



Australian  
Competition &  
Consumer  
Commission

**Inquiry into varying the final access  
determinations for the WLR, LCS and PSTN OA  
– where these services are supplied over the  
NBN**

**Discussion paper**

**April 2012**



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## List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
CAN	customer access network
category A SAOs	category A standard access obligations
CCA	<i>Competition and Consumer Act 2010</i>
CSP	carriage service provider
c-i-c	commercial-in-confidence
FAD	final access determination
LCS	local carriage service
LSS	line sharing service
LTIE	long-term interests of end-users
NBN	National Broadband Network
PSTN OA	public switched telephone network originating access service
PSTN TA	public switched telephone network terminating access service
RSP	retail service provider
SAU	Special Access Undertaking
SSU	Structural Separation Undertaking
Telco Act	<i>Telecommunications Act 1997</i>
ULLS	unconditioned local loop service
WLR	wholesale line rental

## Executive Summary

The ACCC is commencing a public inquiry to consider whether to vary the fixed line services final access determinations (FADs).<sup>1</sup> Telstra has requested the ACCC make this variation. This discussion paper commences the public inquiry.

Subject to certain conditions, the category A standard access obligations (category A SAOs) require telecommunications carriers or carriage services providers (CSPs) to give access to declared services. Telstra has requested that the FADs are varied to provide that the category A SAOs not apply to the declared wholesale line rental (WLR), local carriage service (LCS) and public switched telephone network originating access preselect and override services (PSTN OA), where these services are provided over the NBN, until March 2013.

Telstra have advised that it will provide an interim retail voice service over NBN greenfield estates until at least September 2012. From this date, Telstra intend to supply its mass market NBN wholesale and retail products. However, due to technical and regulatory barriers, Telstra states that it is unable to provide an interim wholesale voice service over NBN greenfield estates until at least September 2012.

Consequently, Telstra is concerned that if the category A SAOs apply to the provision of these services in NBN greenfield estates, it will be unable to comply with the SAOs before September 2012 and provide an access seeker with access to a wholesale voice service over the NBN if requested. Telstra advised that this mainly impacts NBN greenfield estates where Telstra's customer access network (CAN) will not operate as an alternative to NBN fibre services offered during the roll out.

Telstra requested the application of the category A SAOs be removed until March 2013, which will cover the period prior to Telstra releasing its mass market services over the NBN and will accommodate any delays in the release of these services. The ACCC's preliminary view is to vary the FADs to remove the application of the category A SAOs to the supply of WLR, LCS and PSTN OA services over NBN greenfield estates until 31 March 2013.

This discussion paper provides the background to the proposed variation, the assessment framework for making a decision and the ACCC's preliminary views. Interested parties can make submissions in response to the matters raised by the discussion paper until **11 May 2012**. The ACCC anticipates finalising this inquiry within a three month period.

This paper is intended to satisfy the requirement under section 499 in Part 25 of the *Telecommunications Act 1997* (Telco Act) to issue a discussion paper as part of a public inquiry.

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<sup>1</sup> The fixed line FADs are: Final Access Determination No. 1 of 2011 (LSS), Final Access Determination No. 2 of 2011 (LCS), Final Access Determination No. 3 of 2011 (PSTN OA), Final Access Determination No. 4 of 2011 (PSTN TA), Final Access Determination No. 5 of 2011 (ULLS) and Final Access Determination No. 6 of 2011 (WLR).

# 1 Background

This discussion paper commences a public inquiry into whether the ACCC should vary the final access determinations (FADs) for the wholesale line rental (WLR), local carriage service (LCS) and public switched telephone network originating access preselect and override (PSTN OA)<sup>2</sup> declared services. Telstra has requested that the ACCC temporarily remove the application of the category A standard access obligations (category A SAOs)<sup>3</sup> to the provision these services over the national broadband network (NBN) until March 2013. Telstra advised that this mainly impacts NBN greenfield estates.

The ACCC will be deciding whether to vary the FADs. This discussion paper seeks the views of industry and other interested parties as to whether the ACCC should vary the FADs. In particular, a number of questions are included on which the ACCC welcomes views.

## 1.1 Category A standard access obligations

Section 152AR of the *Competition and Consumer Act 2010* (CCA) sets out the category A SAOs.<sup>4</sup> Under this provision, if a carrier or carriage service provider (CSP) supplies a declared service (including to itself) it must, upon request, supply the declared service to a service provider. Section 152AR of the CCA provides further obligations in regards to the supply of the declared service and also some circumstances where the access provider does not have to supply the declared service. However, the provision does not provide exclusion where an access provider is technically unable to provide a wholesale service.

Compliance with the category A SAOs is a carrier licence condition and service provider rule.<sup>5</sup> Failure to comply with the category A SAOs may render the carrier or CSP subject to the enforcement provisions of the *Telecommunications Act 1997* (Telco Act). Further, the category A SAOs are enforceable in the Federal Court by the ACCC or any person whose interests are affected by a breach of the SAOs.<sup>6</sup>

Telstra appears to be concerned that it may be put in a situation where, despite its best efforts, it will be unable to comply with the category A SAOs prior to March 2013 in relation to WLR, LCS and PSTN OA services provided over NBN greenfield estates.

