



**Australian
Competition &
Consumer
Commission**

Fixed Services Review

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

Final report

June 2014



© Commonwealth of Australia 2014

This work is copyright. In addition to any use permitted under the Copyright Act 1968, all material contained within this work is provided under a Creative Commons Attribution 3.0 Australia licence, with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logo
- any illustration, diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright, but which may be part of or contained within this publication.

The details of the relevant licence conditions are available on the Creative Commons website, as is the full legal code for the CC BY 3.0 AU licence.

Requests and inquiries concerning reproduction and rights should be addressed to the Director, Corporate Communications, ACCC, GPO Box 3131, Canberra ACT 2601, or publishing.unit@acc.gov.au

www.accc.gov.au

Table of contents

List of abbreviations and acronyms	4
Glossary	5
Executive summary	7
1 Background	9
2 Consultation	10
3 ACCC final decision	10
4 Legislative framework for varying the final access determinations	11
Appendix A - Variation instruments	26
Appendix B - Legislative framework for varying an access determination	30

List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	Asymmetric Digital Subscriber Line
CAN	Customer Access Network
CBD	Central Business District
CCA	<i>Competition and Consumer Act 2010</i>
DSL	Digital Subscriber Line
DSLAM	Digital subscriber line access multiplexer
ESA	Exchange service area
FAD	Final access determination
IIC	Internal Interconnection Cable
LCS	Local carriage service
LSS	Line sharing service
LTIE	Long-term interests of end-users
NBN	National Broadband Network
PSTN	Public switched telephone network
PSTN OTA	PSTN originating and terminating access
SAOs	Standard access obligations
ULLS	Unconditioned local loop service
WLR	Wholesale line rental

Glossary

access seeker	Telecommunications companies that seek access to the declared service (that is, the right to use the declared service).
access provider	Telecommunications companies that provide access to a declared service.
ADSL	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).
CAN	Customer Access Network. The portion of the copper network that connects each telephone end-user to the network switch at their local exchange.
declaration inquiry	The process by which the ACCC holds a public inquiry to determine whether a service should be declared.
declared service	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.
downstream	Further along the supply chain. For example, mandating access to network services can promote competition in downstream retail broadband services.
end-user	Retail consumers of telecommunication services.
exchange	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.
FAD	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.
fixed line services	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, FTAS and WADSL.
FOAS	The declared fixed originating access service. Allows a telephone call to be connected from the caller to a point of interconnection with another network.
FTAS	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.
IIC	The Internal Interconnection Cable. The IIC is a cable that connects access seeker equipment to Telstra's main distribution frame within the Telstra exchange.

LCS	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.
LSS	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.
LTIE	Long term interests of end-users. In deciding whether declaration will promote the LTIE, the ACCC must have regard to the extent to which declaration is likely to result in the achievement of the following three objectives: promoting competition in markets for telecommunications services, achieving any-to-any connectivity, and encouraging efficient use of, and investment in, infrastructure by which the service is supplied.
PSTN	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.
PSTN OA	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.
PSTN OTA	PSTN Originating and Terminating Access services. Used to refer to the PSTN OA and PSTN TA services together.
PSTN TA	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.
retail service provider	Companies that offer telecommunications services to end-users.
TWA	Telstra Wholesale Agreement. A new 'umbrella' access agreement intended to apply to all wholesale services supplied by Telstra, both regulated and unregulated.
ULLS	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.
Wholesale ADSL	The declared Wholesale ADSL service. Allows access seekers to purchase a Wholesale ADSL product from Telstra and resell internet services to end-users.
WLR	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.

Executive summary

On 11 July 2013, the Australian Competition and Consumer Commission (**ACCC**) commenced the fixed services review (**FSR**) in relation to the declared fixed line services supplied on Telstra's fixed network. The FSR consists of two public inquiries—the declaration inquiry and the final access determination (**FAD**) inquiry (the substantive FAD inquiry).

On 16 April 2014, the ACCC completed the FSR declaration inquiry and decided to extend the declarations for six fixed line services (with some variations) for another five year period until 31 July 2019. The ACCC also decided to remove the CBD exemptions for the wholesale line rental (**WLR**) service and local carriage service (**LCS**) with effect from 1 August 2014.

The six re-declared fixed line services, and the wholesale ADSL service, are currently regulated by FADs that were initially due to expire on 30 June 2014. On 16 April 2014, the ACCC extended these FADs until the day before new FADs are made.

In the substantive FAD inquiry, the ACCC will determine regulated price and non-price terms and conditions for each of the declared fixed line services. The regulated terms and conditions will apply when commercial negotiations do not result in agreement.

Due to the complexity of the pricing issues, the ACCC does not expect to be in a position to complete the substantive FAD inquiry before mid-2015. Consequently, two interim pricing issues arose.

First, in the absence of the variations to the WLR and LCS FADs, there would be no regulated WLR and LCS prices in the CBD areas until new FADs are made in mid-2015. This would mean that the competitive benefits of removing the CBD exemptions from the declarations for these services would not be realised for an extended period of time after the change to the declarations takes effect (from 1 August 2014). The ACCC considers such a delay would not be in the long-term interests of end-users (**LTIE**).

Second, in the absence of the variations to the FADs for the unconditioned local loop service (**ULLS**) and line sharing service (**LSS**), a regulated charge for the internal interconnection cable (**IIC**) service would no longer be available to access seekers acquiring the ULLS and/or LSS until new FADs are made in mid-2015. The IIC charge is currently regulated through arbitral determinations, which expire on 30 June 2014 and cannot be extended. The ACCC considers that it would not be in the LTIE for a regulated IIC charge to be unavailable while the ACCC is conducting its substantive FAD inquiry.

In reaching its view that addressing these issues now would be in the LTIE, the ACCC took into account Telstra's recent introduction of a new Telstra Wholesale Agreement (**TWA**), which is intended to apply to all wholesale services supplied by Telstra. The ACCC considers that with the introduction of the TWA, commercial negotiations between access seekers and Telstra may well occur before new FADs are made.

As a result, the ACCC concluded that these interim pricing issues should be addressed before the substantive FAD inquiry is completed.

Accordingly, on 17 April 2014, the ACCC commenced a public inquiry into whether it should vary the relevant FADs (the FAD variation inquiry). The ACCC received submissions from six stakeholders—Telstra, Optus, iiNet, the Competitive Carriers' Coalition, Aussie Broadband and Macquarie Telecom. Telstra was the only party to object to the ACCC's proposal to vary the FADs and to submit that the issues should not be dealt with until the substantive FAD inquiry is finalised.

