



Australian  
Competition &  
Consumer  
Commission

## **Fixed Services Review**

**Extension of existing fixed line services and  
wholesale ADSL final access determinations**

**Inquiry into varying the WLR, LCS, ULLS and LSS  
final access determinations**

**Discussion Paper**

**April 2014**



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# List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ADSL	Asymmetric Digital Subscriber Line
CAN	Customer Access Network
CBD	Central Business District
CCA	<i>Competition and Consumer Act 2010</i>
c-i-c	commercial in confidence
CSP	Carriage service provider
DSL	Digital Subscriber Line
DSLAM	Digital subscriber line access multiplexer
DTCS	Domestic transmission capacity service
ESA	Exchange Service Area
FAD	Final access determination
HFC	Hybrid fibre-coaxial
IAD	Interim access determination
IIC	Internal Interconnection Cable
ISDN	Integrated Services Digital Network
LCS	Local carriage service
LSS	Line sharing service
LTIE	Long-term interests of end-users
Mbps	Megabits per second
MSAN	Multi-service access node
NBN	National Broadband Network
POI	Point of interconnection
PSTN	Public switched telephone network
PSTN OTA	PSTN originating and terminating access
RIM	Remote Integrated Multiplexer

SAOs	Standard access obligations
SAU	Structural Access Undertaking
SIOs	Services in operation
SSU	Structural Separation Undertaking
TCP Code	Telecommunications Consumer Protection Code
ULLS	Unconditioned local loop service
VoIP	Voice over internet protocol
WLR	Wholesale line rental

# Glossary

<b>access seeker</b>	Telecommunications companies that seek access to the declared service (that is, the right to use the declared service).
<b>access provider</b>	Telecommunications companies that provide access to a declared service.
<b>ADSL</b>	Asymmetric Digital Subscriber Line. A technology for transmitting digital information at high data rates on existing copper phone lines. It is called asymmetric because the download and upload speeds are not symmetrical (that is, download is faster than upload).
<b>CAN</b>	Customer Access Network. The portion of the copper network that connects each telephone end-user to the network switch at their local exchange.
<b>declaration inquiry</b>	The process by which the ACCC holds a public inquiry to determine whether a service should be declared.
<b>declared service</b>	A service that the ACCC regulates under Part XIC of the CCA. Once declared, a service provider must supply the service to other parties in accordance with the standard access obligations and the terms and conditions set in the final access determination.
<b>downstream</b>	Further along the supply chain. For example, mandating access to network services can promote competition in downstream retail broadband services.
<b>end-user</b>	Retail consumers of telecommunication services.
<b>exchange</b>	Place where various numbers and types of communication lines are switched so as to establish a connection between two telephones. The exchange also houses DSLAMs, allowing end users to connect to the internet.
<b>FAD</b>	Final Access Determination. The FAD is made by the ACCC and sets the terms and conditions (including prices) on which a service provider must supply a declared service.
<b>fixed line services</b>	Telecommunications services provided over fixed networks, such as Telstra's copper network and HFC networks. The 'declared fixed line services' are the six fixed line services declared in 2014 – the ULLS, LSS, WLR, LCS, FOAS, and FTAS.
<b>FOAS</b>	The declared fixed originating access service. Allows a telephone call to be connected from the caller to a point of interconnection with another network.
<b>FTAS</b>	The declared fixed terminating access service. Allows a telephone call to be carried from the point of interconnection to the party being called on another network.
<b>IIC</b>	The Internal Interconnection Cable. The IIC is a cable that connects access seeker equipment to Telstra's main distribution frame within the Telstra exchange.

<b>LCS</b>	The declared Local Carriage Service. For a 'per-usage' charge, allows access seekers to resell local calls to end-users without having to invest in their own network and switching equipment. The LCS is purchased in conjunction with the WLR service.
<b>LSS</b>	The declared Line Sharing Service. Allows access seekers to share the use of the copper line connecting consumers to the telephone exchange, allowing them to provide fixed internet services using their own equipment. An alternative provider provides the voice services.
<b>MTAS</b>	The declared Mobile Terminating Access Service. A wholesale service provided by a mobile network operator (MNO) to fixed line operators and other MNOs to connect – or 'terminate' – a call on its mobile network. It enables calls to be made to consumers on mobile phone networks.
<b>PSTN</b>	Public Switched Telephone Network. The telephone network that allows the public to make and receive telephone calls via switching and transmission facilities and utilising analogue and digital technologies.
<b>PSTN OA</b>	The previously declared PSTN Originating Access service. Allows a telephone call to be connected from the caller to a point of interconnection with another network.
<b>PSTN OTA</b>	PSTN Originating and Terminating Access services. Used to refer to the PSTN OA and PSTN TA services together.
<b>PSTN TA</b>	The previously declared PSTN terminating access service. Allows a telephone call to be carried from the point of interconnection to the party being called on another network.
<b>retail service provider</b>	Companies that offer telecommunications services to end-users.
<b>SIO</b>	Service In Operation. Refers to an active telecommunications service provided to an end-user.
<b>ULLS</b>	The declared Unconditioned Local Loop Service. Allows access seekers to use the copper line connecting end-users to the local telephone exchange, allowing them provide both fixed internet (broadband) and voice services using their own DSLAMs and other exchange equipment.
<b>Wholesale ADSL</b>	The declared Wholesale ADSL service. Allows access seekers to purchase a Wholesale ADSL product from Telstra and resell internet services to end-users.
<b>WLR</b>	The declared Wholesale Line Rental service. For a monthly 'per-user' charge, it allows access seekers to purchase a line rental service from Telstra, which includes access to the copper line and associated services (including a dial tone and telephone number) supplied using Telstra's equipment.

# 1 Introduction

This paper explains the ACCC's decision to extend the existing final access determinations (**FADs**) for the declared fixed line services (ULLS, LSS, LCS, WLR, FOAS and FTAS) and the wholesale ADSL service under the *Competition and Consumer Act 2010 (Cth)* (**CCA**).

Separately, this paper also commences an inquiry into whether to vary the FADs for four of the fixed line services—ULLS, LSS, LCS and WLR—to address two immediate issues. The ACCC considers that the proposed variations should be considered now given that the substantive FAD inquiry will not be completed before late 2014, commercial negotiations will likely occur before that time and in view of certain changes to the LCS and WLR declarations (which will take effect from 1 August 2014). Hence, there would be a risk that access to the declared services on reasonable terms and conditions would be delayed if these specific issues were not dealt with until the substantive FAD inquiry is completed.

A brief overview of the extension decision and the proposed variations to the FADs is outlined below in section 3.

## 2 Background

The fixed line services and the wholesale ADSL service are wholesale services supplied by Telstra over its copper public switched telephone network (**PSTN**) and asymmetric digital subscriber line (**ADSL**) network. They form an important input used by retail service providers to supply voice and broadband services to downstream fixed telecommunications markets.

The ACCC currently regulates fixed line services and the wholesale ADSL service under Part XIC of the CCA.