## 1.2 The WLR, LCS and PSTN OA FADs

WLR, LCS and PSTN OA (preselect and override) are declared services typically purchased by access seekers as a wholesale bundled voice product. When bundled, these services allow access seekers to provide end-users with a fixed voice service package to make local, national, long-distance, international and fixed to mobile telephone calls. These services are traditionally provided by Telstra over its customer access network (CAN).

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<sup>2</sup> All references to PSTN OA in this discussion paper refer only to PSTN OA preselect and override services.

<sup>3</sup> As set out in section 152AR of the *Competition and Consumer Act 2010* (CCA).

<sup>4</sup> Section 152AR of the CCA sets out the standard access obligations that apply to carriers and carriage service providers other than an NBN corporation. Section 152AXB of the CCA sets out the standard access obligations that apply to carriers or carriage service providers that are NBN corporations. These are referred to as the category B standard access obligations.

<sup>5</sup> Sections 152AZ and 152BA of the CCA.

<sup>6</sup> Section 152BB of the CCA.

On 20 July 2011 the ACCC made FADs for the declared WLR, LCS and PSTN OA.<sup>7</sup> Clause 1.2 of the FADs states:

*“1.2 These FADs do not apply to services provided by a carrier or carriage service provider over the National Broadband Network.”*<sup>8</sup>

The ACCC decided that the terms and conditions of the FADs would not apply to services provided over the NBN. The ACCC proposed to re-examine the issue of regulation of the NBN wholesale aggregation market at the end of the regulatory period (June 2014), when the NBN roll-out has further progressed. The ACCC considered that this would provide sufficient opportunity for the development of the market for wholesale aggregation services provided over the NBN without regulation.<sup>9</sup> However, in making the FADs the ACCC did not give carriers or CSPs relief from the category A SAOs under section 152AR of the CCA.

### **1.3 Variation of FADs**

The ACCC may vary FADs under section 152BCN of the CCA. In doing so, the ACCC must follow the same procedures as making an access determination, unless the variation is of a minor nature or the parties affected by the variation have consented to the variation.<sup>10</sup> The ACCC must hold a public inquiry under Part 25 of the Telco Act and take into account the matters in section 152BCA of the CCA.<sup>11</sup> The ACCC may, through a variation, include provisions in the FADs that restrict or limit the application to a carrier or CSP of any or all of the category A SAOs.<sup>12</sup>

The ACCC proposes to insert the following clauses into the FADs to give Telstra relief from the SAOs until its wholesale NBN services are available (proposed variation):

“4.1A The category A standard access obligations in section 152AR of the *Competition and Consumer Act 2010* do not apply to the provision of WLR or LCS or PSTN OA (preselect and override) over National Broadband Network greenfield estates.

4.1B Clause 4.1A commences on [date to coincide with date of variation] and ceases to have effect on 31 March 2013.”

## **2 Telstra’s request to vary the FADs**

In a letter dated 8 March 2012 Telstra requested that the ACCC vary the FADs to exclude the operation of the category A SAOs to WLR, LCS and PSTN OA provided over the NBN until March 2013 (**Appendix B**). During which time, Telstra expects to release its mass market services over NBN infrastructure, which is anticipated to occur in September 2012 (Commercial Launch date).

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<sup>7</sup> The other declared services subject to the 20 July 2011 FADs were unconditioned local loop service (ULLS), line sharing service (LSS) and public switched telephone network terminating access (PSTN TA).

<sup>8</sup> ACCC Final Access Determinations Nos. 1 to 6 of 2011 for Fixed Line Services, pg.2.

<sup>9</sup> Inquiry to make final access determinations for the declared fixed line services: Final Report July 2011, pp.166-167.

<sup>10</sup> Subsection 33(3) of the *Acts Interpretation Act 1901* and subsection 152BCN(2) of the CCA – the ACCC does not consider the proposed variation to be of a minor nature.

<sup>11</sup> Section 152BCH of the CCA.

<sup>12</sup> Subsection 152BC(3)(i) of the CCA.

Telstra made the request on the following bases:

- Telstra is the retail provider of last resort in NBN greenfield estates;
- Telstra will provide an interim retail voice service in NBN greenfield estates developed to be compatible with the NBN;
- Telstra will not be able to provide WLR, LCS, and PSTN OA wholesale voice services before Telstra's Commercial Launch date;<sup>13</sup>
- Telstra cannot implement a work around solution based on technical and regulatory barriers;
- Prior to the Commercial Launch date, Telstra expects that this issue will only affect the supply of wholesale voice services in NBN greenfield estates. Telstra submit that NBN Co have estimated that there will be less than 4000 active services in NBN Co greenfield estates by September 2012;
- Telstra will be able to provide wholesale legacy voice services to end users in areas where copper PSTN lines are still available (including NBN brownfield estates);
- Other retail service providers (RSPs) are likely to provide services in NBN greenfield estates by purchasing Layer 2 services from NBN Co. As such, end-users will have choice of RSP;
- Telstra is currently developing NBN based voice services that will be supplied to both retail and wholesale customers. Telstra plans to launch these services from September 2012.

