



Australian
Competition &
Consumer
Commission

Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR

Final Decision

July 2009

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Glossary

ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ADSL	asymmetric digital subscriber line
ARPU	average revenue per user
CAN	customer access network
C&G	corporate & government
CBD	central business district
CCC	Competitive Carriers' Coalition
c-i-c	commercial-in-confidence
CSP	carriage service provider
DSL	digital subscriber line
DSLAM	digital subscriber line access multiplexers
DTCS	domestic transmission capacity service
ERG	European Regulators Group
ESA	exchange service area
FSR2	second position paper in <i>Fixed Services Review</i>
FTM	fixed to mobile
FTTN	fibre-to-the-node
FTTP	fibre-to-the-premises
HFC	hybrid fibre-coaxial cable
IAD	internet access device
IIA	Internet Industry Association
IP	internet protocol
ISP	internet service provider
LCO	local call override
LCS	local carriage service
LSS	line sharing service
LTIE	long-term interests of end-users
MDF	main distribution frame
MDU	multi dwelling unit
MES	minimum efficient scale
MSAN	multi-service access node

NBN	National Broadband Network
NGA	next generation access
NGN	next generation network
NZCC	New Zealand Commerce Commission
OECD	Organisation of Economic Cooperation and Development
PSTN OA	public switched telephone network originating access
PSTN TA	public switched telephone network terminating access
POI	point of interconnection
POTS	plain old telephone service
RFP	Request for Proposals
RIM	remote integrated multiplexer
RKR	record keeping rule
SAO	standard access obligation
SIO	service in operation
SSNIP	small but significant non-transitory increase in price
STS	standard telephone service
TEBA	Telstra Equipment Building Access
TPA	<i>Trade Practice Act 1974 (Cth)</i>
The Tribunal	The Australian Competition Tribunal
ULLS	unconditioned local loop service
VoIP	Voice over Internet Protocol
WLR	wholesale line rental
WOB	whole of business

Summary

Under Part XIC of the *Trade Practices Act 1974* (TPA), the ACCC may determine that particular carriage services and related services are ‘declared’ services. Once a service is declared, carriers and carriage service providers (CSPs) are required to comply with standard access obligations (SAOs) in relation to any such service that they supply.

The ACCC has decided to continue to declare the following fixed-line services: the unconditioned local loop service (ULLS); the line sharing service (LSS); the public switch telephone network originating access (PSTN OA) service; the public switch telephone network terminating access (PSTN TA) service; the local carriage service (LCS); and the wholesale line rental (WLR) service.

These services are used in the supply of fixed voice services and/or fixed broadband services to end-users.

The ACCC is satisfied that continuing to regulate these services will promote the long term interests of end-users (LTIE), in terms of the variety, quality and/or price of fixed voice services and/or fixed broadband services that are available to them.

The need for this regulation will be reviewed in five years time, although it could be reviewed sooner should circumstances require. In nominating this time frame, the ACCC took into account the benefit of providing regulatory certainty during a period of transition to the Government announced National Broadband Network (NBN).

At the commencement of this public inquiry, the ACCC determined to combine this declaration review with the inquiry into the variation of the ULLS service description, which was suspended in April 2008. The variation inquiry was initiated following a request from the G9 consortium to vary the ULLS service declaration to ensure that sub-loop access falls within the definition. This request was complementary to a special access undertaking submitted by the consortium to provide a fibre-to-the-node (FTTN) network. The ACCC notes the special access undertaking was withdrawn in March 2008.

The ACCC considers that in the absence of a FTTN network roll out, varying the ULLS service description would create unnecessary regulatory uncertainty. The ACCC has decided that it is not satisfied that varying the ULLS service description at this time would promote the LTIE.

The ACCC consulted widely on these matters and has taken into consideration various submissions received from interested parties. This consultation included issuing a discussion paper and draft decision.

Chapter 1 Introduction

In November 2008, the ACCC initiated inquiries reviewing the following declared fixed-line services:

- Unconditioned local loop service (ULLS)
- Line sharing service (LSS)
- Public switch telephone network originating access (PSTN OA) service
- Public switch telephone network terminating access (PSTN TA) service
- Local carriage service (LCS), and
- Wholesale line rental (WLR) service.

As the inquiries into each of the fixed-line services is being conducted concurrently, for the purposes of this report they will be referred to as the 'inquiry'.¹

Further, given the common and overlapping issues, submissions to the discussion paper and draft decision have been considered in relation to all the fixed-line services, where relevant.

The declarations for these services expire on 31 July 2009. As required by section 152ALA of the TPA and Part 25 of the *Telecommunications Act 1997*, the ACCC is conducting this inquiry in relation to these services to determine whether to:

- extend or further extend the expiry date of a declaration
- revoke the declaration
- vary the declaration
- allow the declaration to expire without making a new declaration under section 152AL, or
- allow the declaration to expire and make a new declaration under section 152AL.

The ACCC has determined to combine the inquiry into the variation of the ULLS service description, which was initiated in May 2007 and suspended in April 2008, with the declaration inquiry for these services.

In conducting this inquiry, the ACCC has considered whether continued declaration of the services will promote the LTIE of carriage services or of services supplied using carriage services. In determining whether declaration will promote the LTIE, the ACCC has had regard to the extent to which declaration is likely to:

1 Under section 152AN of the TPA, the Commission may combine 2 or more public inquiries.

- promote competition in markets for listed services
- achieve any-to-any connectivity, and
- encourage the economically efficient use of and investment in infrastructure by which listed services are, or are likely to become, capable of being supplied.²

The legislative background to the declaration inquiry process and approach to determining the LTIE is set out in Appendix A.

The review process

The ACCC released a discussion paper on the inquiry in November 2008. The ACCC's preliminary view in the discussion paper was that extending all service declarations for a period of 12 months would promote the LTIE. The ACCC also considered that the ULLS service description should not be varied.

Submissions to the discussion paper were due on 13 March 2009. On 10 February 2009 Telstra wrote to the ACCC and requested an extension. The deadline for submissions was extended until 27 March 2009. The ACCC received 14 submissions in response to the discussion paper.

The ACCC released a draft decision on the inquiry on 4 June 2009. The ACCC's draft view was that extending all service declarations for a period of five years would promote the LTIE. The ACCC also considered that the ULLS service description should not be varied.

Submissions to the draft decision were due on 25 June 2009. The ACCC received eight submissions in response to the draft decision.

Structure of this report

This report sets out the information, analysis and reasons upon which the ACCC's draft decision has been made. The report is structured as follows:

Chapter 2 provides a brief overview of the telecommunications industry, recent developments and regulation of fixed network services

Chapter 3 considers the relevant markets for the declared services

Chapter 4 discusses the state of competition in these markets

Chapter 5 considers whether continued declaration of the ULLS would promote the LTIE

Chapter 6 considers whether continued declaration of the LSS would promote the LTIE

2 Section 152AB of the TPA.

Chapter 7 considers whether continued declaration of the PSTN OA and PSTN TA would promote the LTIE

Chapter 8 considers whether continued declaration of the WLR and LCS would promote the LTIE

Chapter 9 discusses the duration of the extension of the declarations

Appendix A outlines the legislative background for the declaration inquiry and LTIE test

Appendix B provides the services description of the ULLS

Appendix C provides the service description of the LSS

Appendix D provides the service description of the PSTN OA

Appendix E provides the service description of the PSTN TA

Appendix F provides the service description of the LCS

Appendix G provides the service description of the WLR

Appendix H lists the submissions the ACCC received in response to the discussion paper and the draft decision.

Chapter 2 Background

2.1 The regulated services

The regulated services the subject of this inquiry are the ULLS, LSS, WLR, LCS, PSTN OA and PSTN TA. The detailed service descriptions for each of these services are set out in Appendices B to G of this report. A brief overview of each service is set out below.

2.1.1 The unconditioned local loop service (ULLS)

The ULLS involves the use of unconditioned copper pairs between the network boundary at an end-user's premises and a point (at a located at or associated with a customer access module) at which the copper terminates. This point might be at a main distribution frame inside a telephone exchange building or inside equipment housing (e.g. street-based furniture) closer to the end-users. This allows competitors direct access to Telstra's copper lines that connect customers to local telephone exchanges.

With this service there is no prescribed bandwidth as the access seeker receives the twisted copper pair without conditioning or specific carriage technology. This allows access seekers greater choice regarding the products and services they provide to end-users. The access seeker deploys its own infrastructure (such as digital subscriber line access multiplexers (DSLAMs) for xDSL provision) in Telstra's exchange to supply a range of wholesale or retail services, including the supply of high bandwidth data communications and fixed voice services. Access to ULLS also allows access seekers to provide more differentiated broadband services than is currently possible by simply reselling Telstra's existing asymmetric digital subscriber line (ADSL) service. The ULLS can be used to supply voice calls on a wholesale basis, requiring investment in, or access to, a range of switching and other network equipment.

For further details on the ULLS service description refer to Appendix B.

2.1.2 The line sharing service (LSS)

The High Frequency Unconditioned Local Loop Service is the use of the non-voiceband frequency spectrum of unconditioned communications wire (over which wire an underlying voiceband PSTN service is operating) between the boundary of a telecommunications network at an end-user's premises and a point on a telecommunications network that is a potential point of interconnection located at, or associated with, a customer access module and located on the end-user side of the customer access module.

The LSS allows two separate carriers to provide separate services over a single metallic pair (or 'line'). A metallic pair can support a broad range of services by utilising the full spectrum of the line. Traditionally, only 3.1 kHz, a relatively small part of a metallic pair's usable spectrum, was used to provide fixed voice services. With the development of xDSL technology, the remaining part of the spectrum can now be used to provide a variety of fixed broadband services. This allows a combination of low-speed and high-speed services to be provided on a single line at the same time.

Under line sharing, the metallic line spectrum is normally split (or shared) so that one carrier or service provider provides the fixed voice services over the line, while another carrier provides high-speed data services through the use of its own xDSL technology. For example, if Telstra is the access provider, it could deliver fixed voice services to an end-user, while a second carrier could simultaneously provide high-speed data services (such as ADSL) to the same end-user over the copper line.

For further details on the LSS service description refer to Appendix C.

2.1.3 The PSTN originating and terminating access services

The PSTN OA service is the carriage of telephone calls from the calling party to a point of interconnection (POI) with an access seeker's network. Currently a POI is usually located at a trunk or transit exchange.

The PSTN TA is the carriage of telephone calls from a POI within an access seeker's network to the party receiving the call.

Access seekers currently use PSTN OA and TA services to provide the following services: national long-distance calls; international calls; mobile phone to fixed network calls; fixed network to mobile network calls; and local calls.

For further details on the PSTN OA and PSTN TA service descriptions refer to Appendices D and E.

2.1.4 The local carriage service (LCS)

The LCS is a wholesale local call service that allows access seekers to resell local calls without deploying substantial alternative infrastructure. It involves the carriage of a telephone call from one end-user to another end-user in the same standard zone.

While the access seeker usually provides its own marketing, advertising and billing systems, there is limited access seeker equipment required in the provision of the service (although access seekers may seek to provide other elements or services in conjunction with the service). Telstra, as the access provider, provides the end-to-end call service between the calling and called party.

For further details on the LCS service description refer to Appendix F.

2.1.5 The wholesale line rental (WLR) service

The WLR service involves the provision of a basic line rental service that allows the end-user to connect to the access provider's PSTN. The end-user is provided with:

- the ability to make and receive standard PSTN voice calls such as local, national long distance, international, fixed-to-mobile or mobile-to-fixed calls, and
- a telephone number.

As with the LCS, access seeker equipment is not involved in the provision of the WLR service, although access seekers may again seek to provide other services in conjunction with this service.

For further details on the WLR service description refer to Appendix G.

2.2 Recent developments in the telecommunications sector

On 7 April 2009, the Government announced that it had terminated the NBN Request for Proposals (RFP) initiated in April 2008. The Government announced that it would establish a new company to build and operate a NBN over eight years, with the rollout in Tasmania to commence in July 2009 and the rollout in mainland Australia to commence in early 2010.³

According to the government's announcement, the new NBN will be a national, wholesale-only, open access broadband network using:

- Fibre-to-the-premise (FTTP) to 90% of the homes, workplaces and schools, providing speeds up to 100 Mbps, and
- wireless and satellite technologies providing speeds up to 12 Mbps to more remote parts of rural Australia.⁴

The ACCC considers the Government's NBN announcement will have a major effect on the future telecommunications regulatory environment.

The eight year transition period will likely be a time of significant structural and competitive changes as the industry moves to an NBN environment.

As part of the NBN announcement, the Government released a discussion paper entitled *National Broadband Network: Regulatory Reform for 21st Century Broadband*.⁵ The discussion paper:

- outlines the proposed regulatory reforms that the Government will progress to facilitate the roll-out of the NBN, and
- consults on options for broader reforms to make the existing regulatory regime more effective in the transition period before the network is fully rolled out.

Submissions to the discussion paper closed on 3 June 2009. The Government received over 120 submissions from interested parties. There have been no announcements by Government as to what, if any, changes to the existing regulatory regime will be made as a result of this review.

3 Joint media release of the Prime Minister, Treasurer, Minister for Finance and Minister for Broadband, *New National Broadband Network*, 7 April 2009.

4 Ibid.

5 Australian Government, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, April 2009. accessed at:
<http://www.dbcde.gov.au/__data/assets/pdf_file/0006/110013/NBN_Regulatory_Reform_for_the_21st_Century_Broadband_low_res_web.pdf> (08/05/2009).

2.3 Regulation of fixed network services

Under Part XIC of the TPA, the ACCC may determine that particular carriage services and related services are ‘declared’ services. Once a service is declared, carriers and CSPs are required to comply with the SAOs in relation to any such service that they supply.

On 31 July 2009, the current declarations for the ULLS, LSS, PSTN OA, PSTN TA (together PSTN OTA), LCS and WLR expire. These services have been the subject of previous declaration reviews by the ACCC.

In 1997, when the telecommunications access regime commenced, the ACCC had the power to ‘deem’ certain services as declared services under the regime’s transitional arrangements.⁶ The PSTN OA and PSTN TA services were deemed to be declared services as a part of this process.⁷

In 1999, the ACCC declared the ULLS and LCS services as part of the Local Telecommunications Services Inquiry.⁸

In the Local Telecommunications Services Inquiry the ACCC examined the concept of line sharing when considering the case for declaration of the ULLS. At that time, however, the ACCC expressed the view that declaration of a LSS should be considered separately to the ULLS.⁹ In September 2001, the ACCC announced that it would conduct a public inquiry into whether or not a line sharing services should be declared under Part XIC of the TPA and in August 2002 the LSS was declared.¹⁰

In June 2000, Telstra applied to the ACCC under section 152AT of the TPA for an individual exemption for the SAOs in relation to the supply of the LCS. The individual exemption application related to the supply of the LCS within the CBD areas of Sydney, Melbourne, Brisbane, Adelaide and Perth.¹¹ In 2002, the ACCC granted an individual exemption to Telstra in relation to its supply of the LCS in CBD areas.¹²

6 Section 39 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*, provided for the Commission to prepare a statement specifying certain services to be deemed as declared services.

7 The ACCC deemed ‘domestic’ PSTN OA and ‘domestic’ PSTN TA to be declared services. ACCC, *Deeming of Telecommunications Services – A statement pursuant to section 39 of the Telecommunications (transitional provisions and consequential amendments) Act 1997*, June 1997.

8 ACCC, *Declaration of local telecommunications services*, July 1999.

9 Ibid.

10 ACCC, *Line Sharing Service – Final decision on whether or not a Line Sharing Service should be declared under Part XIC of the TPA*, August 2002.

11 ACCC, *Future scope of the local carriage service – discussion paper*, August 2000.

12 ACCC, *Future scope of the local carriage service – final decision*, July 2002.

A review of services for local calls (Local Services Review) was initiated in April 2005.¹³ The LCS declaration was reviewed and extended. The ACCC also decided at that time to declare a WLR service in certain areas (CBD areas were excluded).¹⁴

In December 2005 the ACCC commenced an ongoing Review of the Regulation of Fixed Network Services (Fixed Services Review).¹⁵ This review considers the future regulation of key wholesale and access services that are delivered over Telstra's copper-based fixed network, having regard to emerging market, technological and network developments.

As part of the Fixed Services Review, the ACCC undertook a further inquiry, and in July 2006, the ULLS and PSTN OTA service declarations were extended.¹⁶

In April 2007, the ACCC released *Fixed Services Review - A second position paper* (FSR2). Its primary purpose was to outline a robust framework for the review of existing service declarations under Part XIC of the TPA. More broadly, the paper signalled the principles that the ACCC would apply to regulation of fixed-line services. FSR2 also initiated a review of the LSS and the LSS declaration was extended in October 2007.¹⁷

In 2008, the ACCC granted Telstra individual exemptions from the SAOs for the PSTN OA, WLR and LCS services in certain CBD and metropolitan areas.¹⁸ These exemptions were subject to certain conditions and limitations and, therefore, were crafted to operate in conjunction with the underlying service declarations. These exemption decisions are currently being reviewed by the Australian Competition Tribunal (the Tribunal).

In undertaking this declaration inquiry, the ACCC has largely considered each of the relevant services on an individual basis. However, in order to have a complete understanding of the regulatory framework that applies to fixed-line services, it is necessary to consider the interaction of the full suite of regulatory decisions under Part XIC of the TPA that apply to these services, including decisions to declare certain services or grant particular exemptions. This is discussed further in Chapter 7 and 8.

13 ACCC, *Local Services review – discussion paper*, April 2005.

14 ACCC, *Local Services Review – Final Decision*, July 2006.

15 In December 2005, the ACCC commenced the *Strategic Review of the Regulation of Fixed Network Services* (fixed services review), in accordance with s. 152 ALA of the TPA.

16 ACCC, *Declaration inquiry for the ULLS, PSTN OTA and CLLS – Final determination*, July 2006.

17 ACCC, *Review of the Line Sharing Service declaration – Final decision*, October 2007.

18 See: ACCC, *Telstra's PSTN Originating Access exemption applications - CBD and Metropolitan areas - Final decision and Class Exemption*, October 2008 and ACCC, *Telstra's local carriage service and wholesale line rental exemption applications - Final Decision and Class Exemption*, August 2008.

2.4 Approach to this inquiry

2.4.1 The concept of ‘enduring bottlenecks’

The ACCC outlined its approach to *ex ante* regulation in FSR2 and will follow that approach in this inquiry. The ACCC considers that regulation under Part XIC of the TPA should focus on those elements of the fixed-line network that continue to represent ‘enduring bottlenecks’.

In FSR 2, the ACCC defined an enduring bottleneck as follows:

... an enduring bottleneck is defined to mean a network element or facility that exhibits natural monopoly characteristics¹⁹ and is ‘essential’ to being able to provide services to end-users in downstream markets in a way that promotes the long-term interests of end-users (LTIE). That is, duplication of the network element would result in a loss of technical and allocative efficiency greater than any competitive gains that duplication might achieve.²⁰

Where duplication of a network element is not inefficient, infrastructure-based competition is more likely to be effective (and therefore promote the LTIE) because rivals are able to differentiate their services and compete more vigorously across greater elements of the network and supply chain. Infrastructure-based competition is also more likely to produce enduring benefits because competitors that have invested in their own infrastructure are more likely to remain in the market (because of high sunk costs). However, where duplication of a network element would lead to a loss of technical and allocative efficiency greater than any competitive gains that duplication might achieve, the ACCC considers that regulated access to that element would be more likely to promote the LTIE.

2.4.2 The ACCC’s approach to the LTIE analysis

To determine whether the LTIE will be promoted with declaration or without declaration, the ACCC is required to consider the effects in each relevant market, as well as make an overall assessment of the benefits expected to flow to end-users from declaration.

The FFC in its judgement in *Telstra Corporation Limited v The Australian Competition Tribunal* stated that:

19 The term ‘natural monopoly’ is subject to a varying array of economic definitions. Strictly, a natural monopoly exists where the relevant industry cost function is ‘sub-additive’. An example is where a good or service can be more cheaply produced by a single firm, rather than spreading production over multiple firms. Natural monopoly cost conditions typically arise in industries where there are high fixed and sunk costs, and where economies of scale, scope and/or density are present (although these are not sufficient conditions). In fixed-line networks, natural monopoly cost conditions may exist over particular elements of a network, rather than across the entire supply chain.

20 An enduring bottleneck may also arise in circumstances where an access seeker must purchase access to a particular service in order to ensure the any-to-any connectivity of its service to end-users.

“... an essential part of the analytical enquiry required by s 152AT(4) is a comparison between the “future with” the exemptions and the “future without” the exemptions and an assessment, in the light of that comparison, of which state of affairs is in the LTIE.”²¹

The ACCC considers that in applying the LTIE test, it is useful to consider the likely state of competition in the future both *with* declaration and *without* declaration. Reviewing the state of competition as it currently stands will assist in applying the future with and without test.