The ACCC has finalised its FAD variation inquiry and decided to vary the existing FADs. The variations will ensure that regulated prices for these services are available until new FADs are made. The ACCC has decided to vary:

- the existing WLR and LCS FADs to ensure that the price and non-price terms in those FADs will apply to services supplied in CBD areas from 1 August 2014
- the existing ULLS and LSS FADs to set a regulated IIC charge for these cables used in connection with the supply of ULLS and LSS.

The ACCC has considered the relevant statutory criteria and is of the view that these variations will promote the LTIE.

The variations in relation to LCS and WLR will come into effect on 1 August 2014. The variations in relation to the IIC charge for the ULLS and LSS will come into effect on 1 July 2014. The varied FADs will expire on the day before new FADs come into force.

The ACCC's reasons for its decision are set out in further detail in section 3 and copies of the variation instruments are in **Appendix A**.

1 Background

On 11 July 2013, the ACCC commenced the fixed services review (**FSR**) in relation to the declared fixed line services supplied on Telstra's fixed network. The FSR consists of two public inquiries—the declaration inquiry and the final access determinations (**FAD**) inquiry (the substantive FAD inquiry).

On 16 April 2014, the ACCC completed the FSR declaration inquiry and decided to extend the declarations for six fixed line services (with some variations) for another five year period until 31 July 2019. The ACCC also decided to remove the central business district (**CBD**) areas exemptions for the wholesale line rental (**WLR**) service and local carriage service (**LCS**).

The substantive FAD inquiry will determine the terms and conditions, including price, for the seven declared fixed line services. The ACCC intends that the new FADs will replace the existing FADs for these services. The regulated terms and conditions will apply when commercial negotiations do not result in agreement.

The existing FADs for the seven declared fixed line services were initially due to expire on 30 June 2014. On 16 April 2014 the ACCC extended these FADs until the day before new FADs are made.

Due to the complexity of the pricing issues, the ACCC will not be able to complete the substantive FAD inquiry until mid-2015. Consequently, two interim pricing issues arose:

- In the absence of variations to the WLR and LCS FADs, there would be no regulated WLR and LCS prices in the CBD areas until new FADs are made in mid-2015 even though the variations to the declarations for these services to remove the CBD exemptions take effect from 1 August 2014.
- In the absence of variations to the FADs for the unconditioned local loop service (**ULLS**) and line sharing service (**LSS**), a regulated charge for the internal interconnection cable (**IIC**) service would no longer be available to access seekers acquiring the ULLS and/or LSS until new FADs are made in mid-2015.

Accordingly, on 17 April 2014, the ACCC commenced this public inquiry into varying the FADs for the WLR, LCS, ULLS and LSS (the FAD variation inquiry) to address these two issues (outlined in further detail in sections 1.1 and 1.2 below). The ACCC's discussion paper for the FAD variation inquiry outlined the ACCC's proposed variations to these four FADs and how the ACCC has taken into account the matters listed in subsection 152BCA(1) of the CCA.¹

1.1 Variation to LCS and WLR FADs to apply terms to services supplied in CBD areas

The previous declarations for the LCS and the 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 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 existing FADs for the LCS and the WLR service do not apply to services supplied in CBD areas.

In its April 2014 declaration inquiry final decision, the ACCC varied the service descriptions for the LCS and the WLR service to remove the existing CBD 'carve-out'. From 1 August 2014, services supplied in CBD areas are now subject to declaration.²

In this inquiry, the ACCC proposed to vary the existing LCS and WLR FADs so that the price and non-price terms in those FADs will apply to services supplied in CBD areas.³

¹ ACCC, *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.

² ACCC, *Fixed Services Review: Public Inquiry into the fixed line services declarations - Final Report*, p. 40.

1.2 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 ULLS and the LSS access seekers an 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 to use 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. These arbitral determinations apply to seven access seekers and cannot be extended.

The ACCC proposed to regulate the IIC charge applied to ULLS and LSS access seekers from 1 July 2014 by including a price term addressing the charge in the ULLS and the LSS FADs. This term would be available to all ULLS and LSS access seekers when commercial negotiations did not result in agreement on the charge.⁴

2 Consultation

On 17 April 2014 the ACCC commenced the public inquiry and published a discussion paper on varying the FADs.⁵ Submissions closed on 19 May 2014. The ACCC received submissions from:

- Telstra Corporation Limited (**Telstra**)
- Competitive Carriers' Coalition (**CCC**)
- SingTel Optus Pty Limited (**Optus**)
- Aussie Broadband Pty Limited (**Aussie Broadband**)
- Thomson Geer Lawyers on behalf of iiNet Pty Limited (**iiNet**)
- Macquarie Telecom Pty Limited (**Macquarie**).

Public versions of the submissions are available on the ACCC website. The ACCC has had regard to all relevant submissions in forming its views on this matter.

3 ACCC final decision

Based on the reasons outlined in section 4, the ACCC has decided to vary:

- the existing LCS and WLR service FADs so that the price and non-price terms in those FADs will apply to services supplied in CBD areas from 1 August 2014
- the existing ULLS and LSS FADs to introduce a price term to regulate the IIC charge applied to ULLS and LSS access seekers.

The varied FADs will expire on the day before the new FADs for these four services come into force.

Copies of the respective variation instruments can be found in **Appendix A**.

³ ACCC, 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, p. 9.

⁴ Ibid, p. 9.

⁵ Ibid, p. 9.

4 Legislative framework for varying the final access determinations

The ACCC has varied the LCS, WLR, ULLS and LSS FADs to address two specific matters:

1. To ensure that regulated price and non-price terms for the WLR and LCS services are available in CBD areas from 1 August 2014 when the revised declarations take effect. The ACCC considers that the availability of regulated prices as soon as these revised declarations take effect will ensure that the competitive benefits of declaration identified in the ACCC's Fixed Services Review: Final Declaration Report are realised and will promote the LTIE.⁶
2. To provide for on-going access to the IIC at a regulated price for access seekers that have previously had access to this service under arbitral determinations made in November 2012, and to make this regulated price more broadly available to all access seekers. The ACCC considers that this will ensure access to the declared ULLS and LSS services is on reasonable terms and conditions and will therefore promote the LTIE.⁷

This section sets out the ACCC's assessment against the relevant legislative criteria.

How the ACCC takes into account the matters specified in section 152BCA of the CCA, and other matters that it considers relevant⁸, in deciding whether to make FAD variations is set out in **Appendix B**.

4.1 ACCC's power to vary a final access determination

4.1.1 Submissions

Telstra and Optus each made submissions on the appropriateness of the ACCC's inquiry to vary the fixed line FADs. In particular Telstra questioned the ACCC's basis for making these FAD variations.

Telstra argued that while the ACCC has a range of legislative avenues to resolve regulatory access issues, including powers to make minor variations to a FAD, the issues raised in this particular inquiry can only be reasonably characterised as 'major' FAD variations.