To support its request for variation, Telstra provided the ACCC with a letter outlining the reasons for its requests. This letter contains confidential material and may be obtained by interested parties entering into a confidentiality undertaking with Telstra (refer to **Section 3** of this paper).

In the long term, Telstra submits that the category A SAOs should not apply to wholesale aggregation services provided over the NBN. The longer term issues about the appropriate regulatory regime for these services may be considered by the ACCC in separate processes at a future time.

In response to Telstra's request, the ACCC is considering removing the application of the category A SAOs where the WLR, LCS and PSTN OA declared services are provided over NBN greenfield estates until 31 March 2013. Such an adjustment would apply to all carriers and CSPs (other than an NBN Corporation).<sup>14</sup> The ACCC is proposing that the FADs be varied to give this exclusion affect.

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<sup>13</sup> Telstra does not necessarily consider that the interim voice service is caught by the existing WLR service description. Telstra submits that new services provided over the NBN are likely to be significantly different from those currently available on the copper network. However, Telstra considers that the ACCC should provide interim relief in order to provide greater regulatory certainty during this period.

<sup>14</sup> Category A standard access obligations only apply to carriers and carriage service providers other than an NBN corporation.



### 3 Consultation process

The ACCC encourages industry participants, other stakeholders and the general public to make submissions to the ACCC about the issues raised in this discussion paper. The ACCC will take submissions into account in deciding whether to vary the FADs.

The ACCC intends to produce a final report of the public inquiry and make a decision on whether to vary the FADs (and, if such a decision is made, vary the FADs) without returning for further public consultation. If circumstances dictate that further public or targeted consultation is necessary, the ACCC will engage in such consultation.

The ACCC intends that this public inquiry is concluded within a three month period to allow for regulatory certainty as the roll-out of the NBN continues.

The ACCC requests written submissions to this discussion paper from interested parties before 5.00 pm on **11 May 2012**.

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

Telstra provided the ACCC with a public letter outlining the reasons for its request to vary the FADs (**Appendix B**). Telstra also provided the ACCC with additional confidential material outlining the reasons for its request. Industry participants and stakeholders may obtain a copy of this letter subject to Telstra accepting a confidentiality undertaking from the interested party. An example of the confidentiality undertaking that may apply and an outline of this process is available on the ACCC website:

<http://www.accc.gov.au/content/index.phtml/itemId/990530>.

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

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format, which allows the submission text to be searched.

Please forward submissions to [accessdeterminations@acc.gov.au](mailto:accessdeterminations@acc.gov.au) by **11 May 2012**.

For further information, please contact:

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## 4 Preliminary ACCC views

Based on the reasons outlined in **Section 5**, the ACCC's preliminary view is to vary the FADs to remove the application of the category A SAOs to the supply of WLR, LCS and PSTN OA services over NBN greenfield estates until 31 March 2013. Based on the information received to date, the ACCC consider that the proposed variation satisfies the mandatory assessment criteria outlined in subsection 152BCA(1) of the CCA.

Further, Telstra's request to vary the FADs is limited in scope and duration. The proposed duration of the variation is limited to a period of less than 12 months and is likely to only affect NBN greenfield estates. The number of affected end-users would appear to be minimal. Consequently, the ACCC considers it unlikely that the proposed variation would have an adverse impact on competition on end-users on in NBN greenfield estates.

To address Telstra's limited request, the ACCC proposes to vary the FADs by inserting new clauses 4.1A and 4.1B (to be inserted after clause 4.1):

“4.1A The category A standard access obligations in section 152AR of the *Competition and Consumer Act* 2010 do not apply to the provision of WLR or LCS or PSTN OA (preselect and override) over National Broadband Network greenfield estates.

4.1B Clause 4.1A commences on [date to coincide with date of variation] and ceases to have effect on 31 March 2013.”

Consistent with NBN Co's definitions, the ACCC propose to define NBN greenfield estates as new developments that can be either broadacre or infill premises connected to the NBN.<sup>15</sup> The ACCC propose to further clarify this definition by defining the terms 'broadacre' and 'infill' developments as follows:

- A broadacre estate is a type of greenfield development where new premises are built on currently undeveloped land (i.e. where no copper services are currently available in the surrounding area).
- An infill estate is a type of greenfields development where new premises or a redevelopment (i.e. demolition and rebuild) are built on currently developed land that is surrounded by established areas.<sup>16</sup>

The ACCC could further clarify that NBN greenfield estates may include greenfield estates as described in NBN Co's Monthly Ready for Service Rollout Plans, as published on NBN Co's website from time to time.<sup>17</sup>

### *Questions on which the ACCC seeks views:*

- 1) Should the proposed variation expire at a time by which Telstra should reasonably be expected to have its wholesale voice solutions available for supply over the NBN, being 31 March 2013? If not, what is an appropriate time period to exclude the application of

<sup>15</sup> NBN Co Limited Glossary, <http://www.nbnco.com.au/assets/documents/glossary.pdf>, pg.6.

<sup>16</sup> Ibid, pp.2 and 7.

<sup>17</sup> NBN Co Limited Monthly Ready for Service Rollout Plan, [www.nbnco.com.au](http://www.nbnco.com.au).

the category A SAOs for the provision of WLR, LCS and PSTN OA services over the NBN?