Under Part XIC, the ACCC may declare an eligible service which makes it subject to the Part XIC access regime. Once a service is declared, an access provider that supplies the declared service must supply the service, upon request, to access seekers in accordance with the standard access obligations (**SAOs**).<sup>1</sup>

The fixed line services and the wholesale ADSL service are currently declared under Part XIC of the CCA. The ACCC recently completed its public inquiry to determine whether the previous fixed line service declarations should be extended, revoked, varied, allowed to expire or re-made (**Declaration inquiry**). On 16 April 2014, the ACCC decided to extend the declarations of the fixed line services for the period 1 August 2014 to 31 July 2019, and made variations to some of the service descriptions.<sup>2</sup> The wholesale ADSL declaration will expire on 13 February 2017. Where the changes to the service description in the declarations require variations to the relevant FADs, they are discussed in this discussion paper. The ACCC does not consider that other changes to the service description necessitate variations to the relevant FADs.<sup>3</sup>

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<sup>1</sup> Set out in section 152AR of the *Competition and Consumer Act 2010 (Cth)* (the **CCA**).

<sup>2</sup> ACCC, *Fixed Services Review – Public inquiry into the fixed line services declarations, Final Report*, April 2014.

<sup>3</sup> The ACCC notes that there were some variations to the service descriptions which reduced the scope of the declaration (e.g. changes to the previous PSTN OA (FOAS, from 1 August 2014) service description which excluded PSTN OA pre-selection and override services provided using NBN infrastructure). The ACCC considers

Once a service is declared, the ACCC can make regulated terms of access through a FAD. A FAD can specify how an access provider is to comply with any or all of the SAOs.<sup>4</sup> These FAD terms and conditions will apply where there is no commercial agreement between an access seeker and the access provider.<sup>5</sup> In this way, the FADs create a benchmark that the parties can fall back on when they are unable to negotiate alternative access terms and conditions.

The ACCC has made FADs that are currently in force for the declared fixed line services and wholesale ADSL service (**the existing FADs**). These FADs contain price and non-price terms of access and all of them expire on 30 June 2014.

On 11 July 2013, the ACCC commenced a public inquiry into making new FADs for the fixed line services and wholesale ADSL service (**the substantive FAD inquiry**). The ACCC intends that these new FADs will replace the then prevailing FADs. The substantive FAD inquiry will determine the terms and conditions, including price, for the fixed line services and the wholesale ADSL service in light of submissions provided in the course of the inquiry.

## 3 Overview

### 3.1 Extension of the current fixed line services and wholesale ADSL service FADs

As noted above, the existing FADs will expire on 30 June 2014. The ACCC has decided to extend these FADs, setting a new expiry date to the day before the new FADs come into force, under section 152BCF of the CCA. The reasons for this decision are discussed in section 5 of this paper. The requisite declaration is published on the ACCC's website.<sup>6</sup>

In addition to extending the fixed line services and wholesale ADSL FADs under subsection 152BCF(10), the ACCC intends to make a number of minor variations to these FADs. These include updating all references in these FADs which may have been altered as a result of the ACCC's recent final decision on the fixed services declaration inquiry, and updating the FAD titles for the PSTN OA and the PSTN TA declared services. Pursuant to subsection 152BCN(2), the ACCC is not required to hold a public inquiry about minor variations.

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that these do not require corresponding variations to the relevant FADs to make clear that the FADs still apply to the new declared services.

<sup>4</sup> Refer to subsection 152BC(3) of the CCA.

<sup>5</sup> The terms and conditions in a final access determination apply only to those terms and conditions where terms and conditions on that matter in an Access Agreement cannot be reached, no special access undertaking is in operation setting out terms and conditions on that matter and no binding rules of conduct have been made setting out terms and conditions on that matter: section 152AY of the CCA.

<sup>6</sup> The relevant extension declaration can be found on the ACCC's Telecommunications Public register.– <http://registers.accc.gov.au/content/index.phtml/itemId/971651> (as viewed 17 April 2014).



## 3.2 Inquiry to vary FADs

The ACCC is also conducting a combined inquiry to vary four of the existing fixed line services FADs to address the following specific matters.

### 3.2.1 *Variation to LCS and WLR FADs to apply terms to services supplied in CBD areas*

The previous declarations for the Line Carriage Service (**LCS**) and the Wholesale Line Rental (**WLR**) service (made in 2002 and 2007 respectively and extended in 2009) did not apply to the supply of the LCS and the WLR service in the central business districts (**CBD**) areas. That is, services supplied in the CBD areas of Sydney, Melbourne, Brisbane, Perth and Adelaide were 'carved out' from the declared service descriptions and were therefore not subject to the Part XIC access regime. This means that the current FADs for the LCS and the WLR service do not apply to services supplied in CBD areas.

In its final decision on the declaration inquiry, the ACCC varied the service descriptions for the LCS and the WLR service to remove the existing CBD 'carve-out' i.e. services supplied in CBD areas are now subject to declaration.<sup>7</sup>

The ACCC proposes to vary the existing the LCS and the WLR service FADs so that the price and non-price terms in those FADs now apply to services supplied in CBD areas. The ACCC's consideration of these variations is outlined in section 7.

### 3.2.2 *Variation to ULLS and LSS FADs to include price terms for use of internal interconnection cable to interconnect with the ULLS and the LSS*

Telstra charges Unconditioned Local Loop Service (**ULLS**) and the Line Sharing Service (**LSS**) access seekers an Internal Interconnection Cable (**IIC**) charge. The IIC is a cable that connects access seeker equipment to the ULLS and the LSS on Telstra's main distribution frame within the Telstra exchange. The IIC charge relates to the housing, maintenance and management of the IIC (the IIC service) which is necessary for the provision of the ULLS and the LSS.

The ACCC currently regulates the IIC charge that Telstra applies to ULLS and LSS access seekers through arbitral determinations which it made in November 2012 and which expire on 30 June 2014 and cannot be extended. These arbitral determinations apply to seven access seekers.

After the arbitral determinations expire, the ACCC proposes to regulate the IIC charge applied to ULLS and LSS access seekers by including a price term addressing the charge in the ULLS and the LSS FADs. This term of the FADs would be expressed to apply to all ULLS and LSS access seekers. Section 8 of this paper sets out the inquiry as it relates to this proposed variation.

## 4 Consultation

The ACCC has the power to vary a FAD.<sup>8</sup> In doing so, the ACCC must follow the same procedures as making an FAD, unless the variation is of a minor nature or the parties affected by the variation have consented to the variation. As the proposed variations are not minor nor have the consent of the affected parties been sought, the

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<sup>7</sup> ACCC, *Fixed Services Review – Public inquiry into the fixed line services declarations, Final Report*, April 2014.

ACCC must hold a public inquiry under Part 25 of the *Telecommunications Act 1997* (Cth) (**Telco Act**).<sup>9</sup>

This discussion paper constitutes notice that the ACCC is holding an inquiry to vary the FADs as outlined in section 3.<sup>10</sup> This inquiry is separate to the substantive FAD inquiry.

#### 4.1 Making a submission

The ACCC encourages industry participants, other stakeholders and the public more generally to consider and make submissions on the matters set out in this discussion paper.

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

The ACCC expects that claims for commercial in confidence status of information by parties will be limited in nature in order to allow widest possible participation in the public inquiry.

The *ACCC-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator on the collection, use and disclosure of information. In addition to the ACCC-AER information policy, the ACCC has also recently published the Confidentiality Guideline for submitting confidential material to ACCC communications inquiries which sets out the process parties should follow when submitting confidential information to communications inquiries commenced by the ACCC. Copies of both the ACCC-AER information policy and the confidentiality guideline can be downloaded from the ACCC's website.<sup>11</sup>

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format which allows the submission text to be searched. Please contact Luke Eipper regarding any questions you have concerning this consultation on (03) 9658 6443.