Therefore when assessing whether extending a declaration would promote the LTIE, it is useful to undertake the following analysis:

1. Broadly identify those markets that would be affected by extending the declaration.
2. Assess the state of competition within those markets.
3. Assess whether price and service offerings to consumers in those markets are likely to be better with the extension of the declaration than they would be without the extension of the declaration.

It is necessary in the first instance to assess the boundaries and state of competition of the market in which the regulated service is supplied. This is because of the close interrelationship between wholesale and retail markets. The level of competition in the supply of the regulated services may be one determinant of the level of competition in retail markets.

In most cases, the markets most likely to be affected by declaration are the market(s) for retail services rather than the market in which the regulated service is supplied (where these markets are separate). This reflects the key rationale for access to essential infrastructure – that of promoting more competitive outcomes by enabling the supply of wholesale inputs on terms and conditions more reflective of competitive outcomes. Further, the aim of promoting the LTIE guides the ACCC to be particularly mindful of the impact of declaration on the supply of services at the retail level.

Therefore, an assessment of whether declaration will promote competition requires consideration of both the market for the regulated service and its vertically related markets.

Once the boundaries of the relevant markets have been identified, the ACCC can then consider whether the state of competition in these markets will be enhanced by declaration (or extending the declaration) of the regulated service.

The ACCC considers that competition is a process of rivalry. Accordingly it may be difficult to describe (in qualitative terms) the *extent* to which declaration is required to promote competition through simply examining its impact on that process. In many cases, it will be more instructive to examine the extent to which declaration would promote competition from the perspective of end-users (i.e. in terms of price, quality and service diversity), and the likely prospects for competition in the absence of

21 *Telstra Corporation Limited v Australian Competition Tribunal*, [2009 FCAFC] 29, para 159.

declaration. Where declaration promotes competition, it is also likely to promote dynamic efficiencies due to the development of new and better quality services.

A useful tool for the ACCC to use when assessing whether declaration will promote competition is the future 'with or without test'. Under this approach, the current state of competition in the markets for both the eligible and retail services is first assessed. Only by understanding the current state of competition in these markets can a meaningful vision of the likely future state of competition be understood.

2.5 Pricing principles

Section 152AQA of the TPA requires the ACCC to determine principles relating to the price of access to a declared service. Subsection 152AQA(3) requires the ACCC to make such a determination at the same time as, or as soon as practicable after, the ACCC declares a service.

The ACCC has received two submissions in relation to pricing principles for fixed-line services.²²

Now that the declaration inquiry is concluded, the ACCC will begin consultation on pricing principles as soon as practicable.

22 Macquarie Telecom, *Submission to the Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, pp. 2-5. Competitive Carriers Coalition, *Submission Local Service indicative prices*, 22 April 2009.

Chapter 3 The relevant markets for the declared services

3.1 The ACCC's approach to market definition

When conducting a declaration inquiry, subsection 152AB(2) of the TPA requires the ACCC to consider whether declaration of an eligible service is likely to promote competition in markets for particular carriage services and services supplied by means of carriage services.²³ The first step in the analysis is to identify those markets relevant to determining whether declaration will promote competition.

It is important to note that Part XIC of the TPA does not require the ACCC to precisely define the scope of relevant markets for the purpose of a declaration inquiry. It may be sufficient to broadly identify the scope of the relevant markets likely to be affected by the extension, revocation, variation or expiration of a relevant declaration for a service. Accordingly, a market definition analysis under Part XIC of the TPA should be seen in the context of determining whether declaration would promote competition rather than developing an 'all purpose' market definition.²⁴

Section 4E of the TPA provides that a market includes any goods or services that are substitutable for, or otherwise competitive with, the goods or services under analysis. Accordingly, identifying relevant substitutes to the service in question is the key to defining a market.

The ACCC's approach to market definition set out in the 2008 *Merger Guidelines* focuses on two key dimensions of substitution:

- the product dimension and
- the geographic dimension.

In some cases, market definition requires close attention to the functional levels of the supply chain that are relevant to the matter under consideration or the particular timeframe over which substitution possibilities should be assessed. Generally, however, these functional and temporal considerations form part of the product and geographic dimension analysis. The ACCC focuses on the foreseeable future when considering the likely product and geographic dimensions of a market.

The ACCC takes a purposive approach to market definition, which means that the definition of a relevant market cannot be separated from the particular issue under consideration. Market definition always depends on the specific facts and circumstances of the relevant issue and current evidence from market participants will often be critical. Decisions relating to market definition in previous, albeit similar, inquiries will not necessarily provide definitive guidance.

23 s. 152AL(1) of the TPA.

24 See ACCC, *Telecommunications services- Declaration provisions – a guide to the declaration provisions of Part XIC of the TPA*, 1999.

Identifying relevant substitutes to the service in question is key element to defining a market. Substitution involves switching from one product to another in response to a change in the relative price, service or quality of the product. There are two types of substitution:

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

These switching costs, if significant, can significantly impede the substitutability of products.

A method to determine if a product or service is a close substitute is to use the hypothetical monopolist or 'SSNIP' test. This test establishes the smallest 'product' or 'geographic' space over which a hypothetical monopolist could impose a 'small but significant non-transitory increase in price' (SSNIP) without reducing its profits. A SSNIP in the context of the hypothetical monopolist usually consists of a price rise for the foreseeable future of 5 to 10 per cent above the price level that would prevail without competition.

In assessing the *product dimension* of substitution, it may be useful to consider:

- the function or end use of the product
- physical and technical characteristics of the product
- costs of switching purchases between the product and potential substitutes
- views and past behaviour of buyers regarding the likelihood of substitution between products
- evidence of buyers switching to other products in response to price increases in the recent past
- evidence of producers redeploying their production capacity in response to price increases in the recent past
- costs of switching production and distribution systems from another product line to a product that is closely substitutable with the relevant product
- views, business records and past behaviour of suppliers of the relevant products regarding the impact of price and marketing decisions by suppliers of potential substitute products on their own pricing and marketing decisions, and
- relative price levels and price movements of the product compared to potential substitutes.

In relation to the *geographic dimension* of substitution, the ACCC notes that a product in a particular geographic region (or a group of products or regions) is a close substitute if a significant proportion of sales or supply capacity would be likely to switch in response to a small but significant non-transitory increase in the price of the product in question, quickly and without significant investment or switching costs.

In assessing the geographic dimension, it may be useful to consider:

- the costs to customers of obtaining supply from alternative regions
- any limitations on the ability of customers to access alternative sources of supply in alternative regions
- the costs of extending or switching production and distribution systems to supply the customers in alternative regions
- any regulatory or other practical constraints on suppliers selling to alternative regions
- records relating to trade flows and the actual movement of customers and/or suppliers between geographic regions, especially related to changes in relative prices across regions in the recent past
- views and business records of buyers and suppliers regarding the likelihood of switching between geographic sources of supply, and
- the relative price levels and price movements of different geographic sources of supply.

The ACCC should be cognisant of commercial realities when defining the geographic dimension of a market.²⁵

3.2 Identifying the relevant markets

3.2.1 Overview

To define the relevant markets, the ACCC begins with the services in question. In the context of this review, the key issue is what services access seekers could turn to (in terms of price and the level of functionality or quality) in order to compete in the relevant downstream markets, if the provider of the declared services were to give less and charge more.

Broadly speaking, the ULLS, LSS, WLR, LCS and PSTN OTA can be used separately or in conjunction to provide a range of fixed voice and/or fixed broadband services at the retail and wholesale levels.

A fixed voice service can be described as a standard telephone service (STS). A STS is a telecommunications service that connects customers to the PSTN.²⁶

25 In *Australia Meat Holdings v Trade Practices Commission* (1989) ATPR 40-932 at 50,091-50,092, the Federal Court quoted with approval from Von Kalinowski (*Antitrust laws and trade regulation* (Matthew Bender, New York, 1981), Vol 3 at pp18-96) that “Any geographic market... must be one that corresponds to the commercial realities of the industry and represents an economically significant trade area. Because a geographic market determination looks to actual trade patterns, it is not required that geographical boundaries be drawn with exactitude...”.

26 Section 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* defines the standard telephone service (STS) as being a telephone service fit for the purpose of

A fixed broadband service can be defined as a high bandwidth carriage service that is characterised as an ‘always on’ connection that generally (but not always) involves the carriage of communications at through-put speeds equal to or greater than 256 Kbps.

The ULLS and LSS can be used to supply products:

- at the wholesale level (such as wholesale fixed voice services or wholesale fixed broadband services), or
- at the retail level directly to end-users (the LSS can be used to supply fixed broadband and the ULLS can be used to supply fixed voice, fixed broadband or bundled fixed voice and fixed broadband).

The WLR, LCS and PSTN OTA are wholesale inputs that can be used to supply fixed voice services at the retail level.

As shown below, the regulated services can be used in different combinations to supply fixed voice and/or broadband products at the retail level.

Retail product	Possible means of supply	
Fixed voice	ULLS	Declared
	WLR/LCS/PSTN OA	Declared
	LSS	Declared
	Wholesale voice ²⁷	Unregulated
Fixed broadband	ULLS	Declared
	LSS	Declared
	Wholesale DSL	Unregulated
Bundled fixed voice and broadband	ULLS	Declared
	LSS & WLR/LCS/PSTN OA	Declared
	Wholesale DSL & WLR/LCS/PSTN OA	Unregulated & declared
	LSS & wholesale voice	Unregulated & declared
	Wholesale voice & wholesale DSL	Unregulated

voice telephony, or if voice telephony is impractical for a person with a disability, a form of communication that is equivalent to voice telephony.

27 A commercially negotiated fixed voice package containing local calls, long distance calls, international calls and fixed-to-mobile calls.

The various factors and types of information which influence the ACCC's market definition for the fixed-line services are set out and assessed in detail in the ACCC's views at 3.3.

3.2.2 ACCC's preliminary views

In both the discussion paper and the draft decision, the ACCC's preliminary view was that the relevant markets for the purposes of the declaration inquiry were:

- the wholesale and retail provision of fixed voice services;
- the wholesale and retail provision of fixed broadband services; and
- the wholesale and retail provision of bundled fixed voice and fixed broadband services.²⁸

In relation to the geographic dimension to be applied to identifying the relevant markets, the ACCC's preliminary view was that it was appropriate to adopt a national market approach.²⁹

The ACCC received a number of submissions on the issue of market definition. The submissions are considered in the analysis below.

3.3 ACCC's views on relevant markets – product dimension

The declared services subject to this review are inputs to a range of voice, broadband and bundled voice and broadband products provided at the wholesale and retail level.

The ACCC considers each in turn. Before doing so, however, the ACCC has considered the impact of the Government's NBN announcement on the declaration inquiry.

3.3.1 Impact of the NBN announcement on the market assessment

The ACCC notes that the Government's proposed NBN is likely to have a substantial impact on the manner in which fixed-line services are provided in the future.

Optus considers that where reliable information on the NBN is available, it should be factored into its market and competition analysis because it can act as a reliable 'forecast' of likely future conditions. Optus also suggests this information is having an immediate impact on industry expectations by, for example, 'impacting the decision-making processes of market participants with regard to infrastructure-investment'.³⁰

28 ACCC, *Fixed Services Review Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, discussion paper*, November 2008, p. 35.

29 Ibid. pp. 34-35.

30 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, pp. 6-7.

Telstra submits that the Government's NBN announcement adds an additional substitute for fixed-line services over the CAN. Telstra asserts it appears likely that the NBN will be substantially deployed nationwide over the next five years.³¹

The ACCC recognises the Government's NBN will have a major effect on the future communications industry and regulatory environment, particularly in relation to the regulation of the fixed services subject to this declaration review. The ACCC notes Optus' view that the NBN announcement has had an immediate impact on industry expectations. In particular, given the Government's NBN announcement, the ACCC considers it is less likely that the construction of an end-to-end fixed-line access network, in addition to the CAN and the NBN, would be economically efficient in the foreseeable future.

However, in relation to the ACCC's assessment of the relevant markets for this declaration review, the ACCC notes that there is little information currently available on many important matters that are central to determining the impact of the NBN. These matters include the intended design of the NBN, the available services, pricing and non-pricing issues, rollout timing and expected take-up, which are yet to be determined. The lack of information on these matters prevents the ACCC from forming a considered view as to the actual or likely future substitutability of NBN services for the declared services subject to this review. Therefore, it would be premature for the ACCC to factor the NBN into the market and competition analysis that forms the basis of this declaration review.

The ACCC also notes that while the Government has indicated the NBN rollout will commence in Tasmania in July 2009, the timetable for the completion of the network and the widespread provision of services to access seekers, both in Tasmania and in the rest of Australia, is not certain. The Government has indicated it expects the rollout to take eight years. This period is significantly longer than the maximum five year extension of the service declarations under the TPA.

The ACCC recognises that the transition period will likely be a time of significant structural and competitive change as the industry moves to an environment where an NBN operates alongside, or possibly instead of, Telstra's fixed network infrastructure. However, the ACCC is satisfied that there are sufficient statutory mechanisms available to review the service declarations if market conditions or other developments, such as the availability of NBN services, demand.³²

3.3.2 Fixed voice services

Retail level

The ACCC considers it is appropriate to include basic access, local calls, national and international long distance calls and fixed to mobile calls within a bundle of fixed voice services (fixed voice services). The ACCC notes that consumers are

³¹ Telstra, *Submission to Fixed Services Review Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR –Draft Decision*, June 2009, pp. 2-3.

³² For example, under section 152AL of the TPA, the ACCC may hold a public inquiry in relation to proposals to declare, vary, revoke or extend services on its own initiative or if requested in writing to do so by a person.

increasingly acquiring a bundle of fixed voice services from the one provider.³³ This may be due to customer preferences for receiving a single bill for all the services and the cost savings of acquiring a bundle from the same service provider – the price of the package is usually at a discount to that of acquiring given amounts of a product separately.

The ACCC understands that WLR and LCS along with PSTN OTA are currently the predominant inputs used by providers other than Telstra to supply fixed voice services to end-users. There are two alternative services that could be used instead of fixed voice services:

- voice over internet protocol (VoIP) services, or
- mobile services.

The ACCC considers the substitutability of each for fixed voice services below.

Fixed to VoIP substitution

VoIP refers to the encoding of voice communication into Internet Protocol (IP) packets for transmission over data networks.³⁴

Broadly speaking, there are three main types of VoIP services available to consumers:

- Soft switching and the ULLS (POTS emulation)
- Internet access device (IAD) and the ULLS/LSS (carrier-grade VoIP), and
- VoIP and the ULLS/LSS (application layer VoIP).

The ACCC considers that VoIP via POTS emulation is likely to be substitutable for a PSTN voice service on the demand-side because the experience from the consumer's perspective would be identical. Furthermore, the ACCC understands that the costs involved for end-users in acquiring a POTS emulation voice service are unlikely to vary significantly from traditional fixed voice services.

The ACCC does not consider that application layer VoIP services are likely to be substitutable for PSTN voice services at the present time. In terms of demand-side substitutability, there are limitations concerning quality and security as well as the necessity of having a broadband service to access VoIP.

In relation to carrier grade VoIP services, in terms of price competition, VoIP often enables service providers to offer cheaper prices for local calls and standard telephony

33 See ACCC, Telstra's PSTN Originating Access exemption applications – CBD and Metropolitan areas, Final Decision and Class Exemption, October 2008, pp. 55-57.

34 The discussion focuses on the substitutability of "carrier grade" VoIP voice rather than soft-client VoIP (i.e. application layer only VoIP services, such as those provided by Skype or engine) as the ACCC does not consider soft-client VoIP a potential substitute at this stage.

services than traditional PSTN calls.³⁵ However, the physical and technical characteristics of a carrier-grade VoIP product can be quite different to that of traditional PSTN voice.

In response to the discussion paper, Telstra submits that the exclusion of VoIP from the retail and wholesale fixed voice markets stands at variance with mounting evidence of the popularity of naked DSL, which is usually bundled with carrier grade VoIP.³⁶

However, Optus submits that carrier grade VoIP is not a significant substitute that can provide an effective competitive constraint on Telstra's pricing in the fixed-line market due to technical limitations, in terms of quality of service, call routing, terminal location and interoperability.³⁷

The ACCC notes that the increasing take-up of naked DSL services that include carrier grade residential IP telephony connections (such as those currently offered by Internode and iiNet) suggests that carrier grade VoIP may emerge as a stronger substitute for fixed-line voice services in the future.

However, at this stage, take-up of carrier grade VoIP services still appears to be limited. As noted in the Australian Communications and Media Authority (ACMA)'s *Communications report 2007-08*, about 17 per cent of internet users had used a VoIP service at home by June 2008. VoIP was being used mainly for international calls (67 per cent of end-users), compared with 46 per cent for long-distance calls and 38 per cent for local calls.³⁸ This suggests that in many cases VoIP is being used as a complementary service to traditional PSTN voice services.

At this stage, the ACCC considers VoIP services are unlikely to be effective substitutes for fixed voice services. Depending on the type of service being used, there can be limitations concerning the quality characteristics of VoIP services, the requirement for switching customer premises equipment and also the necessity to acquire a fixed broadband service in conjunction with the VoIP service. The ACCC also notes that LSS-based VoIP would always be a second line service, which would clearly be a complementary service to the traditional fixed-line.

Therefore, ACCC does not consider that the availability of VoIP services would be sufficient to prevent a SSNIP in relation to fixed voice services within the foreseeable future.

35 For example, Gotalk currently offers 300 local calls, 300 national calls and 100 calls to Australian mobiles for \$14.95 per month, with an additional \$5 surcharge if the customer does not maintain a broadband account with the company. Gotalk, *Residential: Signup to VoIP and save!*, accessed at <<http://www.gotalk.com.au/Residential/VoIP/Pages/SignuptoVoIPonline.aspx>>, accessed on 4 May 2009.

36 Telstra, *Response to ACCC discussion paper – Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 9.

37 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper, March 2009*, paragraph 4.12.

38 ACMA, *Communications Report 2007-08*, ACMA, Melbourne, 2008, p. 51.

On the supply-side, the ACCC considers it would be unlikely that a VoIP provider would switch to providing fixed voice services over the PSTN in the event of a SSNIP in fixed voice services. The business case for entering into supply of voice via VoIP is likely to be based on a different business case to the supply of fixed voice services given the differences in functionality between VoIP and traditional fixed voice.

Fixed to mobile substitution

In response to the discussion paper, Telstra submits that wireless voice services exert some competitive constraint on fixed service pricing and that there is an ever increasing level of substitution between fixed voice and mobile voice services.³⁹

In contrast, Optus submits that it is not yet the case that a substantial number of end-users in Australia have given up their fixed-line voice service in favour of a mobile telephone.⁴⁰

The ACCC has closely considered the substitutability of fixed and mobile voice at the retail level.

On the demand side, the ACCC must consider the likelihood of consumers switching to mobile services in the event of a SSNIP in fixed voice services.

ACMA’s most recent *Communications Report* provides an indication of the trends in subscriber numbers for mobile and fixed-line services from 1999-00 to 2007-08.⁴¹

As Table 1 demonstrates, in 2007–08 the number of fixed and mobile voice services in operation (SIOs) grew simultaneously for the first time since 2003-04. Prior to this reporting period the number of fixed voice SIOs had declined for three consecutive years. In contrast, the number of mobile voice services has grown steadily for the past seven financial years.

Table 1 The number of fixed-line and mobile telephone services in operation (millions) 2001–02 to 2007–08

Year	2001–02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
Fixed voice	11.4	11.6	11.7	11.5	11.3	10.9	11.0
Mobiles	12.7	14.3	16.5	18.4	19.8	21.3	22.1

Source: ACMA 2006-07 and 2007-08 communications reports.

39 Telstra, *Response to ACCC discussion paper – Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, pp. 9-10.

40 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 4.15.

41 ACMA, *Communications Report 2007-08*, ACMA, Melbourne, 2008, p. 51.

The ACCC notes that, taken together, the previous declines in fixed voice services subscriptions and increase in mobile services subscriptions suggests that there is some degree of fixed-to-mobile substitution occurring. However, the ACCC is of the view that the increase in mobile phone subscriptions has not been fully ‘offset’ by an equivalent decrease in fixed services. Accordingly, from a demand perspective, the ACCC is of the view that mobile use may be viewed by the majority of consumers as a complement to their traditional fixed-line rather than as a substitute.

In its most recent analysis of the level of substitution between fixed-line communications and mobile technology, ACMA identified the existence of a four-stage substitution continuum, with consumers at different stages according to their lifestyles, communications preferences and technical knowledge.⁴² The four stages identified are no substitution, partial substitution, advancing substitution and full substitution.

