



**Submission by AAPT Limited**

**in response to**

**ACCC**

***Fixed Services Review***

***Discussion Paper on the Declaration Inquiry***

**PUBLIC VERSION**

**August 2013**



## **A Introduction**

1. The Australian Competition and Consumer Commission (**ACCC**) is holding a public inquiry relating to the declaration of fixed line services. The declarations of the following fixed line services are due to expire on 31 July 2014:
  - unconditioned local loop service (**ULLS**);
  - line sharing service (**LSS**);
  - local carriage service (**LCS**);
  - wholesale line rental service (**WLR**);
  - public switched telephone network originating access service (**PSTN OA**); and
  - public switched telephone network terminating access service (**PSTN TA**),(referred to collectively as **the Fixed Line Services**).
2. As part of its public inquiry, the ACCC has released a discussion paper entitled “*Fixed Services Review Discussion Paper on the Declaration Inquiry*” dated July 2013 (**the Discussion Paper**). AAPT Limited (**AAPT**) welcomes the opportunity to provide a response to the Discussion Paper. AAPT’s response is set out below.
3. Please note that this submission contains commercial in confidence information which is marked ‘[c-i-c]’ and highlighted in yellow.

## **B Overview and structure of submission**

4. AAPT agrees with the following views of the ACCC expressed in the

Discussion Paper:

- the National Broadband Network (NBN)<sup>1</sup> rollout appears to have effectively removed any possibility of a carrier investing in a large scale fixed line access network to compete with Telstra;<sup>2</sup> and
  - during the gradual transition to the NBN, the majority of end-users are likely to continue to receive their fixed line services via Telstra's copper network.<sup>3</sup>
5. If these views are correct, which AAPT submits they are, it is clear that until the transition to the NBN has been completed, access to Telstra's network will be necessary in order to provide voice and broadband services to end users, or in economic terms, Telstra's copper network will continue to be an enduring bottleneck. If this enduring bottleneck is not regulated, Telstra will be able to, and as a vertically integrated provider will have an incentive to, either deny access or charge monopoly rents for access. It is clear that neither of these outcomes promote the long term interests of end users (LTIE), but rather are clearly contrary to the LTIE.
6. AAPT accepts that Telstra's copper network will cease to be an enduring bottleneck once it has been replaced by the NBN. However, AAPT submits that Telstra's network should remain regulated until the transition to the NBN has been fully completed. Otherwise Telstra will have the ability to deny access or charge monopoly rents in circumstances where no alternative NBN service is available.
7. Therefore, AAPT submits that the material question is not whether Telstra's

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<sup>1</sup> AAPT notes the comments in the Discussion Paper that the nature of the Fixed Line Services review, and the approach taken to the issues discussed in the Discussion Paper, could change if there was any substantial change in policy settings related to the NBN, including considering the possible need for further consultation with industry (Discussion Paper at p.8). Similarly, AAPT's submissions relating to the impact of the NBN are subject to any relevant changes to NBN policy.

<sup>2</sup> Discussion Paper, at p.27.

<sup>3</sup> Discussion Paper, at p.24.



network should continue to be regulated until the transition to the NBN has been completed. The material question is how should Telstra's network continue to be regulated until the transition to the NBN has been completed.

8. AAPT submits that a continuing declaration of the existing Fixed Line Services is appropriate in order to address the enduring bottleneck characteristics of Telstra's copper network and to provide the industry with certainty during a period of significant change.
9. AAPT notes that the ACCC has divided its consideration of the Fixed Line Services into the following three service categories:
  - network access services (which includes ULLS and LSS);
  - resale services (which includes WLR and LCS); and
  - interconnection services (which includes PSTN TA and PSTN OA).
10. The reasons why AAPT believes ULLS and LSS should continue to be declared are set out in section C below.
11. The reasons why AAPT believes WLR and LCS should continue to be declared are set out in section D below.
12. The reasons why AAPT believes PSTN TA and PSTN OA should continue to be declared are set out in section E below.
13. AAPT notes that the ACCC has raised the issue of whether resale services using the NBN should be declared. AAPT submits that there is no need for any such declarations. AAPT's reasons for this view are set out in section F below.
14. AAPT notes that the ACCC is considering whether to commence a

declaration inquiry into facilities access services.<sup>4</sup> AAPT submits that the ACCC should commence such an inquiry and should declare access to Telstra exchange buildings, Telstra ducts and Telstra external interconnect facilities. The reasons for this contention are set out in section G below.

15. AAPT submits that the service descriptions for the Fixed Line Services should be robust enough to deal with changes in technology but they should also be targeted to only address enduring bottlenecks. This contention is explained in section H below.
16. Finally, in section I below, AAPT provides its answers to the specific questions in the Discussion Paper.