Telstra submitted that where the ACCC seeks to make a 'major' or substantive FAD variation, the ACCC must conduct a full and proper inquiry as if it were making a new FAD.⁹ Telstra submitted that in this instance the ACCC has not given itself or stakeholders sufficient time to fully consider the "complex and material" issues generated by the proposed variations, and therefore the ACCC cannot have reasonably decided whether the proposed FAD variations satisfy the statutory criteria set out in subsection 152BCA(1) of the CCA.¹⁰

Optus submitted that the ACCC should have considered using other methods to extend the FADs including the use of an interim access determination (IAD).¹¹ Optus submitted the ACCC could have extended the existing 2011 FADs until 31 July 2014, the date of expiry for the existing fixed line

⁶ This is outlined in more detail on pp. 15-16.

⁷ This is outlined in more detail on pp. 23-24.

⁸ Subsection 152BCA(3) of the CCA.

⁹ Telstra, May 2014 Submission, p. 4.

¹⁰ Ibid, p. 14.

¹¹ Optus, May 2014 submission, p. 4.

service declarations.¹² Optus considered that the ACCC could then from 1 August 2014 issue an IAD which extended the existing FAD terms until the conclusion of the substantive FAD inquiry.¹³

Optus submitted that this arrangement would provide the ACCC with the flexibility to assess the LCS and WLR access prices during the substantive FAD inquiry, and if it determined that these prices needed varying, it would be possible for the ACCC to backdate these prices to align with the start of the declaration period (1 August 2014).¹⁴

4.1.2 ACCC final views

The ACCC agrees with Telstra that the matters discussed in this variation inquiry—the setting of price and non-price terms of access to WLR and LCS services in CBD areas and implementing a regulated IIC charge—are not ‘minor’ and cannot therefore be dealt with by making minor variation to the relevant FADs pursuant to subsection 152BCN(2) of the CCA, under which a public inquiry is not required.

However, the ACCC considers that this FAD variation inquiry has provided stakeholders with sufficient time and information to assess and comment on the ACCC’s proposed FAD variations, and has given the ACCC sufficient time to take these stakeholder views into account in making its final decision.

The ACCC has provided stakeholders with 28 days to assess and respond to the ACCC’s proposed FAD variations. To assist stakeholders in making submissions, the ACCC published a discussion paper which outlined the reasons for the ACCC’s proposal to vary the FADs, the assessment framework the ACCC proposed to use to make its decision whether to vary the FADs, and the ACCC’s preliminary views on the proposed FAD variations.

Further, the ACCC notes that this FAD variation inquiry considers previously modelled prices that have been subject to considerable prior consultation and assessment (through the 2011 Fixed Services FAD Inquiry and the relevant arbitrations). The ACCC considers this pricing information to be the best information currently available to make the proposed FAD variations.

Until the ACCC and industry have had an adequate opportunity to assess the new information provided by Telstra under the Building Block Model Record Keeping Rule (BBM RKR) and consider the relevant issues in depth, the information and decision making from the 2011 FAD inquiry remains the most relevant and robust information available to the ACCC and industry. The ACCC will consider the BBM RKR information and other pricing issues further during the course of the substantive FAD inquiry, which it expects to complete by mid-2015.

The reasons for the ACCC’s decision to vary the FADs are detailed in sections 4.3 and 4.4, including the ACCC’s assessment regarding the LTIE, the legitimate interests of the access provider and the other matters specified in section 152BCA of CCA.

In relation to Optus’s submission that the ACCC could have used an IAD as an alternative to extending the FADs under subsection 152BCF(10) of the CCA, the ACCC notes that the power to make an IAD is restricted to those services that have not been previously declared or where no access determination has previously been made.

4.2 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 purposes of assessing the FAD variations. Consistent with the ACCC’s preliminary view expressed in the discussion paper released on 17 April 2014, the ACCC considers the relevant markets for the fixed line services are the national markets for:

- retail fixed voice services
- retail fixed broadband services

¹² Ibid, p. 4.

¹³ Ibid, p. 4.

¹⁴ Ibid, p. 4.

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

These are the same market definitions as used in the ACCC's recent declaration inquiry for the fixed line services.

4.3 Inquiry to vary the FADs for the LCS and WLR to implement price and non-price terms for CBD areas

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 has varied the existing LCS and WLR FADs to apply to services supplied in CBD areas. Specifically, this variation extends price and non-price terms to the LCS and WLR service supplied in CBD areas. This variation commences on 1 August 2014 when the new declaration commences and it will expire on the day before the new FADs for these four fixed line services come into force.

The final variation instrument is attached as **Appendix A**.

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

4.3.1 Submissions on price terms

Telstra submitted that the recent changes to the LCS and WLR service descriptions—made by the ACCC as part of the fixed line services declaration inquiry—do not create an urgent or immediate need for the ACCC to specify price and non-price terms for the supply of these services in CBD areas.¹⁵

Telstra argued that the supply terms for the WLR service have never been regulated in CBD areas before now, and for over 10 years the supply terms for LCS have not been regulated in CBD areas.¹⁶ Telstra submitted that the relevant markets for the LCS and WLR service in CBD areas do not require regulation because these markets are highly competitive and operate efficiently.¹⁷ As such, Telstra submitted that there is no justification for *ex ante* regulation of price and non-price terms for LCS and WLR in CBD areas.¹⁸

Optus, iiNet, Aussie Broadband, CCC and Macquarie all submitted that setting a price for CBD areas would create a single national access price which would be consistent with the ACCC's recent decision to remove CBD carve-outs from the declarations for these services.

The CCC submitted that the ACCC's decision to extend the existing FAD terms to CBD areas reduces the prospect of Telstra being incentivised to charge differential prices and offer different terms of access for the LCS and WLR services in different geographic areas.¹⁹

Aussie Broadband and iiNet both submitted that when the relevant statutory criteria are applied on a 'with or without' basis it clearly establishes that extending the non-CBD area supply terms to CBD areas from 1 August 2014 better satisfies the statutory criteria than allowing Telstra to be unregulated and use its monopoly terms to continue supply to these areas.²⁰

Macquarie submitted that, while the proposed FAD variation price terms are the best available estimates and that it is practical and expedient for the ACCC to adopt these prices, these prices

¹⁵ Telstra, May 2014 submission, p. 14.

¹⁶ Ibid, p. 14.

¹⁷ Ibid, p. 17.

¹⁸ Ibid, p. 17.

¹⁹ Competitive Carriers' Coalition, May 2014 submission, p. 1.