A 2008 survey commissioned by ACMA revealed a strong correlation between the age of the consumer and their stage in the substitution continuum.⁴³ Young adults aged 18 to 24 demonstrate the highest levels of full substitution from fixed to mobile voice services. One-third of Australians in this age group live in a mobile-only household, which is a significantly higher rate than any other group.⁴⁴ In contrast, many consumers aged over 55 are yet to engage in any substitution of voice services; that is, they do not use any additional communications services other than their fixed-line phone. While only 4 per cent of the population fall into the category of only using fixed-line communications, this percentage increases dramatically as age increases. To demonstrate this, 39 per cent of households with consumers aged over 65 reported that they did not use any additional communications services on top of their fixed-line.⁴⁵

The quality of mobile voice calls can also vary dramatically depending on proximity to a mobile tower and the relevant service provider’s general network coverage. Accordingly, mobile voice can have very poor quality in low coverage areas. Given carriage service grade obligations, the quality of fixed local calls tend to be of much greater consistency.⁴⁶

In light of the above, the ACCC continues to take the view that mobile services are only an effective substitute for fixed-line voice services in a small percentage of cases. For most consumers, the two platforms are seen as complements rather than substitutes. This is due to a range of factors, including costs associated with mobile

42 ACMA, *Fixed-mobile convergence and Fixed-mobile substitution in Australia*, July 2008, p. 18.

43 ACMA commissioned the consultancy Roy Morgan Research to undertake a national telephone survey in May-June 2008. The survey was divided into two subgroups: fixed-line users—1396 respondents and mobile-phone users not connected to a fixed-line service—241 respondents.

44 ACMA, *Convergence and Communications - Report 1: Australian household consumers' take-up and use of voice communications services*, March 2009, pp. 19-20.

45 Ibid. p. 19.

46 However, the ACCC notes that issues will arise with local calls when there is a service fault or fault with the end-users handset.

services, the inconsistency of call quality and consumer practice. However, the ACCC continues to actively monitor consumer behaviour and preferences in this regard.

On the supply-side the ACCC is of the view that a provider of mobile services would be highly unlikely to switch to provision of fixed voice services over the PSTN in the event of a SSNIP in fixed voice services. This is because of the large and lumpy sunk costs and lead times involved in switching.

Wholesale level

Retail fixed voice services have traditionally been supplied via the wholesale services WLR, LCS and PSTN OTA.

LCS and WLR are resale services and can be used separately to provide basic access and local calls as part of a fixed voice bundle or as part of broader bundle of fixed voice and/or fixed broadband, mobile or pay TV services. However, the ACCC understands that it would be highly unusual for LCS and WLR to be acquired by separate providers both serving the same end-user.

PSTN OA is a wholesale input and can be used:

- in conjunction with the LCS and WLR service to supply the broader bundle of fixed voice services (i.e. including long distance, international and fixed to mobile (FTM) calls), and
- separately for the supply of long distance (national and international) and FTM calls.

PSTN TA is needed to terminate any call (regardless of its origination) on Telstra's CAN.

Imputation testing of LCS and WLR suggests that an access seeker would not be able to compete profitably on the basis of supply of LCS and WLR alone if it were supplying at the retail level only. Access seekers would need to provide a broader suite of telecommunication services (including domestic long distance, international long distance and fixed-to-mobile) in addition to local calls and line rental to efficiently operate with a profitable margin.⁴⁷

Therefore, the ACCC considers it is appropriate to consider LCS and WLR as a bundled product together with PSTN OA (fixed voice bundle) at the wholesale level. It is also relevant that the potentially substitutable products at both the wholesale and retail levels tend to replicate the bundle of LCS/WLR/PSTN OA products.

In terms of demand-side substitution, it is necessary to consider whether a firm that wishes to supply fixed voice services to end-users has any alternative options to the fixed voice bundle at the wholesale level. Central to this analysis is the functionality provided by the LCS, WLR and PSTN OA compared with potential substitute services.

47 ACCC, *Changes in the prices paid for telecommunications services in Australia 2006–2007*, June 2008.

Potential alternatives to the LCS, WLR and PSTN OA include:

- re-sale of a fixed voice bundle by other service providers (wholesale level)
- ULLS-based provision (access level), and
- provision over alternative end-to-end networks such as HFC or fibre optic (network level).

Re-sale of fixed voice bundle

With regard to the ‘wholesale level’, the ACCC understands that various other telecommunications firms to Telstra supply a wholesale fixed voice service to access seekers from time to time.⁴⁸ For example, the ACCC understands that Optus is one such provider that offers a wholesale product using soft switching and the ULLS combined with DSLAM/multi-service access node (MSAN) deployment to supply a wholesale fixed voice bundle to other providers. To the extent that such services are available at competitive rates, the ACCC is of the view that this would pose an effective substitute to the wholesale fixed voice bundle available from Telstra.

The ACCC notes that the existence of alternative networks does not necessarily provide access seekers using the fixed voice bundle the ability to use the alternative networks as a supply substitute. With regard to the provision of a wholesale product over Optus’ HFC network, the ACCC understands that Optus does not currently offer an HFC wholesale voice product.

The ACCC notes that owners of alternative infrastructure to Telstra’s PSTN, such as Optus, are not required to provide access to their networks. Therefore, alternative networks such as HFC will not necessarily provide a competitive constraint if there were a SSNIP in Telstra’s fixed voice bundle.

In terms of demand-side substitutability, a telecommunications reseller may not readily substitute a HFC-based wholesale voice service from Optus in place of the fixed voice bundle. Such a service is likely to be unattractive to wholesale customers as it would require time-consuming and expensive work at customer premises as well as reduced scale and coverage. There would also be potential work for access seekers in upgrading their own facilities, such as network interfaces. Furthermore, wholesale customers could be restricted to on-selling these services within the Optus HFC footprint, and may face difficulties in connecting certain premises such as multi dwelling units (MDUs).

In consideration of the above, the ACCC is of the view that provision of a wholesale voice service over Optus’ HFC network is not presently a close substitute for Telstra’s wholesale fixed voice bundle.

Optus states in their submission to the discussion paper that third-party access to HFC networks is generally neither sought, nor easily engineered.⁴⁹ Further, in the past

48 For example PowerTel wholesales business services (both voice and broadband) to end-users.

49 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 4.25-32.

where there has been a small but significant increase in price of the wholesale fixed voice bundle, Optus has not offered wholesale access to its HFC network.

Therefore, while HFC networks may be a competitive alternative for the owners of these networks, they are limited in the extent to which they provide a competitive alternative for other access seekers.

ULLS-based provision

With regard to the ‘access level’, the ACCC notes that ULLS can serve the functional needs of access seekers that seek access to the fixed voice bundle because the ULLS can be used for the provision of fixed voice services in the retail markets.

However, Adam Internet et al. submit that for each of the declared services substitution remains limited.⁵⁰ Adam Internet et al. suggest that ULLS substitution for WLR, LCS and PSTN OA is weak, costly and impeded by inadequate migration processes. Adam Internet et al. are doubtful that the ULLS competition that the ACCC identified in its WLR/LCS and PSTN OA exemption decisions can deliver sufficient competition in the provision of fixed voice services. According to Adam Internet et al., Telstra has failed to implement an efficient LSS to ULLS migration process, as required under the individual exemption conditions.⁵¹

In terms of quality, the ULLS can provide equivalent fixed voice services to that provided by Telstra and resellers of Telstra’s fixed voice bundle. In order to provide equivalent fixed voice services via ULLS, access seekers must acquire the ULLS and install a DSLAM or an MSAN into a Telstra exchange. Where a DSLAM is used, the access seeker must acquire voice switching services, while where an MSAN is used, a voice card allows for soft-switching via IP technology. When using an MSAN to provide fixed voice services, the access seeker must also build or acquire sufficient transmission capacity.

Therefore, although the ULLS can be used by access seekers as a substitute for the fixed voice bundle, the extent of the substitutability depends upon the level of investment required by access seekers to migrate from re-sale to ULLS-based competition. Additional requirements to migration can include the access seeker’s ability to:

- invest in infrastructure (DSLAMs or MSANs) and exploit any economies of scale and scope that exist in the market
- gain access to exchanges (i.e. access seekers have alerted the ACCC to significant issues associated with the length of queues in which access seekers must wait in order to gain access to exchanges, as well as capacity constraints in exchanges – that Telstra deals with by ‘capping’ exchanges – thereby effectively closing them off to new entrants)

50 Adam Internet et al., *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 2.

51 Ibid. p. 3.

- gain access to competitively priced switching services and backhaul transmission services, and
- migrate existing customers from the LCS and WLR (on occasion, bundled with the LSS) to the ULLS without significant disruptions (in this regard the ACCC notes that access seekers have claimed that consumers can be without a fixed broadband service during this process for approximately three weeks).

The ACCC does not consider that LSS, from either the demand or supply side perspectives, is a substitute for LCS and WLR. LSS allows one access seeker to provide data services to an end-user while another provider supplies a fixed voice service to that consumer. While a VoIP service may be offered by LSS-based broadband providers, the ACCC does not consider this to be substitutable. Further, if a service provider is using LSS, the end customer would generally already have a PSTN based voice service. Therefore, any VoIP offering is likely to be an additional voice service rather than an alternative.

Provision over alternative networks

At the ‘network’ level, a potential alternative to acquiring the fixed voice bundle would be for an access seeker to invest in its own alternative network infrastructure.

Optus submits that alternative technologies such as mobile and HFC may substitute for the provision of fixed-line voice services to a limited extent, but remain subject to technical and geographical limitations. As a result, Optus considers these technologies currently cannot serve as an effective competitive constraint for access seekers in the provision of fixed-line voice services in downstream markets wishing to use these technologies as an alternative to the current regulated wholesale inputs.

The ACCC is of the view that the ongoing presence of natural monopoly characteristics across certain elements of fixed networks means that full-facilities based competition is unlikely to be efficient or commercially feasible in most scenarios. Further, the large and lumpy sunk costs combined with the considerable lead times involved by an access seeker switching to provision of fixed voice services via their own infrastructure are likely to be simply too large to prevent a SSNIP.

Therefore, the ACCC is of the view that the substitutable products that access seekers could turn to if there were a price increase of the fixed voice bundle provided by Telstra is a wholesale fixed voice bundle from alternative providers, to the extent that it is available, or use of the ULLS.

The ACCC notes that over time, wireless and mobile networks may be increasingly capable of providing competitive voice services, with expectations that shared cell bandwidth capacities will continue to increase. However, these networks’ coverage footprints are still expanding and are yet to reach the scale of Telstra’s CAN.

Accordingly, the product market is likely to be for the supply of wholesale inputs used for the provision of fixed voices services. These inputs are likely to include the fixed voice bundle and ULLS but not the LSS or alternative infrastructure such as wireless or HFC.

Other potential markets in relation to voice services

Corporate and Government customers

In response to the discussion paper, Optus submits that the ACCC should identify a separate corporate and government (C&G) fixed voice market segment. Optus submits that if it and other service providers are to compete in this market and meet their 'whole of business' requirements, there needs to be certainty of access to Telstra's underlying infrastructure and products.⁵²

The ACCC's view is that there is not a separate market for the provision of fixed voice services to C&G customers. While on the demand-side, C&G customers may have particular service requirements distinct from other consumers, there is likely to be a sufficiently large degree of supply-substitution such that supply to residential customers is likely to be a substitutable service for supply to C&G customers.⁵³

Pre-selectable services

Optus submits that the ACCC should consider a market for long distance services.⁵⁴ In this regard, Optus is primarily concerned with the maintenance of the PSTN OA declaration. Optus submits that the PSTN OA declaration allows the market segment to be unbundled from network access so that customers can potentially purchase line rental services from one provider and long distance calling from a separate provider.⁵⁵

Optus submits that the PSTN OA declaration enables competitive providers to offer long distance services to any given end-user, regardless of which carrier is providing underlying network access to that end-user.⁵⁶

The PSTN OA service can be used to provide long distance (domestic and international) and FTM services on a 'pre-select' or 'over-ride' basis, without the need to acquire WLR and LCS. PSTN OA is also acquired by voice resellers who acquire PSTN OA along with WLR and LCS to provide the full suite of fixed voice services to end-users.⁵⁷

The ACCC's view is that pre-selectable services should not be considered a separate market. This is because:

52 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 4.41.

53 ACCC, *Telstra's PSTN Originating Access exemption application - CBD and Metropolitan areas - Final Decision and Class Exemption*, October 2008, p. 62.

54 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 4.43.

55 Ibid. paragraph 4.45.

56 Ibid.

57 See ACCC, *Telstra's PSTN Originating Access exemption application - CBD and Metropolitan areas - Final Decision and Class Exemption*, October 2008, p. 54 for a discussion of the various uses of PSTN OA.

- the majority of acquirers of PSTN OA purchase a bundle of LCS, WLR and PSTN OA services from Telstra (i.e. the majority are voice resellers)
- there has been a steady decline in recent years in the use of PSTN OA by override operators and call preselection providers, and
- the steady decline in the percentage of end-users who unbundle long distance services from basic access and local telephone services.⁵⁸

Conclusion

The ACCC is of the view that the relevant product dimension is the retail and wholesale provision of fixed voice services.

3.3.3 Fixed broadband services and bundled fixed voice and fixed broadband services

Retail level

It is useful to consider (1) fixed broadband and (2) bundled fixed voice and fixed broadband services in the same section as much of the discussion in terms of substitutability at the retail level is similar for both.

Fixed voice services were defined above. As noted earlier, fixed broadband can be characterised as an ‘always on’ connection that generally (but not always) involves the carriage of communications at through-put speeds equal to or greater than 256 Kbps. It is important to note that the actual speeds experienced by consumers can be affected by many factors including how many users are accessing a network at one time. In the case of fixed-line broadband, speed may be affected by the consumer’s distance from the exchange.

Consumers can acquire fixed broadband services as part of a bundle with voice from the same service provider. Alternatively, they can acquire voice and broadband services from different providers or choose to acquire a broadband service and not acquire a voice service (e.g. naked DSL).

The ACCC considers that the broadband component could be supplied via:

- DSL broadband over Telstra’s CAN, including via the ULLS and LSS or by resellers purchasing wholesale broadband from Telstra or other ULLS-based access seekers
- broadband provided over a HFC network, and
- broadband provided over fixed and mobile wireless networks (wireless broadband).

The ACCC considers that broadband and voice bundles with similar pricing, quality and functionality delivered via non-DSL networks, such as HFC or wireless networks, may be substitutable for broadband provided by means of xDSL technologies from

58 ACCC, *Telstra's PSTN Originating Access exemption application - CBD and Metropolitan areas - Final Decision and Class Exemption*, October 2008, p. 56.

the perspective of most consumers. The ACCC has considered the level of substitutability of these services below.

HFC

In addition to the copper fixed-line network, there are two HFC cable networks in metropolitan areas of Australia capable of delivering high speed fixed broadband and fixed voice services. Telstra uses its HFC network for the provision of television and fixed broadband services. Optus uses its HFC network for the provision of television and fixed broadband services, as well as fixed voice services.

In total, Telstra and Optus' HFC networks have a geographic footprint of approximately 2.6 million homes.⁵⁹ This is significantly less than Telstra's fixed-line CAN.⁶⁰ There is also a large degree of overlap between the two networks. Optus' network passes approximately 2.2 million premises in Sydney, Melbourne and Brisbane. The ACCC understands that of the 2.2 million homes passed by the Optus HFC network, approximately 0.8 million homes are classified by Optus themselves as 'unserviceable'.⁶¹

Optus has stated that it supplies residential customers via its HFC network, rather than Telstra's CAN, where the premises are serviceable by HFC.⁶²

Optus offers a number of standalone and bundled fixed broadband packages in the retail market over its HFC network, with some plans offering peak theoretical maximum speeds of 30 Mbps at prices comparable to xDSL products.⁶³ As noted above, the actual speeds available to customers on an HFC network may be significantly slower than the peak theoretical network speed which has been advertised. In addition, the availability of Optus' cable plans is determined by the location of customers' premises.

In response to the discussion paper, Optus noted that alternative technologies to deliver broadband services are not an effective competitive constraint on Telstra's fixed-line network.⁶⁴ In relation to HFC, Optus notes that these networks are limited

59 ACCC and ACMA, *Communications Infrastructure and Services Availability in Australia 2008*, 2008, pp. 11-12.

60 ACCC, *Telecommunications competitive safeguards report for 2006-2007*, May 2008, p. 19.

61 ACCC, *Telstra's exemption application in respect of the Optus HFC network - Final Decision*, November 2008, p. 52.

62 Optus, *Optus submission to the Australian Competition and Consumer Commission on Telstra's December 2007 Exemption Application for Fixed-line Services in the Optus HFC Area*, March 2008, p. 4.

63 Optus Cable plans, found online at: http://personal.optus.com.au/web/ocaportal.portal?_nfpb=true&_pageLabel=personal_cable_producttypeHSD_marketSegmentres&productpath=/personal/internet&FP=/personal/internet/broadband/cable/plansandratescable&site=personal, accessed on 4 May 2009.

64 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 4.20.

in geographic coverage. Optus submits that many homes within its HFC network footprint are not serviceable and are unlikely to be in the near future. Furthermore, Optus submits that third party access to HFC networks is neither sought, nor easily engineered.⁶⁵

Telstra submits that under a sub-national approach to market definition, HFC does provide an effective upstream substitute in some geographic areas and there is potential for alternative wholesale supply from these networks.⁶⁶

In its final decision on Telstra's exemption application in respect of the Optus HFC network, the ACCC considered that xDSL broadband (supplied using the ULLS or LSS) and cable broadband products are likely to be broadly substitutable from a demand perspective.⁶⁷ This is because, in the event of a SSNIP in DSL broadband, an end-user may likely switch to cable broadband (provided their premises are serviced by a cable network). However, the ACCC noted that there may be costs incurred by a consumer in switching between an xDSL broadband product and a HFC broadband product, which may impede their ability or tendency to switch between the services.⁶⁸ The ACCC considers that these views are applicable to this declaration review.

Wireless technologies

The ACCC is aware that some carriers, such as Optus, provide a bundled fixed voice and 3G wireless broadband service to consumers.⁶⁹ While prima facie such services, if priced competitively, could provide a constraint upon fixed-line voice and broadband bundles, the ACCC considers that the extent to which services on wireless networks offer viable alternatives, in terms of quality, functionality and price, to retail broadband services provided via Telstra's CAN is unclear.⁷⁰ In addition, the ACCC notes it is unlikely that mobile broadband solutions will be capable of providing, to the mass market, the bandwidth required to compete against fixed-line technologies in the provision of high bandwidth applications such as file video sharing and IPTV.⁷¹

In response to the discussion paper, Optus noted that alternative technologies to deliver broadband services are not an effective competitive constraint on Telstra's

65 Ibid., paragraph 4.25-32.

66 Telstra, *Response to ACCC discussion paper – Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 10.

67 ACCC, *Telstra's exemption application in respect of the Optus HFC network – Final decision*, November 2008, p. 41.

68 Ibid.

69 Optus bundled fixed voice and wireless broadband plans, found online at:

http://personal.optus.com.au/web/ocaportal.portal?nfpb=true&pageLabel=Template_wRHS&FP=/personal/internet/wirelessbroadband&site=personal, accessed 4 May 2009.

70 ACCC, *Telstra's exemption application in respect of the Optus HFC network – Final decision*, November 2008, pp. 41-42.

71 Ibid.

fixed-line network.⁷² In relation to wireless networks, Optus notes these networks have significant differences in terms of pricing and speed of service and, therefore, are not complete substitutes for fixed-line broadband.⁷³

Telstra has submitted that wireless voice and broadband, in both mobile and fixed forms definitely exert some competitive constraint on fixed services pricing at the present time and there is an ever increasing level of substitution between fixed voice and mobile voice services.⁷⁴

The ACCC notes that over time, wireless and mobile networks may be increasingly capable of providing competitive voice and lower bandwidth data services, with expectations that shared cell bandwidth capacities will continue to increase.

Over the last two to three years, Australia's 3G mobile telephony operators have invested heavily in mobile broadband data technology. In this regard, it is possible that mobile wireless broadband services may increasingly become a stronger substitute for consumers as operators enhance their networks over time.

This may particularly be the case for lower bandwidth applications. For applications such as web browsing, email and instant messaging, it would appear that the capabilities of mobile broadband are comparable to fixed broadband from a demand perspective. According to ACMA, the most common uses of the internet still appear to be email, banking, information searching and bill paying.⁷⁵ Such applications are not bandwidth intensive and are efficiently supported by a theoretical maximum broadband speed of less than 1.5 Mbps.

However, the ACCC does not consider that wireless networks are currently capable of supporting higher bandwidth applications. While developments in wireless networks, such as the Long-Term Evolution (LTE) of 3G services, may improve the substitutability of wireless broadband services, the timeframes for the evolution of these technologies suggest they will continue to lag behind the offerings available via fixed-line networks.

In terms of pricing, there are signs that some competitive influence is being exerted by mobile voice and data services on fixed voice and fixed broadband services, although they are yet to reach the point of being full or effective substitutes. The ACCC's analysis suggests that plans for fixed wireless services are beginning to align much more closely with fixed broadband services of equivalent data quotas, resulting in a dramatic drop in prices for wireless broadband.⁷⁶

72 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 4.20.