## **C ULLS and LSS should continue to be declared**

17. The ACCC last declared the ULLS and the LSS in 2009. The ACCC's reasons for declaring the ULLS and LSS are set out in the *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR Final Decision July 2009 (the 2009 Final Decision)*.
18. As noted in the Discussion Paper, in deciding to re-declare the ULLS and LSS in 2009, the ACCC concluded that Telstra's provision of the ULLS and LSS remained an enduring bottleneck.<sup>5</sup> As regards the ULLS, the ACCC stated:<sup>6</sup>

*The ACCC notes that although there are alternatives to the ULLS for providing retail fixed broadband and fixed voice services, these supply options do not currently provide an effective substitute for the ULLS in terms of underlying functionality and/or geographic coverage. Even where competitors have developed their own facility based networks, the ACCC considers that access to Telstra's ubiquitous network is essential due to*

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<sup>4</sup> Discussion Paper section 4.4.

<sup>5</sup> Discussion Paper at p.25.

<sup>6</sup> 2009 Final Decision at p.59.

*Telstra's market power and advantages in terms of economies of scale and scope from being vertically integrated.*

*Therefore the ACCC considers that reliance on these alternatives would limit an access seeker's ability to effectively compete across product-price-service package dimensions of broadband and voice supply, compared to use of the ULLS.*

*Without the ULLS declaration, the ACCC considers that Telstra is likely to have significant and ongoing market power in the negotiation of terms and conditions for the service. Further, the ACCC considers that Telstra could withhold supply of the ULLS or set prices at supra-competitive levels.*

19. As noted in the 2009 Final Decision, the ULLS allows access seekers to compete in the retail market on greater dimensions of supply and allows competitors the opportunity to innovate their services than would otherwise be possible if only resale services were available.<sup>7</sup>

20. As regards LSS, the ACCC stated:<sup>8</sup>

*The ACCC notes the LSS has been used to compete aggressively in the market for fixed broadband services and has been effective in promoting rivalry, customer choice and innovation in the market. The LSS, in particular, promotes customer choice as it enables individual end-users to acquire voice and xDSL services from different access seekers over the same line.*

*Continued declaration is likely to facilitate further competitive entry and investment by competitors interested in providing fixed broadband only services. In this context, ongoing access to the LSS on reasonable terms is likely to promote competition by ensuring access seekers are better able to compete with Telstra across all dimensions (the price-product-service package) of retail supply. This should generate lower prices for end-users*

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<sup>7</sup> 2009 Final Decision at p.5 and p.41.

<sup>8</sup> 2009 Final Decision, at p.72.

*and a greater range of better quality service offerings.*

21. AAPT notes that rather than simply continue to apply its reasoning from 2009, the ACCC is considering industry changes since 2009 as part of its consideration of whether to re-declare the ULLS and LSS, and the ACCC has identified the following developments as being relevant to the ACCC's consideration of whether to re-declare the ULLS and LSS:<sup>9</sup>
- the rollout of the NBN;
  - the slowing in investment in access seeker equipment installed at Telstra exchanges which is used in connection with ULLS and LSS (which, for ease of reference, will be referred to as **Access Seeker Infrastructure**);
  - the decline in take-up of the LSS; and
  - the upgrading of HFC networks to the DOCSIS 3.0 standard.
22. AAPT submits that none of these developments justify ceasing to declare the ULLS and LSS. In light of this, the reasons for declaring the ULLS and LSS in 2009 remain valid and, accordingly, the declarations for ULLS and LSS should be extended. The reasons why the above developments do not justify ceasing to declare the ULLS and LSS are explained below.

## **C1 The NBN**

23. The effect of the NBN is discussed in section B above. As discussed in that section, the ULLS and LSS declarations ceasing to apply prior to the full transition from Telstra's copper network to the NBN would allow Telstra to withdraw ULLS and LSS services or charge monopoly rents for them in circumstances where there are no alternative NBN services available.

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<sup>9</sup> Discussion Paper, section 4.1.3.

## **C2 The slowing in investment in Access Seeker Infrastructure**

24. AAPT submits that the slowing in investment in Access Seeker Infrastructure is linked to the rollout of the NBN. Under the circumstances, it is understandable that the level of investment in new Access Seeker Infrastructure will steadily decrease. However, access seekers will continue to invest in new Access Seeker Infrastructure where it is economically viable to do so, and access seekers will continue to use existing Access Seeker Infrastructure until that infrastructure is no longer required.
25. As discussed in section B above, if the declarations for ULLS and LSS cease to apply prior to the full migration of services to the NBN, Telstra would be at liberty to withdraw ULLS and LSS services or charge higher prices. In addition to the obvious detrimental impacts on competition and disruption to end user services that this would have, the withdrawal of ULLS and LSS would also have implications for efficient investment in infrastructure because it would lead to Access Seeker Infrastructure becoming redundant sooner than it otherwise would.

## **C3 The decline in take-up of the LSS**

26. The ACCC notes that the percentage of services in operation on Telstra's copper network being supplied using the ULLS increased from 6 per cent in March 2009 to 14 per cent in March 2013. In contrast, the take-up of the LSS has declined from its peak of 8 per cent of services in September 2010 to 7 per cent.<sup>10</sup>
27. AAPT acknowledges that it may be preferable for access seekers to provide bundled services using the ULLS rather than using LSS and a resale voice service. However, ULLS is not a complete substitute for LSS because, as noted in extract from the 2009 Final Decision set out at paragraph **20** above,

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<sup>10</sup> Discussion Paper, at p.26.



the LSS promotes customer choice because it enables individual end users to acquire voice and broadband services from different access seekers over the same line. While the uptake of LSS may have declined, AAPT still uses a significant number of LSS. Therefore, notwithstanding the decline in LSS take up as compared to ULLS, declaration of the LSS continues to have utility.