²⁰ Aussie Broadband, May 2014 submission, p. 3; iiNet, May 2014 submission, p. 3.

should only be considered temporary until such time as the ACCC completes its assessment of the FAD prices in the substantive FAD inquiry.²¹

Telstra submitted that the ACCC has not taken into account the “more recent and more relevant” pricing information provided by Telstra and that the varied price terms use out-of-date information.²² Telstra therefore argued that the varied FAD pricing is not a reasonable estimate of the efficiently incurred costs of supplying the LCS and WLR service.²³

4.3.2 ACCC final views on price terms

The ACCC disagrees with Telstra’s submission that there is no immediate need to specify price and non-price terms for the LCS and WLR services in CBD areas.

As noted below, the ACCC’s recent Fixed Services Review - Final Declaration Report noted the competition effects of access seekers paying a higher commercial price for the WLR service in CBD areas than in non-CBD areas.²⁴ In light of this assessment, the ACCC considers that it is not in the LTIE for access seekers to continue to pay these higher commercial prices for the next 12 months, until a new FAD can be made.

Optus, iiNet, Aussie Broadband, CCC and Macquarie all submitted that the ACCC’s decision to vary the existing FADs to provide for regulated terms and conditions on the date the decision to remove CBD exemptions comes into effect is consistent with the ACCC’s decision to remove the exemptions. These submissions all stated that setting the same regulated WLR price in the CBD areas as applied in non-CBD areas would create a single national access price.

The ACCC considers that implementing regulated WLR and LCS prices as soon as possible will provide industry with certainty until the new FADs are finalised.

The ACCC does not accept Telstra’s submission that the varied FAD pricing is not a reasonable estimate of the efficiently incurred costs of supplying the LCS and WLR service. The ACCC acknowledges that the varied FAD pricing is based on cost information from the 2011 FAD inquiry and that it is adopting price terms based on cost estimates which were only modelled until 30 June 2014. The ACCC has received more recent actual and forecast demand and expenditure information from Telstra under the BBM RKR for the purposes of the substantive FAD inquiry. However, this information has not been subject to complete ACCC review and industry consultation. The ACCC notes that this process will take considerable time to complete as it is part of the broader pricing exercise for the substantive FAD inquiry, which will address a number of complex pricing issues.

The ACCC agrees with Macquarie’s submission that the varied FAD pricing is based on the best available estimates and that it is practical and expedient for the ACCC to adopt these prices until the substantive FAD inquiry is completed.

The ACCC’s final view is that the information used in this FAD variation inquiry is the best information currently available to the ACCC and is appropriate until the completion of the substantive FAD inquiry.

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

Submissions

Telstra submitted that the ACCC cannot be satisfied that the proposed price terms for the LCS and the WLR service will promote the LTIE. In this regard, Telstra submitted that the ACCC has failed to take into account:

- the current state of competition in CBD areas and the very significant differences in competitive dynamics in these areas, compared to other geographic areas

²¹ Macquarie Telecom, May 2014 submission, p. 3.

²² Telstra, May 2014 submission, p. 17.

²³ Ibid, p. 17.

²⁴ ACCC, *Fixed Services Review: Public Inquiry into the fixed line services declarations - Final Report*, pp. 40-42.

- the extent to which existing competitive dynamics may be affected by regulation of prices for LCS and the WLR service
- the extent of competing infrastructure in CBD areas – including alternative networks and DSLAM infrastructure – and the potential for further investment in competing infrastructure
- the likely effect of LCS and WLR price regulation on incentives for efficient use of and investment in infrastructure, including competing infrastructure.²⁵

Optus submitted that access seekers have previously advocated that the CBD exemptions for the LCS and WLR service should be removed in order to promote a more level playing field in the supply of these services in the related national markets.²⁶

However, Optus also submitted that the ACCC's decision to extend the FAD terms to CBD areas does not address the issue of over-recovery of access charges by Telstra during the existing or the extended FAD period. Optus considers that Telstra's access charges for these services do not reflect the cost of supply.

Aussie Broadband, iiNet and Macquarie agreed with the ACCC's draft view that the proposed variations to the LCS and WLR service are likely to promote the LTIE.²⁷

ACCC final views

Many of the arguments raised by Telstra were considered and addressed by the ACCC in deciding to remove the CBD exemptions for the WLR and LCS services in the Fixed Services Final Declaration report. In particular, the ACCC found during the declaration inquiry that:

- In the absence of regulated prices for LCS and WLR service in CBD areas, Telstra would be likely 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.
- Telstra has been charging access seekers \$31.77 per month (business end-users) and \$27.60 per month (residential end-users) for WLR services supplied in the exempt CBD areas. These prices are above the nationally averaged regulated WLR price of \$22.84 per month and above Telstra's estimated costs of supplying these services in the CBD areas.
- The high commercial WLR prices in the CBD areas were likely to significantly constrain the ability of access seekers using the WLR service to compete with Telstra in supplying voice services and bundled voice and broadband services to end-users located in CBD areas and in providing 'whole of business' offerings on a national basis.
- There remains significant demand for copper-based voice services in CBD areas. For a significant number of end users, alternative networks (such as fibre networks and ULLS-based access seeker networks) are not viable substitutes because of the significant switching costs in moving to these alternatives (including replacing customer premises equipment, such as handsets and point-of-sale equipment).
- Economies of scale in access seeker exchange equipment mean that ULLS-based supply of voice-only services is not commercially viable where end-users demand a small number of voice-only services per premises.
- Access prices that reflect efficient costs, and do not include any monopoly profits, would facilitate access to WLR services and LCS by access seekers on reasonable terms and conditions. This would 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.
- By promoting competition in downstream markets, overall dynamic efficiency is encouraged as competition would create stronger incentives for technological and product innovation.

²⁵ Telstra, May 2014 submission, p. 5.

²⁶ ACCC, *Fixed Services Review: Public Inquiry into the fixed line services declarations - Final Report*, p. 38.

²⁷ Aussie Broadband, May 2014 submission, p. 3; iiNet, May 2014 submission, p. 3; Macquarie Telecom, May 2014 submission, p. 2.

The ACCC's examination of a number of 'typical' CBD end-user case studies in the Fixed Services Review - Final Declaration Report found that the high commercial WLR price is likely to keep retail prices high for end-users in CBD areas because of the constraints on access seekers' ability to compete with Telstra on price.²⁸ Accordingly, varying the WLR and LCS FADs to apply regulated nationally-averaged prices in CBD areas will enable access seekers to compete more effectively with Telstra to supply small and medium-sized business that require a small number of voice-only services to particular premises and to offer competitive 'whole of business' packages of services to corporate end-users.

The ACCC also considered the concerns raised in Telstra's submission about the effect of the FAD variation on future investment, innovation and product differentiation in its analysis in the Fixed Services Review - Final Declaration report. The ACCC concluded that whenever it is efficient to do so, carriers will continue to use, and invest in, their own networks to supply retail services to end-users.

For these reasons, the ACCC considers that implementing the WLR and LCS prices in CBD areas will promote economically efficient investment in and use of telecommunications infrastructure and thereby promote the LTIE.