- 2) Should the proposed variation allow that the category A SAOs still apply to PSTN OA special services supplied over the NBN?
- 3) Should the proposed variation apply to NBN greenfield estates or should it apply to all NBN estates that are, or will be ready for service before 31 March 2013?
- 4) Do you agree with the ACCC's proposed definition of an NBN greenfield estate? Please provide reasons.

## 5 Assessment framework

### 5.1 Legislative framework

This section sets out the relevant legislative framework and the criteria the ACCC intends to have regard to when making a decision on whether to vary FADs. It also outlines the approach the ACCC proposes to take to assist in assessing the state of competition in the relevant markets. This includes whether removing the application of the category A SAOs for the supply of WLR, LCS and PSTN OA over NBN greenfield estates will promote the long-term interests of end-users (LTIE).

The ACCC must have regard to the criteria specified in subsection 152BCA(1) of the CCA when making a decision on whether to vary an FAD. These criteria 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.

The ACCC's views on how to interpret the legislative criteria are summarised below. The ACCC may also take into account any other matters that it thinks are relevant when making an FAD.<sup>18</sup> Further detail on the access regime and criteria for making FADs can be found in **Appendix D** of this discussion paper.

Compliance with an FAD is both a carrier licence condition and a service provider rule.<sup>19</sup> A breach of either a carrier licence condition or a service provider rule may lead to a pecuniary penalty of up to \$10 million for each contravention.<sup>20</sup> Private action to enforce an FAD may also be taken in the Federal Court.<sup>21</sup>

### 5.2 Relevant markets

The ACCC is of the view that Part XIC of the CCA does not require it to precisely define the scope of the relevant markets for the purpose of assessing the proposed variation of the FADs. Further, the ACCC considers that a precise definition of the relevant markets is not critical when this particular issue is common across relevant markets.

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<sup>18</sup> Subsection 152BCA(3) of the CCA.

<sup>19</sup> Sections 152BCO and 152BCP of the CCA.

<sup>20</sup> Section 570 of the Telco Act.

<sup>21</sup> Section 152BCQ of the CCA.

The ACCC proposes that the relevant markets for assessing the impact of the proposed variation can be broadly described as follows:

- the market for the retail and wholesale supply of voice services over the NBN
- the market for the retail and wholesale supply of broadband services over the NBN, and
- the market for the retail and wholesale supply of a bundle of voice and broadband services over the NBN.<sup>22</sup>

*Questions on which the ACCC seeks views:*

- 5) Comment on the appropriateness of the market dimensions described above for assessing the impact of the proposed variation.

### **5.3 Paragraph 152BCA(1)(a) – whether the variation will promote the LTIE**

The ACCC considers that the proposed variation is in the long-term interests of end-users. The ACCC considers it unlikely that the proposed variation would have an adverse effect on competition over NBN greenfield estates. Any impact on competition prior to September 2012 is likely to be minimal given the proposed variation would only be in force for a limited period of time and apply to a limited number of NBN end-users (i.e. not likely to be more than 4000 services).

The ACCC does not consider that the proposed variation will impact upon the achievement of any-to-any connectivity.

Given the limited duration of the proposed variation, the ACCC considers it unlikely that the variation would adversely impact on the efficient use of and investment in infrastructure. Based on the longer term rollout of the NBN, the removal of regulation may encourage NBN access seekers to invest in their own infrastructure in order to connect directly with the NBN, as opposed to relying on the equivalent wholesale voice and data services traditionally provided over the CAN. This is consistent with the ACCC's views in the [Inquiry to make final access determinations for the declared fixed line services: Final Report July 2011](#) (July 2011 Final Report). In this report, the ACCC anticipated that there will be multiple access providers competing for customers over the NBN.<sup>23</sup>

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

Based on the limited nature of Telstra's request, the ACCC considers it unlikely that the proposed variation would adversely impact the legitimate business interests of carriers or CSPs. The ACCC considers that the proposed variation will support the legitimate business interests of access providers, including Telstra, with regulatory certainty that the category A SAOs will not apply. It will enable Telstra to continue to provide its interim retail voice

<sup>22</sup> Inquiry to make final access determinations for the declared fixed line services: Final Report July 2011, p.20.

<sup>23</sup> Inquiry to make final access determinations for the declared fixed line services: Final Report July 2011, p.166.

service over NBN greenfield estates without risk of breaching conditions of its carrier licence as a consequence of failing to comply with the category A SAOs.

The ACCC considers that it may be appropriate to consider the cost to Telstra in providing its interim solution. Further, extending the variation until 31 March 2013 may provide Telstra with sufficient time to offer its mass market NBN wholesale and retail voice services should there be any delays in meeting its proposed release in September 2012.

The ACCC note that the proposed variation may impact on the legitimate business interests of carriers and CSPs in the short term who wish to gain access to a Telstra wholesale voice service over the NBN before September 2012. However, the ACCC considers that the proposed variation may only affect a small number of NBN access seekers.

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

The ACCC considers that this criterion requires that the ACCC have regard to the interests of all access seekers. The ACCC anticipates that other providers will purchase Layer 2 services from NBN Co in order to provide both wholesale and retail voice services over the NBN. Other than Telstra, various access providers have already indicated a willingness to provide wholesale services over the NBN. The ACCC anticipates that the limited numbers of NBN end-users impacted by the proposed variation are likely to have access to alternate voice services.