#### **C4 The upgrading of HFC networks to the DOCSIS 3.0 standard**

28. The ACCC states that in considering whether Telstra's copper network remains a bottleneck, the ACCC will again consider whether existing competing HFC networks represent effective substitutes to Telstra's copper network for providing voice and telephone services to end users.<sup>11</sup>
29. In its previous consideration of whether Optus' HFC network provides an effective substitute for providing voice and broadband services to end users, the ACCC concluded that, although Optus' HFC network allows Optus to compete with Telstra in the relevant retail markets within the geographic footprint of Optus' HFC network, the existence of Optus' HFC network does not prevent Telstra's copper network from remaining a bottleneck.<sup>12</sup> The reasons for this include:
- the limited geographic footprint of Optus' HFC network;<sup>13</sup> and
  - the fact that Optus' HFC network is not configured to provide wholesale services.<sup>14</sup>
30. The ACCC states that the effect of the DOCSIS 3.0 upgrade is that Optus' HFC network is now capable of providing download speeds of

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<sup>11</sup> *ibid.*

<sup>12</sup> 2009 Final Decision at pp. 24, 25, 30, 35, 49, 52, 56, 73, 85.

<sup>13</sup> *ibid.*, at p.85.

<sup>14</sup> *ibid.*, at pp.52, 56.

approximately 100Mbps.<sup>15</sup> AAPT submits that this fact does not affect the ACCC's previous conclusion that the existence of the Optus HFC network does not remove the bottleneck characteristics of Telstra's copper network.

31. As regards the prospects of any other fixed line networks being built or extended to an extent that would lead to Telstra's copper network no longer being a bottleneck, as stated in section B above, AAPT agrees with the view in the Discussion Paper that the NBN rollout appears to have effectively removed any possibility of a carrier investing in a large scale fixed line access network to compete with Telstra.<sup>16</sup> This is particularly applicable to Optus' HFC network given the agreement between Optus and NBN Co that includes the decommissioning of Optus' HFC network.<sup>17</sup>

## **D WLR and LCS should continue to be declared**

32. The ACCC last declared the WLR and LCS in 2009. The reasons why the ACCC declared WLR and LCS in 2009 are summarised in the Discussion Paper as follows:<sup>18</sup>

*Declaration of these services would provide end users with greater choice of retail service providers and product features and could lead to lower priced local calls and bundled services for end users. [the Resale Competition Justification]*

[...]

*It was thought that the availability of resale services would provide access seekers with an opportunity to build their customer bases, reputations and market knowledge before investing in their own exchange equipment [the 'ladder of investment' Justification].*

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<sup>15</sup> Discussion paper, at p.26.

<sup>16</sup> *ibid*, at p.27.

<sup>17</sup> Discussed in section 3.3.1 of the Discussion Paper.

<sup>18</sup> Discussion Paper, at p.29.

33. AAPT notes that the ACCC refers to the following trends as being relevant to consideration of the continued declaration of WLR and LCS:<sup>19</sup>
- there has been an increase in the number of end-users serviced by access seekers using the ULLS and LSS; and
  - there continues to be market entry by new retail service providers.
34. AAPT submits that these trends are consistent with the declaration of WLR and LCS having a positive effect on the LTIE during the period 2009 to 2013. Firstly, given the high barriers to entry and the absence of a competitive national wholesale market, AAPT questions whether the number of new entrants during the period 2009 to 2013 would have increased if WLR and LCS had not been declared. Secondly, the increased numbers of end users serviced by ULLS and LSS suggests that the declaration of WLR and LCS has not hindered investment in Access Seeker Infrastructure and it is not necessary to kick away the ‘bottom rung of the ladder’ in order for the ‘ladder of investment’ theory to work. As discussed above in section C2 above, this growth has significantly slowed recently. AAPT believes that this slowdown is due to the NBN.
35. AAPT submits that even if the rollout of the NBN has removed the mid to long term relevance of the ‘ladder of investment’ Justification, sufficient justification for the continued declaration of WLR and LCS remains during the period of migration to the NBN. This justification is twofold.
36. Firstly, in the absence of a competitive wholesale market, if the declarations for WLR and LCS cease to apply prior to the full migration of services to the NBN, Telstra would have the ability to:
- cease supplying WLR and LCS services before an NBN alternative service is available - in which case existing access seekers would be

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<sup>19</sup> Discussion Paper, at p.30.

faced with the choice of ceasing to supply the relevant retail services or making inefficient investments in Access Seeker Infrastructure, and new entrants would likely choose not to enter the market; or

- charge monopoly rents for WLR and LCS before an NBN alternative service is available - in which case existing access seekers would be faced with the choice of passing on the price increase to end users, providing the relevant retail services at a loss or making inefficient investments in Access Seeker Infrastructure, and new entrants would likely choose not to enter the market.