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

Submissions

Aussie Broadband and iiNet submitted that they agree with the ACCC's draft views that the proposed variations to the LCS and WLR FADs are consistent with Telstra's legitimate business interests.²⁹

Optus submitted that the existing FAD prices will lead to the over-recovery of costs by Telstra because payments to Telstra for leasing or selling network assets to NBN Co and for the de-commissioning of its copper network have not been adequately accounted for.

Telstra submitted that the ACCC has not taken into account the "more recent and more relevant" pricing information provided by Telstra in setting the price terms for the LCS and WLR service in CBD areas and that the varied price terms use out-of-date information. Telstra argued that the varied FAD pricing is not a reasonable estimate of its efficiently incurred costs of supplying the LCS and WLR service.

ACCC final views

The ACCC considers that the LCS and WLR service CBD prices are likely to allow Telstra to recover its estimated operating expenditures on assets used to supply the LCS and WLR service in CBD areas, depreciation on these assets, a commercial rate of return on its investments, and its related tax liabilities. The ACCC considers that this is consistent with Telstra's legitimate business interests.

The ACCC considers that the LCS and WLR regulated prices in the existing FADs are reasonable estimates of the efficiently incurred costs of supplying those services based on the best available information. The information on which these FAD prices are based was subject to extensive industry consultation and ACCC analysis during the 2011 FAD inquiry. As noted above, more recent actual and forecast demand and expenditure information provided by Telstra under the BBM RKR has not been subject to complete ACCC review and industry consultation. It cannot therefore represent a sufficiently reliable source of information, at this stage, for making a decision on FAD prices as its accuracy and reasonableness has not been tested.

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

Submissions

²⁸ ACCC, *Fixed Services Review: Public Inquiry into the fixed line services declarations - Final Report*, pp. 40-43.

²⁹ Aussie Broadband, May 2014 submission, p. 3; iiNet, May 2014 submission, p. 3.

Aussie Broadband and iiNet submitted that they agree with the ACCC's draft views that the proposed variations to the LCS and WLR service would not disadvantage the interests of access seekers.³⁰

ACCC final views

The ACCC considers the proposed FAD variation will provide certainty for access seekers and will promote efficient investment by access seekers in supplying retail services. The ACCC considers that this is consistent with access seekers' interests.

Further, the ACCC found in its recent declaration inquiry that, in the absence of regulated prices for LCS and WLR service in CBD areas, Telstra would be likely to continue to charge WLR prices that are above its efficient costs of supplying WLR services in CBD areas. It would also be open to Telstra to charge LCS prices above its efficient costs. The ACCC therefore considers that setting a regulated price for WLR service and LCS that reflects the estimated efficient costs of supplying those services would be in the interests of access seekers.

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

Submissions

Aussie Broadband and iiNet submitted that they agreed with the ACCC's draft views that the proposed variations to the LCS and WLR service reflect the best currently available estimates of the direct and efficient costs of these declared services.³¹

ACCC final views

The ACCC is of the view that the LCS and WLR prices are reflective of the direct costs of providing access to these services as they are based on the best available information on these costs.

The existing FAD prices ensure that the estimated direct costs of providing access to the LCS and WLR services 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 services, would reasonably reflect the relative usage of the network by LCS and WLR services.³² This ensures that the direct costs for LCS and WLR service have been taken into account in determining the proposed prices.

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

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

No stakeholders submitted on this legislative criterion.

The ACCC considers this matter to not be of relevance to its decision to vary the LCS and WLR service FADs.

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

No stakeholders submitted on this legislative criterion.

The ACCC is of the view that the LCS and WLR prices do not compromise the safe and reliable operation of any carriage service, telecommunications network or facility. The LCS and WLR service

³⁰ Aussie Broadband, May 2014 submission, p. 3; iiNet, May 2014 submission, p. 3.

³¹ Aussie Broadband, May 2014 submission, p. 3; iiNet, May 2014 submission, p. 3.

³² ACCC, *Inquiry to make final access determinations for the declared fixed line services - Final Report*, July 2011, p. 135.

prices reflect the efficiently incurred costs of providing these services. Accordingly, this would allow the access provider to recover the cost of any necessary maintenance and network asset replacement as required to ensure that the declared fixed line services are provided safely and reliably.

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

The ACCC considers the varied FAD pricing for the LCS and WLR services reflects the efficient costs of supplying these services on a nationally averaged basis, which includes the CBD areas. Therefore, for similar reasons as discussed above in regard to subsection 152BCA(1)(a) of the CCA and 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.

4.3.3 Submissions on non-price terms

As noted above (in section 4.3.1), Telstra has submitted there is no justification for the ACCC to specify price and non-price terms of supply for the LCS and WLR service in CBD areas.³³ While Telstra has not made any specific submissions about the extension of the current non-price terms in the LCS and WLR FADs to CBD areas, it submitted that price and non-price terms should only be specified for a particular service in a particular geographic area after taking into account relevant market conditions in that geographic area.³⁴

Macquarie and Optus both submitted that because the LCS and WLR services are supplied in national markets, there is no practical difference between the supply of these two services in CBD and non-CBD areas that would necessitate different non-price terms of supply.³⁵

Aussie Broadband and iiNet submitted that they consider the existing FAD non-price terms better promote the LTIE and better satisfy the additional statutory criteria than Telstra's standard non-price terms in its access agreements. These two parties consider Telstra's standard non-price terms to be one-sided in favour of Telstra. These two parties further submitted that the ACCC should investigate during the substantive FAD inquiry whether the existing non-price terms could be improved.³⁶

4.3.4 ACCC final views on non-price terms

The ACCC considers that extending the existing non-price terms in the LCS and WLR service FADs to CBD areas will promote regulatory consistency in regard to these services. The ACCC has taken regulatory consistency into account as a matter that it considers is relevant to its assessment.³⁷

Each matter that the ACCC must take into account in accordance with section 152BCA of the CCA is addressed below.

Separately, the ACCC notes that it has commenced consulting on non-price terms as part of the substantive FAD inquiry. The ACCC will commence its consultation on price terms shortly.

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

No stakeholders submitted on this legislative criterion.

The ACCC considers that extending the non-price terms is more likely to promote the LTIE, compared to if the terms were not extended. The ACCC considers it is important that access seekers in CBD

³³ Telstra, May 2014 submission, p. 17.

³⁴ Ibid, p. 15.

³⁵ Macquarie Telecom, May 2014 submission, p. 3; Optus, May 2014 submission, p. 6.

³⁶ Aussie Broadband, May 2014 submission, p. 5; iiNet, May 2014 submission, p. 5.

³⁷ The ACCC may take into account any other matters that it thinks are relevant: subsection 152BCA(3) of the CCA.

areas 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.³⁸ This would promote competition on its merit in the relevant retail markets.

