the draft FAD.

~~**"NBN Upgrade"** means a planned Major Network Modernisation and Upgrade by the Commonwealth of Australia and/or NBN Co that upgrades an existing access network as part of a fibre to the premises upgrade.~~

Explanation for deletion of definition of "NBN Upgrade" - This term is not used in the draft FAD.

"Network" of a party, means that party's system, or series of systems, that carries, or is capable of carrying communications by means of guided or unguided electromagnetic energy;

"NonBilling Dispute" means a dispute other than a Billing Dispute;

"Ongoing Creditworthiness Information" has the meaning as set out in clause 3.8 of Schedule 3 of this FAD;

"Party" means a party to this FAD;

"**Payment Breach**" means a failure by the Access Seeker to pay any amount owing under this FAD by the due date for payment;

Explanation for new definition of "Payment Breach" - This definition has been proposed as a result of amendments to clauses 3.5(c)(iii), 5.10 and 6.1(a).

~~**"People"** of a party, means each of that party's directors, officers, employees, agents, contractors, advisers and representatives but does not include that party's end-users or the other party;~~

Explanation for deletion of definition of "People" - This term is not used in the draft FAD.

"POI" means point of interconnection and is a location for the interconnection of networks;

"Protected Service" means a DTCS service where an Access Provider has contractually agreed to provide more than one geographically diverse path in the inter-exchange component of the Service;

Prohibited Traffic means traffic offered across a POI for which there is no agreement between the Access Provider and the Access Seeker that the Access Provider will carry such traffic or provide a related service to the Access Seeker

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Explanation for new definition of "Prohibited Traffic" - This definition, taken from the FADs for the declared fixed line services, has been introduced as a result of the use of that concept in proposed new clause 6.X(c).

~~**"Quality of service I (QOS 1)"** means the quality of service that is available using a DTCS service that:~~

~~(a) is a Protected Service;~~

~~(b) is provided using a network that is capable of delivering the DTCS service by means of more than two geographically diverse paths; and~~

~~(c) has an overall service reliability of 99.9 per cent;~~

Explanation for deletion of definition of "Quality of service (QOS 1)" - This term is not used in the draft FAD.

~~**"Regional"** means:~~

- ~~a route from a location outside a Capital City~~

~~Boundary to another location; or~~

- ~~a route to a location outside a Capital City~~

~~Boundary from another location; but does not include a~~

~~Tail-End route;~~

Explanation for deletion of definition of "Regional" - This term is not used in the draft FAD.

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

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

"Security" means the amount and form of security required to be provided to the Access Provider in respect of the provision by the Access Provider of the DTCS under Schedule 3'

"Service" means the ~~DTCS~~wholesale ADSL service.

"Suspension Event" has the meaning set out in clause 6.1 of Schedule 6;

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"Suspension Notice" has the meaning set out in clause 6.1 of Schedule 6;

"Structural Separation Undertaking" means:

(a) an undertaking given by Telstra under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which comes into force in accordance with section 577AB, and any amendment to that undertaking which comes into force in accordance with subsection 577B(6); and

(b) a migration plan approved by the ACCC under Subdivision B of Division 2 of Part 33 of the *Telecommunications Act 1997* (Cth) which, pursuant to subsection 577BE(5), forms part of the undertaking referred to in paragraph (a), and any amendment to that plan which is approved by the ACCC in accordance with section 577BF,

and includes all binding schedules, annexures and attachments to such documents; ~~**"Tail End"** means a route wholly within a single ESA;~~

Explanation for deletion of definition of "Tail End" - This term is not used in the draft FAD.

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