73 Ibid. paragraph 4.33-36.

74 Telstra, *Response to ACCC discussion paper – Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 7.

75 ACMA, *Telecommunications today—internet activity and content*, September 2008, p. 15.

76 The analysis has been conducted for the forthcoming publication, ACCC, *Telecommunications Reports 2007-08*.

Since the release of the discussion paper in November 2008, wireless broadband technology subscriptions have continued to grow steadily. In its December 2008 *Internet Activity Survey*, the Australian Bureau of Statistics (ABS) noted that there were 1.46 million wireless access subscriptions – almost 20 per cent of all broadband subscriptions.⁷⁷ This represents an increase of over 6 per cent in wireless subscriptions as a portion of total broadband subscriptions during the six month period from June to December 2008.

While wireless subscriptions are increasing, the ACCC remains concerned that wireless broadband services are not yet a close substitutes for fixed-line broadband services, given the coverage and functionality which can be provided over the higher bandwidth fixed network.

Despite signs that wireless offerings are becoming increasingly competitive, the extent to which consumers consider wireless/mobile broadband internet technologies as substitutes for fixed technologies is currently unclear. The ACCC does not consider that the availability and functionality of wireless broadband offerings is a sufficient to prevent a SSNIP. Therefore, the ACCC considers it is prudent to adopt a conservative approach and consider that any constraint upon fixed broadband and voice markets is likely to be only at the margins.⁷⁸

The ACCC considers that there is unlikely to be any significant supply-side substitution in terms of supply of broadband via different technologies. This is due to the high costs involved in switching supply over different platforms (e.g. copper, HFC or wireless).

In light of the above, the ACCC is of the view that the relevant product dimension for supply of broadband services and bundled broadband and voice services includes supply of high bandwidth carriage services over copper (xDSL), HFC and, to a lesser extent, possibly wireless technologies.

Wholesale level

In relation to standalone broadband services, these services can be supplied by providers using the following wholesale inputs available via Telstra's CAN:

- LSS (where there is an underlying PSTN voice service present); or
- ULLS (if there is no underlying PSTN voice service present, i.e. naked DSL) or
- wholesale DSL (unregulated).⁷⁹

77 ABS, *8153.0 Internet Activity Survey, December 2008*, March 2009.

78 ACCC, *Telstra's local carriage service and wholesale line rental exemption applications – Final Decision and Class Exemption*, August 2008, p. 41.

79 Wholesale DSL is an unregulated service and is not being considered for declaration as part of this declaration inquiry.

Standalone fixed broadband services have traditionally been supplied via the LSS or a wholesale DSL product. The use of ULLS to supply naked DSL has been a relatively recent innovation (since late 2007).⁸⁰

Wholesale DSL broadband is commercially provided by Telstra to resellers over its CAN. In early July 2008 Telstra announced that it would begin offering wholesale ADSL2+ under certain conditions.⁸¹ Telstra has announced several wholesale ADSL2+ agreements since then.⁸²

Some other telecommunications providers, including Optus, also provide wholesale DSL broadband through ULLS or LSS, used in conjunction with DSLAM/MSAN deployment.

An alternative access product is upper spectrum sharing (USS), which is essentially where an access seeker using the ULLS can provide the LSS to another access seeker. However, the ACCC understands that no parties have used the USS since declaration of the ULLS and the ACCC is not aware of any current industry plans to commence supply of the service. Further, Telstra would also be able to prevent supply of the USS if it were requested. Therefore, the USS may be limited as a viable alternative input for providing retail fixed broadband services.

The ULLS appears to clearly service the functional needs of access seekers that seek access to the LSS, as both the ULLS and the LSS can be used for the provision of xDSL services in retail markets. To some extent it could be said that in the case where an access seeker wishes to provide only fixed broadband services in retail markets, the ULLS is a weaker substitute for the LSS (although the increasing take-up of naked DSL services may be changing this).

In relation to bundled fixed voice and fixed broadband services, there are a number of alternative combinations of access and wholesale level products that can be used to provide bundled fixed voice and fixed broadband via Telstra's CAN.

Bundled fixed voice and fixed broadband could be provided using the following alternative combinations of inputs:

- 1) ULLS (access level product)

80 See iiNet, Media release: *iiNet goes Naked*, accessed at: <<http://www.iinet.net.au/about/media/releases/15-11-07-iiNet-Goes-Naked.pdf>>, accessed on 17 November 2008.

81 Colley, A, *Telstra to sell broadband capacity wholesale*, accessed at <<http://www.australianit.news.com.au/story/0,,24897,24020159-15306,00.html>>, accessed on 17 November 2008.

82 See: Andrew Colley, 'Telstra lifts gates on ADSL2+', accessed at <<http://www.australianit.news.com.au/story/0,,24147452-15306,00.html>>, accessed on 8 August 2008; Petroc Wilton, 'Pacnet joins People on TLS ADSL2+ reseller roster', *Communications Day (Weekly)*, 26 September 2008; Luke Coleman, 'Westnet latest on Telstra ADSL2+', *Communications Day*, 29 October 2008.

- 2) wholesale DSL (unregulated) plus WLR, LCS and PSTN OTA (wholesale level products), or
- 3) LSS (access level product) plus WLR, LCS and PSTN OTA (wholesale level products).

Access seekers can use either wholesale level products or access level products or even a combination of both to supply a bundled fixed broadband and fixed voice service.

Where access seekers use a combination of access/wholesale level products (LSS plus WLR/LCS/PSTN OA) or wholesale products (wholesale DSL plus WLR/LCS/PSTN OA) to supply bundled voice and broadband services, the ULLS would constitute a direct substitute for these alternatives.

Alternative networks

At the 'network' level, an option for access seekers in the event of a price rise in regulated services would be to invest in its own infrastructure (such as HFC or wireless technologies).

The limitations of these alternative technologies as substitutes for fixed voice services and fixed broadband services were discussed previously, and these same limitations would apply when considering substitutable infrastructure in relation to bundled fixed voice and fixed broadband services.

The ACCC is of the view that the large and lumpy sunk costs combined with the considerable lead times involved by an access seeker switching to provision of fixed voice services via their own alternative infrastructure are likely to be simply too large to prevent a SSNIP if regulated services were no longer declared. The ongoing presence of natural monopoly characteristics across particular elements of the fixed networks means that full-facilities based competition is unlikely to be efficient or commercially feasible in most scenarios.

Accordingly, the product market is likely to be for the supply of wholesale inputs used for the provision of bundled fixed broadband and fixed voice services.

3.3.4 Geographic dimension

Substitutability tests tend to be of limited use when delineating the geographical dimension of telecommunications markets.⁸³ The ACCC must be guided by commercial realities in identifying the appropriate geographic dimension of relevant markets.⁸⁴

The ACCC has in the past adopted a national geographic dimension when framing the geographic scope of relevant telecommunications markets. This recognises the

83 The ACCC previously noted this in ACCC, *Declaration of local telecommunications services – A report on the declaration of an unconditioned local loop service, local PSTN originating and terminating services, and a local carriage service under Part XIC of the TPA*, July 1999, p. 42.

84 *Australia Meat Holdings v Trade Practices Commission*, (1989) ATPR 40-392 at 50,111.

difficulties in applying traditional geographic demand and supply-side substitutability analysis to fixed-line telecommunications services. The opportunity for demand-side substitution is limited by the fact that the fixed-line infrastructure is physically connected to a household. A consumer is unlikely to move to another geographic area simply due to a price increase or degradation of quality for a number of reasons, including that the cost of re-location is likely to outweigh any savings on the price of fixed-line services.

In terms of supply-side substitutability, the nature of fixed-line networks, including the sunk and lumpy characteristics of investment and the long lead times often involved in deployment, suggest that rivals will have limited scope to re-deploy networks quickly to supply other geographic areas in response to a non-transitory price increase or the degradation of quality.

That said, the ACCC notes that the declaration of the ULLS and LSS has meant that competition has developed unevenly across different geographic areas of Australia. In more densely populated areas, it has been commercially feasible for access seekers to install their own DSLAMs in Telstra exchanges in order to provide retail fixed broadband and fixed voice services to end-users. As noted in the FSR2, the ACCC considered that, in certain circumstances, it may be useful to examine competitive dynamics at a geographically disaggregated level in the future.

In the discussion paper, the ACCC noted that for the purposes of this review, it intended to adopt a national geographic dimension. In its submission in response to the discussion paper, Telstra notes it did not support the ACCC's national market approach on the basis that competition has emerged unevenly across different parts of Australia.⁸⁵ For example, Telstra submits that using a sub-national approach to market definition allows for a more considered analysis of the role of HFC networks in providing an effective wholesale substitute to the fixed-line services.⁸⁶

While the ACCC notes Telstra's view, it considers it does not sufficiently recognise the scope and scale of access seeker use of the declared fixed-line services that are the subject of the declaration inquiry. In particular, the ACCC notes that access seekers utilise the regulated fixed-line services across a range of geographic areas and at different take-up levels.

The ACCC notes that while it used a sub-national approach when undertaking its recent exemptions analysis, analysing competition on an ESA-by-ESA basis, this approach was governed by the scope of the individual exemption applications it received from Telstra. Telstra's LCS/WLR and PSTN OA individual exemption applications were limited to a specific sub-set of ESAs which it believed displayed similar competitive characteristics. It is important to note that in coming to its final decision on Telstra's applications, the ACCC did not concur with Telstra's competition assessment across all ESAs. This demonstrates the difficulty in applying a criteria or rule to a distinct geographic area. In addition, in granting Telstra limited

85 Telstra, *Response to ACCC discussion paper – Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 9.

86 Ibid.

exemptions, the ACCC granted these across a single ‘footprint’, rather than across several smaller markets. The ACCC considers that to apply a sub-national approach across all fixed-line services and across all geographic areas of Australia would likely lead to impractical outcomes.

The ACCC considers it must take a more holistic view when assessing whether to retain a declaration than it has when assessing an exemption application. Therefore, for the purposes of this declaration review, the ACCC’s final view is that the relevant markets have a national geographic dimension.

3.4 Conclusion

In light of the above arguments, the ACCC considers the relevant markets to be 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.

Chapter 4 The state of competition

This chapter provides an overview of the current state of competition in the markets defined in Chapter 3.

4.1 The ACCC's approach to assessing the state of competition in the relevant markets

Once the relevant markets have been defined the next step in the analysis is to assess the state of competition in the relevant markets.

If competition in the relevant markets is determined to be effective, then declaration of the eligible service is not likely to have an effect in terms of promoting further competition or the LTIE. In this regard the Explanatory Memorandum states:

... it is not intended that the access regime embodied in this Part impose regulated access where existing market conditions already provide for the competitive supply of services. In considering whether a thing will promote competition, consideration will need to be given to the existing levels of competition in the markets to which the thing relates.⁸⁷

4.1.1 The concept of effective competition

At the theoretical level, the concept of 'perfect competition' describes a market structure in which no producer or consumer has the market power to influence prices. Economic theory suggests that perfectly competitive markets have a large number of buyers and sellers, the goods and services are perfect substitutes, all firms and consumers have complete knowledge about the pricing and output decisions of others and all firms can freely enter or exit the relevant market.

In reality, these conditions are rarely found in any market or industry – even those in which competition between rival firms is relatively intense. It is certainly not realistic to expect 'perfect competition' for fixed-line telecommunications markets given that:

- many services are provided by a small number of providers, in a situation where the incumbent as owner of the only ubiquitous local loop remains the dominant provider of most (if not all) essential inputs
- the industry is characterised by economies of scale, scope and density over large ranges of output
- services are often differentiated from each other, and
- there are constantly evolving service types and network technologies.

⁸⁷ *Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996* – item 6, proposed s. 152AB.

The concept of ‘effective competition’ recognises the practical limitations of the theory of perfect competition. While precise definitions of such a standard are always difficult, some characteristics can be highlighted. Effective competition:⁸⁸

- is more than the mere threat of competition—it requires that competitors be active in the market, holding a reasonably sustainable market position⁸⁹
- requires that, over the long run, prices are determined by underlying costs rather than the existence of market power (a party may hold a degree of market power from time to time)
- requires that barriers to entry are sufficiently low and that the use of market power will be competed away in the long run, so that any degree of market power is only transitory
- requires that there be ‘independent rivalry in all dimensions of the price/product/service [package]’,⁹⁰ and
- does not preclude one party holding a degree of market power from time to time but that power should ‘pose no significant risk to present and future competition’.⁹¹

These five factors are indicators of the extent to which competition constrains market participants to supply products and services of a given quality at prices that are based on efficient costs.

As discussed in Chapter 3, the ACCC considers both demand and supply-side substitutability constraints. From the *demand-side*, a relevant consideration is to what extent end-users or access seekers can substitute towards other products/services (or sources of supply) in the event of a SSNIP or equivalent exercise of market power by an incumbent firm. From the *supply-side*, a relevant consideration is the extent to which (and how quickly) rival firms could switch or expand supply in the event of a SSNIP or equivalent exercise of market power, by an incumbent firm.

The OECD has referred to effective competition in telecommunications in the following way:

Effective competition is concerned not only with the ability to control prices and costs for products and/or services, but also with consumer benefits such as quality of service, a range of services

88 This is not intended to be an exhaustive characterisation of effective competition.

89 Olivier Boylaud and Giuseppe Nicoletti, ‘Regulation, market structure and performance in telecommunications’, *OECD Economics Studies*, no. 32, 2001/1.

90 *Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd* (1976) 25 FLR 169.

91 In general, however, market power must not be used in a way that would constitute a ‘misuse of market power’. This is not intended to be an exhaustive characterisation of effective competition. See: Boylaud and Nicoletti, ‘Regulation, market structure and performance in telecommunications’.

available to consumers, efficient operation of firms in a market and innovative service provisions as well.⁹²

4.1.2 Factors which are relevant to a competition assessment

When assessing the effectiveness of competition in a particular market, the ACCC examines a range of both structural and behavioural characteristics. These include (but are not limited to) factors such as:

- structural factors, including the level of concentration in the market
- the potential for the development of competition in the market (including planned entry, the size of the market and the existence and height of barriers to entry, expansion or exit in the relevant markets)
- the dynamic characteristics of markets, including growth, innovation and product differentiation as well as changes in costs and prices over time, and
- the nature and extent of vertical integration in the market.

Telstra submits that the current state of competition is not a relevant factor in assessing whether regulation is necessary. Telstra states:

...in the FFC Decision, the court accepted Telstra's submission "... on the proper construction of the criterion in s 152AB(2)(c).... "the objective of promoting competition in markets for listed services" is to be assessed having regard to the existence of barriers to entry and expansion" and later stated, "There is no doubt that the overarching objective of Part XIC is to promote the LTIE and thus it is to the "long-term" to which attention must be directed".⁹³

As noted in Chapter 2, the Full Federal Court stated that:

"... an essential part of the analytical enquiry required by s 152AT(4) is a comparison between the "future with" the exemptions and the "future without" the exemptions and an assessment, in the light of that comparison, of which state of affairs is in the LTIE."⁹⁴

The ACCC considers that in applying the LTIE test, it is useful to consider the likely state of competition in the future both *with* declaration and *without* declaration. Reviewing the state of competition as it currently stands will assist in applying the future with and without test.

4.1.3 Barriers to effective and sustainable competition

Telecommunications industries are generally characterised by high barriers to infrastructure based competition in fixed-line services arising from substantial sunk costs and economies of scale. These barriers may limit the ability of new entrants and

92 OECD, *Indicators for the Assessment of Telecommunications Competition* DSTI/ICCP/TISP, 2001, p. 6.

93 Telstra, *Response to ACCC discussion paper – Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 10.

94 *Telstra Corporation Limited v Australian Competition Tribunal*, [2009 FCAFC] 29, para 159.

existing players to deploy network infrastructure that can serve as an effective competitive alternative to services provided over Telstra's CAN.

For instance, the economies of scale associated with telecommunications networks suggest that competitors need to invest on a large scale in order to achieve per unit network costs that could potentially rival Telstra's.

In addition, a large retail customer base is typically necessary to justify investment in infrastructure before a new entrant can compete effectively with Telstra.⁹⁵ To date, competitors generally seek to build scale in retail markets through the resale of other wholesale services. However, this strategy is itself subject to barriers including customer switching costs (such as contract lock-in), customer inertia and reliance upon Telstra for the necessary wholesale inputs.

Telecommunications consumers may face costs of switching between retail suppliers. Supply contracts typically involve a fee for the costs of physically disconnecting and churning customers. These costs, in addition to general information asymmetries about the range of competitors' products, mean that some consumers tend not to change their service provider unless there is a compelling reason to do so.

Further, the decision to choose a retailer other than Telstra for services such as long-distance, or international calls, usually means that a customer faces a penalty by way of higher charges for basic access and local calls provided by Telstra. Together, these conditions provide Telstra with a considerable competitive advantage as the dominant, incumbent provider of retail services on the fixed network.

In addition, new entrants are often reliant on Telstra for the wholesale inputs that are necessary to compete at the retail level. Competitors who provide local telecommunications services rely upon Telstra to provide wholesale services as well as maintenance and customer switching (churn) processes. In such circumstances, economic theory suggests that the incumbent will face a strong incentive to discriminate against its competitors by providing lower quality or higher cost wholesale services.⁹⁶

Further impediments arise due to the difficulties that some access seekers face in obtaining access to Telstra's exchange facilities to install their own infrastructure. These impediments could be due to an exchange being 'capped' or through the delays faced in queuing and in installing equipment.

As set out in more detail in the exemption decisions, the ACCC is of the view that if an exchange is classed by Telstra as capped,⁹⁷ that exchange is effectively closed to new access seeker equipment required to provide fixed voice and fixed broadband services. In addition, access seekers with existing deployments may be precluded

95 This is also true for competitors seeking to take advantage of access to the ULLS as a basis for broadband and voice services competition.

96 Literature on the economics of sabotage was reviewed in the ACCC's *Competitive Safeguards Report 2003-04*.

97 'Capped' may include 'rack-capped', 'MDF-capped', 'fully-capped' or 'potentially capped'.

from deploying further equipment in that exchange. Therefore, exchange capping at a minimum represents an impediment for new and existing access seekers seeking to switch customers from re-sale to ULLS in the event of a price rise in the LCS and WLR. At the maximum, it represents an absolute barrier to entry by ULLS and LSS in some exchanges.

The lengthy delays faced by access seekers could also act as a barrier to entry or expansion because the delay in installing equipment could stifle access seekers' ability to retain and attract new customers.⁹⁸

As noted above infrastructure-based competition utilising the ULLS enables competitors to compete in the retail market on greater dimensions of supply and allows competitors the opportunity to innovate their services. This is likely to lead to more sustainable competition which in turn should generate lower prices for end-users and a greater range of better quality service offerings.

Although the ULLS promotes more sustainable competition this is contingent on there being no, or low, barriers to ULLS entry.

Therefore, as discussed in the WLR, LCS and PSTN OA exemption decisions, the ACCC did not consider that the ULLS would be an effective competitive alternative to the WLR, LCS or PSTN OA services without measures imposed to address barriers to ULLS entry such as exchange capping, exchange queuing and the lack of a robust LSS to ULLS migration process.

4.2 The state of competition

4.2.1 The relevant markets to consider

As noted in Chapter 3, for the purposes of this declaration inquiry, the ACCC considers the relevant markets to be:

- 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.

4.2.2 ACCC's preliminary views

In both the discussion paper and the draft decision, the ACCC's preliminary view on the state of competition was that Telstra has significant market power in both the wholesale and retail markets for fixed voice services, standalone fixed broadband services and bundled fixed voice and broadband services. Telstra's market power

98 In response to complaints raised about exchange capping and the lengthy delays faced by access seekers, in July 2008 the ACCC made a record-keeping rule (RKR) which requires Telstra to maintain records on issues relating to access to Telstra's exchange facilities. Telstra must also give monthly reports to the ACCC that include details of Telstra decisions to cap and uncap exchanges and the amounts of space reserved by Telstra for its own anticipated future requirements. The imposition of this RKR has introduced greater transparency to the process of accessing Telstra's TEBA enabled exchanges.

arises from its control of the copper access network infrastructure required to provide fixed voice and fixed broadband services; its control of the price and non-price access to regulated services including the ULLS; and its vertical integration into retail markets.

The ACCC concluded that Telstra’s market power and large market share and customer base combined with the costs for customers of switching between retail suppliers and the general information asymmetries about the range of competitors’ products meant that the fixed voice market, standalone fixed broadband market and bundled fixed voice and fixed broadband market did not display the characteristics of effective competition.

4.2.3 Level of competition in the relevant markets

Level of competition in wholesale and retail fixed voice services

Retail fixed voice services

The market for fixed-line services remains very highly concentrated. Although the number of providers of retail fixed voice services increased from 166 to 210 over 2007–08,⁹⁹ Telstra and Optus continue to retain the largest retail shares in the fixed voice market.

Table 2 provides a breakdown of wholesale and retail fixed voice services provided by Telstra over its CAN. This table does not include carriers accessing Telstra's CAN through the utilisation of the ULLS to provide fixed voice services.