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

The ACCC does not consider this criterion relevant to the variation of the FADs. Temporarily excluding the application of the category A SAOs for WLR, LCS and PSTN OA services supplied over NBN greenfield estates removes the obligation for an access provider to provide these wholesale services. Consequently, there would be no adverse impact on the direct costs of providing access to such a service.

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

The ACCC does not consider this criterion relevant to the variation of the FADs. The proposed variation removes the obligation for an access provider to provide the declared WLR, LCS and PSTN OA services over NBN greenfield estates. Consequently, access providers and access seekers will not be seeking to recover the costs of enhancement or extension capabilities for these declared services over the NBN during the period in which the category A SAOs do not apply.

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

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

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

The proposed variation will allow Telstra to ensure the economically efficient operation of its interim voice service over the NBN.

*Questions on which the ACCC seeks views:*

- 6) Do you agree with the ACCC's application of the section 152BCA(1) criteria for making the proposed variation? Please provide reasons.
- 7) Are other NBN access seekers likely to provide wholesale and/or retail voice services in NBN greenfield estates ready for service before September 2012?
- 8) What impact will the proposed variation have on NBN access seekers who are unable to obtain an NBN wholesale voice service from Telstra? How many NBN access seekers would be likely to request a wholesale voice service from Telstra to service NBN end-users prior to September 2012?

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

The ACCC may, if the carrier or provider supplies one or more other eligible services,<sup>24</sup> take those services into account when making an access determination. The ACCC is of the view that this criterion is not relevant to its decision to vary the FADs as Telstra will only be able provide the interim fixed voice retail product. Telstra intend to only provide this product until September 2012, at which time it intends to offer its mass market NBN wholesale and retail fixed voice products.

## **5.11 Subsection 152BCA(3) – other matters**

This subsection states the ACCC may take into account any other matters that it thinks are relevant when making or varying an FAD. The ACCC is of the view that regulatory certainty as to the applicability of the category A SAOs is a factor in deciding whether to vary the FADs as requested by Telstra.

The proposed variation may provide regulatory certainty to Telstra and other NBN access seekers for the short period in which Telstra is unable to provide wholesale voice services over the NBN. That is, it will provide NBN access seekers with certainty as to the regulation of access to wholesale voice services provided over the NBN until 31 March 2013.

The proposed variation will also provide Telstra with business certainty and continuity. Telstra may continue to operate as the retail provider of last resort without the risk of breaching its carrier licence due to a temporary inability to comply with the category A SAOs. Based on the short term nature of the proposed variation, the ACCC does not consider it would be in the LTIE to potentially risk Telstra's carrier licence due to conflicting regulatory obligations.

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<sup>24</sup> 'Eligible service' has the same meaning as in section 152AL of the CCA.

The ACCC also considers that it may have regard to the following in deciding whether or not to vary the FADs:

- submissions received in response to the ACCC's *Public inquiry to make final access determinations for the declared fixed line services: Discussion paper*, April 2011, and
- the ACCC's *Inquiry to make final access determinations for the declared fixed line services: Final Report*, July 2011.

These considerations and documents do not limit the matters that the ACCC may have regard to when considering whether to vary the FADs.

*Questions on which the ACCC seeks views:*

9) What other matters should be considered when varying the FADs?



## **6 Longer term issues in the regulation of the NBN**

Telstra's request to vary the FADs raises the broader question of ongoing regulation of wholesale aggregation services. The NBN presents a significant structural change away from the previous vertically integrated industry structure, which should in turn promote competition in downstream markets. There are a number of ongoing regulatory matters that may impact upon the future development of NBN wholesale aggregation markets and have possible implications for future regulation on the NBN. These include the ACCC's assessment of NBN Co's Special Access Undertaking and the implementation of Telstra's Structural Separation Undertaking and Migration Plan.

The ACCC's preliminary views as outlined in this discussion paper relate to Telstra's limited request to vary the FADs. The ACCC note that Telstra has also requested that the ACCC permanently remove the application of the SAOs to WLR, LCS and PSTN OA (preselect and override) services supplied over the NBN. The ACCC is yet to make a decision regarding Telstra's request for the long term removal of regulation for these services over the NBN.

These preliminary views in regard to the interim voice services in NBN greenfield estates may not reflect the ACCC's broader views regarding the future regulation of wholesale aggregation services provided over the NBN. The ACCC will monitor the development of these services over the longer term and may consider the need for regulation of such services at a future time.