37. AAPT submits that these outcomes obviously do not promote the LTIE as they are harmful to competition and may lead to inefficient investment in infrastructure and increased prices for end users.
38. Secondly, the Resale Competition Justification acknowledges that resale based competition is valuable in its own right - i.e. its utility is not merely to act as the bottom rung of the 'ladder of investment'.
39. In light of the above, AAPT submits that WLR and LCS should continue to be declared.
40. In December 2011, the ACCC decided to revoke the geographic exemptions relating to WLR, LCS and PSTN OA.<sup>20</sup> The reasons that led to the ACCC revoking the geographic exemptions were that:<sup>21</sup>
  - Telstra remains the main provider of wholesale voice-only services and was exercising its market power to charge WLR prices in the exempt areas that were significantly above supply costs.

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<sup>20</sup> The geographic exemptions are described in Chapter 2 of Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services Issues paper September 2011.

<sup>21</sup> Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services Final Report, December 2011, at pp. 6-8.



- Supply-side constraints and Telstra's dominance in retail services significantly limit the effectiveness of retail competition in restraining Telstra's exercise of its wholesale market power.
- The exemption provisions have the potential to distort decisions on using, and investing in, infrastructure.

41. AAPT submits that these reasons remain valid and are likely to remain valid as regards the provision of WLR and LCS by Telstra using Telstra's copper network.

## **E PSTN TA and PSTN OA should continue to be declared**

42. The reasons why the ACCC declared PSTN TA and PSTN OA in 2009 are summarised in the Discussion Paper as follows:<sup>22</sup>

- Declaring the PSTN TA and PSTN OA services would enable access seekers to combine existing network access infrastructure with their own billing and customer service equipment so as to provide end to end retail and wholesale local and long distance voice services to end users, as well as to other service providers.
- Declaring the PSTN TA service would also promote any to any connectivity. Without declaration of the PSTN TA service, a network operator may have the incentive to withdraw access to the service or offer it on unreasonable terms because of the greater size and reach of its customer access network compared to other networks.

43. As regards PSTN TA, AAPT submits that its importance in achieving any to any connectivity is, of itself, sufficient justification for it to continue to be declared.

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<sup>22</sup> Discussion Paper, at p.32.



44. As regards PSTN OA, it is not possible to provide a full PSTN voice resale service without using PSTN OA. Therefore, AAPT submits that the justifications for the continued declaration of WLR and LCS discussed in section D above also apply to PSTN OA.
45. Accordingly, AAPT submits that PSTN TA and PSTN OA should continue to be declared.

## **F There is no need to declare NBN resale services**

46. Potential access seekers will not face significant barriers to entry in supplying services over the NBN if there is a competitive wholesale market for resale services. Therefore, the ACCC should only consider declaring resale services over the NBN if there is sufficient evidence to establish that a competitive wholesale market for resale services over the NBN will not be forthcoming. AAPT believes there is no such evidence. On the contrary, AAPT submits that there is a strong likelihood that there will be a competitive wholesale market for resale services over the NBN for the following reasons:

- The NBN Corporate Plan distinguishes between wholesale service providers and retail service providers.<sup>23</sup> This is consistent with an intention that resale services will be competitively available on the NBN.
- NBN Co itself does not intend to offer any layer 3 services (as distinct from some limited layer 3 functionality that is required to provide NBN Co's layer 2 wholesale services).<sup>24</sup>
- The NBN architecture of 121 points of interconnection (**POIs**) is

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<sup>23</sup> See Corporate Plan 2012–15 6 August 2012, at Chapter 11 - Glossary of Terms.

<sup>24</sup> NBN Co Submission to ACCC Consultation Paper on variation of NBN Co SAU May 2013, at p.38 - available at: <http://transition.accc.gov.au/content/index.phtml/itemId/1112128>

likely to encourage smaller retail service providers to seek resale services from wholesale service providers in order to avoid the cost of building out to all POIs. This will create a demand for such services which will stimulate competition in the market for NBN resale services and investment in infrastructure. Indeed one of the ACCC's key findings in its advice to Government on the NBN POIs was that the implementation of a semi-distributed approach was likely to best promote both retail and wholesale competition across all relevant markets.<sup>25</sup>

- A number of NBN access seekers, including AAPT<sup>26</sup>, Telstra<sup>27</sup> and Optus<sup>28</sup> are offering or intend to offer wholesale services over the NBN.

## **G Facilities Access Services should be declared**

47. Telstra remains the dominant owner of exchange buildings, ducts and external and internal interconnect facilities (for ease of expression these will be referred to collectively as **Telstra Facilities**).
48. Access is required to Telstra Facilities to enable other carriers to provide competitive services and to establish their own facilities. The requirement for competitors of Telstra to obtain access to Telstra Facilities has allowed Telstra to act in ways that are detrimental to competition and contrary to the LTIE. This has been demonstrated by Telstra failing to provide access or providing access at monopoly rents. For example:

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<sup>25</sup> ACCC Advice to Government National Broadband Network Points of Interconnect Public Version November 2010, at p.2.