Submissions are due on **19 May 2014**.

Please email submissions to:

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<sup>8</sup> Under subsection 33(3) of the *Acts Interpretation Act 1901* (Cth) subject to the changes specified in section 152BCN of the CCA.

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

<sup>10</sup> Pursuant to subsection 498(1)(a) *Telecommunications Act 1997*. See also section 499 *Telecommunications Act 1997*.

<sup>11</sup> ACCC, Communications inquiries - confidentiality guideline, as viewed 10 April 2014 - <http://www.accc.gov.au/publications/communications-inquiries-submitting-confidential-material>

## 5 Decision to extend the fixed line services and wholesale ADSL service FADs

As noted in section 2, the existing FADs for the fixed line services and the wholesale ADSL service expire on 30 June 2014. The ACCC has made the decision to extend the expiry date for these FADs to the day before the day on which the new FADs come into force. To provide transparency to industry, this section outlines the ACCC's decision and the reasons behind it.

Under the Part XIC of the CCA the ACCC can extend existing FADs in certain circumstances. Subsection 152BCF(10) of the CCA provides that:

*“If:*

- (a) an access determination (the **original access determination**) relating to access to a declared service is in force; and*
- (b) the Commission has commenced to hold a public inquiry under Part 25 of the Telecommunications Act 1997 about a proposal to make another access determination in relation to access to the service; and*
- (c) the Commission considers that it will make the other access determination, but will not be in a position to do so before the expiry date for the original access determination;*

*the Commission may, by writing, declare that the expiry date for the original access determination is taken to be the day immediately before the day on which the other access determination comes into force.”*

Specifically, the circumstances referred to in subsection 152BCF(10) of the CCA are satisfied. Existing FADs are currently in force and in July 2013 the ACCC commenced the substantive FAD inquiry about making new FADs for the relevant declared services. The ACCC also considers that it will make new FADs for the relevant declared services but will not be in a position to do so before the expiry date of the existing FADs. While the ACCC has commenced the FAD inquiry that inquiry is in its information collection stage.

The ACCC has requested and received information from Telstra under the building block model record keeping rule (**BBM RKR**). This information is necessary for the ACCC to set price terms for the declared fixed line services. The ACCC considers that disclosing the BBM RKR information, with appropriate protections for sensitive information, is necessary for interested parties to be given an opportunity to consider, review and comment on this information. The ACCC is currently consulting on arrangements for disclosure of that information to the public or certain parties by notice to Telstra under section 151BUA of the CCA.<sup>12</sup>

The ACCC must first give a draft of the disclosure notice to Telstra and invite Telstra to make a submission on the draft within a period of at least 28 days.<sup>13</sup> On 19 March

<sup>12</sup> Refer to subsections 151BUA (2) and (4) CCA.

<sup>13</sup> Subsection 151BUA(6) of the CCA

2014 the ACCC gave Telstra a draft disclosure notice and released a consultation paper inviting submissions on the proposed approach to disclosure of information provided under the BBM RKR. Submissions on the consultation paper are sought by 17 April 2014.<sup>14</sup>

If the ACCC decides to disclose the Telstra material or extracts from the Telstra material, it will issue Telstra with a final disclosure notice and publish the notice on the ACCC website. The material will be available subject to the terms and conditions set out in the disclosure notice after a period of at least 28 days after Telstra is given the final disclosure notice.

The ACCC considers that it will conclude the consultation process and make a decision on whether and how to disclose the BBM RKR information in mid-2014. Only after this will the ACCC be in a position to issue a discussion paper on the substantive FAD inquiry and commence extensive consultation. Accordingly, the ACCC considers that it will not be in a position to make FADs on the relevant services by 30 June 2014 (when the existing FADs expire).

In view of the above, the ACCC has made the decision to extend the expiry date for the existing FADs to the day before the day on which the (new) fixed line service and wholesale ADSL service FADs comes into force. Extending the expiry date of the existing FADs will also provide regulatory certainty and consistency for access providers and access seekers until new FADs are made and come into force.

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<sup>14</sup> For more information on the BBM RKR information collection can be found on the ACCC's website, as viewed 26 March 2014: [www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fixed-line-services-fad-inquiry-2013/bbm-rkr-information-collection](http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fixed-line-services-fad-inquiry-2013/bbm-rkr-information-collection)

## 6 Inquiry to vary FADs

As outlined in section 3, the ACCC proposes to make variations to the LCS, WLR, ULLS and LSS FADs to address two specific matters. The ACCC sets out below the relevant legislative framework the ACCC must have regard to when making a decision on whether to vary the FADs.

### 6.1 Legislative framework

As noted above, the ACCC has the power to vary an FAD.<sup>15</sup> In doing so, the ACCC must follow the same procedures as making an FAD, unless the variation is of a minor nature or the parties affected by the variation have consented to the variation. As the proposed variations are not minor nor have the consent of the affected parties been sought, the ACCC must hold a public inquiry under Part 25 of the Telco Act.<sup>16</sup> The ACCC must also take into account the matters specified in subsection 152BCA(1) of the CCA in deciding whether to vary a FAD.<sup>17</sup> These matters are:

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

For the purpose of determining whether a particular thing promotes the long-term interests of end-users (**LTIE**), regard must be had to the extent to which it is likely to result in the promotion of competition in the relevant markets, achieve any-to-any connectivity, and encourage the economically efficient use of, and investment in, infrastructure.<sup>18</sup>

In relation to assessing promotion of competition in the relevant markets, Part XIC of the CCA does not require the ACCC to precisely define the scope of the relevant markets for the purposes of assessing the FAD variations. Generally, and consistent with the ACCC's final decision on the declaration inquiry, the ACCC considers the relevant markets for the fixed line services are the national markets for:

- retail fixed voice services

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<sup>15</sup> Under subsection 33(3) of the *Acts Interpretation Act 1901* (Cth) subject to the changes specified in section 152BCN of the CCA.

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

<sup>17</sup> Subsection 152BCN(1) of the CCA and subsection 33(3) of the *Acts Interpretation Act 1901* (Cth).

<sup>18</sup> Refer to section 152AB of the CCA.

- retail fixed broadband services
- bundled retail fixed voice and broadband services
- wholesale network access services
- wholesale resale voice services
- wholesale interconnection services.

The relevant markets are further noted in the assessment of each proposed FAD variation in sections 7 and 8.

How the ACCC has taken into account the matters specified in section 152BCA of the CCA, and other matters that it considers relevant,<sup>19</sup> in deciding whether to make these FAD variations are set out in **Appendix A**.

The ACCC has applied the legislative framework in its assessment of the proposed FAD variations in sections 7 and 8.

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<sup>19</sup> Subsection 152BCA(3) of the CCA.

## 7 Inquiry to vary FADs for LCS and WLR to implement prices for CBD areas

As noted in section 2, the ACCC has varied the previous LCS and WLR service declarations to remove the CBD 'carve-out' such that the declarations now apply to services where the supply of the LCS and WLR service is within the CBD areas of Sydney, Melbourne, Brisbane, Adelaide or Perth.<sup>20</sup>

The ACCC considers that the existing FADs even as extended (see section 5) may not apply to services supplied in CBD areas. The ACCC is therefore proposing to vary the LCS and WLR service FADs to clarify that their terms apply to services supplied in CBD areas.