## Appendix A: Questions on which the ACCC seeks views

- 1) Should the proposed variation expire at a time by which Telstra should reasonably be expected to have its wholesale voice solutions available for supply over the NBN, being 31 March 2013? If not, what is an appropriate time period to exclude the application of the category A SAOs for the provision of WLR, LCS and PSTN OA services over the NBN?
- 2) Should the proposed variation allow that the category A SAOs still apply to PSTN OA special services supplied over the NBN?
- 3) Should the proposed variation apply to NBN greenfield estates or should it apply to all NBN estates that are, or will be ready for service before 31 March 2013?
- 4) Do you agree with the ACCC's proposed definition of an NBN greenfield estate? Please provide reasons.
- 5) Comment on the appropriateness of the market dimensions described above for assessing the impact of the proposed variation.
- 6) Do you agree with the ACCC's application of the section 152BCA(1) criteria for making the proposed variation? Please provide reasons.
- 7) Are other NBN access seekers likely to provide wholesale and/or retail voice services in NBN greenfield estates ready for service before September 2012?
- 8) What impact will the proposed variation have on NBN access seekers who are unable to obtain an NBN wholesale voice service from Telstra? How many NBN access seekers would be likely to request a wholesale voice service from Telstra to service NBN end-users prior to September 2012?
- 9) What other matters should be considered when varying the FADs?

## Appendix B: Letter from Telstra to the ACCC, 8 March 2012

Note: Telstra has provided additional confidential material outlining the reasons for their request. Interested stakeholders may obtain a copy of this material subject to Telstra accepting a confidentiality undertaking with the interested party. For more information refer to: <http://www.accc.gov.au/content/index.phtml/itemId/990530>

8 March 2012

Michael Cosgrave  
Group General Manager  
Communications Group  
Australian Competition and Consumer Commission  
Level 35, The Tower  
360 Elizabeth Street  
Melbourne Vic 3000  
Email: [michael.cosgrave@acc.gov.au](mailto:michael.cosgrave@acc.gov.au)

Dear Mr Cosgrave

### Interim relief from the SAOs in relation to WLR, LCS and PSTN OA supplied over NBN

I refer to ongoing discussions between Telstra and the Australian Competition and Consumer Commission (**Commission**) regarding the regulation of voice services provided over NBN.

As the Commission is aware, Telstra is seeking immediate, interim regulatory relief with respect to the provision of regulated resale voice services (WLR, LCS and PSTN OA (preselect and override) over NBN Co infrastructure for a period of 12 months (**Interim Relief**). Telstra is seeking Interim Relief to provide greater regulatory certainty prior to launch of Telstra Wholesale's mass market NBN voice services. During the period prior to Telstra Wholesale launching its mass market NBN voice services, Telstra Wholesale will be unable to supply resale voice services in areas where there is no PSTN connection to the end user.

The remainder of this letter sets out why Telstra is seeking Interim Relief, the proposed timeframe for which Interim Relief is sought and the likely number of end users that may be affected by Telstra Wholesale not supplying resale voice services using NBN infrastructure prior to the commercial launch of Telstra Wholesale's NBN voice services.

#### *Why Telstra is seeking interim relief*

Prior to the launch of Telstra Wholesale's NBN resale voice services, Telstra Wholesale will not have voice services over NBN Co infrastructure available for supply to wholesale customers. Telstra Wholesale will still be able to supply legacy resale voice services to end users in areas where PSTN lines are available.

Although Telstra Wholesale will not be providing voice services over NBN infrastructure prior to the development and launch of Telstra's commercial NBN-based voice services, Telstra will be providing an interim retail voice offering in NBN Greenfield estates as the NBN is rolled out in those areas, consistent with its regulatory obligations as universal service provider. Telstra will not be able to provide this interim voice service to wholesale customers.

Telstra is currently developing NBN-based voice services that will be able to be supplied to both retail and wholesale customers. Once developed, these services will be made available to retail and wholesale customers at the same time. It should be noted that vendor delays, or

other delays in the development of this service, may also impact on Telstra's anticipated launch date.

Telstra is currently proposing to initially launch mass market NBN-based voice services utilising the UNI-D port of the NBN Co ONT. The service will connect to the UNI-D port of the NBN Co ONT via a home gateway with an in-built ATA. The voice service will be a VoIP offering, supported by an underlying broadband service. Although Telstra Wholesale will not have resale voice services available in NBN Co Greenfield estates prior to the development of this service, retail service providers will have the opportunity to provide services to end users in these estates by contracting with NBN Co directly.

It is important to note that Telstra does not necessarily consider that the interim voice service (or other voice services supplied over the NBN Uni-D port) is caught by the existing WLR service description. However, Telstra nevertheless considers that the Commission should grant Interim Relief in order to provide greater regulatory certainty during this period.

*Interim relief should be for a period of 12 months*

Telstra considers that the Commission should consider this matter as soon as possible, and provide Interim Relief for a period of at least 12 months (i.e. March 2013). Telstra is seeking Interim Relief for this period for the following reasons:

- A 12 month period will cover the period prior to Telstra releasing mass market services over NBN Co infrastructure (which is anticipated to occur in September 2012 but could be delayed); and
- This period will also provide sufficient time for the Commission to hold a more general inquiry into whether or not the regulation of resale (layer 3) access services over the NBN is in the long term interests of end users.

As noted above, interim relief for a 12 month period would provide the Commission with sufficient time to hold a more wide-ranging inquiry to remove resale-based regulation over NBN infrastructure.

To maximise the competitive potential of the NBN and the emerging IP-based service environments, Telstra considers that the Commission should commit to explicit regulatory forbearance as the market develops. The NBN and the introduction of a ubiquitous, IP-based service environment represents a nascent emerging market. New services provided over the NBN are likely to be significantly different from those currently available from the copper network, with the deployment of the NBN expected to accelerate the development of (and investment in) all-IP, access-agnostic service offerings. The development of these new services (at both retail and wholesale) will require significant new investment and innovation in an uncertain commercial environment.