<sup>26</sup> See: <https://aapt.com.au/national-broadband-network-NBN>

<sup>27</sup> See: NBN Co Special Access Undertaking Telstra's response to the ACCC Consultation Paper – variation of NBN Co Special Access Undertaking, at p.5. Available at: <http://transition.accc.gov.au/content/index.phtml/itemId/1112128>

<sup>28</sup> See Computer World 30 March 2011 available at: [http://www.computerworld.com.au/article/381455/optus\\_eyes\\_nbn\\_wholesale\\_aggregator\\_role/](http://www.computerworld.com.au/article/381455/optus_eyes_nbn_wholesale_aggregator_role/)

- in July 2010 Telstra was fined \$18.55 million for denying competitors access to its exchange buildings;<sup>29</sup> and
  - in November 2012, the ACCC made an arbitration determination which prevented Telstra from engaging in double recovery regarding its charges for the internal interconnection cable.<sup>30</sup>
49. AAPT considers that the Telstra Facilities represent an enduring bottleneck and, accordingly, they should be properly regulated.
50. Furthermore, given that NBN Co and/or transmission providers are likely to continue to require access to the Telstra Facilities on an ongoing basis after the rollout of the NBN, rollout of the NBN is unlikely to change the bottleneck character of the Telstra Facilities.
51. AAPT submits that it is appropriate that the declaration be limited to the Telstra Facilities because it is these ubiquitous facilities that are the enduring bottleneck in need of regulation. AAPT submits that this approach is appropriate because other carriers would be sufficiently constrained by competition from Telstra. The fact that other carriers are constrained by Telstra is something that the ACCC has previously recognised in exempting other carriers from declaration.<sup>31</sup>
52. Accordingly, AAPT submits that the ACCC should commence a public inquiry into the declaration of facilities access and should declare access to the Telstra Facilities.
53. AAPT acknowledges that access to Telstra Facilities is available under Schedule 1 of the *Telecommunications Act 1997* (**the Telco Act**). However,

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<sup>29</sup> See: <http://www.accc.gov.au/media-release/18-million-penalty-imposed-on-telstra>

<sup>30</sup> ULLS and LSS Access Disputes Chime Communications Pty Ltd / Telstra Reasons for Final Determinations November 2012, at p.14.

<sup>31</sup> See section H below and Public inquiry to make a final access determination for the Wholesale ADSL service Final Report May 2013, at section 6.2



the processes for obtaining reasonable terms of access under Schedule 1 of the Telco Act are inefficient and badly flawed as compared to the processes for obtaining reasonable terms of access for declared services under Part XIC of the *Competition and Consumer Act 2010* (CCA). This situation is due to legislative changes that were made by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* (CCS Act) which have the effect of delivering the ‘worst of both worlds’ for access seekers as regards obtaining reasonable terms of access under Schedule 1 of the Telco Act. In order to understand why this is the case, it is necessary to consider:

- How the telecommunications access regime under Part XIC of the CCA operated prior to the amendments that were made by the CCS Act.
- How the telecommunications access regime under Part XIC of the CCA operates after the amendments that were made by CCS Act.
- The effect of the amendments made by the CCS Act on the access regime under Schedule 1 of the Telco Act.

**G1 How the telecommunications access regime under Part XIC of the CCA operated prior to the amendments that were made by the CCS Act**

54. Prior to the amendments made by the CCS Act, if an access provider and access seeker could not agree on the terms of access to a declared service, either party could seek to have the terms determined by the ACCC in an arbitration.<sup>32</sup> This was commonly referred to as the ‘negotiate/arbitrate’ model. Under this model, the ACCC’s terms would override the terms of an access agreement that had been made prior to the arbitration determination.

55. The ACCC was able to set indicative prices and make model terms and

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<sup>32</sup> See former Division 8 of Part XIC of the CCA.

conditions of access. This allowed access providers and access seekers to know what the ACCC's likely approach in an arbitration would be.

**G2 How the telecommunications access regime under Part XIC of the CCA operates after the amendments that were made by the CCS Act**

56. Practical difficulties arose with the 'negotiate/arbitrate' model because Telstra tended to only offer terms which were inconsistent with what had become well established regulated terms (i.e. access seekers were forced to seek arbitrations in circumstances where the outcome of the arbitration was obvious to all parties concerned due to the existence of indicative prices, model terms and previous arbitration decisions).
57. The legislative response to these difficulties was to move away from the 'arbitrate' part of the model and instead allow the ACCC to set upfront regulated terms in an access determination which could be applicable without the need for an arbitration and which are capable of being relied on by all access seekers rather than only those that have sought arbitration. Therefore, an access determination was intended to create a benchmark, or default regulated terms, which access seekers could fall back on in the event that the access provider insisted on offering unreasonable terms.<sup>33</sup>
58. However, the ACCC's ability to set upfront regulated terms was not intended to interfere with the parties' ability to enter into a genuine commercial agreement. In order to allow genuine commercial agreements to prevail over inconsistent access determinations, the amendments made by the CCS Act to Part XIC of the CCA include section 152BCC of the CCA which provides that an access determination has no effect to the extent to which it is inconsistent with an access agreement.

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<sup>33</sup> Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 Explanatory Memorandum, at pp.4, 52 and 53.