### 7.1 ACCC preliminary view

Based on the information available and having taken into account the matters specified in section 152BCA of the CCA and other relevant matters, the ACCC's preliminary view is that it should vary the LCS and WLR service FADs so that they apply to services supplied in CBD areas. Specifically, this variation will extend the price and non-price terms to LCS and WLR service supplied in CBD areas. The variation would commence on 1 August 2014 when the new declaration commences.

#### *Price terms*

The ACCC is proposing that the price terms currently specified in the existing LCS and WLR service FADs should apply to not only services supplied in non-CBD areas but services supplied in CBD areas as well. These prices are 8.9 cents per local call for the LCS and \$22.84 per month for WLR service (**the proposed LCS and WLR service CBD prices**).

The proposed LCS and WLR service CBD prices were calculated during the previous FAD inquiry in 2011, using a building block model pricing methodology. The ACCC refers to its pricing model as the fixed line services model (**FLSM**). The FLSM is structured on the assets used to supply fixed line services. Allocation factors are used to determine the cost blocks for operating costs, capital costs (return on and of capital) and taxation, and these blocks are then summed to forecast the aggregate revenue requirement for each asset class and each year. A share of each asset class revenue requirements is then allocated to each of the declared fixed line services and prices for the declared fixed line services are calculated by dividing the revenue requirement for each service by forecast demand for that service. This model and how it was used to estimate LCS and WLR service prices is discussed in detail in the ACCC's final report on the previous FAD inquiry (July 2011).<sup>21</sup>

The proposed LCS and WLR service CBD prices are the same as the nationally averaged prices applying in the 2011 FADs. The ACCC is of the view that it is

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<sup>20</sup> In relation to WLR, the revised service declaration now applies (from 1 August 2014) where the supply of the line rental telephone service is within the Central Business District Area of Sydney, Melbourne, Brisbane, Adelaide and Perth (ACCC, *Fixed Services Review Declaration Inquiry, Final Report*, April 2014).

In relation to LCS, the revised service declaration now applies (from 1 August 2014) where the supply of the local carriage service originates from an exchange located within a Central Business District Area of Sydney, Melbourne, Brisbane, Adelaide or Perth and terminates within the standard zone which encompasses the originating exchange (ACCC, *Fixed Services Review Declaration Inquiry, Final Report*, April 2014).

<sup>21</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services*, final report, July 2011.

reasonable that the price terms that currently apply to WLR service and LCS in non-CBD areas should also apply to WLR service and LCS supplied in CBD areas. The ACCC's reasons for setting the nationally averaged prices for LCS and WLR service are set out in its final report on the 2011 FAD inquiry.<sup>22</sup>

### *Non-price terms*

The ACCC is proposing that the non-price terms and conditions specified in the existing LCS and WLR service FADs should apply to not only services supplied in non-CBD areas but services supplied in CBD areas as well. These terms relate to a number of commercial matters including billing and notifications, creditworthiness and security, general dispute resolution procedures, confidentiality provisions, communications with end users, network modernisation and upgrade provisions, and suspension and termination.

These proposals will be given effect by varying the existing LCS and WLR FADs to specify that the price terms and non-price terms will apply to services supplied in both non-CBD and CBD areas.

The draft variation instrument is attached as **Appendix B**.

## **7.2 Assessment framework**

The relevant legislative framework the ACCC must apply is discussed in section 6.1. In relation to these LCS and WLR FAD variations, the ACCC notes that the relevant markets are the retail fixed voice services and bundled fixed voice and fixed broadband services markets and the wholesale markets for network access, resale and interconnection services. The ACCC has applied the legislative framework to the proposed price and non-price terms in the sections below.

### **7.2.1 Price terms**

The LCS and WLR service pricing is based on data that was available to the ACCC during the previous 2011 FAD inquiry.<sup>23</sup> That information is the best available information currently available to the ACCC. While the ACCC has received more recent information from Telstra under the BBM RKR (including forecast information on services expected to be migrated to the NBN), this information has not been subject to complete ACCC review and industry consultation. To the extent that the information from the 2011 FAD inquiry is out-dated, the effect of this would be limited as the pricing was modelled through to 30 June 2014 and would only be in place for a relatively short period of time beyond this date (until new FADs come into force). The ACCC has taken this into account as a matter which it thinks is relevant.<sup>24</sup>

Each of the matters the ACCC must take into account under section 152BCA of the CCA is addressed below.

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<sup>22</sup> Namely, setting WLR prices on a nationally averaged basis was consistent with the Government's arrangements for setting retail prices, and LCS supply costs were not expected to vary significantly by geographic area.

See ACCC, *Inquiry to make final access determinations for the declared fixed line services*, final report, July 2011, pp. 103-107.

<sup>23</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services*, final report, July 2011.

<sup>24</sup> Subsection 152BCA(3) of the CCA.



### **7.2.1.1 Subsection 152BCA(1)(a) – whether the determination will promote the LTIE**

The ACCC considers that setting the proposed LCS and WLR service CBD prices promotes the LTIE, compared to no regulated price being in place. Specifically, the ACCC considers:

- In the absence of regulated prices for LCS and WLR service in CBD areas, Telstra would be expected to charge (at least in the case of the WLR service) prices that are above efficient costs. It would also be open to Telstra to charge LCS prices above the efficient costs. In this regard, the ACCC noted the following in its draft report on the fixed line services declarations:

*Telstra's list price for a business WLR service (Basic Telephone Service with Business Access) is \$31.77 per month compared to the regulated price of \$22.84 per month. The ACCC considers this evidence supports a conclusion that Telstra has market power in the exempt areas and is using that market power to set above-cost WLR prices.<sup>25</sup>*

- The LCS and WLR service prices, calculated using a BBM pricing methodology, are reasonable estimates of the efficiently incurred costs of supplying those services based on best available information. Access prices that reflect efficient costs, and do not include any monopoly profits, would facilitate access to WLR service and LCS services by access seekers. Importantly, this approach better ensures that access seekers and Telstra's own retail operations face a similar cost base for using Telstra's copper network and associated exchange equipment that is needed to supply retail line rental and local call services. This would therefore promote competition in the relevant retail markets in CBD areas, and nationally for 'whole of business' voice and broadband packages supplied to nationally-based end users.
- Setting LCS and WLR service CBD prices would provide certainty for both the access provider and access seekers during the period from when CBD areas are subject to declaration to when new FADs are made. This certainty would promote efficient investment and competition in the relevant retail markets.
- By promoting competition in downstream markets, overall dynamic efficiency is encouraged as competition would incentivise technological and product development.
- The prices and innovation would allow Telstra to recoup its efficiently incurred costs in supplying these services, including a commercial return on its investments, which in turn would encourage the efficient use of, and investment in, infrastructure used to provide LCS and WLR service.

In view of the above, the ACCC considers that setting the proposed LCS and WLR service CBD prices would promote the LTIE in the relevant markets.

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

The ACCC considers that the proposed LCS and WLR service CBD prices would allow Telstra to recover its forecast operating expenditures on assets used to supply LCS and WLR service in CBD areas, its related forecast tax liabilities, depreciation

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<sup>25</sup> ACCC, *Fixed Services Review – Public inquiry into the fixed line services declarations - draft report*, December 2013, pp. ix

on these assets, and earn a commercial rate of return on its investments. This is because the price developed through the 2011 FAD process allows Telstra to recover its efficient costs over time. The ACCC considers that this is consistent with Telstra's legitimate business interests.