Table 2 Wholesale and retail fixed voice services provided over Telstra’s customer access network

Retail/wholesale percentages	2004–05	2005–06	2006–07	2007–08
Retail	79%	78%	80%	84%
Wholesale	21%	22%	20%	16%
Total number of lines on network (millions)	10.12	9.94	9.76	9.37

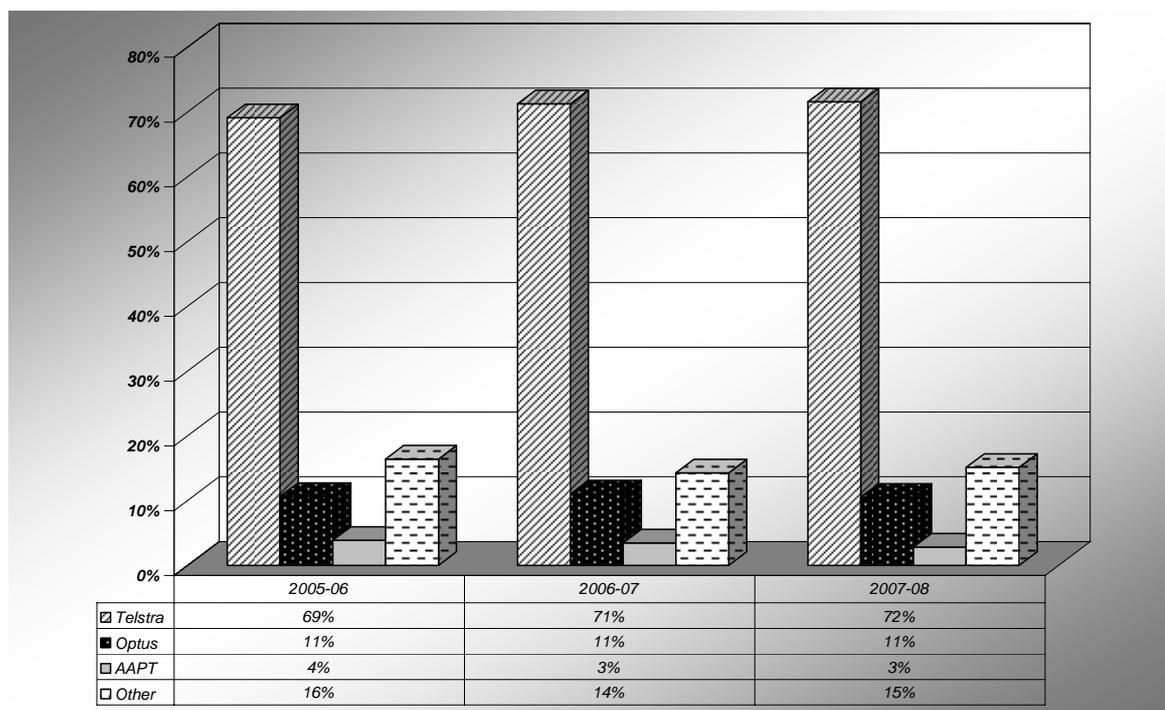
Source: Telstra financial reports.

Telstra remains the dominant supplier of fixed voice at both the wholesale and retail level. The 9.37 million wholesale and retail voice lines provided over Telstra’s networks accounts for 84 per cent of all fixed voice lines (excluding the ULLS) in Australia (up from 80 per cent for the 2006-07 financial year). However, in 2007-08 Telstra's wholesale voice service share represented 16 per cent of all shares held in fixed voice services, compared with 20 per cent at the conclusion of the previous reporting period.

99 ACMA and ACCC, *Communications Infrastructure and Services Availability in Australia 2008*, December 2008.

Figure 1 provides a summary of the retail market shares of the three largest carriers – Telstra, Optus and AAPT – in the fixed voice segment in terms of subscribers.¹⁰⁰ This shows Telstra reversing the decline in its retail service share in relation to retail fixed voice services over the last two financial years. Telstra has stated that this increase in retail lines is due to the success of its subscription based pricing plans and churning customers back from competitors.¹⁰¹

Figure 1 Retail fixed voice market shares by number of subscribers



Source: ACMA communications reports, Telstra financial reports & Singtel quarterly reports.

There continues to be a trend of Telstra's competitors moving away from a business model which is reliant on pure resale of the incumbent's wholesale services to a model which involves use of the ULLS and some investment by the carrier in its own equipment to enable service provision.

This suggests that retail fixed voice service provision over the ULLS is increasingly considered as an effective competitive alternative to the fixed voice services provided by Telstra. The ACCC came to this conclusion in its exemption analysis of Telstra's LCS and WLR and PSTN OA individual exemption applications.¹⁰²

100 A lack of public disclosure in relation to the respective subscriber numbers of the other retail PSTN voice service providers – numbering a total of 210 carriers in 2007-08 – forecloses any analysis of their relative individual market shares. However, as a group, Figure X suggests that over the last three years, they have been able to essentially maintain their stake in the market in competition with the major three providers of Telstra, Optus and AAPT.

101 Telstra, *Telstra Corporation Limited Annual Report 2007-08*, p.13.

102 ACCC, *Telstra's local carriage service and wholesale line rental exemption applications - Final Decision and Class Exemption*, August 2008 and ACCC, *Telstra's PSTN Originating*

However, the ACCC granted individual exemption orders, which were subject to conditions and limitations, and relied upon the underlying WLR, LCS and PSTN OA declarations. Without the imposition of the conditions and limitations attached to the individual exemption orders, the ACCC was not satisfied that the individual exemptions would promote the LTIE, and the ULLS would not be an effective competitive alternative to the retail fixed voice services provided by Telstra.¹⁰³

Therefore the evidence above suggests that there is not currently effective competition in retail fixed voice services. This is exacerbated by Telstra's vertical integration and significant market share in retail fixed voices. Telstra's competitors have only been able to attain minimal market share (with Optus being the highest with 11 per cent).

Although the ULLS, as an effective competitive alternative to WLR, LCS and PSTN OA, has the potential to broaden fixed voice competition from pure resale, this is contingent on there being no barriers to ULLS entry. As discussed above, barriers to ULLS entry include exchange capping, delays in installing DSLAMs due to queues in obtaining TEBA access and the lack of a robust LSS to ULLS migration process.

PSTN terminating access (TA) regulation is also necessary to ensure that all service providers are able to terminate calls on their respective networks. This is explained further in Chapter 7.

Wholesale fixed voice services

Like the retail fixed voice services market, the wholesale fixed voice services market exhibits high concentration levels, indicating Telstra's dominance and the reliance of competitors on Telstra's CAN network.

Primarily, there are three combinations of access or wholesale services which competitors can use to participate in the retail fixed voice market. These combinations rely on regulated access from Telstra and are based on acquiring:

- the LCS, WLR and PSTN OTA from Telstra to resell a fixed voice bundle to end-users
- the PSTN OTA from Telstra to provide domestic long distance, international and fixed-to-mobile calls to end-users, or
- the ULLS from Telstra and combining it with their own switching equipment to provide a fixed voice bundle to end-users.

Firms who choose to provide wholesale services in competition to Telstra could build their own end-to-end network, build a ULLS-based network or obtain a service from

Access exemption applications – CBD and Metro areas – Final Decision and Proposed Class Exemption, October 2008.

¹⁰³ As noted above, the Tribunal has considered the ACCC's exemption decision for WLR and LCS. The Tribunal has published reasons in relation to the WLR and LCS decision, which indicates that it intends to make limited and conditional individual exemption orders that also rely on the underlying declaration of the services. It is yet to finalise its consideration of the exemptions for the PSTN OA service.

another access seeker who is wholesaling the spare capacity on their own ULLS DSLAM network.

The ACCC has identified Telstra and Optus as the two primary suppliers of wholesale fixed voice services across Australia. However, the ACCC notes that there is a great disparity of scale between Telstra's and Optus' wholesale supply.

Telstra remains the dominant supplier of wholesale fixed voice services. For the half financial year ending December 2008, Telstra maintained 1.34 million domestic wholesale SIOs.¹⁰⁴ This represented a 10.7 per cent decrease in the total number of wholesale SIOs for the half-financial year. The strong take-up of ULLS by access seekers during the same period – a 17 per cent increase – may account for a significant proportion of this decline.¹⁰⁵

While the ACCC has been unable to identify the number of Optus wholesale SIOs for the period ending December 2008, Optus has reported growth in wholesale fixed revenue. Optus' wholesale fixed revenue increased by 7.4 per cent during the 9 month period to December 2008. Interestingly, its wholesale domestic voice revenue increased by 31.1 per cent, accounting for much of the total fixed growth.

For the 9-month period ending December 2008, Optus had released publicly available figures on the number of telephony customers it services through utilisation of its HFC network and the ULLS. The number of customers served was 524,000 and 414,000 for HFC and ULLS, respectively.¹⁰⁶ The majority of these services are likely to be Optus retail customers, which indicates that Optus' wholesale business is not large in comparison to Telstra.

The ACCC considers Optus' capacity to wholesale fixed voice services using the spare capacity on their DSLAMs could provide a constraint on Telstra's pricing if the fixed voice services were not declared. However, this constraint may not be especially strong, even in Band 2 given the disparity in their DSLAM deployment and the possible capacity constraints of ULLS expansion given MDF capping, in particular.

Further, other wholesale players, such as AAPT and Primus in the fixed voice market are unlikely to impose a constraint on Telstra due to their small presence.

Although Optus provides some constraint to Telstra in wholesaling fixed voice service, the market is effectively a duopoly, which would suggest that there is not effective competition.

Level of competition in wholesale and retail fixed broadband services

Retail fixed broadband

104 Telstra, *Half-year results and operations review – December 2008*, February 2009. p. 13.

105 Ibid. p. 15.

106 Singapore Telecommunication Limited and subsidiary companies, *Management discussion and analysis of financial condition, results of operations and cash flows for the third quarter and nine months ended 31 December 2008*, p. 47.

The ABS estimates that at the end of the December quarter 2008 there were 6.67 million active broadband subscribers in Australia representing 83 per cent of total internet subscribers in Australia.¹⁰⁷

xDSL continued to be the dominant access technology used for non dial-up subscribers, with 4.21 million, or almost 63 per cent of all non dial-up subscribers over Telstra's fixed-line network.¹⁰⁸

In July 2009 there were an estimated 1,763 exchanges enabled with ADSL2+,¹⁰⁹ compared with 412 at 31 January 2007. ADSL2+ services are now available in nearly all metropolitan exchanges.¹¹⁰ Figure 2 below illustrates the xDSL broadband allocation between Telstra and access seekers utilising the ULLS and LSS.¹¹¹

Figure 2 indicates that Telstra has dominance in the xDSL broadband sector, with access seekers acquiring only 1 million lines of the 5 million lines on Telstra's fixed-line network.¹¹²

107 ABS, *8153.0 Internet Activity Survey (December 2008)* accessed on Australian Bureau of Statistics website at: <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8153.0/>> (06/05/09).

108 Ibid.

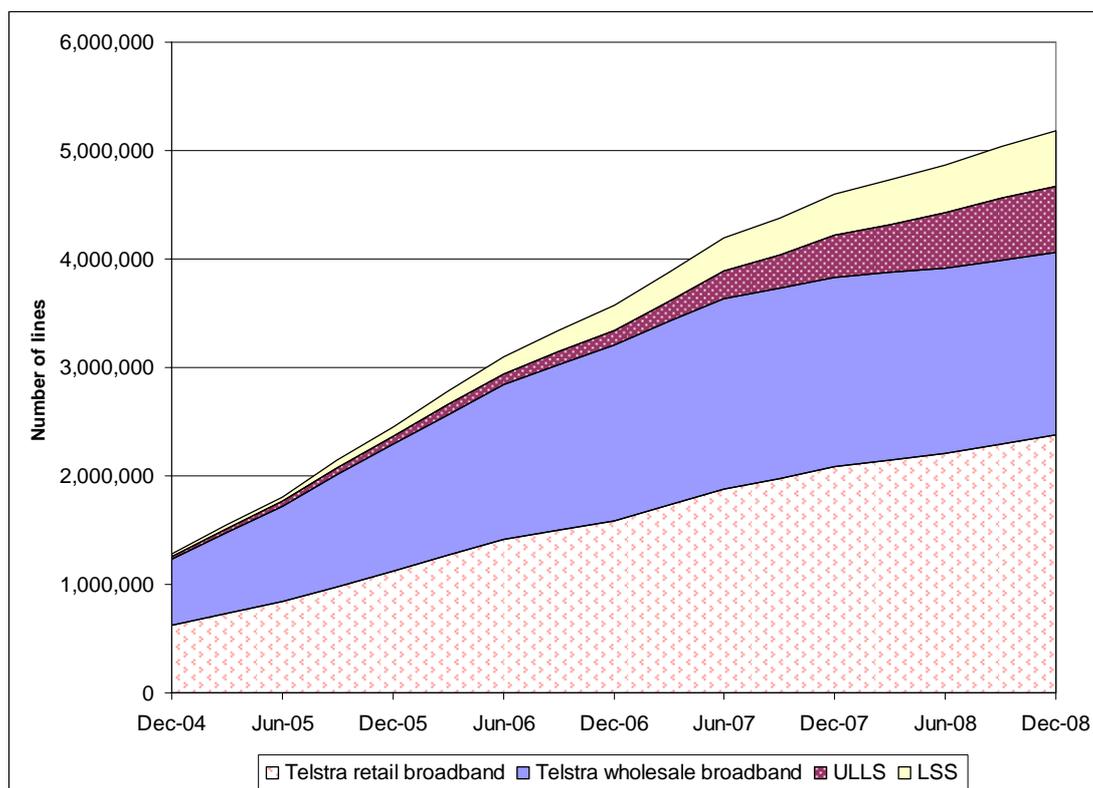
109 ADSL2+ enabled exchanges, Telstra Wholesale website, accessed at http://www.telstrawholesale.com/products/docs/access_broadband_adsl_en_ex.xls

110 ACCC and ACMA, *Communications Infrastructure and Services Availability in Australia 2008*, ACMA, Melbourne, 2008, p. 4. ADSL2+ became more widely available following Telstra's activation of a further 900 ESAs between February and April 2008. These exchanges serve some 16.6 million people.

111 Compiled by the ACCC from annual reports, ABS Internet Activity Survey and published data on ULLS and LSS take-up.

112 Due to the different sources of information, the number of x DSL line may differ from those published in the ABS Internet Activity Survey. However, the figure does demonstrate Telstra's dominance in the fixed broadband sector.

Figure 2 xDSL Broadband Allocation on Telstra’s fixed-line network



Source: Compiled from Annual reports, ABS Internet Activity Survey and published data on ULLS and LSS take-up

Although Telstra remains the dominant supplier of xDSL broadband, access seekers continued to enter the xDSL sector using the ULLS and LSS, with an increase between March 2008 and March 2009 of 44.8 per cent and 32.3 per cent respectively.

Table 3 The number of ULLS and LSS SIOs– March 2008 - March 2009

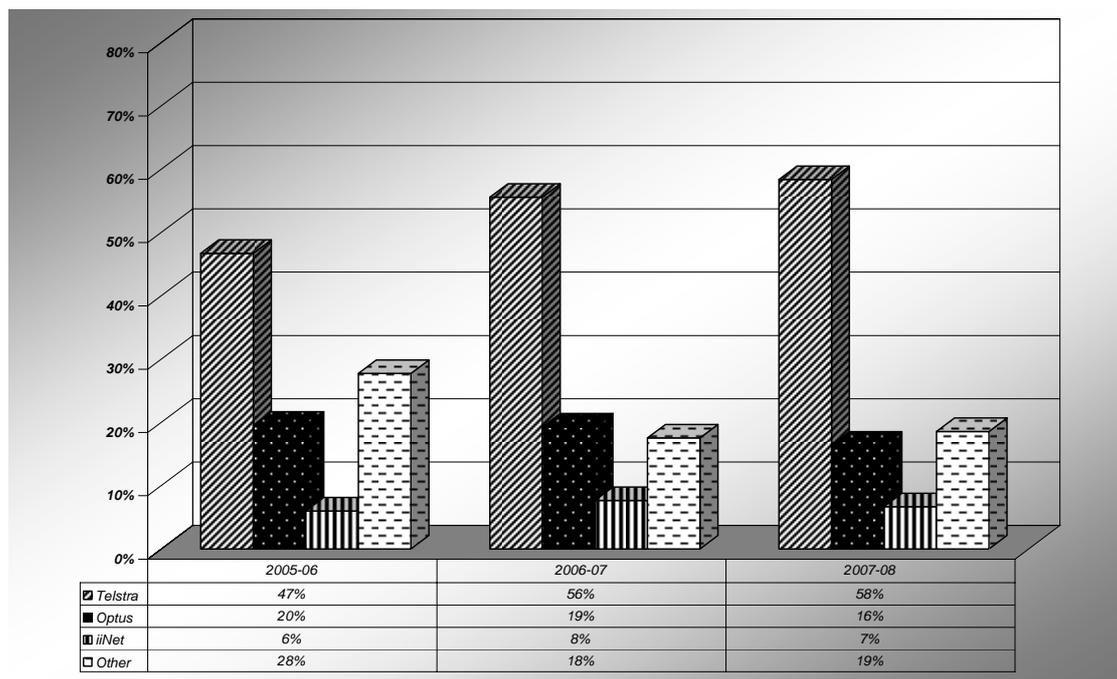
Fixed-line service	Mar 08	June 08	Sept 08	Dec 08	Mar 09	Change % Mar 08- Mar 09
ULLS SIOs	447,455	520,592	574,205	610,600	648,147	44.9%
LSS SIOs	405,029	434,859	469,725	498,988	536,043	32.3%

Source: CAN RKR data for March 2008, June 2008 and December 2008, March 2009.¹¹³

Figure 3 below shows the retail fixed broadband market share between Telstra, Optus, iiNet and others. Although Telstra has increased its retail market share since 2005-06, Telstra’s competitors managed to capture a combined share of over 40 per cent of retail fixed broadband customers.

113 ACCC, *Quarterly snapshots of ULLS, LSS and DSL*, March 2008 to March 2009.

Figure 3 Retail fixed broadband service share by number of subscribers, 2005–2008



Source: ACMA Communications Report 2007–08 and company annual reports.

Twenty three ISPs have invested in their own DSLAM/MSAN equipment to enable xDSL service provision, with most investing in ADSL2+ equipment.

Table 4 below indicates that as at March 2009 there were 540 ESAs across Australia in which Telstra may face direct xDSL competition from at least one of these ISPs.

Although this only covers 30 per cent of Telstra xDSL enabled ESAs, the 540 ESAs contain most of the Australian population. Analysis conducted by the ACCC suggests that access seekers using their own DSLAMs now have a combined footprint of 12.2 million people, up from 11.7 million over the year.¹¹⁴

Table 4 ESAs by number of access seekers (Mar 09)

Number of Access Seekers using ULLS and/or LSS	0	1	2	3	4	5	6	7	8	9	10	>10	Total
Number of ESAs	4529	144	78	55	71	62	54	17	21	19	16	3	5069

Source: Telstra CAN RKR data (Mar 09), available on the ACCC website

114 Analysis conducted using, GNAF, 2006 Census, ExchangeInfo and aggregated Telstra CAN RKR data. Adjustments were made for services which are not terminated at the MDF and those that are too far from the exchange to receive and ADSL service (3.4 km Euclidian distance)

According to the Internet Industry Association (IIA) broadband index,¹¹⁵ which reports on broadband packages covering a wide range of technologies including xDSL, cable, wireless and satellite, overall broadband service prices have not declined significantly. However, carrier investments in high-speed broadband are enabling faster service speeds available to consumers at no additional premium.¹¹⁶ Therefore, users of higher speed broadband connections are gaining additional value at little extra cost.

Wholesale fixed broadband

As discussed in Chapter 3, access seekers could purchase wholesale DSL from an ISP using the ULLS or LSS to provide fixed broadband. While wholesale DSL is not a declared service pursuant to Part XIC of the TPA, it is clear that various ISPs are providing wholesale fixed broadband services to other access seekers through their own DSLAM networks.

However, the ACCC considers that reselling wholesale DSL services provides relatively limited scope for competition since wholesale customers are subject to the service providers control over the price, quality, and terms and conditions of access to wholesale DSL. It therefore provides a different level of functionality when compared with retailing fixed broadband via the LSS or ULLS.

Further, as discussed in Chapter 3, the ACCC considers that fixed broadband provided over Optus' HFC network could also provide limited constraint to Telstra. However the ACCC agrees with the Adam Internet et al submission that even though there has been facilities-based competition growth in fixed services the relative level of competition remains insufficient to suggest the incumbent's dominance of telecommunications markets has been removed or even diminished.¹¹⁷

Therefore the ACCC agrees with the Adam Internet et al submission that Telstra's CAN will remain the primary means that fixed voice and internet services are provided in the foreseeable future even though the existing HFC networks from Optus and TransAct could compete with Telstra.¹¹⁸ This is because the current levels of competition would not exist without regulation, as other carriers do not have access to the HFC networks.