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

No stakeholders submitted on this legislative criterion.

The ACCC considers that the varied 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.³⁹

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

No stakeholders submitted on this legislative criterion.

The ACCC considers that the varied non-price terms 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 the LCS and WLR service in CBD areas.

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

The ACCC has formed the view that, to the extent it is relevant, the varied non-price terms take into account the direct costs of providing access to the declared service.

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

The ACCC considers this matter to not be of relevance in its decision to vary the LCS and WLR service FADs to extend the non-price terms to services supplied in CBD areas.

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

The ACCC considers that the varied non-price terms 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.

³⁸ Subsection 152BCA(1)(a) of the CCA.

³⁹ Subsection 152BCA(1)(b) of the CCA.

4.4 Inquiry to vary the FADs for the ULLS and LSS to include price terms for use of Internal Interconnection Cable to interconnect with the ULLS and LSS

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 has decided to vary the existing ULLS and LSS FADs to include price terms for the IIC charge.

The ACCC has decided to specify an IIC charge of \$0.056 (excluding GST) per month. This charge is the same as that set in the 2012 final arbitral determinations.⁴⁰ This variation commences on 1 July 2014 (the day after the existing arbitral determinations expire).

The final variation instrument is attached as **Appendix A**.

The reasoning for this decision is discussed in the sections following.

4.4.1 Submissions

Telstra submitted that it does not agree with the ACCC's proposed FAD variations to specify IIC charges as it considers there to be no 'immediate' issue requiring regulatory intervention.⁴¹ Telstra submitted that contrary to the ACCC's concerns outlined in the Discussion Paper, Telstra has no intention of seeking to increase existing IIC charges upon expiry of the current arbitral determinations.⁴²

Telstra further submitted that the proposed variations are 'major' variations to the existing FADs, and as such the ACCC is required to hold a proper inquiry whereby all relevant matters, including which may be raised in the course of consultation with stakeholders.⁴³

Telstra submitted that the ACCC cannot reasonably be satisfied of the statutory criteria simply based on the outcome of the 2012 arbitral determinations, and the information obtained during the course of those determinations. Telstra submitted the following supporting arguments:

- The ACCC has not given itself, or stakeholders sufficient time to make submissions on all the relevant matters associated with setting an IIC charge
- The ACCC used a "second best" pricing methodology when it set the IIC charges in those arbitral determinations
- The IIC charges in those arbitral determinations were intended to resolve bilateral disputes and therefore should not be transposed as FAD pricing which would apply to all access seekers.⁴⁴

Telstra also raised issues that it considered should be taken account, specifically noting:

- the efficient cost of providing access
- whether or not IIC charges should apply uniformly across all geographic areas
- whether the FADs should make different provisions with respect to different carriers, classes of carriers or different access seekers.⁴⁵

Optus submitted that it welcomed the ACCC's recognition that the IIC service is to be considered an ancillary service to the supply of the ULLS and the LSS.⁴⁶ However, Optus submitted that it has

⁴⁰ 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.

⁴¹ Telstra, May 2014 submission, p. 21.

⁴² Ibid, p. 21.

⁴³ Ibid, p. 21.

⁴⁴ Ibid, pp. 21-22.

⁴⁵ Ibid, pp. 21-22.

⁴⁶ Optus, May 2014 submission, p.6.

concerns about the ACCC's proposed approach to set the IIC charges in the FADs based on the charges determined by the ACCC in the 2012 arbitration process. In particular Optus stated that it is unclear how all the IIC costs have been taken into account, as the proposed FAD charge only refers to the monthly access charge for IIC on a per cable, per month basis.⁴⁷

Optus submitted that because it was not a party to these arbitrations, it was not privy to the information canvassed during this access dispute, and therefore prior to the ACCC setting a regulated IIC charge that would apply to all ULLS and LSS access seekers, the ACCC should engage in a proper industry consultation process.⁴⁸ Optus noted that this process would include a broader assessment of the costs of supplying the IIC service, and therefore such a consultation process should be reserved by the ACCC to the substantive FAD inquiry.⁴⁹

Aussie Broadband, iiNet and Macquarie all submitted that they are in broad agreement with the ACCC in its application of subsection 152BCA(1) of the CCA for the proposed variation to the ULLS and LSS FADs.⁵⁰

Macquarie submitted that it supports the ACCC's proposed variations to the ULLS and the LSS FADs.⁵¹ Macquarie noted that while the proposed IIC charge may not be ideal, it strongly supports this charge being implemented as it would enable access seekers to compete more effectively and deliver lower prices to end-users as quickly as possible.⁵²

Aussie Broadband and iiNet submitted that they consider the proposed IIC charges for the ULLS and LSS FADs better promotes the LTIE and better satisfies the additional statutory criteria than Telstra's standard commercial price for the same service.⁵³

Macquarie, Aussie Broadband and iiNet all noted, however, that the proposed FAD IIC charges should be considered as temporary until the ACCC completes a more fulsome analysis of the ULLS and LSS as part of its substantive FAD inquiry.⁵⁴ In particular, Aussie Broadband and iiNet anticipated that the new FAD prices for these services would likely be lower.⁵⁵

The CCC submitted that it supports the ACCC's decision to introduce a regulated IIC charge in the FADs as the previous arbitration disputes demonstrate Telstra's ability and willingness to charge access seekers well above its own costs of supply for the IIC.⁵⁶ The CCC submitted in the absence of on-going regulation it considers there is every reason to believe Telstra will again engage in this conduct.⁵⁷

4.4.2 ACCC final views

The ACCC has decided to specify an IIC charge of \$0.056 (excluding GST) per month. This charge is the same as that set in the 2012 final arbitral determinations.

⁴⁷ Ibid, p. 7.

⁴⁸ Ibid p. 7.

⁴⁹ Ibid, p. 7.

⁵⁰ Aussie Broadband, May 2014 submission, p. 6; iiNet, May 2014 submission, p. 6; Macquarie Telecom, May 2014 submission, p. 4.

⁵¹ Macquarie Telecom, May 2014 submission, p. 4.

⁵² Ibid, p. 4.

⁵³ Aussie Broadband, May 2014 submission, p. 6; iiNet, May 2014 submission, p. 6; Macquarie Telecom, May 2014 submission, p. 4

⁵⁴ Aussie Broadband, May 2014 submission, p. 6; iiNet, May 2014 submission, p. 6; Macquarie Telecom, May 2014 submission, p. 4

⁵⁵ Aussie Broadband, May 2014 submission, p. 6; iiNet, May 2014 submission, p.6.

⁵⁶ Competitive Carriers' Coalition, May 2014 submission, p. 1.

⁵⁷ Ibid, p. 1.

In deciding to vary the FADs for the ULLS and LSS, the ACCC has 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. The ACCC has set out below the reasons for its decision.