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

As noted above, the ACCC considers that setting the proposed LCS and WLR service CBD prices provides certainty for access seekers and will promote efficient investment by access seekers in the relevant retail services. The ACCC considers that this is consistent with access seekers legitimate business interests. In the absence of a regulated price for LCS and WLR service in CBD areas access seekers would have to individually negotiate prices for those areas even though they already have a uniform national price everywhere else LCS and WLR service are supplied.

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

The ACCC considers that the existing FAD prices (based on the BBM pricing methodology) ensure that the estimated direct costs of providing access to LCS and WLR service supplied in CBD areas are included in the revenue requirement. The ACCC also considers that the cost allocation factors, which allocate the aggregate revenue requirement to LCS and WLR service, would reasonably reflect the relative usage of the network by LCS and WLR service.<sup>26</sup> This ensures that the direct costs for LCS and WLR service have been allocated in the proposed prices.

Additionally, the ACCC also notes that the existing prices in the FADs for LCS and WLR service are nationally averaged including across CBD areas. The ACCC therefore considers that in setting these nationally averaged prices the ACCC took into account the direct costs of providing access to the declared services in CBD areas.

In view of the above, the ACCC considers that the proposed prices reflect the direct costs of providing access to LCS and WLR service.

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

This matter is not relevant to the ACCC's decision to vary the LCS and WLR service FADs.

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

Setting the proposed LCS and WLR service CBD prices will not compromise the safe and reliable operation of any carriage service, telecommunications network or facility. The LCS and WLR service prices reflect the efficiently incurred costs of providing these services. Accordingly, this would allow the access provider to recover the cost

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<sup>26</sup> ACCC, *Inquiry to make final access determinations for the declared fixed line services*, final report, July 2011, p 135.

of any necessary maintenance and network asset replacement as required to ensure that the declared fixed line services are provided safely and reliably.

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

The proposed LCS and WLR service CBD prices reflect the efficient costs of supplying those services. Therefore, for similar reasons as discussed in section 7.2.1.1 in relation to the LTIE, the ACCC is of the view that the prices will encourage the economically efficient operation of a carriage service, a telecommunications network or a facility.

#### **7.2.2 Non-price terms**

The ACCC considers that extending the existing non-price terms that apply to LCS and WLR services currently to services supplied in CBD areas would provide regulatory consistency across CBD and non-CBD areas. The ACCC has taken this into account as a matter that it considers is relevant to its assessment.<sup>27</sup> Each matter that the ACCC must take into account in accordance with section 152BCA of the CCA is addressed below.

##### **7.2.2.1 Subsection 152BCA(1)(a) – whether the determination will promote the LTIE**

The ACCC considers that extending the non-price terms would promote the LTIE, compared to if the terms were not extended. The ACCC considers it important that access seekers are able to rely on a reasonable set of non-price 'benchmark' terms of access which are consistent with the terms available for the LCS and the WLR service outside of CBD areas.

As an example, the confidentiality schedule specifies permitted uses of confidential information disclosed to the access provider, such as use by the access provider for the purposes of the FAD. This prevents access seeker confidential information being used for non-permitted purposes such as use by Telstra to gain a competitive advantage.<sup>28</sup> This would promote competition on its merit in the relevant retail markets.

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

The ACCC considers that the proposed non-price terms are consistent with the legitimate business interests of a carrier or carriage service provider. For example, the creditworthiness and security schedule contains terms that allow an access provider to obtain security and creditworthiness information reducing the carrier or carriage service providers' financial risk.<sup>29</sup>

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<sup>27</sup> The ACCC may take into account any other matters that it thinks are relevant: subsection 152BCA(3) of the CCA.

<sup>28</sup> Subsection 152BCA(1)(a) of the CCA.

<sup>29</sup> Subsection 152BCA(1)(b) of the CCA.

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

The ACCC also considers that the non-price terms would protect the interests of all persons who have rights to use the declared service. For instance, the general dispute resolution procedures benefit access seeker interests (and access provider interests) as they encourage dispute resolution procedures which are simple, flexible, quick and inexpensive. This means access seekers are not unduly constrained in their ability to conduct their business operations. The ACCC considers this is in the interests of access seeker rights to use LCS and WLR service in CBD areas.

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

The ACCC has formed the view that the proposed non-price terms take into account the direct costs of providing access to the declared service. For example, the suspension and termination schedule provides that where a service has been terminated, an access provider must refund to an access seeker a fair and equitable proportion of the monies paid under the FADs for the period from when the service has been terminated. This ensures that the access provider does not over-recover the costs of providing the service.

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

This matter is not relevant to the ACCC's decision to vary the LCS and WLR service FADs to extend the non-price terms to services supplied in CBD areas.

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

The ACCC considers that the proposed non-price terms would promote the economically efficient operation of a carriage service, a telecommunications network or a facility. For instance, the network modernisation and upgrade provisions require Telstra to give notice and consult with access seekers about major network modernisations and upgrades. These processes reduce information asymmetries about network changes, and ensure that access seekers make more informed and efficient investment decisions.

Given the above considerations, the ACCC considers that the proposed variation satisfies the assessment criteria outlined in section 152BCA of the CCA.

## **7.3 Questions**

*Questions on which the ACCC seeks views in relation to the proposed variation to the LCS and WLR service FADs (extending FAD terms to services supplied in CBD areas):*

- 1) Do you agree with the ACCC's application of the subsection 152BCA(1) criteria for making the proposed variation? Please provide reasons.
- 2) Do you agree with the ACCC's proposed LCS and WLR service CBD prices? Please provide reasons.
- 3) Do you agree with the ACCC's proposed non-price terms? Please provide reasons.

## 8 Inquiry to vary FADs for ULLS and LSS to include price terms for use of internal interconnection cable to interconnect with the ULLS and LSS

The IIC is a cable that connects access seeker Digital Subscriber Line Access Multiplexers (**DSLAMs**) and other equipment to the ULLS and LSS on Telstra's main distribution frame within the Telstra exchange for the purpose of supplying services to end-users. The IIC charge relates to the housing, maintenance and management of the IIC (**the IIC service**).

As noted in section 3, in November 2012, the ACCC made two arbitral final determinations setting a price for the IIC service in relation to the ULLS and the LSS.<sup>30</sup> These final determinations were made in response to an access dispute between Telstra and seven access seekers under the previous Part XIC regime (now repealed).<sup>31</sup>

The ACCC's approach to setting the IIC charge in the arbitrations involved two steps. Initially, the ACCC used Telstra's IIC cost model as a starting point for deriving an IIC charge because this cost model identified the specific assets used to provide the IIC service and it included estimates of the costs associated with these assets. The ACCC then refined Telstra's cost model through a number of adjustments so that it more closely aligned with the ACCC's FLSM pricing approach (discussed above in section 7.1). For example, the ACCC removed particular elements from Telstra's cost model that the ACCC considered would result in over-recovery or double recovery if it was factored into the IIC charge.<sup>32</sup>

These arbitral final determinations are scheduled to expire on 30 June 2014 and cannot be extended.<sup>33</sup> The ACCC is therefore considering regulating the IIC charge by adding price terms to the ULLS and the LSS FADs by way of the proposed FAD variation.<sup>34</sup>

In this regard, the ACCC's power in making or varying a FAD is in respect of specifying 'any or all of the terms and conditions on which a carrier is to comply with the standard access obligations applicable to the carrier' as well as dealing 'with any other matter relating to access to a declared service'.<sup>35</sup> In this regard, the ACCC considers the terms and conditions on which Telstra allows ULLS and LSS access seekers to use the IIC for the purpose of interconnecting their equipment with the ULLS and the LSS to be terms and conditions on which Telstra complies with the

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<sup>30</sup> ACCC, *Access Disputes Between Chime Communications Pty Ltd (Access Seeker) and Telstra Corporation Limited (Access Provider), Line Sharing Service*, 22 November 2012, [6]; and ACCC, *Access Disputes Between Chime Communications Pty Ltd (Access Seeker) and Telstra Corporation Limited (Access Provider), Unconditioned Local Loop Service*, 22 November 2012, [6].