It is the ACCC's view that wholesale fixed broadband markets are becoming increasingly competitive, particularly in metropolitan areas where access seekers have installed their own DSLAM and/or MSAN equipment into exchanges.

115 The index analyses every internet access package offered by the five major Australian ISPs (Telstra, Optus, Primus, iiNet and Unwired) to calculate the Total Cost of Broadband (i.e. start up costs plus headline fees plus usage charges) of subscribing to each of them for customers of each usage profile.

116 Internet Industry Association, *Spectrum/IIA Broadband Index (Q1 2009)*, March 2009.

117 Adam Internet et al., *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 2.

118 *Ibid.*, p. 3.

Ongoing access to the ULLS and LSS is critical to enabling access seekers to make efficient investment in xDSL infrastructure and offer their own competitive xDSL services. Access to the ULLS and LSS is aiding the wholesale markets to become more competitive, however, Telstra is still in a strong position to reap the benefits of the fixed broadband sector given that Telstra controls access to the key inputs necessary for competition in retail fixed broadband markets. In addition, the networks that are capable of supplying high-bandwidth carriage services are expensive to build, involve large sunk costs and are characterised by large economies of scale. Therefore it is unlikely to be efficient for an operator to duplicate Telstra's fixed copper network if there were a SSNIP.

Level of competition in wholesale and retail bundled fixed voice and broadband services

Retail bundled fixed voice and fixed broadband services

As discussed in the preceding sections on competition in retail fixed voice and retail fixed broadband services, the ACCC considers that competitors to Telstra (utilising the LSS and ULLS) are beginning to offer competitive fixed voice and fixed broadband services.

According to the IIA broadband index,¹¹⁹ bundled broadband packages appear to offer consumers more value for their internet service than stand-alone packages. This relationship appears to be consistent over the range of internet service bundles consumers choose. According to the IIA, Australian consumers are paying for a stand-alone connection from \$45.70 per month (for an ultra-slow theoretical maximum 256 Kbps connection) to \$83.16 per month (for heavy users with a theoretical maximum connection of 17+ Mbps).¹²⁰ This compares to costs of \$38.24 and \$85.70 for bundled connections with similar speeds.¹²¹ However, it is important to note that whether the total bundled package is more economical than the stand-alone package depends on the value and utility the additional services offer the end-user.

An example of a competitive package to Telstra's bundled fixed voice and fixed broadband services is Optus' 'Fusion' packages. For a fixed monthly price, the Fusion package provides unlimited local and national long distance calls, unlimited calls to Optus GSM mobiles, line rental and high speed broadband.¹²²

Although access seekers' increased take-up of the LSS and the ULLS, in combination with alternative networks (HFC), is increasing the potential to offer competitive bundled fixed voice and fixed broadband services in the retail market, this

119 The index analyses every internet access package offered by the five major Australian ISPs (Telstra, Optus, Primus, iiNet and Unwired) to calculate the Total Cost of Broadband (i.e. start up costs plus headline fees plus usage charges) of subscribing to each of them for customers of each usage profile.

120 Internet Industry Association, *Spectrum/IIA Broadband Index (Q1 2009)*, March 2009, p.5.

121 Internet Industry Association, *Spectrum/IIA Broadband Index (Q1 2009)*, March 2009, p. 9.

122 See: <http://www.optusfusion.com/>

competitive pressure is underpinned by and relies upon ongoing regulated access to the ULLS and LSS.

Wholesale bundled fixed voice and fixed broadband services

Optus concurs with the ACCC's preliminary view that Telstra has significant market power in the wholesale market for bundled fixed voice and fixed broadband services.¹²³ Optus notes Telstra retains a dominant position in fixed-line telecommunications due to its ownership of the copper and HFC networks, is the largest wholesale and retail provider, the dominant pay-TV service provider and the dominant provider of directory information services as well as the largest mobile network operator.¹²⁴

Further, Macquarie fully supports the ACCC's preliminary view on the state of competition, noting Telstra's 'unparalleled market position'. In particular, Macquarie notes that Telstra uniquely holds market leadership positions in fixed, mobile, pay TV, digital content and broadband service market segments when compared to its global peers.¹²⁵

The ACCC continues to consider that Telstra has significant market power in the wholesale market for fixed voice and fixed broadband services. This view is based on several factors.

Firstly, Telstra still controls the infrastructure by which the overwhelming majority of fixed voice and fixed broadband services are provided, with 85 per cent of all fixed voice lines supplied over its CAN.

Secondly, Telstra controls price and non-price access to LCS, WLR, LSS and ULLS. Other providers of wholesale fixed voice services (which Telstra has elsewhere submitted to be AAPT-PowerTel and Nextep in addition to Optus)¹²⁶ and wholesale fixed broadband services currently depend on Telstra for access to ULLS and LSS. While regulated ULLS access is likely to act as a constraint upon LCS and WLR pricing, it is important to note that regulation creates the constraint. Without such regulation, Telstra's pricing of the LCS, WLR and ULLS would be relatively unconstrained.

Thirdly, Telstra is vertically integrated and enjoys a strong position in retail markets for fixed telephony services. Telstra's retail market share has increased from 69 per cent in 2005-06 to 72 per cent in 2007-08. This may further affect the potential for competitive entry in the wholesale market. A large retail customer base is typically

123 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 5.1.

124 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, pp. 31-32.

125 Macquarie Telecom, *Submission to the Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 2.

126 ACCC, *Telstra's local carriage service and wholesale line rental exemption applications—final decision and class exemption*, August 2008, p. 96.

necessary to justify investment in infrastructure before a new entrant can compete effectively with Telstra. In addition, telecommunications consumers face high costs of switching between retail suppliers. Supply contracts typically involve a fee for the costs of physically disconnecting and churning customers. These costs, in addition to general information asymmetries about the range of competitors' products, mean that consumers tend not to change their service provider unless there is a compelling reason to do so.

Accordingly, it is the ACCC's view that wholesale markets for the provision of bundled fixed voice and fixed broadband do not display the characteristics of effectively competitive markets. That said, the scenario of alternative carriers wholesaling fixed voice and fixed broadband services to access seekers is becoming more prevalent, with Optus clearly providing some wholesale services to other companies using its ULLS-based networks.¹²⁷

A related point, and one particularly significant to the recent HFC exemption application, is the ability of Optus to provide wholesale services over its HFC network. Optus does not currently provide a wholesale fixed voice service over its HFC network, and Telstra likewise does not provide wholesale services over its HFC. The ACCC is not aware of widespread use of HFC for wholesaling in overseas jurisdictions, and it would appear to be unusual to supply wholesale services over this technology. The ACCC notes again that Optus is the largest user of the declared ULLS. Optus uses the ULLS to act as a wholesaler of voice and data services to provide services to other telecommunications companies.¹²⁸ Accordingly removing Optus' ability to wholesale over ULLS may have a significant effect on wholesale markets.

4.3 Conclusion on the state of competition

The ACCC considers that the analysis that it has undertaken reveals that on a national basis access seekers have managed to attain modest market share in the retail fixed voice market and a more significant market share in the broadband markets. However the level of competition in the provision of these services varies significantly from ESA to ESA and competition in the retail fixed voice, fixed broadband and bundled fixed voice and broadband markets are underpinned by, and rely on, ongoing regulated access to the ULLS and LSS in particular.¹²⁹

The ACCC agrees with Adam Internet et al. that Australia's telecommunications industry requires a robust regulatory environment if competition in the provision of fixed services is to survive and grow.¹³⁰

127 3rd Wave Communication Pty Ltd, 'Internode offers naked ADSL2+ via Optus resale', *Exchange*, Volume 20 Issue 9, 14 March 2008, p. 7.

128 *Singtel management discussion and analysis*, June 08, p. 42.

129 Looking at the percentage of ULLS and LSS SIOs to total SIOs in an ESA.

130 Adam Internet et al., *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 3.

Further, the ACCC notes that access seekers providing retail fixed voice services and fixed broadband services in the less populous areas of Australia (ULLS Bands 3 and 4 especially) are likely to have a lower market share than in CBD and metropolitan areas due to the higher barriers to entry and expansion.

The ACCC notes that in relation to competition in the relevant retail markets competition is emerging at different rates in different geographic areas. That is, where barriers to entry are lower, investment in access based competitive infrastructure, and thus competition, is emerging more quickly.

Further, the ACCC considers that if the ULLS, LCS, WLR and PSTN OA were no longer regulated then competition in the fixed voice market would diminish. The ULLS, as an effective competitive alternative to WLR, LCS and PSTN OA has the potential to broaden fixed voice competition from pure resale. However, this is contingent upon there being no barriers to ULLS entry. As outlined above the barriers to entry for the provision of fixed voice over the ULLS include exchange capping, delays in installing DSLAMs due to queues in obtaining TEBA access and the lack of a robust LSS to ULLS migration process. Accordingly, the ACCC considers that present barriers in providing fixed voice over the ULLS suggest that the regulation of LCS, WLR and PSTN OA are still required to sustain the emerging competition in fixed voice services.

Further, Telstra still controls the infrastructure by which the overwhelming majority of fixed voice and fixed broadband services are provided and because of its vertical integration Telstra enjoys a strong position in fixed voice and fixed broadband services. This affects the potential for competitive entry in the wholesale market. A large retail customer base is typically necessary to justify investment in infrastructure before a new entrant can compete effectively with Telstra.

Accordingly, it is the ACCC's view that both the wholesale and retail markets for the provision of fixed voice services, fixed broadband services and bundled fixed voice and fixed broadband services do not display the characteristics of effectively competitive markets.

Chapter 5 The unconditioned local loop service

In this chapter, the ACCC sets out its views on whether continued declaration of the ULLS would promote the LTIE, in particular through the extent to which it is likely to promote competition in relevant markets; achieve any-to-any connectivity; and encourage economically efficient use of, and investment in, infrastructure. This chapter also considers the inquiry into the possible variation of the ULLS service description and whether it would promote the LTIE. This analysis leads to the ACCC's views on whether the ULLS declaration should be further extended, revoked, varied, allowed to expire, and/or whether a new declaration should be made.

An overview of the legislative criteria for assessing whether to declare a service, and the ACCC's approach, are contained in Appendix A of this report. Appendix B contains the service description for the ULLS.

5.1 Background

5.1.1 What is the ULLS?

The ULLS involves the use of unconditioned copper pairs between the network boundary at an end-user's premises and a point (located at or associated with a customer access module) at which the copper terminates. This allows competitors direct access to Telstra's copper lines.

5.1.2 Initial declaration of the ULLS in 1999

The ULLS was declared in 1999 as part of the ACCC's *Declaration of local telecommunications services*.¹³¹

The service was identified as the 'use of copper-based communications wire between the boundary of a telecommunications network (on the customer's side) and a point where the copper terminates.'¹³² As the service has no prescribed bandwidth, nor is it subject to a prescribed carriage technology, the ACCC noted that the ULLS was able to provide a variety of voice and data services.¹³³

The ACCC noted that declaration of the ULLS would allow service providers to provide new and innovative services as they would not have to rely solely on Telstra's choices in terms of service range and timing of deployment in relation to high bandwidth services.¹³⁴

131 ACCC, *Declaration of local telecommunications services*, July 1999.

132 Ibid. p. 14.

133 Ibid. p. 15.

134 Ibid. pp. 2 & 93.

The ACCC also considered that Telstra was unlikely to supply the ULLS to access seekers in the absence of declaration, at least not in a manner that would have met access seekers' requirements.¹³⁵

Therefore the ACCC considered that the declaration was:

...likely to promote competition in the market for high bandwidth carriage service and the market for local telephony services to a significant extent, with consequent benefits to end-users.¹³⁶

In addition, the ACCC considered that the declaration would facilitate the roll out of new infrastructure through lowering barriers to entry and reducing investment risks.¹³⁷ The ACCC was satisfied, therefore, that the declaration of the ULLS was in the LTIE.¹³⁸

5.1.3 Re-declaration of the ULLS in 2006

During 2006, the ACCC concluded that it would promote the LTIE to re-declare the ULLS in all areas for a period of 3 years, until 31 July 2009.¹³⁹

The ACCC considered that declaration of the ULLS was likely to encourage more effective and sustainable competition in the provision of fixed voice and fixed broadband services than would occur in the absence of declaration. The ACCC noted that the continued ULLS declaration would promote competition by expanding the range of potential voice and broadband services providers, which would therefore increase the ability for price competition.¹⁴⁰

The ACCC also indicated that in the absence of declaration of the ULLS, the ability of access seekers to provide a range of broadband and voice services that are differentiated from those supplied via Telstra's wholesale services, or to acquire it on reasonable terms and conditions, would be inhibited.¹⁴¹

5.2 The long-term interests of end-users

The ACCC's view is that extending the ULLS declaration would promote the LTIE. The ACCC does not consider that varying or revoking the declaration, or allowing the ULLS declaration to expire, and making new declarations, would be in the LTIE. This is consistent with the ACCC's preliminary views as set out in its discussion paper and the draft decision.

135 Ibid. p. 94.

136 Ibid. p. 94.

137 Ibid. p. 2.

138 Ibid. p. 94.

139 ACCC, *Declaration inquiry for the ULLS, PSTN OTA and CLLS – Final Determination*, July 2006, pp. 27-39.

140 Ibid.

141 Ibid.

The ACCC has reached this view having regard to the extent to which the declaration of the ULLS would result in achieving the objectives set out in section 152AB.

5.2.1 Would continued declaration be likely to promote competition?

As discussed in Chapter 3, in identifying the relevant markets to this declaration inquiry, the ACCC assessed the level of service substitutability for services supplied over Telstra's CAN network. This analysis has assisted the ACCC in considering whether continued declaration of the ULLS promotes competition in the provision of fixed voice, fixed broadband and bundled fixed voice and fixed broadband services.

Is the ULLS declaration required to promote competition in the relevant wholesale markets?

For the purposes of this current inquiry, the ACCC has examined whether declaration of the ULLS is required to ensure that this service, or an effective substitute, will be provided on reasonable terms and conditions to access seekers. A key issue in this regard is the level of competitive constraints that operate in the wholesale market for the ULLS.

The ACCC's analysis indicates that continued declaration of the ULLS would promote competition in the relevant wholesale and retail markets. The ACCC considers that the ULLS is an enduring bottleneck service due to structural characteristics of the market. Telstra, the owner of the ubiquitous CAN over which the ULLS is provided, is vertically integrated into the downstream wholesale and retail markets. Therefore, Telstra has limited incentives to supply the ULLS on reasonable terms and conditions to access seekers.

The ACCC notes Telstra's submission that the ACCC should vary the ULLS service description to provide that Telstra is not bound by the SAOs in relation to the supply of the ULLS to the owner of an alternative fixed network (such as an HFC network, or a fibre based network) within the geographic area served by that network.¹⁴²

The ACCC notes that alternative fixed-line networks are limited in their capacity to impose an effective constraint on Telstra's behaviour in relation to access to the ULLS.

As noted in Chapter 3, the ACCC considers that while HFC networks may be a competitive alternative for the owners of these networks, they are limited in the extent to which they provide a competitive alternative for other access seekers. This is due to third party access to HFC networks, for the delivery of fixed broadband and fixed voice services, not being mandated and not currently being provided by the HFC network operators.

In addition, as the ACCC concluded in its recent exemption decision regarding the Optus HFC network, excluding competitors in particular areas in which they own alternative infrastructure would represent a form of discriminatory access.¹⁴³ The

142 Telstra, *Response to ACCC discussion paper – FSR – Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 11.

143 ACCC, *Telstra's exemption application in respect of the Optus HFC network – Final Decision*, November 2008, p. 9.

ACCC considers that this could lead to significant disincentives for companies to deploy infrastructure and therefore:

- have significant negative implications for the promotion of competition, particularly the promotion of facilities-based competition in the wider telecommunications industry; and
- discourage the economically efficient use of and investment in infrastructure as it singles out competitors which could discourage investment and could undermine the potential for efficient network-based and facilities-based competition.

The Tribunal endorsed this view in its recent decision on the HFC exemption matter.¹⁴⁴

In relation to the number of fixed and mobile wireless networks that are available, the ACCC notes that, at this stage, it is doubtful that these networks can provide effective substitutes for the ULLS in terms of quality, functionality and price, particularly on the demand-side, as compared to Telstra's CAN.

Therefore, compared with access to the ULLS over Telstra's ubiquitous fixed-line network, competitors relying on alternative standalone infrastructure are limited in the addressable market available to them and the quality of the voice and broadband services they can provide to end-users.

Without the ULLS declaration, Telstra would have significant and ongoing market power in the negotiation of terms and conditions for the ULLS service. As a vertically integrated operator, Telstra may refuse to supply the ULLS to its competitors. The number of access disputes currently being arbitrated by the ACCC on both price and non-price terms of access to the ULLS demonstrates Telstra's incentives to deny access to the service. For example, Adam Internet et al submit that the large number of access disputes demonstrates Telstra's unwillingness to negotiate reasonable terms of access with competitors. Adam Internet et al consider that if the ULLS declaration was removed and access were left solely to commercial negotiation, Telstra would likely refuse to provide access to the service.¹⁴⁵

The ACCC is satisfied that, absent declaration, it is unlikely that commercially agreed prices and terms of access for the ULLS would be consistent with the prices and terms of access that would promote future competition.

Without the ULLS declaration, the extent and form of competition in markets for wholesale fixed voice, fixed broadband and fixed bundled services is likely to be

144 *Telstra Corporation Limited* [2009] ACompT 1, para 145.

145 Adam Internet et al., *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS*, It also suggests that access seekers relying on commercially negotiated access to the ULLS may be restricted in their ability to compete with Telstra in retail markets and consequently, absent the ULLS declaration, the benefits of competition in retail markets, including lower prices for end-users and a greater range of better quality service offerings, may not be realised. *PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 3.

diminished in comparison to degree of competition in these markets if the ULLS declaration is extended.

These factors, in combination with the fact that Telstra is the only current supplier of ULLS, Telstra's vertical integration and the high barriers to entry suggest that the ability and incentive for Telstra to either deny access to the ULLS or set prices at supra-competitive level will remain strong. The ACCC is satisfied that this strongly suggests that removing declaration of the ULLS would lead to a significant reduction in competition in wholesale markets.

In contrast, extending declaration of the ULLS is likely to support future competition in the relevant markets. Future competition based on regulated access to the ULLS is likely to stimulate the provision of wholesale fixed voice and wholesale DSL services by ULLS-based competitors seeking to exploit unused capacity or potential economies of scale on their ULLS-based networks. For example, Optus uses its ULLS DSLAM network to provide wholesale services to other access seekers. Optus has previously utilised the spare capacity on its DSLAMs to provide a wholesale DSL service to Internode, who then resold a naked DSL service to its competitors.¹⁴⁶ Such alternative provision of wholesale services can provide increased competitive tension at the wholesale level and help to constrain Telstra's ability to price its wholesale DSL services at supra-competitive levels.¹⁴⁷

Is the ULLS declaration still required to promote competition in the relevant retail markets?

The ULLS is an important input for the supply of fixed broadband, fixed voice and bundled fixed voice and fixed broadband services in retail markets. In particular, the ULLS enables access seekers to compete over all retail dimensions of fixed broadband and fixed voice supply.

The ACCC considers that continued declaration will promote competition in the provision of retail fixed voice and fixed broadband services because declaration is likely to facilitate further competitive entry and investment by competitors. With declaration, access to the ULLS on reasonable terms will enable access seekers to better compete with Telstra across all dimensions of retail supply. This should generate lower prices for end-users and a greater range of better quality service offerings.

As outlined in Chapter 4, the ACCC notes that the take-up of the ULLS by access seekers has accelerated in recent times. Table 3 in Chapter 4 demonstrates that there has approximately been a 45 per cent increase in ULLS SIOs within the 12-month period from March 2008 to March 2009.

As a result of this growth in take-up of the ULLS, the ACCC has observed increased competition and coverage in the provision of retail xDSL services. Approximately 23

146 Luke Coleman and Grahame Lynch, *Internode get naked on-net, says increased reach reduces DSL blackspots*, Communications Day, 27 August 2008.

147 ACCC, *Telstra's local carriage service and wholesale line rental exemption applications – Final Decision and Class Exemption*, August 2008, p. 6.

ISPs have invested in their own DSLAM/MSAN equipment to enable xDSL service provision, with most investing in ADSL2+ equipment. At 31 December 2008, 2757 exchanges were enabled to provide ADSL services covering 98 per cent of SIOs.¹⁴⁸ Excluding Telstra, the most expansive DSLAM rollouts have been by iiNet, Optus, Primus and TPG.¹⁴⁹

Further, the growth in take-up of the ULLS has also increased the competition in retail fixed voice services and bundled fixed voice and broadband packages. As outlined in Chapter 4, end-users are now able to obtain a range of bundled fixed voice and fixed broadband packages, some of which entitle end-users to unlimited voice calls for a fixed monthly cost.