*The temporary unavailability of Telstra Wholesale resale voice services is unlikely to have a material adverse effect on end users or retail service providers*

It is important to reiterate that the temporary non availability of Telstra Wholesale resale voice services referred to above is unlikely to impact a large number of end users, as few end users will be connected to the NBN prior to Telstra's targeted timing for the launch of mass market NBN-based voice services. For example, NBN Co has estimated that there will be less than 4,000 active services in NBN Co Greenfield estates by September 2012.

Further, given the likelihood that many wholesale voice customers will migrate directly to the NBN, only a fraction of end users are likely seek a voice service provided over a Telstra Wholesale resale service. Service providers will be able to provide services to end users by

directly contracting with NBN Co, or acquiring services through an alternative wholesaler or aggregator where these services are available.

*Conclusion*

Telstra hopes that this information assists the Commission in reaching a timely resolution to this issue. Telstra welcomes the opportunity to discuss this in more detail with the Commission.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Jane van Beelen', with a stylized flourish at the end.

Jane van Beelen  
Executive Director - Regulatory Affairs  
Telstra Corporation Limited

## **Appendix C: Proposed variation instrument**

### **COMPETITION AND CONSUMER ACT 2010**

**Variation of Final Access Determinations No. 1 to 6 of 2011 made under section 152BC by the Australian Competition and Consumer Commission**

**Removal of the application of the category A standard access obligations in respect of WLR, LCS and PSTN OA provided over the NBN**

#### **1. Title**

These Determinations may be cited as:

Final Access (Variation) Determination No.1 of 2012 (LSS)  
Final Access (Variation) Determination No.2 of 2012 (LCS)  
Final Access (Variation) Determination No.3 of 2012 (PSTN OA)  
Final Access (Variation) Determination No.4 of 2012 (PSTN TA)  
Final Access (Variation) Determination No.5 of 2012 (ULLS)  
Final Access (Variation) Determination No.6 of 2012 (WLR)

#### **2. Commencement**

These Determinations come into effect on **x date 2012.**

#### **3. Variation**

Final Access Determination No. 1 of 2011 (LSS)  
Final Access Determination No. 2 of 2011 (LCS)  
Final Access Determination No. 3 of 2011 (PSTN OA)  
Final Access Determination No. 4 of 2011 (PSTN TA)  
Final Access Determination No. 5 of 2011 (ULLS)  
Final Access Determination No. 6 of 2011 (WLR)

are hereby varied as set out below:

After Clause 4.1 insert:

4.1A The category A standard access obligations in section 152AR of the *Competition and Consumer Act 2010* do not apply to the provision of WLR or LCS or PSTN OA (preselect and override) over National Broadband Network greenfield estates.

4.1B Clause 4.1A commences on [date to coincide with date of variation] and ceases to have effect on 31 March 2013.”



## Appendix D: Legislative framework for access determinations

The telecommunications access regime contained in Part XIC of the *Competition and Consumer Act 2010* (CCA) enables the ACCC to set default price and non-price terms in access determinations. An access determination will only apply where there is no commercial agreement between the access seekers and access provider. The access determinations create a benchmark which access seekers can fall back on while still allowing parties to negotiate different terms.

Access determinations can be interim or final. Where access determinations specify terms and conditions of access they must include terms and conditions relating to price (or a method of ascertaining a price) and may also contain non-price terms, although this is not compulsory.<sup>25</sup> Compliance with access determinations is a carrier licence condition and a service provider rule.<sup>26</sup> The access determinations do not apply to the extent they are inconsistent with various other instruments and agreements, including access agreements between parties.<sup>27</sup>

### Public inquiry

The access regime requires the ACCC to consider making access determinations for all declared services. For a newly declared service, the ACCC must commence a public inquiry into making an access determination within 30 days after the declaration is made.<sup>28</sup> The ACCC must make an FAD within 6 months of commencing a public inquiry. The ACCC can extend the time frame for making an FAD by up to 6 months.<sup>29</sup> The FADs for WLR, LCS and PSTN OA (along with ULLS, LSS and PSTN TA) were made on 20 July 2011 and expire on 31 July 2014.

### Content of access determinations

Section 152BC of the CCA specifies what an access determination may contain. These include, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the standard access obligations provided for in the CCA and terms and conditions of access to a declared service. Access determinations can make different provisions with respect to different access providers or access seekers.<sup>30</sup>

### Fixed principles provisions

An access determination may contain a fixed principles provision, which allows a provision in an access determination to have an expiry date after the expiry date of the access determination.<sup>31</sup> Such a provision would allow the ACCC to 'lock in' a term so that it would be consistent across multiple access determinations.

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<sup>25</sup> Subsection 152BC(3) of the CCA.

<sup>26</sup> Sections 152BCO and 152BCP of the CCA.

<sup>27</sup> Section 152BCC of the CCA.

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

<sup>29</sup> Subsections 152BCK(2) and (3) of the CCA.

<sup>30</sup> Subsection 152BC(5) of the CCA.