<sup>31</sup> Chime Communications Pty Ltd, Adam Internet Pty Ltd, Agile Pty Ltd, Network Technology (Aust) Pty Ltd, Wideband Networks Pty Ltd, TPG Internet Pty Ltd and Netspace Networks Pty Ltd.; section 152CP of the CCA (now repealed).

<sup>32</sup> ACCC, *ULLS and LSS Access Disputes Chime Communications Pty Ltd / Telstra, Reasons for Final Determinations*, November 2012, pp. 16-49.

<sup>33</sup> Transitional provisions do not provide for the arbitration final determination for the IIC to be extended. This is consistent with the objective of bringing all such final determinations to an end in repealing Division 8 of Part XIC of the CCA.

<sup>34</sup> Section 152BCN of the CCA.

<sup>35</sup> Subsections 152BC(3)(a) and 152BC(3)(j) of the CCA.

standard access obligations that are applicable to it pursuant to subsection 152AR(5) of the CCA, as well as being matters that relate to access to the ULLS and the LSS.<sup>36</sup>

## 8.1 Preliminary ACCC view

Based on the reasons outlined in section 8.2, the ACCC's preliminary view is that it should vary the ULLS and LSS FADs to specify an IIC charge of \$0.056 (excluding GST) per month, being the same as that set in the final arbitral determinations (the proposed IIC charge).<sup>37</sup> The ACCC proposes that the variation would commence on 1 July 2014 (the day after the existing arbitral determinations expire).

The draft variation instrument is attached as **Appendix C**.

The ACCC's preliminary view is based on the information available and having taken into account the matters specified in section 152BCA of the CCA and other relevant matters, as outlined in subsection 152BCA(1) of the CCA.

## 8.2 Assessment framework

The relevant legislative framework is set out in section 6.1. With regard to the relevant markets, the ACCC considers the relevant markets are the same as that for ULLS and LSS, specifically, the markets for:

- retail fixed voice services
- retail fixed broadband services
- bundled retail fixed voice and broadband services
- wholesale network access services
- wholesale resale voice services
- wholesale interconnection services.

The proposed IIC charge was determined in November 2012 on information available to the ACCC at that time. The ACCC considers that this information is the best available to date for the same reasons as discussed above in section 7.2.1. Further, the BBM RKR data recently received by the ACCC does not include disaggregated data specific to the IIC and as such the ACCC may need to seek additional data to price the IIC service in the substantive FAD inquiry. The ACCC has taken this into account as a matter which it considers relevant.<sup>38</sup>

Each of the matters the ACCC must take into account under subsection 152BCA of the CCA is addressed below.

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<sup>36</sup> ACCC, *ULLS and LSS Access Disputes Chime Communications Pty Ltd / Telstra, Reasons for Final Determinations*, November 2012, p 8.

<sup>37</sup> ACCC, *Access Disputes Between Chime Communications Pty Ltd (Access Seeker) and Telstra Corporation Limited (Access Provider), Line Sharing Service*, 22 November 2012; and

ACCC, *Access Disputes Between Chime Communications Pty Ltd (Access Seeker) and Telstra Corporation Limited (Access Provider), Unconditioned Local Loop Service*, 22 November 2012.

<sup>38</sup> Subsection 152BCA(3) of the CCA.

### **8.2.1 Subsection 152BCA(1)(a) – whether the variation will promote the LTIE**

The ACCC considers that the proposed variation will promote the LTIE. The IIC is integral to the ULLS and the LSS—without it the supply of either of these declared services would not be possible. The ACCC considers that the proposed IIC charge is a reasonable estimate of the efficiently incurred costs of supplying the IIC service (based on the best available data).

The ACCC considers implementing the proposed IIC charge (based on efficiently incurred costs) will promote competition in the relevant markets, by encouraging ULLS and LSS based competition. The ACCC also considers that in the absence of a regulated IIC charge, Telstra would have the incentive and ability to charge prices above the efficient cost for this service and this would be detrimental to competition. Additionally, implementing the proposed IIC charge would:

- encourage efficient investment over time in the IIC cables and the equipment used to provide the IIC service because the price includes a commercial return on investment and will incentivise efficient investment
- encourage the efficient use of the infrastructure used to supply the IIC service.

Finally, the ACCC considers that by promoting competition in downstream markets, this will likely incentivise technological and product innovation and in turn promote dynamic efficiency in the relevant markets.

In view of the above, the ACCC considers that the variation implementing the proposed IIC charge would promote the LTIE compared to if no variation took place.

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

The ACCC considers the proposed variation is consistent with Telstra's legitimate business interests. This is because it allows Telstra to recover its estimated costs and earn a commercial return on its investments (without allowing Telstra to over-recover costs or recover any lost profits).

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

The ACCC is of the view that the proposed IIC charge would not disadvantage the interests of access seekers. As the proposed IIC charge is based on the efficient cost of supplying the IIC service, access seekers would be able to provide competitive services in retail markets.

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

While the IIC service is not part of the declared ULLS and LSS, it is a service which relates to access to these declared services. Consequently, the cost of providing the IIC is a direct cost of providing access to these declared services.

As noted above in section 8.2.1, the ACCC considers that the existing IIC charge, which is based on the most up to date available pricing data to the ACCC, reflects the best estimate of the efficient cost of supplying the IIC service and also compensates Telstra for the direct cost of providing the IIC service. The ACCC also notes that costs which were sufficiently recovered through other services were removed from the IIC charge when it was made; therefore, the proposed IIC charge reflects the direct costs of providing it and does not allow over-recovery.

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

The ACCC does not consider this matter is relevant to the proposed variation of the ULLS and LSS FADs. The proposed variation is not expected to involve extensions or enhancement of capability of any service.

**8.2.6 Subsection 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service**

The ACCC does not consider this matter is relevant to the proposed variation of the ULLS and LSS FADs. The proposed variation is not expected to impact on the safe and reliable operation of a carriage service.

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

The ACCC considers that the proposed IIC charge will reflect the efficient cost of providing the IIC service. This would encourage the economically efficient operation of the relevant carriage services, networks and facilities as they relate to the provision of the IIC service. These efficiencies are discussed in more detail in section 8.2.1.

**8.3 Questions**

*Questions on which the ACCC seeks views in relation to the proposed variation to the ULLS and LSS FADs (implementing the proposed IIC charge):*

- 4) Do you agree with the ACCC's application of the subsection 152BCA(1) criteria for making the proposed variation? Please provide reasons.
- 5) Do you agree with the ACCC's proposed IIC charge? Please provide reasons.