**G3 The effect of the amendments made by the CCS Act on the access regime under Schedule 1 of the Telco Act**

59. Access under Schedule 1 of the Telco Act operates under the negotiate arbitrate model. This means that unlike under Part XIC of the CCA, the ACCC has no power to make upfront terms of access as regards facilities access under Schedule 1 of the Telco Act. Therefore, in the event that an access provider offers unreasonable terms of access to an access seeker, the access seeker's regulatory recourse would be to seek an arbitration under Schedule 1 of the Telco Act. If the parties cannot agree on an arbitrator, the ACCC is the arbitrator.
60. However, the CCS Act inserted sections 18(7) and 36(8) into Schedule 1 of the Telco Act. The effect of these provisions is to give precedence to access agreements over arbitrated terms of access in the same way that section 152BCC of the CCA gives precedence to access agreements over access determinations. This means that access seekers now have the worst of both worlds under Schedule 1 of the Telco Act because regulated terms are overridden by access agreements but there are no default regulated terms that the access seeker can rely on when negotiating with the access provider.
61. Therefore, if an access provider offers unreasonable terms of access on a take it or leave it basis, the access seeker has the following choice:
- accept the unreasonable terms of access; or
  - seek an arbitration from the ACCC and, in order to ensure that the ACCC's arbitrated terms will have effect, delay obtaining access until the ACCC has made its decision.
62. Delaying access is unlikely to be commercially viable. The original negotiate arbitrate model addressed this problem by allowing the terms in an arbitrated determination to override inconsistent terms in an access

agreement so an access seeker could accept unreasonable terms in order to gain access and then seek to obtain reasonable terms from the ACCC, with the ACCC's terms being applicable as soon as the ACCC had made its arbitration determination. Therefore, the absence of upfront regulated terms was tempered by having an immediate entitlement to arbitrated terms.

63. Although regulated terms in Part XIC of the CCA are also overridden by inconsistent access agreements, Part XIC of the CCA assumes the existence of upfront default regulated terms that can be relied upon by the access seeker when negotiating with an access provider.<sup>34</sup> Furthermore, the ACCC has the power to make binding rules of conduct<sup>35</sup> and also to issue procedural directions<sup>36</sup> in order to avoid any abuses by an access provider during negotiations. There are no equivalent powers under Schedule 1 of the Telco Act.
64. This is clearly an unsatisfactory situation in circumstances where the facilities in question are, as in the case of the Telstra Facilities, enduring bottlenecks. In light of this, AAPT submits that the ACCC should declare the Telstra Facilities so that the ACCC is able to make upfront regulated terms which address the inequality of bargaining position between Telstra and access seekers.

## **H The service descriptions for the Fixed Line Services should be robust and targeted**

65. AAPT submits that Telstra's ubiquitous network is an enduring bottleneck and the declaration of the Fixed Line Services is necessary to address the problems for competition and the LTIE that arise from this fact.

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<sup>34</sup> This is implied by section 152AY of the CCA. See also Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 Explanatory Memorandum, at pp.4, 52 and 53.

<sup>35</sup> Under Division 4A of Part XIC of the CCA.

<sup>36</sup> Under section 152BBA of the CCA.

66. AAPT submits that when considering the scope of the declarations for the Fixed Line Services, it is important for the ACCC to have regard to two basic principles.
67. Firstly, service descriptions for the Fixed Line Services should be robust enough to deal with changes in technology in order to avoid a change in underlying network infrastructure of a regulated bottleneck leading to a defacto withdrawal of regulation to that bottleneck as occurred in the case of the South Brisbane exchange when Telstra replaced copper with fibre.<sup>37</sup>
68. Secondly, infrastructure owners or service providers who are already sufficiently constrained by competition from the incumbent bottleneck infrastructure operator should not be subject to any unnecessary regulatory burden. This principle was recognised by the ACCC when it made its final access determination for the Wholesale ADSL Service.<sup>38</sup> AAPT submits that this principle should be of general application so that either the service descriptions are specifically targeted at Telstra or other carriers and carriage service providers are exempted from the standard access obligations in respect of the declared services.

## **I Answers to ACCC questions**

- 1. Do you consider the ACCC's proposed assessment framework is appropriate for assessing whether declaring certain fixed line services would promote the LTIE? That is, will the proposed assessment framework assist the ACCC in assessing whether declaring a service will promote competition in markets for telecommunications services, achieve any-to-any connectivity and encourage efficient use and investment in infrastructure by which the service is supplied?**

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<sup>37</sup> The issues relating to the South Brisbane exchange are discussed on the ACCC's website at: <http://transition.accc.gov.au/content/index.phtml/itemId/946529>

<sup>38</sup> See Public inquiry to make a final access determination for the Wholesale ADSL service Final Report May 2013, at section 6.2



The ACCC's assessment framework is described in chapter 2 of the Discussion paper. AAPT agrees with the following propositions in section 2.1 of chapter 2 of the discussion paper:

- In deciding to declare a service, the ACCC must be satisfied that declaration of the service will promote the LTIE.
- In deciding whether declaration is likely to 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 (**the LTIE Objectives**):
  - promoting competition in markets for telecommunications services;
  - achieving any-to-any connectivity; and
  - encouraging efficient use and investment in infrastructure by which the service is supplied.