Without the ULLS declaration, access seekers would have to rely on alternative options to compete in retail fixed broadband and retail fixed voice services, such as wholesale fixed broadband and fixed voice services from Telstra or services provided over other networks, such as the HFC or wireless. As discussed above, the ACCC does not consider these alternatives to be effective substitutes for the ULLS. Reliance on these alternatives would limit an access seekers' ability to effectively compete across product-price-service package dimensions of fixed voice and fixed broadband supply when compared to the use of the ULLS.

In relation to reselling wholesale DSL services, the ACCC notes that this provides limited scope for competition as wholesale customers are subject to wholesale providers' control over the price and quality of the wholesale service. Similarly, service providers reselling a fixed voice bundle using Telstra's WLR, LCS and PSTN OA would also be subject to Telstra's control over the price, quality and terms and conditions of access to these fixed voice services.

The ACCC therefore considers that allowing the ULLS declaration to expire would likely reduce competition in the relevant retail markets, which would have a negative impact on customer choice and innovation in the supply of fixed broadband and fixed voice services.

Conclusion

The ACCC considers that Telstra's CAN and in particular the ULLS remains an enduring bottleneck service.

Network Technology, Saunders, Adam Internet, Amcom Telecom and Wideband Networks all lodged identical submissions in response to the draft decision.¹⁵⁰

148 Telstra, *Telstra Customer Access Network Record-Keeping Rule data for December Quarter 2008* and GNAF.

149 Ibid.

150 Network Technology, *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR – Draft Decision*, June 2009; Adam Internet, *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR – Draft Decision*, June 2009; Amcom Telecom, *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR – Draft Decision*, June 2009; Wideband Networks, *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR – Draft Decision*, June 2009. These parties are referred to as Network Technology et al.

Network Technology et al agree that ULLS remains an enduring bottleneck service where Telstra controls access to the network and facilities necessary to provide services to end-users. Network Technology et al consider that continued declaration would promote the LTIE by allowing these carriers to provide diverse products at competitive rates. Without declaration, Network Technology et al consider that there is a reasonable potential that they would not be able to continue providing all services to consumers as Telstra's ability to impede competition would increase.¹⁵¹

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 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.

The ACCC considers that continued declaration of the ULLS is likely to promote competition in both fixed broadband and fixed voice services as it will ensure access seekers are better able to compete with Telstra in wholesale and retail markets, leading to lower prices for end-users and a greater range of better quality service offerings.

5.2.2 Would continued declaration achieve any-to-any connectivity?

In addition to the impact of declaration on competition the ACCC must consider whether continued declaration is likely to achieve the objective of any-to-any connectivity, which enables end-users to communicate with each other, irrespective of the network to which they are connected. As the Explanatory Memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996 noted, the concept of any-to-any connectivity is not always relevant in the declaration context.¹⁵²

The Explanatory Memorandum stated that the objective of any-to-any connectivity will only be relevant when considering whether a particular service promotes the LTIE of a carriage service that involves communications between end-users. When considering other types of services (such as carriage services which are inputs to an

151 On the Net et al, *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR – Draft Decision*, June 2009, p. 1.

152 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill, 1996, pp. 40-41.

end-to-end service or distributive services such as the carriage of pay television), this criterion will be given little, if any, weight compared to the other two criteria.

Based on this view, and in the absence of any submissions on the matter, the ACCC considers that declaration of the ULLS will have no impact on the objective of achieving any-to-any connectivity.

5.2.3 Would continued declaration encourage the economically efficient use of, and investment in, infrastructure?

The ACCC considers that declaration of the ULLS has encouraged access seekers to invest efficiently in infrastructure. The ULLS provides access seekers with full access to the copper wire, allowing them to physically terminate the line from a customer's premises to their own equipment located in Telstra exchanges.

Relationship between competition and efficiency

There is a strong interaction between the assessment of the promotion of competition¹⁵³ and the assessment of encouraging the efficient use of, and the economically efficient investment in, infrastructure.¹⁵⁴

The ACCC considers that where the analysis indicates there will be a promotion of competition, it is likely that this promotion of competition will lead to the efficient use of and investment in infrastructure.

For example, the ACCC's analysis above suggests that with declaration competition will be promoted, which in turn will lead to greater efficiencies by encouraging greater use of existing ULLS-based infrastructure to provide fixed voice and fixed broadband services at the wholesale and retail levels and result in the greater take-up of ULLS-based competition.

Therefore it is the ACCC's view that ULLS-based competition encourages competitors to compete on various dimensions of supply, such as price and quality, which allows them to innovate their services and leads to more sustainable competition.

Impact on efficient use of infrastructure

It is the ACCC's view that continued declaration of the ULLS will enable greater competition in retail markets and, therefore, improve productive and dynamic efficiency in those markets by both the access provider and access seekers investing and innovating in ways that ensure they produce services of a chosen quality at the lowest possible cost in the future. Further, the ACCC would expect allocative efficiency to be improved with continued ULLS declaration as it would be more likely that over time the final prices paid for retail services by end-users will better reflect the efficient costs of providing these services.

153 In the context of s. 152AB(2)(c) of the TPA.

154 In the context of s. 152AB(2)(e) of the TPA.

The ACCC's competition analysis also indicates that, in the absence of declaration, Telstra continues to face little competitive constraint when negotiating the prices and terms and conditions of access to the ULLS due to it being a vertically integrated firm. Therefore, Telstra is less likely to face the correct incentives to price its services in ways which promote the efficient use of its existing infrastructure. Accordingly, the ACCC is of the view that continued declaration is likely to promote the efficient use of infrastructure.

Optus submits that Telstra is incorrect in claiming that Optus' use of the ULLS leads to inefficient use of Optus' HFC network.¹⁵⁵ Optus argues that it already uses its HFC network in preference to declared services, where homes are serviceable, to provide services to end-users.¹⁵⁶ Optus submits that due to serviceability, its HFC network is not a complete substitute for Telstra's CAN.¹⁵⁷

Technical feasibility – technology in use or availability

The ACCC believes it is technically feasible to supply and charge for the ULLS service, noting that the ULLS has been declared and provided since 1999.

Incentives for investment in existing infrastructure

Continued declaration is likely to promote efficient investment in existing infrastructure by reducing the investment risks prevalent in an industry where investment is characterised by sunk costs and economies of scale. Continued declaration is likely to reduce barriers to entry and have a positive effect on investment by access seekers. In the absence of a ULLS declaration, the ability of access seekers to acquire the ULLS, or to acquire it on reasonable terms and conditions, would be reduced and it is reasonable to conclude that access seekers' incentives for efficient investment in infrastructure may be distorted.

In response to the draft decision, Optus submits that the Government's NBN announcement means that it is no longer efficient for Telstra to make further significant infrastructure investments in the CAN.¹⁵⁸ The ACCC is not satisfied that there is sufficient certainty regarding future market developments to reach this conclusion.

In any event, the price that Telstra can charge competitors for the ULLS is a determinant of Telstra's decision to maintain, improve or expand its existing infrastructure, or whether to invest in new infrastructure. The access price will also impact on competitors' decisions whether to utilise the ULLS or invest in alternate infrastructure. The ACCC considers that the regulatory regime allows Telstra to recover the efficient costs of supplying and charging for the ULLS through the ULLS

155 Optus, *Submission to ACCC in response to FSR Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, p. 46.

156 Ibid.

157 Ibid.

158 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, pp. 7-8.

and other charges and therefore provides the correct incentives to Telstra and competing providers to invest efficiently in existing networks.

As discussed previously, continued declaration of the ULLS will promote competition in the delivery of fixed voice and fixed broadband services at both the wholesale and retail levels. It is clear from developments in Australia and internationally that customer demand for fixed broadband services, and ULLS based competition, are the key drivers of network modernisation initiatives. Therefore, the ACCC's view is that continued declaration will promote the competitive tension in the relevant markets, which will support incentives for efficient investment.

Incentives for investment in new infrastructure

In relation to recent investment in new infrastructure based on the existing CAN (for example, in DSLAMs and MSANs), the ACCC's view is that that this is unlikely to have taken place in the absence of declaration of the ULLS. That is, the ACCC considers that in the absence of the declaration of the ULLS, the ability of access seekers to provide a range of broadband services that are differentiated from those supplied via Telstra's wholesale services, or the ability to acquire ULLS on reasonable terms and conditions, would be reduced.

Optus agrees with this proposition stating that 'the removal of regulation to fixed-line services would in most cases discourage access seekers investing in their own infrastructure.'¹⁵⁹ Optus asserts that regulated access has encouraged ULLS-based investment and contributed to competition.¹⁶⁰

As noted in Chapter 3, Optus states that the Government's NBN announcement is having an immediate impact on industry expectations by, for example, 'impacting the decision-making processes of market participants with regard to infrastructure-investment'.¹⁶¹ Optus submits that it would be inefficient for any party to construct a new fixed-line telecommunications access infrastructure, independent of both the CAN and the proposed NBN, because it would involve inefficient duplication of infrastructure.¹⁶²

Further, Optus submits that any arguments that deregulation would promote efficient investment should be rejected given the Tribunal's reasoning in the HFC exemption judgement. Optus submits that facilitating access to the existing CAN is more efficient than attempting to duplicate the infrastructure facilities.¹⁶³

159 Ibid. p. 40.

160 Ibid. p. 42.

161 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, pp. 6-7.

162 Ibid., pp. 7-8.

163 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, p. 11.

Given the Government's NBN announcement, the ACCC considers it is less likely that the construction of an additional end-to-end fixed-line access network would be economically efficient in the foreseeable future. In recognising this, the ACCC considers continued declaration of the fixed-line services will not reduce the likelihood of investment in additional fixed-line access networks.

Adam Internet et al. also submit that:

Access to infrastructure on reasonable terms remains paramount in encouraging new entrants, increasing efficiency and improving competitive conditions. In the foreseeable future, fair access to fixed service networks will not occur except via firm regulation. The removal of regulation, whether in geographic areas such as ESAs or at a national level in relation to particular services will in both the short and long term diminish competition, reduce effective use of infrastructure and push up prices, all at the detriment to the LTIE and the industry in general.¹⁶⁴

It is the ACCC's view that continued declaration of the ULLS is likely to continue to provide the impetus for dynamic efficiency gains through technological innovation and investment in the underlying infrastructures used to provide fixed broadband and fixed voice services.

Legitimate commercial interests of the access provider

The concept of the 'legitimate commercial interests' of the access provider has a number of dimensions. For instance, it covers the provider's ability to exploit economies of scale and scope; its interest in earning a commercial return on its investment; its interest in maintaining contractual obligations; and its interest in using the network for future requirements.

The ACCC considers that continued declaration of the ULLS would not adversely impact on Telstra's ability to exploit economies of scale and scope or Telstra's ability to earn a commercial return because the regulatory regime allows Telstra to recover the efficient costs of supplying and charging for the ULLS through the ULLS and other charges.

The ACCC acknowledges that Telstra incurs costs in supplying and charging for the ULLS. These include the technical costs of supplying the service, costs associated with complying with the SAOs and the cost of systems to provide billing information to access seekers. The ACCC considers that these costs are reasonable, given the regulatory regime allows Telstra to recover the efficient costs of supplying and charging for the ULLS through the ULLS and other charges.

It is the ACCC's view that declaration of the ULLS is not detrimental to Telstra's legitimate commercial interests.

Conclusion

The ACCC considers that declaration will likely encourage efficient investment in infrastructure used to provide the ULLS and efficient use of infrastructure used to provide services in the retail markets.

164 Adam internet et al, *Submission on FSR declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 3.

Absent declaration, the ACCC has found that Telstra is likely to face little competitive constraint in setting prices at levels consistent with those expected in a competitive market. As a result, Telstra is less likely to face the correct incentives to price its services in ways which promote the efficient use of infrastructure. Declaration in such a situation is likely to ensure access prices better reflect costs, thus providing appropriate signals for access seekers' build/buy decisions and more efficient investment in infrastructure.

Continued declaration of the ULLS is also likely to encourage efficient investment in infrastructure used to supply fixed voice and fixed broadband services. The ACCC considers that, absent declaration, the ability of access seekers to acquire the ULLS, or to acquire it on reasonable terms and conditions would be constrained. This may also distort the incentives of access seekers to undertake efficient investment in or use of infrastructure.

The ACCC considers that Telstra's incentives to efficiently invest in replacement technologies to deliver fixed voice and fixed broadband services should not be unduly affected by the declaration of the ULLS.

5.2.4 ACCC views on whether continued declaration would promote the LTIE

The ACCC considers that the ULLS is an important platform for competition in fixed voice and fixed broadband services. The ACCC considers that in the absence of a ULLS declaration, retail competition in fixed voice and fixed broadband services would be limited to service providers on-selling Telstra's wholesale products. Retail competition would be stifled as customers would not have the same degree of choice as is available via ULLS-based competition.

The ACCC's views are that continued declaration of the ULLS will also stimulate the provision of wholesale fixed voice and wholesale xDSL services from ULLS-based competitors seeking to exploit unused capacity or to exploit potential economies of scale on their ULLS-based networks. This will provide increased competitive tension at the wholesale level and help to constrain Telstra's ability to price its wholesale fixed voice services and wholesale xDSL services at supra-competitive levels.

The continued declaration of the ULLS will also allow access seekers to receive the ULLS on competitive terms and therefore be able to compete more vigorously with Telstra in the retail markets. As such end-users would benefit from lower prices for and a greater range of better quality service offerings.

Further, the continued declaration of the ULLS will encourage efficient investment in and use of infrastructure and encouraged innovation, product differentiation and price discipline on Telstra in the supply of fixed voice and fixed broadband services.

Therefore, given the discussion above, the ACCC's view is that extending the ULLS declaration would be in the LTIE.

The ACCC proposes to extend the ULLS declaration for five years to provide regulatory certainty to encourage investment and promote competition. The reasons are set out in Chapter 9 of this decision.

5.3 Possible variation of the ULLS service description

In its draft decision, the ACCC stated that it was not satisfied that varying the ULLS service description would promote the LTIE. The ACCC notes that it has not received any submissions in response that oppose its intention not to vary the ULLS service description.

5.3.1 Background

In March 2007, the ACCC received a request from the G9 consortium of companies to vary the ULLS declaration to ensure that sub-loop access falls within the definition of the declared ULLS.¹⁶⁵ The G9's request was based on the rationale that it was necessary to ensure that sub-loop access fell within the definition of the declared ULLS. The G9 argued that this variation would provide certainty for a FTTN provider as the provision of services over the network would be contingent on access to the sub-loop. The request was complementary to a special access undertaking relating to a proposed FTTN network which was also lodged with the ACCC. The special access undertaking was withdrawn in March 2008.

In May 2007, the ACCC issued a discussion paper as part of a public inquiry under section 152AL of the TPA to determine whether it should vary the service description for the ULLS.¹⁶⁶

The ACCC received 9 submissions in response to the ULLS variation discussion paper.

On 17 December 2007 the ACCC released a position paper on possible variation to the ULLS service declaration (ULLS position paper).¹⁶⁷ The ULLS position paper concluded that there was no need at that point in time to vary the current ULLS declaration for the purpose of addressing the sub-loop issue. However, regardless of FTTN developments, the ACCC noted that the ULLS declaration may need to be varied to reflect a more technically neutral service description at some future point.

Submissions to the ULLS position paper set out a range of positions with Telstra contending that a service variation was premature and the G9 and AAPT both

165 The current ULLS service description involves access to unconditioned communications wire in the CAN between the boundary of a telecommunications network (on the customer side) and a point where the communications wire terminates. Currently, the communications wire generally terminates at the local exchange. In contrast, access to the sub-loop involves access at a new point between the customer and the local exchange along the communications wire. That is, access at the sub-loop level would enable an access seeker to gain access to a smaller part of the local copper loop (rather than the full local loop).

166 ACCC, *An ACCC discussion paper examining possible variation of the service declaration for the unconditioned local loop service*, May 2007.

167 ACCC, *ACCC inquiry into the possible variation of the service declaration for the unconditioned local loop service – position paper*, December 2007.

submitting that the ACCC was incorrect in determining that there was no need to vary the declaration for the purposes of addressing the sub-loop issue.¹⁶⁸

On 21 April 2008, the public inquiry was suspended in recognition that there was no pressing need to vary the ULLS service description at the time.

In accordance with section 152AN of the TPA, the ACCC decided to combine the inquiry considering possible variation of the ULLS service description with this declaration inquiry.

5.3.2 The long-term interests of end-users

Would varying the ULLS service description be likely to promote competition?

The ACCC notes that there are a range of views regarding the variation of the ULLS description.

For example both Adam Internet et al. and ATUG consider that the ULLS service description should be varied to ensure sub-loop access is available to access seekers on reasonable terms¹⁶⁹ and ATUG also asks the ACCC to explicitly include access to other physical infrastructure (such as ducts) in its consideration to access products to support increased competition.¹⁷⁰

Optus has no comment on the ACCC's preliminary view given the uncertainty about the Governments NBN RFP at the time of the decision but considers that the ULLS service variation will need to be reviewed in due course.¹⁷¹

Telstra agrees with the ACCC's preliminary view that there is no value in considering any change to the ULLS service description at this time. Telstra notes some change may be warranted in light of the eventual NBN outcome but it would be speculative and unnecessary to seek to anticipate what form any changes may need to take.¹⁷²

168 Letter from A Sheridan (G9 consortium) to R Home (ACCC), *Re: Proposed variation of the service description for the ULLS*, 26 February 2008; AAPT/PowerTel, *Submission by AAPT Ltd and PowerTel Ltd to the ACCC position paper Unconditioned Local Loop Service*, ACCC inquiry into possible variation of the service declaration for the unconditioned local loop service December 2007, February 2008

169 Adam Internet et al., *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 1 and ATUG, *Fixed Services Review Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper* November 2008, March 2009, p. 1.

170 ATUG, *Fixed Services Review Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper* November 2008, March 2009, p. 1.

171 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 6.59.

172 Telstra, *Response to ACCC discussion paper – Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 6.

Noting the views outlined in submissions, the ACCC considers that a variation to the ULLS service description is most relevant in the event of a national FTTN network roll out using Telstra's CAN.¹⁷³

However, given the Government's recent announcement that it proposes to build a FTTP network, the ACCC notes that access at the sub-loop level of Telstra's CAN would not be needed for access seekers to compete in providing fixed voice and/or fixed broadband in retail markets.

Therefore in the absence of a proposed FTTN rollout at this time, the ACCC considers that varying the ULLS service description will not promote competition and would create further regulatory uncertainty, given that the current ULLS service description has been effective in promoting competition in fixed broadband and fixed voice markets.

Would varying the ULLS declaration achieve any-to-any connectivity?

As discussed above, in the absence of a proposed FTTN rollout the ACCC considers that the current ULLS service description is sufficient to achieve any-to-any connectivity. This is evident from the ability of access seekers to currently interconnect to one another's end-to-end and DSLAM networks.

Would varying the ULLS declaration encourage the economically efficient use of, and investment in, infrastructure?

Given the unlikely rollout of a FTTN network, the ACCC considers that varying the ULLS service description will not encourage the economically efficient use of and investment in infrastructure.

The current ULLS service description has achieved efficient use of and investment in infrastructure, as outlined in section 5.2.3 above. Therefore varying the ULLS service description in the absence of a FTTN rollout would not achieve any further efficiency and only add to regulatory uncertainty.

Will varying the ULLS service description promote the LTIE?

It is the ACCC's view is that it is not satisfied that varying the ULLS service description at this time would promote the LTIE.

In the absence of a FTTN network roll out, varying the ULLS service description would create unnecessary regulatory uncertainty as the current ULLS service description has been successful in promoting competition in the retail fixed voice and fixed broadband markets and achieving efficient use of and investment in infrastructure required to compete in the retail fixed voice and fixed broadband markets.

The ACCC notes, however, that under s. 152AL of the TPA, the ACCC could reconsider the need for sub-loop access in a future declaration inquiry if necessary.

173 ACCC, *ACCC inquiry into possible variation of the service declaration for the unconditioned local loop service – position paper*, December 2007.

5.3.3 Other issues raised in the ULLS position paper

The ACCC noted in the ULLS position paper that a more general issue to consider in relation to the ULLS service description was whether the definitions of network elements, such as the Customer Access Module (CAM) and the copper wire, and current assumptions about their characteristics and locations within the network, will continue to apply in the evolution towards a modern next generation network.¹⁷⁴ The ACCC proposed minor drafting amendments for industry comment in recognition of the potential need for amendments to the service description to ensure technical and functional neutrality in the future.¹⁷⁵ At this stage, the ACCC does not consider that there is a pressing need to amend the service description in this way. In addition, the ACCC considers issues regarding the technical and functional neutrality of the ULLS service description may be less relevant following the Government's recent announcement that it proposes to build a FTTP network. However, the ACCC would consider necessary drafting amendments to the service definitions in the future if circumstances change.