<sup>31</sup> Subsection 152BCD of the CCA.

## Varying an access determination

Section 152BCN allows the ACCC to vary or revoke an access determination. A fixed principles provision cannot be varied or removed unless the access determination sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.<sup>32</sup>

## Commencement and expiry provisions

Section 152BCF of the CCA sets out the commencement and expiry rules for access determinations. An access determination must have an expiry date.<sup>33</sup>

## Criteria to consider when varying an access determination

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>34</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.

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

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

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

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

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<sup>32</sup> Subsection 152BCN(4) of the CCA.

<sup>33</sup> Subsection 152BCF(5) of the CCA.

<sup>34</sup> Subsection 152BCN(1) of the CCA and subsection 33(3) of the *Acts Interpretation Act 1901*.



## Paragraph 152BCA(1)(a)

The first criterion 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’.

The ACCC has previously published a guideline explaining what it understands by the phrase ‘long-term interests of end-users’ in the context of its declaration responsibilities.<sup>35</sup> This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for varying the access determinations for the WLR, LCS and PSTN OA.

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

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.<sup>36</sup>

The ACCC also notes that the Australian Competition Tribunal (Tribunal) has offered guidance in its interpretation of the phrase ‘long-term interests of end-users’ (in the context of access to subscription television services):

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

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

\*Interests: the interests of the end users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings. ...[T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case ...

\*Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.<sup>37</sup>

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

- promoting competition in markets for carriage services and services supplied by means of carriage services
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in:
  - the infrastructure by which listed carriage services are supplied, and

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<sup>35</sup> ACCC, Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act, July 1999, in particular pp. 31-38.

<sup>36</sup> *ibid.*, p. 33.

<sup>37</sup> *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

- any other infrastructure by which listed services are, or are likely to become, capable of being supplied.<sup>38</sup>

### ***Promoting competition***

In assessing whether particular terms and conditions will promote competition, the ACCC will analyse the relevant markets to which the declared service is an input and consider whether the terms set in those markets remove obstacles to end users gaining access to carriage services and services supplied by means of carriage services.<sup>39</sup>

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

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

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

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end user who is supplied with a carriage service that involves communication between end users is able to communicate, by means of that service, with each other end user who is supplied with the same service or a similar service. This must be the case whether or not the end users are connected to the same telecommunications network.<sup>40</sup>

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

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

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

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
  - the technology that is in use, available or likely to become available
  - whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and
  - the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the NBN) by which services are, or are likely to become, capable of being supplied, and

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<sup>38</sup> Subsection 152AB(2) of the CCA.

<sup>39</sup> Subsection 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] A CompT 3 at [92]; *Telstra Corporation Limited* [2006] A CompT at [97], [149].

<sup>40</sup> Subsection 152AB(8) of the CCA.

- the risks involved in making the investment.<sup>41</sup>

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

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

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

...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.<sup>42</sup>

...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.<sup>43</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>44</sup>

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

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

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment.<sup>45</sup> The ACCC is of the view that the concept of ‘legitimate business interests’ in relation to varying FADs should be interpreted in a similar manner, consistent with the phrase ‘legitimate commercial interests’ used elsewhere in Part XIC of the CCA.

For completeness, the ACCC notes that it would be in the access provider’s legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.<sup>46</sup>

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.<sup>47</sup>

<sup>41</sup> Subsections 152AB(6) and (7A) of the CCA.

<sup>42</sup> Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [159].

<sup>43</sup> *ibid.* at [164].

<sup>44</sup> *ibid.*

<sup>45</sup> ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

<sup>46</sup> ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

<sup>47</sup> Telstra Corporation Limited [2006] ACompT 4 at [89].

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

The third criterion requires the ACCC to consider ‘the interests of all persons who have the right to use the service’ when 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>48</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>49</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>50</sup>

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

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

The fourth criterion requires that the ACCC consider ‘the direct costs of providing access to the declared service’ when 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>51</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>52</sup>

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs criterion ‘is concerned with ensuring that the costs of providing the service are recovered.’<sup>53</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>54</sup>

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<sup>48</sup> Telstra Corporation Limited [2006] ACompT 4 at [91].

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

<sup>52</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>53</sup> Telstra Corporation Limited [2006] ACompT 4 at [92].

<sup>54</sup> *ibid.* at [139].

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

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

In the 1997 Access Pricing Principles, the ACCC stated:

This criterion requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.<sup>55</sup>

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

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

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

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

...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.<sup>56</sup>

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

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

The final criterion of subsection 152BCA(1) requires the ACCC to consider ‘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. 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>57</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

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<sup>55</sup> 1997 Access Pricing Principles, p. 11.

<sup>56</sup> ACCC, Final determination – Model Non-price Terms and Conditions, November 2008, p. 8.

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

- the telecommunications networks and infrastructure used to supply these services.<sup>58</sup>

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

Subsection 152BCA(2) 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,<sup>59</sup> take into account:

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

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in varying an access determination, does not consider the declared service in isolation, but also considers other relevant services.<sup>60</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>61</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>58</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [94]-[95].

<sup>59</sup> 'Eligible service' has the same meaning as in section 152AL of the CCA.

<sup>60</sup> Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

<sup>61</sup> *ibid.*