AAPT believes that these propositions are uncontroversial and consideration of these matters is expressly required by the applicable statutory test.<sup>39</sup>

As regards assessing whether or not regulation will achieve the LTIE Objectives, the ACCC proposes to use well-established economic principles to analyse the expected impacts of regulation of particular services. The ACCC expresses these economic principles as requiring consideration of the following matters:<sup>40</sup>

- whether the relevant infrastructure exhibits enduring bottleneck characteristics;

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<sup>39</sup> 152AL(3)(d) and 152AB(2)

<sup>40</sup> Discussion Paper, at p.11.

- whether requiring access to services provided by telecommunications infrastructure will promote economic efficiency and competition; and
- whether infrastructure operators are vertically integrated,

(for ease of expression these matters will be referred to as **the Economic Matters**).

The following principles can be identified from the ACCC's analysis of the Economic Matters in the Discussion Paper:

- Declaration is likely to promote the LTIE where infrastructure facilities are enduring bottlenecks.<sup>41</sup>
- The aim of regulating natural monopoly infrastructure should be to achieve the productive efficiency benefits of a single infrastructure operator while preventing or minimising the efficiency losses and higher prices that result from the use of monopoly power. If regulation does so, it will:
  - ensure effective competition can occur in markets upstream and downstream of the natural monopoly infrastructure; and
  - promote efficient investment in natural monopoly infrastructure and related sunk investments upstream and downstream of the natural monopoly infrastructure.<sup>42</sup>
- Where a bottleneck infrastructure facility is operated by a vertically integrated owner, providing equivalent access as between the infrastructure owner's own downstream operations will reduce

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<sup>41</sup> *ibid.*

<sup>42</sup> *ibid* at p.13.



barriers to entry to, and support effective competition in, downstream markets.<sup>43</sup>

For ease of Expression these will be referred to as **the Economic Principles**.

AAPT agrees that the Economic Principles are highly relevant to the LTIE Objectives. An application of the Economic Principles cannot take place without consideration of the Economic Matters. Therefore, AAPT submits that an assessment framework that involves consideration of the Economic Matters and, if relevant, an application of the Economic Principles, will assist the ACCC in assessing whether declaring a service will promote competition in markets for telecommunications services, achieve any-to-any connectivity and encourage efficient use and investment in infrastructure by which the service is supplied.

**2. How should the ACCC define the markets relevant to network access services for the purposes of this review?**

In making its final access determinations for the Fixed Line Services, the ACCC stated the following:<sup>44</sup>

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

AAPT submits that given that:

- network access services are wholesale fixed line services;

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<sup>43</sup> *ibid.*

<sup>44</sup> Inquiry to make final access determinations for the declared fixed line services Final Report July 2011, at p.19.





- network access services are capable of being used to provide retail and wholesale fixed line voice, broadband and bundled voice and broadband services; and
- access seekers utilise the services across a range of geographic areas and at different take-up levels,

the relevant markets that should be considered are the national markets for:

- the retail and wholesale provision of fixed voice services;
- the retail and wholesale provision of fixed broadband services, and
- the retail and wholesale provision of bundled fixed voice and fixed broadband services.

AAPT notes that using these market definitions would be consistent with the market definitions used by the ACCC when it last declared the Fixed Line Services in 2009.<sup>45</sup>

- 3. Does Telstra's copper network continue to be a bottleneck for providing voice services to end-users? Please consider the impacts (if any) of the NBN rollout and the existence of HFC networks and give reasons for your answer.**

Yes. Please refer to section B above.

- 4. Does Telstra's copper network continue to be a bottleneck for providing broadband services to end-users? Please consider the impacts (if any) of the NBN rollout and the existence of HFC networks and give reasons for your answer.**

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<sup>45</sup> Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR Final Decision July 2009, at p.36.

Yes. Please refer to section B and C above.

- 5. Would declaring network access services promote the long-term interests of end-users? Please give reasons, referring to the implications for competition, any-to-any connectivity (where relevant) and the efficient use of and investment in infrastructure.**

AAPT submits that declaring network access services will promote the long-term interests of end-users. Please refer to section C above.

- 6. In the event that the ULLS and LSS continue to be declared, are the service definitions for these services still appropriate? Please give reasons.**

AAPT's views on service descriptions are set out at section H above.

- 7. Have developments in the industry since 2009 indicated that the ACCC should consider commencing a declaration inquiry in respect of any new or different network access services? If so, please specify the services and explain why declaring them would promote the long-term interests of end-users.**

AAPT is not currently aware of any need to vary the ULLS or LSS service descriptions.

- 8. How should the ACCC define the markets relevant to resale services for the purposes of this review?**

AAPT's suggested approach to market definition is set out above in response to question 2. If the resale services include the Wholesale ADSL Service then the relevant markets should be the national markets for:

- the retail and wholesale provision of fixed voice services;
- the retail and wholesale provision of fixed broadband services, and



- the retail and wholesale provision of bundled fixed voice and fixed broadband services.

If the resale services do not include the Wholesale ADSL Service, then the relevant markets should be the national markets for:

- the retail and wholesale provision of fixed voice services; and
- the retail and wholesale provision of bundled fixed voice and fixed broadband services.