The ACCC considers that the IIC is integral to access seekers' ability to use the ULLS and the LSS. The ACCC considers that it is important for access seekers are able to access the declared services on reasonable terms and conditions, in order to promote the LTIE.

The arbitration determinations made in November 2012 in relation to the IIC are due to expire on 30 June 2014. Should these determinations expire, and the ACCC take no further action, the access seekers that previously had access to a regulated price for the IIC would no longer have access to regulated terms.

In the 2012 arbitration determination, the ACCC noted that the (then) future fixed line services FAD inquiry may consider the IIC, given that the IIC is necessary for the provision of the ULLS and LSS.⁵⁸ The ACCC has commenced its inquiry into making new FADs for the ULLS and LSS, including consulting on the IIC. However the ACCC does not expect to complete the substantive FAD inquiry until 2015 and considers that access seekers and Telstra may well engage in commercial negotiations before that time. The ACCC is aware that Telstra has recently introduced a new Telstra Wholesale Agreement (**TWA**). This is a new 'umbrella' agreement, which is intended to apply to all wholesale services supplied by Telstra, both regulated and unregulated services. Telstra has indicated that it will negotiate with access seekers on transitioning to the TWA.

Therefore, as outlined in the discussion paper, the ACCC proposed to regulate the IIC charge applied to ULLS and LSS access seekers from 1 July 2014 by including a price term addressing the charge in the ULLS and the LSS FADs. This term would be available to all ULLS and LSS access seekers if commercial negotiations did not result in agreement on the charge.⁵⁹

The ACCC recognises that the proposed IIC charge was determined in November 2012 based on information available to the ACCC at that time. However, the ACCC does not agree with Telstra and Optus that it should not use this information to set an IIC charge in the ULLS and LSS FADs. The ACCC considers this information to be the best available and most robust data it has on the costs of supplying the IIC service.

The ACCC will seek more up-to-date information about the costs relevant to setting the IIC charge during the substantive FAD inquiry. In May 2014, the ACCC commenced consultation on a number of matters relevant to the substantive FAD inquiry, including IIC pricing.

The ACCC acknowledges Telstra's submission that the IIC charge was first estimated in the context of an arbitration determination, not a FAD inquiry. The ACCC also recognises that Optus was not a party to the 2012 arbitrations. However, the ACCC notes the following:

- The ACCC referred to the 2012 arbitration determination in its discussion paper in explaining the basis for the ACCC's decision on the IIC charge.⁶⁰ A copy of the ACCC's reasons for decision was published on the ACCC's website in November 2012. This has provided parties an opportunity to consider the ACCC's decision and its reasoning. Telstra submitted that the arbitrated price is well known to industry.⁶¹
- The pricing approach adopted in making the arbitration determination was general in nature and not specifically related to the arrangements for any one access seeker. Therefore, the nature of the pricing approach allows for a broader application in the FAD, for the purposes of this variation.

⁵⁸ ACCC, ULLS and LSS Access Disputes, Chime Communications Pty Ltd / Telstra, Reasons for Final Determination, September 2012, pp. 64-65.

⁵⁹ ACCC, *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, p. 9.

⁶⁰ ACCC, *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, p. 21.

⁶¹ Telstra, May 2014 submission, p. 21.

The ACCC considers that the IIC charge determined during the 2012 arbitrations represents a reasonable estimate of the efficiently incurred costs of supplying the IIC service, based on the best data available to the ACCC. Varying the existing FADs to include this charge, until new FADs are made, will allow access seekers to have access to a reasonable IIC charge should commercial negotiations not result in agreement on the charge.

With respect to the specific issues raised by Telstra regarding the IIC charge, the ACCC considers that the pricing approach does take into account the efficient cost of providing access to the IIC.

On the other issues raised by Telstra regarding the geographically differentiated prices and different provisions for different carriers/access seekers, the ACCC notes that based on current information, these issues do not appear to be significant factors for this variation inquiry. Telstra has not submitted material in support of any particular measures. No submissions by other parties raised issues in relation to these matters. The ACCC notes that there will be an opportunity for the ACCC and parties to consider any new material on these and other issues during the substantive FAD inquiry.

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

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

Submissions

Aussie Broadband and iiNet submitted that they agree with the ACCC's draft views that the proposed variations to the ULLS and LSS FADs would promote the LTIE. These parties submitted that Telstra has on numerous occasions chosen to charge access prices far above its efficient supply costs.

Aussie Broadband and iiNet both submitted that they consider Telstra has not passed on to all access seekers the IIC charge set in the ACCC's 2012 arbitration determination. These parties submitted that, if this is the case, Telstra will over-recover its efficient costs, which will in turn result in higher costs to end-users, lower quality services, and reduced competition, all of which are contrary to the LTIE.

Telstra submitted that the IIC price is based on a "second best" pricing methodology. Telstra also submitted that it has no intention of seeking to increase IIC charges upon the expiry of the current arbitral determinations.

ACCC final view

The ACCC considers this variation promotes the LTIE. The IIC is integral to access seekers' ability to use the ULLS and the LSS.

The ACCC considers that the IIC charge represents a reasonable estimate of the efficiently incurred costs of supplying the IIC service, based on the best data available to the ACCC.

The ACCC does not accept Telstra's argument that the IIC price is based on a "second best" pricing methodology. The pricing approach used in the arbitration process sought to estimate the costs of supplying the IIC. The price was based on a 'bottom-up' pricing model developed by Telstra that identified specific assets which were related to providing the IIC and allocated costs on a 'per IIC pair' basis.

The ACCC considered that using Telstra's IIC model was an appropriate starting point for deriving the IIC charge and made certain adjustments to the model to more closely align it with the pricing for the declared services. The ACCC considered that there were difficulties with using the FLSM to model the IIC charge. Specifically, the asset classes in the FLSM were not sufficiently disaggregated to allow the ACCC to estimate IIC costs based on the specific assets used to provide the service.

The ACCC considered that the approach taken in the arbitration determination to set the IIC charge was a reasonable estimate of the efficiently incurred costs of supplying the IIC service, and would therefore promote competition and efficiency, and that would be in the LTIE.⁶²

The ACCC remains of the view that the IIC pricing methodology adopted in the arbitration determination provides a reasonable estimate of the efficiently incurred costs of supplying the IIC

⁶² Ibid. pp. 55-58.

service, based on the best currently available data. As discussed above, the ACCC has commenced consultation on setting an IIC charge, including the appropriate pricing methodology, as part of the substantive FAD inquiry.

The ACCC considers that implementing the proposed IIC charge will promote competition in the relevant markets. Setting a charge to reflect the estimated efficient costs of supplying the service will promote competition in the relevant markets via the ULLS and LSS.