## 9 Consolidated list of questions

*Questions on which the ACCC seeks views in relation to the proposed variation to the LCS and WLR FADs (extending FAD terms to services supplied in CBD areas):*

- 1) Do you agree with the ACCC's application of the subsection 152BCA(1) criteria for making the proposed variation? Please provide reasons.
- 2) Do you agree with the ACCC's proposed LCS and WLR service CBD prices? Please provide reasons.
- 3) Do you agree with the ACCC's proposed non-price terms? Please provide reasons.

*Questions on which the ACCC seeks views in relation to the proposed variation to the ULLS and LSS FADs (implementing the proposed IIC charge):*

- 4) Do you agree with the ACCC's application of the subsection 152BCA(1) criteria for making the proposed variation? Please provide reasons.
- 5) Do you agree with the ACCC's proposed IIC charge? Please provide reasons.

# Appendix A

## Legislative framework for varying an access determination

The ACCC has the power to vary an FAD.<sup>39</sup>

The ACCC must have regard to the criteria specified in subsection 152BCA(1) of the CCA when varying an access determination. The ACCC must consider the same criteria (and follow the same procedures) as though it was making an access determination.<sup>40</sup> These criteria are:

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

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

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

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

### Subsection 152BCA(1)(a)

The first matter for the ACCC to consider when varying an access determination is 'whether the determination [variation] will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services'.

In its draft report on the declaration inquiry, the ACCC discussed what it understands by the phrase 'long-term interests of end-users' in the context of its declaration responsibilities.<sup>41</sup> The ACCC has reflected this in its interpretation of 'long-term interests of end-users' for the purposes of assessing the FAD variations.<sup>42</sup> This is discussed below.

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<sup>39</sup> Under subsection 33(3) of the *Acts Interpretation Act 1901* (Cth) subject to the changes specified in section 152BCN of the CCA.

<sup>40</sup> Subsection 152BCN(1) of the CCA and subsection 33(3) of the *Acts Interpretation Act 1901*.

<sup>41</sup> ACCC, *Fixed Services Review – Public inquiry into the fixed line services declarations, Draft Report*, December 2013.

<sup>42</sup> *Ibid*, pp. 45-48.

## Promoting competition

Competition is the process of rivalry between firms, where each firm is constrained in its price and output decisions by the activity of other firms. Competition benefits consumers (the end-users) through lower prices, the level of service quality preferred by end-users, and a greater choice of services.

Subsection 152AB(4) of the CCA provides that, in determining the extent to which the FAD variation is likely to result in the objective of ‘promoting competition’, regard must be had (but is not limited) to the extent to which declaration will remove obstacles to end-users of listed services gaining access to listed services.<sup>43</sup>

Denying service providers access to necessary wholesale services on reasonable terms is a significant obstacle to end-users gaining access to services. Obstacles to accessing these services include the price, quality and availability of the services and the ability of competing providers to provide telephony and broadband services.

Reasonable regulatory terms of access set through FADs can remove such obstacles by facilitating the entry of service providers, which promotes competition in markets supplying end-users.

When conducting a FAD variation inquiry, the ACCC is required under subsection 152AB(2) of the CCA to consider whether the FAD variation is likely to promote competition in relevant markets. The ACCC’s approach to assessing this objective involves defining the relevant markets which is explained below.

### **Identifying the relevant markets**

Section 4E of the CCA provides that the term “market” means a market in Australia for the goods or services under consideration, as well as any other goods or services that are substitutable for, or otherwise competitive with, those goods or services. The ACCC’s approach to market definition is discussed in the ACCC’s 2008 Merger guidelines.<sup>44</sup>

Section 4E of the CCA provides that a market includes any goods or services that are substitutable for, or otherwise competitive with, the goods or services under analysis. Accordingly, substitution is key to market definition. The ACCC’s approach to market definition in the 2008 merger guidelines focuses on two dimensions of substitution – the product dimension and the geographic dimension.<sup>45</sup> Additionally, the ACCC also considers the functional and the temporal dimensions of the market in its approach to market definition.

Substitution involves switching from one product to another in response to a change in the relative price, service or quality of the product that is the subject of the inquiry. There are two types of substitution:

- demand-side substitution, which involves customer switching, and
- supply-side substitution, which involves supplier switching.

There may be associated switching costs or difficulties which, if significant, can impede the substitutability of products.

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<sup>43</sup> Subsection 152AB(5) of the CCA.

<sup>44</sup> ACCC, *Merger guidelines*, November 2008.

<sup>45</sup> *Ibid*, pp. 15–19.

When considering whether a product is substitutable, the ACCC may consider customer attitudes, the function or end use of the technology, past behaviours of buyers, relative price levels, and physical and technical characteristics of a product.<sup>46</sup>

A method to determine if a product or service is a close substitute for the purposes of market definition is to use the hypothetical monopolist or 'SSNIP' test.<sup>47</sup> The test establishes an area of product and geographic space over which a hypothetical monopolist would likely impose a 'small but significant non-transitory increase in price' (SSNIP). A SSNIP in the context of the hypothetical monopolist test usually consists of a price rise for the foreseeable future of 5 to 10 per cent above the price level that would prevail under competitive market conditions.

Part XIC of the CCA does not require the ACCC to precisely define the scope of the relevant markets in a FAD variation inquiry. The ACCC considers that it is sufficient to broadly identify the scope of the relevant market(s) likely to be affected by the FAD variation. Accordingly, a market definition analysis under Part XIC should be seen in the context of shedding light on how the variation would or would not promote competition and the LTIE in those markets.

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

The objective of any-to-any connectivity is achieved when each end-user is able to communicate with other end-users, whether or not they are connected to the same telecommunications network.<sup>48</sup> The any-to-any connectivity requirement is particularly relevant when considering services that require interconnection between different networks.

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

In determining the extent to which the FAD variation is likely to encourage the economically efficient use of, and investment in, infrastructure, subsections 152AB(6) and (7) of the CCA provide that regard must be had (but is not limited) to the technical feasibility of providing and charging for the services, the legitimate commercial interests of the supplier(s) of the services, and the incentives for investment in infrastructure.

Economic efficiency has three components:

- Productive efficiency refers to the efficient use of resources within each firm to produce goods and services using the least cost combination of inputs.
- Allocative efficiency is the efficient allocation of resources across the economy to produce goods and services that are most valued by consumers.
- Dynamic efficiency refers to efficiencies flowing from innovation leading to the development of new services or improvements in production techniques. It also refers to the efficient deployment of resources between present and future uses so that the welfare of society is maximised over time.

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

*...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.*<sup>49</sup>

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<sup>46</sup> A useful list of information the ACCC may consider when identifying close substitutes to the relevant product is contained in the 2008 Merger Guidelines, p. 19.

<sup>47</sup> SSNIP stands for small but significant non-transitory increase in price.

<sup>48</sup> Subsection 152AB(8) of the CCA.

<sup>49</sup> Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [159].

*...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.<sup>50</sup>*

*...access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.<sup>51</sup>*

The ACCC has considered the Tribunal's view in its assessment of this criterion.