- 9. Does Telstra’s copper network represent a bottleneck for providing resale voice services to end-users? Should the ACCC continue to declare resale voice services? Please give reasons referring to the state of competition in voice markets, any-to-any connectivity and the efficient use and investment in infrastructure.**

AAPT submits that Telstra’s copper network continues to represent a bottleneck for providing resale voice services to end users and the ACCC should continue to declare resale voice services. Please refer to sections B and D above.

- 10. Will potential access seekers face significant barriers to entry in supplying services over the NBN? If so, would declaring resale services provided using NBN infrastructure promote the LTIE? Please give reasons, referring to the implications for competition, any-to-any connectivity (where relevant) and the efficient use of and investment in infrastructure.**

AAPT does not believe that potential access seekers will face significant barriers to entry in supplying services over the NBN. Please refer to section F above.



- 11. In the event that the WLR service and the LCS continue to be declared, are the service descriptions for these services still appropriate?**

AAPT's views on service descriptions are set out at section H above.

- 12. Have developments in the industry since 2009 indicated that the ACCC should consider commencing a declaration inquiry in respect of any new or different resale services? If so, please specify the services and explain why declaring them would promote the LTIE.**

AAPT is not currently aware of any need to declare any additional resale services.

- 13. How should the ACCC define the market relevant to interconnection services for the purposes of this review?**

AAPT's suggested approach to market definition is set out above in response to question 2. The relevant markets should be the national markets for:

- the retail and wholesale provision of fixed voice services; and
- the retail and wholesale provision of bundled fixed voice and fixed broadband services.

- 14. Would extending the declarations for the PSTN OA and PSTN TA services promote the long-term interests of end-users? Please give reasons, referring to the implications for competition, any-to-any connectivity and the efficient use of and investment in infrastructure.**

AAPT submits that extending the declarations for the PSTN OA and PSTN TA services would promote the long-term interests of end-users. Please refer to sections B and E above.



- 15. What implications do end-users' growing use of mobile- and VoIP-based voice services, and growth in the use of the ULLS and access seekers' own equipment, have for declaration of the PSTN OTA services?**

AAPT submits that notwithstanding these developments, the declaration of the PSTN OTA remains justified. AAPT's reasons for this view are set in section E above.

- 16. Are the service descriptions for the PSTN OA and PSTN TA services still appropriate? Should service descriptions for voice interconnection services be technology-neutral? Please give reasons for your answer.**

AAPT's views on service descriptions are set out at section H above. As regards PSTN TA specifically, AAPT submits that a regulated service for terminating voice calls should be available on all networks given the importance of achieving any to any connectivity.

- 17. What does the expected change in the fixed line network—from a copper network carrying an analogue signal to a fibre network carrying VoIP—mean for the declaration of interconnection services?**

As discussed above at section H, there is a need to ensure that the service descriptions are robust enough to deal with changes in technology.

- 18. Do developments in the industry or in interconnection arrangements since 2009 indicate that the ACCC should consider commencing a declaration inquiry in respect of any new or different interconnection services?**

AAPT is not currently aware of any need to declare any additional interconnection services.



- 19. What facilities access services do you currently use? Please describe how you use these services and why they are needed by your business.**

Access to Telstra's facilities is essential to AAPT's business. AAPT requires access to Telstra's exchange buildings, external interconnect facilities and ducts in order for AAPT to provide a range of wholesale and retail services to its customers.

Access to Telstra's bottleneck facility services has become increasingly important to AAPT [Start c-i-c]

[Redacted text block]

[End c-i-c];

- 20. Have you experienced any unreasonable difficulties in obtaining facilities access? If so, please describe the nature of the difficulties, their significance to your business, and whether they were resolved. For any difficulties that were resolved, please explain how they were resolved and how long it took to reach a solution. If they were not resolved, please describe the impact on your business.**

[C-I-C Begins]

[Redacted text block]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[C-I-C Ends]

- 21. Should the ACCC consider whether any facilities access services be declared? If so, please specify the service(s) and give reasons. In explaining your reasons, please comment on the expected impact of declaring the service(s), referring to any effects on competition, any-to-any connectivity, efficient use of infrastructure, and infrastructure investment.**

Yes. Please refer to section G above.

- 22. Would regulating facilities access services through the FADs of any declared fixed line services be more or less effective in promoting the LTIE than declaring facilities access services in their own right? Please give reasons for your view.**

AAPT submits that the Telstra Facilities should be declared in their own right. These facilities are enduring bottlenecks and obtaining access to these bottlenecks may not always be related to access to a declared service.





For example, duct access that is used to provide a competitive transmission service on an exempt route will not be related to a declared service.

Therefore, regulating facilities access through the FADs of the declared fixed line services has the potential to make the scope of regulated access under Part XIC narrower and less effective than if it is declared in its own right.

**23. What is an appropriate duration for the declarations? Please give reasons.**

AAPT submits that the Fixed Line Services should be declared for a further period of five years. AAPT submits that doing so would allow Telstra's bottleneck infrastructure to be regulated through the transition to the NBN. For the reasons set out in section B above, AAPT believes that this timeframe is appropriate. AAPT submits that declaring the Fixed Line Services would also have the benefit of providing certainty to industry during a period of significant change.