As such, the ACCC also considers that implementing this IIC charge will:

- encourage efficient investment over time in the relevant cables and associated equipment because the IIC charge will allow the access provider to recover its estimated supply costs, including a commercial return on investment, and this will promote efficient investment
- encourage the efficient use of the ULLS and LSS by access seekers, and the efficient use of and investment in the equipment used by ULLS and LSS access seekers to supply services to end-users.

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

The ACCC welcomes Telstra's submission that it has no intention of seeking to increase IIC charges upon the expiry of the current arbitral determinations. However, the ACCC considers that setting regulated price terms will provide certainty to access seekers that they will be able to access regulated services at reasonable prices. It will also ensure that the regulated IIC charge is available to all access seekers in the event that commercial negotiations do not result in agreement on an IIC charge.

In view of the above, the ACCC considers the variation to introduce an IIC charge promotes the LTIE compared to if no variation took place.

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

Submissions

Aussie Broadband and iiNet submitted that they agree with the ACCC's draft views that the proposed variations to the ULLS and LSS FADs are consistent with Telstra's legitimate business interests.⁶³

ACCC final view

The ACCC considers this variation is consistent with Telstra's legitimate business interests. This is because, based on the best available information, 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 from related markets any profits that are lost as a result of providing access).

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

Submissions

Aussie Broadband and iiNet submitted that they agree with the ACCC's draft views that the proposed variations to the ULLS and LSS FADs would not disadvantage the interests of access seekers.⁶⁴

ACCC final view

The ACCC confirms its view that it considers the IIC charge is unlikely to disadvantage the interests of access seekers. As the proposed IIC charge is based on an estimate of the efficient cost of supplying the IIC service, based on the best available information, the ACCC considers access seekers should be better able to provide competitive services in retail markets.

⁶³ Aussie Broadband, May 2014 submission, p. 4; iiNet, May 2014 submission, p. 4.

⁶⁴ Aussie Broadband, May 2014 submission, p. 5; iiNet, May 2014 submission, p. 4.

The ACCC notes that access seekers are free to negotiate commercial price and non-price terms of supply for the ULLS and LSS (including the IIC charges) with access providers. However, if the ACCC did not vary the FAD to include an IIC charge, ULLS and LSS access seekers would not be able to rely on any regulated term for the IIC if commercial negotiations did not result in agreement on the charge.

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

Submissions

Aussie Broadband and iiNet submitted that they agree with the ACCC's draft view that the proposed IIC charge is based on the efficient costs that Telstra incurs to provide the IIC service to access seekers and this charge fairly accommodates the interests of Telstra and access seekers acquiring the ULLS and LSS.⁶⁵

ACCC final view

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 subsection 152BCA(1)(a) of the CCA, the ACCC considers that the existing IIC charge, which is based on the most up-to-date pricing data available to the ACCC, reflects a reasonable 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 IIC charge reflects the direct costs of providing the IIC service and does not allow over-recovery.

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

The ACCC did not receive any specific submissions on this legislative criterion.

The ACCC does not consider this matter to be significant to this variation of the ULLS and LSS FADs. However, the ACCC notes that, in determining the pricing approach for the IIC, the IIC model takes into account estimates of various costs that have been borne by different parties (Telstra and access seekers).

Therefore the ACCC is of the view that the variation adequately considers the value of extensions or enhancements whose costs have been borne by someone else in relation to the IIC service.

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 this variation of the ULLS and LSS FADs because this variation is not expected to impact on the safe and reliable operation of a carriage service.

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

The ACCC considers that the IIC charge reflects a reasonable estimate of the efficient cost of providing the IIC service, based on the best available information. Consequently, the ACCC considers the IIC charge is likely to 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 above in subsection 152BCA(1)(a) of the CCA on whether the variation will promote the LTIE.

⁶⁵ Aussie Broadband, May 2014 submission, p. 6; iiNet, May 2014 submission, p. 6.

Appendix A – Variation instruments

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: 18 June 2014

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

LSS IIC monthly service charge per pair
\$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

ULLS IIC monthly service charge per pair
\$0.056

Date of decision: 18 June 2014

Appendix B - Legislative framework for varying an access determination

The ACCC has the power to vary an FAD.⁶⁶

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.⁶⁷ 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 Final 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.⁶⁸ The ACCC has reflected this in its interpretation of 'long-term interests of end-users' for the purposes of assessing the FAD variations.⁶⁹ This is discussed below.

⁶⁶ Under subsection 33(3) of the *Acts Interpretation Act 1901* (Cth) subject to the changes specified in section 152BCN of the CCA.

⁶⁷ Subsection 152BCN(1) of the CCA and subsection 33(3) of the *Acts Interpretation Act 1901* (Cth).

⁶⁸ ACCC, Fixed Services Review: Public Inquiry into the fixed line services declarations - Final Report, pp.4-5.

⁶⁹ Ibid, pp. 4-5.

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.⁷⁰

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.⁷¹

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.⁷² 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.

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.⁷³

70 Subsection 152AB(5) of the CCA.

71 ACCC, Merger guidelines, November 2008.

72 Ibid, pp. 15–19.

73 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.

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.⁷⁴ 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.⁷⁵ 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.⁷⁶

...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.⁷⁷

74 SSNIP stands for small but significant non-transitory increase in price.

75 Subsection 152AB(8) of the CCA.

76 Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [159].

77 Ibid, at [164].

...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.⁷⁸

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.⁷⁹

The Tribunal has taken a similar view of the expression 'legitimate business interests'.⁸⁰

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.⁸¹ 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.⁸²

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.⁸³

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.

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.

78 Ibid at [164].

79 ACCC, Access pricing principles—telecommunications, July 1997 (1997 Access Pricing Principles), p. 9.

80 Telstra Corporation Limited [2006] ACompT 4 at [89].

81 Telstra Corporation Limited [2006] ACompT 4 at [91].

82 Ibid, [91].

83 Ibid, [91].

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.⁸⁴ 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.⁸⁵

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'.⁸⁶ 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.⁸⁷

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.⁸⁸

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.

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.⁸⁹ That is, it calls for a consideration of productive, allocative and dynamic efficiency.

84 Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

85 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.

86 Telstra Corporation Limited [2006] ACompT 4 at [92].

87 Ibid, at [139].

88 ACCC, Access Pricing Principles – Telecommunications – a guide, July 1997, p. 11.

89 ACCC, Resolution of telecommunications access disputes – a guide, March 2004 (revised).

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.⁹⁰

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.⁹¹

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.⁹²

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.⁹³ 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.⁹⁴

Subsection 152BCA(3)

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

90 Ibid, p. 57.

91 Telstra Corporation Limited [2006] ACompT 4 at [94]-[95].

92 'Eligible service' has the same meaning as in section 152AL of the CCA.

93 Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

94 Ibid, p. 178.