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

The second matter that the ACCC must consider are 'the legitimate business interests of the carrier or provider' when making an FAD. The ACCC notes that it would be in the access provider's legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.<sup>52</sup>

The Tribunal has taken a similar view of the expression 'legitimate business interests'.<sup>53</sup>

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

The third matter that the ACCC must consider are 'the interests of all persons who have the right to use the service' when varying an FAD.

The ACCC considers that this criterion requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.<sup>54</sup> The access seekers' interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete with the access provider in the provision of retail services.<sup>55</sup>

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

The ACCC considers that this class of persons has an interest in being able to compete for the custom of end users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.<sup>56</sup>

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

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<sup>50</sup> Ibid, at [164].

<sup>51</sup> Ibid at [164].

<sup>52</sup> ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

<sup>53</sup> Telstra Corporation Limited [2006] ACompT 4 at [89].

<sup>54</sup> Telstra Corporation Limited [2006] ACompT 4 at [91].

<sup>55</sup> Ibid, [ 91].

<sup>56</sup> Ibid, [ 91].

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

The fourth matter that the ACCC must consider are 'the direct costs of providing access to the declared service' when varying an FAD.

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

The ACCC interprets this criterion, and the use of the term 'direct costs', as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal's approach in an undertaking decision.<sup>57</sup> A contribution to such apportioned costs can also be supported by other criteria.

However, the criterion does not extend to compensation for loss of any 'monopoly profit' that occurs as a result of increased competition.<sup>58</sup>

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs criterion to be 'concerned with ensuring that the costs of providing the service are recovered'.<sup>59</sup> The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.<sup>60</sup>

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

The fifth matter that the ACCC must consider is 'the value to a party of extensions, or enhancements of capability, whose cost is borne by someone else' when varying an FAD.

In the 1997 Access Pricing Principles - Telecommunications, the ACCC stated:

*This criterion requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.<sup>61</sup>*

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

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

The sixth matter that the ACCC must consider is 'the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility' when varying an FAD.

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

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<sup>57</sup> Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

<sup>58</sup> See *Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44: [T]he 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

<sup>59</sup> Telstra Corporation Limited [2006] ACompT 4 at [92].

<sup>60</sup> *Ibid.*, at [139].

<sup>61</sup> ACCC, *Access Pricing Principles – Telecommunications – a guide*, July 1997, p. 11.

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

The sixth matter that the ACCC must consider is 'the economically efficient operation of a carriage service, a telecommunications network facility or a facility' when varying an FAD.

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase 'economically efficient operation' embodies the concept of economic efficiency as discussed earlier under the LTIE.<sup>62</sup> That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.<sup>63</sup>

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

- retail services provided by access seekers using the access provider's services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.<sup>64</sup>

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

Subsection 152BCA(2) of the CCA provides that, in varying an access determination that applies to a carrier or carriage service provider who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services, take into account:

- the characteristics of those other eligible services
- the costs associated with those other eligible services
- the revenues associated with those other eligible services, and
- the demand for those other eligible services.<sup>65</sup>

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in varying an access determination, does not consider the declared service in isolation, but also considers other relevant services.<sup>66</sup> As an example, the Explanatory Memorandum states:

*...when specifying the access price for a declared service which is supplied by an access provider over a particular network or facility, the ACCC can take into account not only the access provider's costs and revenues associated with the declared service, but also the costs and revenues associated with other services supplied over that network or facility.<sup>67</sup>*

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

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

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<sup>62</sup> ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised).

<sup>63</sup> *Ibid.*, p. 57.

<sup>64</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [94]-[95].

<sup>65</sup> 'Eligible service' has the same meaning as in section 152AL of the CCA.

<sup>66</sup> Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

<sup>67</sup> *Ibid.*, p. 178.

# Appendix B – Draft variation instrument

## COMPETITION AND CONSUMER ACT 2010

Variation of Final Access Determinations No. 2 and 6 of 2011 made under section 152BC by the Australian Competition and Consumer Commission  
Application of LCS and WLR FAD terms to CBD services

### 1. Title

These Determinations may be cited as:

Final Access (Variation) Determination No.1 of 2014 (LCS)  
Final Access (Variation) Determination No.2 of 2014 (WLR)

### 2. Commencement

These Determinations come into effect on 1 August 2014.

### 3. Variation

Final Access Determination No. 2 of 2011 (LCS)  
Final Access Determination No. 6 of 2011 (WLR)

are hereby varied as set out below:

The following definitions are to be inserted into the *Definitions* section of **Schedule 1 – Interpretation and Definitions**:

**Central Business District Area** means the exchange service areas that are classified as CBD for the purposes of the ordering and provisioning procedures set out in the Telstra Ordering and Provisioning Manual as in force on the date of effect of the renewed declaration.

**standard zone** has the same meaning as in Part 4 of the Telecommunications (Consumer Protection and Service Standards) Act 1999.

After Clause 4.1E insert:

4.1F Clause 4.1 applies to any or all of the standard access obligations in respect of the LCS and WLR services as those services are declared as of 1 August 2014, including:



- a) in relation to the WLR, services supplied in the Central Business District Area of Sydney, Melbourne, Brisbane, Adelaide or Perth, and
- b) in relation to the LCS, services where the supply of the local carriage service originates from an exchange located within a Central Business District Area of Sydney, Melbourne, Brisbane, Adelaide or Perth and terminates within the standard zone which encompasses the originating exchange.

4.1G Clause 4.1F commences on 1 August 2014 and ceases to have effect on the day before a new FAD for LCS and WLR comes into force.

Date of decision: June 2014

# Appendix C- Draft variation instrument

## COMPETITION AND CONSUMER ACT 2010

Variation of Final Access Determinations No. 1 and No. 5 of 2011 made under section 152BC by the Australian Competition and Consumer Commission

Implementation of a regulated charge for the internal interconnection cable service

### 1. Title

These Determinations may be cited as:

Final Access (Variation) Determination No. 3 of 2014 (LSS)

Final Access (Variation) Determination No. 4 of 2014 (ULLS)

### 2. Commencement

These Determinations come into effect on 1 July 2014.

### 3. Variation

Final Access Determination No. 1 of 2011 (LSS)

Final Access Determination No. 5 of 2011 (ULLS)

are hereby varied as set out below:

The following definitions are to be inserted into the *Definitions* section of **Schedule 1 – Interpretation and Definitions**:

**IIC** means the internal interconnection cable.

**Internal Interconnection Cable** means a twisted pair of copper wires forming a cable that connects an access seeker's intermediate distribution frame to Telstra's main distribution frame.

**pair** means the twisted pair of copper wires forming the internal interconnection cable.

The following price term is to be inserted into **Schedule 2 – Price terms for Line Sharing Service (LSS)**:

After Clause 2.2 insert:

- 2.3. The price for LSS IIC monthly service charge per pair is for the period 1 July 2014 to the day before a new FAD for LSS comes into force:

**LSS IIC monthly service charge per pair**

<b>LSS IIC monthly service charge per pair</b>
\$0.056

The following price term is to be inserted into **Schedule 6 – Price terms for Unconditioned Local Loop Service (ULLS)**:

After Clause 6.2 insert:

- 6.3. The price for ULLS IIC monthly service charge per pair is for the period 1 July 2014 to the day before a new FAD for ULLS comes into force:

**ULLS IIC monthly service charge per pair**

<b>ULLS IIC monthly service charge per pair</b>
\$0.056

Date of decision: June 2014