174 ACCC, *ACCC inquiry into possible variation of the service declaration for the unconditioned local loop service – position paper*, December 2007, p. 17.

175 *Ibid.* p. 27.

Chapter 6 Line sharing service

In this chapter, the ACCC sets out its views on whether the continued declaration of the LSS would promote the LTIE through promoting competition in the relevant markets; achieving any-to-any connectivity; and encouraging economically efficient use of, and investment in, infrastructure. This analysis leads to the ACCC's views on whether the LSS declaration should be further extended, revoked, varied, allowed to expire, and/or whether a new declaration should be made.

An overview of the legislative criteria for assessing whether to declare a service, and the ACCC's approach, are contained in Appendix A of this report. Appendix C contains the service description for the LSS.

6.1 Background

6.1.1 What is the line sharing service?

Line sharing is where two separate carriers provide separate services over a single metallic pair (or 'line'). The metallic line spectrum is normally split (or shared) so that one carrier or service provider provides the voice services over the line, while another carrier (the access seeker) provides high-speed broadband services through the use of its own xDSL technology.

6.1.2 Initial declaration of the LSS in 2001-02

In the Local Telecommunications Services Inquiry in 1999, the ACCC examined the concept of line sharing when considering the case for declaration of the ULLS. At that time, however, the ACCC expressed the view that declaration of an LSS should be considered separately to the ULLS.¹⁷⁶

Following the declaration of the ULLS, there were requests from participants in the telecommunications industry for LSS to be declared.

In September 2001, the ACCC announced that it would conduct a public inquiry into whether or not line sharing services should be declared under Part XIC of the TPA. The ACCC considered a particular form of line sharing which involved an access provider providing a voice-band PSTN service to an end-user, while providing access to another carrier (the access seeker) to simultaneously provide services to the same end-user over the high-frequency portion of the metal wire.

In August 2002, the ACCC declared the LSS on the basis that such a declaration was likely to promote the LTIE.¹⁷⁷ In its decision, the ACCC considered that:

To the extent that declaration can help ensure more competitive terms and conditions are being set for a LSS, the ACCC believes that this has the potential to preserve competition in the downstream markets for high-speed data services, as it will help

176 ACCC, *Declaration of local telecommunications services*, July 1999.

177 ACCC, *LSS – Final decision on whether or not a LSS should be declared under Part XIC of the TPA*, August 2002, p. vi.

enable access seekers to compete with Telstra in downstream markets on a more even footing.¹⁷⁸

6.1.3 Re-declaration of the LSS in 2007

The LSS declaration was due to expire on 31 October 2007. The ACCC initiated an LSS declaration review and in October 2007 released a final decision to extend the declaration.

In its final decision the ACCC concluded that it was in the LTIE to declare the LSS in all areas until 31 July 2009, so that it could be reconsidered as part of the ongoing Fixed Services review. In coming to this view, the ACCC considered that the LSS was an important input for the promotion of competition in the provision of downstream high-bandwidth carriage services.¹⁷⁹ The ACCC noted that:

... the present structure of the market for the LSS conferred significant and ongoing market power to Telstra in negotiation of terms and conditions for the service. As such, the ACCC considered that declaration of the LSS would lead to the service being more likely to be provided on competitive terms and conditions. This would, in turn, promote the LTIE by ensuring that access seekers would be better able to compete with Telstra in downstream markets.¹⁸⁰

The ACCC considered that the declaration of the LSS would encourage efficient investment in, and efficient use of, infrastructure used to provide services in downstream markets. Absent declaration, Telstra was not likely to face constraints in setting prices above levels consistent with those expected in a competitive market. In addition the ability of access seekers to acquire the LSS or to acquire it on reasonable terms and conditions would be reduced.¹⁸¹

The ACCC also concluded that the declaration of the LSS was consistent with the achievement of any-to-any connectivity.¹⁸²

6.2 The long-term interests of end-users

The ACCC's view is that extending the LSS declaration would promote the LTIE. The ACCC does not consider that varying or revoking the declaration, or allowing the LSS declaration to expire, and making a new declaration, would be in the LTIE. This is consistent with the ACCC's preliminary views as set out in its discussion paper and draft decision.

The ACCC has reached this view having regard to the extent to which the declaration of the LSS would result in achieving the objectives set out in section 152AB.

178 Ibid. p. v.

179 ACCC, *Review of the Line Sharing Service Declaration – Final Decision*, October 2007, p. 65.

180 Ibid.

181 Ibid. p. 8.

182 Ibid.

6.2.1 Would continued declaration promote competition?

In determining whether the continued declaration of LSS will promote the LTIE, the ACCC must assess the extent to which declaration will be likely to result in the promotion of competition in the relevant markets for these services.

AAPT, ATUG, Adam Internet et al., CCC, Macquarie Telecom and Optus agree with the ACCC's preliminary view that the continued declaration of the LSS would promote competition.¹⁸³

The ACCC's view is that the relevant markets are the retail and wholesale supply of fixed broadband services and, to a lesser extent, the retail and wholesale supply of a bundle of fixed voice and fixed broadband services.

As discussed in both the discussion paper and the draft decision, the LSS is an important input for the supply of retail fixed broadband services to end-users. In particular, the LSS enables access seekers to compete over all retail dimensions of fixed broadband supply.

Network Technology et al agree with the ACCC that the LSS remains an enduring bottleneck where Telstra controls access to the network and facilities necessary to provide services to end-users. Network Technology et al consider that continued declaration would promote the LTIE by allowing these carriers to provide diverse products at competitive rates. Without declaration, Network Technology et al consider that there is a reasonable potential that they would not be able to continue providing all services to consumers as Telstra's ability to impede competition would increase.¹⁸⁴

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 and a greater range of better quality service offerings.

183 AAPT Limited, *Response to Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR – a discussion paper*, dated November 2008, March 2009, p. 2; Adam Internet et al., *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 1; ATUG, *Fixed Services Review Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper* November 2008, March 2009, p. 1; Macquarie Telecom, *Submission to the Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 2; Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 7.1-2

184 On the Net et al, *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR – Draft Decision*, June 2009, p. 1.

The ACCC's analysis indicates that removing the declaration of the LSS would lead to significantly less competition in the relevant markets than would be the case if the LSS declaration is extended. This is largely due to the structural characteristics of the market. In particular, Telstra owns the ubiquitous copper network across which the LSS is provided. While there are alternative fixed networks (HFC) and a number of fixed and mobile wireless networks, for the same reasons as discussed in Chapter 3 and in Chapter 5 in relation to the ULLS, the ACCC is not satisfied that the services provided over these networks are effective substitutes for the LSS.

Given those limitations, in the absence of LSS declaration, the remaining options available for access seekers to compete in the retail fixed broadband services market:

- resale of Telstra's wholesale DSL broadband services;
- acquiring the LSS on non-regulated terms and conditions; or
- acquiring the ULLS

As discussed in Chapter 3, the ACCC considers that the above options would limit an access seeker's ability to effectively compete across product-price-service package dimensions of fixed broadband supply, when compared to use of the LSS.

The ACCC notes that reselling Telstra's wholesale DSL services provides limited scope for competition since wholesale customers are subject to the wholesale providers control over the price, quality, and terms and conditions of access to wholesale DSL.

Without the LSS declaration, competitors could seek to acquire the LSS on non-regulated terms and conditions. However, without declaration, Telstra would have significant and ongoing market power in the negotiation of terms and conditions for the service. The ACCC considers it unlikely that Telstra's commercially agreed prices for the LSS, absent declaration, would be consistent with those that would promote competition in the relevant markets.

Further, as a vertically integrated operator and the only current supplier of LSS, Telstra may have the ability and incentive to either deny access or set prices for an LSS service at supra-competitive levels to its competitors, absent declaration. For example, Adam Internet et al submit that the large number of access disputes that the ACCC continues to arbitrate demonstrates Telstra's unwillingness to negotiate reasonable terms of access with competitors and therefore if left solely to commercial negotiation (without regulation) Telstra would probably refuse to provide access.¹⁸⁵ The ACCC considers that if access seekers had to rely on commercially negotiated access to the LSS, due to the removal of declaration, access seekers may be restricted in their ability to compete with Telstra in retail markets. Therefore, the ACCC is satisfied that extending declaration of the LSS is more likely to promote competition in future markets than would be the case without the LSS declaration.

185 Adam Internet et al., *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 3.

The ACCC notes Telstra's submission that the ULLS is an effective substitute for the LSS and, therefore, the LSS declaration should be allowed to expire. Telstra considers declaring both services is unnecessary and inefficient.¹⁸⁶ In contrast, Optus notes in its submission that that ULLS is not always the most efficient or viable form of entry for all access seekers across all geographic regions.¹⁸⁷

The ACCC is not satisfied that the ULLS is an effective substitute for the LSS when the LSS is used solely to supply fixed broadband services. The ULLS provides functionality beyond that of the LSS. Further, without continued LSS declaration, the ACCC is concerned that consumer choice would be limited as end-users may no longer be able to acquire voice and xDSL services from different providers over the same copper line.

As discussed in Chapter 3, the ULLS may be an effective competitive alternative to the LSS where an access seeker uses the LSS in conjunction with the LCS, WLR and PSTN OA to provide a bundled fixed voice and fixed broadband service to end-users. However, the ACCC notes that a significant barrier to transitioning from the LSS to the ULLS is the lack of a robust LSS to ULLS migration path. This may limit the ability of access seekers to seamlessly transition to the ULLS and the ACCC considers that the lack of a migration path may create uncertainty and risks for access seekers wishing to transition to ULLS-based supply.

This is an issue the ACCC addressed in granting the individual exemption orders for LCS, WLR and PSTN OA. The ACCC placed a condition on the individual exemption orders that ensured that LCS, WLR and PSTN OA continued to be available on regulated terms until such a time that an appropriate LSS to ULLS migration path was in place. Adam Internet et al. note that Telstra has failed to implement an efficient LSS to ULLS migration process, as required under the individual exemption conditions.¹⁸⁸

In any event, the migration process is an issue specific to a subset of LSS services. For the reasons outlined above it does not alter the underlying rationale for the LSS declaration itself.

The ACCC notes Telstra's submission that the ACCC should vary the LSS service description to provide that Telstra is not bound by the SAOs in relation to the supply of the LSS to the owner of an alternative fixed network (such as an HFC network, or a fibre based network) within the geographic area served by that network.

However, as outlined in Chapter 5, the ACCC considers that excluding competitors in particular areas could represent a form of discriminatory access, which could lead to

186 Telstra, *Response to ACCC discussion paper – Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 11

187 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 7.5

188 Adam Internet et al., *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 2

significant disincentives for companies to deploy infrastructure and therefore stifle competition and discourage further efficient investment in facilities-based networks.

Conclusion

The ACCC is of the view that the continued declaration of the LSS is likely to promote competition in the provision of retail fixed broadband services and bundled voice and broadband services. Removing declaration is likely to result in less competition in these markets.

The ACCC notes that although there are alternatives to the LSS for providing retail fixed broadband services, however, these alternatives would limit an access seeker's ability to effectively compete across product-price-service package dimensions of fixed broadband supply, compared to use of the LSS.

Without the LSS declaration, Telstra would have significant and ongoing market power in the negotiation of terms and conditions for the service. Therefore the ACCC considers it is unlikely that commercially agreed prices for the LSS, absent declaration, would be consistent with those that are likely to promote competition. Further, absent declaration, Telstra may refuse to supply the LSS to its competitors.

The ACCC considers that continued declaration of the LSS is likely to promote competition in fixed broadband services as it will ensure access seekers are better able to compete with Telstra in retail markets, leading to lower prices for end-users and a greater range of better quality service offerings.

Therefore, the ACCC considers that competition in the provision of retail fixed broadband services and to a lesser extent in the provision of bundled fixed voice and fixed broadband services will be promoted if the LSS declaration is extended.

6.2.2 Would continued declaration achieve any-to-any connectivity?

For the same reasons as set out in chapter 5, the ACCC's views are that declaration of the LSS will have no impact on the objective of achieving any-to-any connectivity.

6.2.3 Would continued declaration encourage the economically efficient use of, and investment in, infrastructure?

The ACCC's views are that continued declaration will encourage efficient investment in, and efficient use of infrastructure used to provide services over the LSS in the relevant retail markets.

Impact on efficient use of infrastructure

The ACCC considers that the three components of efficiency – allocative, productive and dynamic – will be enhanced with the continued declaration of the LSS.

Continued declaration of the LSS will enable greater competition in the retail markets, and also be expected to improve productive and dynamic efficiency in these markets by providing service providers the incentive to find lower-cost means of producing the retail services. This would also encourage both access providers and access seekers to invest and innovate in ways that will ensure they produce services of a chosen quality at the lowest possible cost in the future. Further, the ACCC would expect that with continued declaration, allocative efficiency is likely to be improved

as it would be more likely that over time the final prices paid for retail services by end-users will better reflect the efficient costs of provision of these services.

The ACCC agrees with Optus' submission that continued declaration of the LSS is likely to promote the efficient use of infrastructure by promoting cost reflective prices.¹⁸⁹

The ACCC's competition analysis also indicates that, in the absence of declaration, Telstra continues to face little competitive constraint when negotiating the prices and terms and conditions of access to the LSS. Therefore, in the absence of declaration Telstra is less likely to face the correct incentives to price its services in ways which promote the efficient use of infrastructure. Conversely, declaration provides access seekers with access to the declared service on reasonable terms and conditions, and in doing so is likely to place competitive pressure on Telstra such that all parties will face the correct incentives to supply and price their services in ways which reflect more efficient use of the underlying infrastructure.

Accordingly, the ACCC is of the view that continued declaration is likely to promote the efficient use of infrastructure.

Technical feasibility – technology in use or availability

The ACCC believes it is technically feasible to provide a LSS, noting that the LSS has been declared and provided since 2002.

Incentives for efficient investment in existing infrastructure

Continued declaration is likely to promote efficient investment in existing infrastructure by reducing the investment risks prevalent in an industry where investment is characterised by sunk costs and economies of scale. Continued declaration is likely to reduce barriers to entry and have a positive effect on investment by access seekers. In the absence of LSS declaration, the ability of access seekers to acquire the LSS, or to acquire it on reasonable terms and conditions, would be inhibited and it is reasonable to conclude that access seeker' incentives for efficient investment in infrastructure may be distorted.

Incentives for efficient investment in new infrastructure

As noted in the preceding chapter, Optus states that the Government's NBN announcement is having an immediate impact on industry expectations by, for example, 'impacting the decision-making processes of market participants with regard to infrastructure-investment'.¹⁹⁰

189 Optus., *Submission to ACCC in response to FSR Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, p. 55.

190 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, pp. 6-7.

Optus submits that it would be inefficient for any party to construct a new fixed-line telecommunications access infrastructure, independent of both the CAN and the NBN, because it would represent inefficient duplication of infrastructure.¹⁹¹

Further, Optus submits that any arguments that deregulation would promote efficient investment should be rejected given the Tribunal's reasoning in the HFC exemption judgement. In its judgement the Tribunal stated that duplication of 'last mile' infrastructure, on the face of it, would seem to be socially wasteful investment.¹⁹² Optus submits that facilitating access to the existing CAN is more efficient than attempting to duplicate the infrastructure facilities.¹⁹³

Given the Government's NBN announcement, the ACCC considers it is less likely that the construction of an additional end-to-end fixed-line access network would be economically efficient in the foreseeable future. In recognising this, the ACCC considers continued declaration of the fixed-line services will not reduce the likelihood of investment in additional fixed-line access networks.

In relation to investments in infrastructure based on the existing CAN, the ACCC's view is that efficient investment in such infrastructure is unlikely to have taken place in the absence of declaration of the LSS (and ULLS). In the absence of declaration of the LSS, the ability of access seekers to provide a range of broadband services that are differentiated from those supplied via Telstra's wholesale services, or to acquire it on reasonable terms and conditions, is likely to be inhibited.

Therefore it is the ACCC's view that the continued declaration of the LSS is likely to have provided the impetus for dynamic efficiency gains through technological innovation and investment in the underlying infrastructures used to provide fixed broadband and fixed voice services.

Legitimate commercial interests of the access provider

The TPA requires the ACCC to consider the legitimate interests of potential access providers.¹⁹⁴ This includes an access provider's ability to exploit economies of scale and scope and is closely related or influenced by the price and non-price terms upon which access is granted.

The ACCC acknowledges that Telstra incurs costs in supplying and charging for the LSS. These include the technical costs of supplying the service, costs associated with complying with the SAOs and the cost of systems to provide billing information to access seekers. The ACCC considers that these costs are reasonable, given the regulatory regime allows Telstra to recover the efficient costs of supplying and charging for the LSS through the LSS and other charges.

191 Ibid., pp. 7-8.

192 Application by Telstra Corporation Ltd [2009] ACompt 1 (22 May 2009), at [115-116].

193 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, p. 11.

194 Subsection 152AB(6)(b).

It is the ACCC's view that the continued LSS declaration would not compromise Telstra's legitimate commercial interests as supplier of the LSS, given the regulatory regime allows Telstra to recover the efficient costs of supplying and charging for the LSS through the LSS and other charges.

Conclusion

Like the ULLS, the ACCC considers that continued declaration will likely encourage efficient investment in infrastructure used to provide the LSS and efficient use of infrastructure used to provide services in the retail markets.

Absent declaration, the ACCC has found that Telstra is likely to face little competitive constraint in setting prices at levels consistent with those expected in a competitive market. As a result, Telstra is less likely to face the correct incentives to price its services in ways which promote the efficient use of infrastructure. Declaration in such a situation should ensure access prices better reflect costs.

Continued declaration of the LSS is also likely to encourage efficient investment in infrastructure used to supply fixed broadband services. The ACCC considers that, absent declaration, the ability of access seekers to acquire the LSS, or to acquire it on reasonable terms and conditions would be constrained. This may also distort the incentives of access seekers to undertake efficient investment in or use of their own infrastructure.

The ACCC considers that Telstra's incentives to efficiently invest in replacement technologies to deliver fixed broadband services should not be unduly affected by the declaration of the LSS.

6.2.4 ACCC's view on whether continued declaration would promote the LTIE

The ACCC is of the view that the LSS is an important input for the promotion of competition in the provision of retail fixed broadband services. By allowing access to the high frequency portion of an unconditioned local loop, the LSS enables access seekers to compete over all retail stages in the provision of fixed broadband services.

Without the LSS declaration, Telstra would have significant and ongoing market power in the negotiation of terms and conditions for the service. Therefore the ACCC considers it is unlikely that commercially agreed prices for the LSS, absent declaration, would be consistent with those that are likely to promote competition. Further, as a vertically integrated operator, Telstra may refuse to supply the LSS to its competitors, absent declaration.

The ACCC considers that continued declaration of the LSS is likely to promote competition in the fixed broadband services market as this would lead to the eligible service being more likely to be provided on competitive terms and conditions. In turn, the ACCC believes this would lead to the promotion of the LTIE by ensuring access seekers are better able to compete with Telstra in retail markets. This should generate lower prices for end-users and a greater range of better quality service offerings.

Furthermore, the ACCC considers that continued declaration of the LSS will maintain the level of competition in the market for bundled fixed voice and fixed broadband

where this market may be affected by the recent exemption orders for LCS, WLR and PSTN OA.

The ACCC also considers that continued declaration is likely to encourage the efficient investment in, and use of infrastructure to provide services in the relevant retail markets.

Therefore, given the discussion above, the ACCC's view is to extend the LSS declaration. The ACCC does not consider it will promote the LTIE, to revoke the declaration or allow the declaration to expire and make a new declaration.

The ACCC proposes to extend the LSS declaration for five years for the reasons set out in chapter 9 of this decision.

Chapter 7 PSTN originating and terminating access services

In this chapter, the ACCC sets out its views on whether the continued declaration of the PSTN OA and PSTN TA services would promote the LTIE, in particular through the extent to which it is likely to promote competition in relevant markets; achieve any-to-any connectivity; and encourage economically efficient use of, and investment in, infrastructure.

An overview of the legislative criteria for assessing whether to declare a service, and the ACCC's approach, are contained in Appendix A of this report. Appendix D contains the service descriptions for PSTN OA and Appendix E contains the service description for PSTN TA.

At the time of writing this decision the PSTN OA individual exemptions were being reviewed by the Tribunal.

7.1 Background

7.1.1 What is PSTN originating access?

PSTN OA is the carriage of telephone calls from the calling party to a point of interconnection (POI) with an access seeker's network. Currently a POI is usually located at a trunk or transit exchange.

7.1.2 What is PSTN terminating access?

PSTN TA is the carriage of telephone calls from a POI within an access seeker's network to the party receiving the call.

7.1.3 Initial declaration of PSTN OTA

On 30 June 1997, the PSTN OTA services were deemed to be declared services for the purposes of Part XIC of the TPA.¹⁹⁵

7.1.4 Local Services Review 2006

As part of its *Local Services Review* in 2006, the ACCC conducted a declaration inquiry into the PSTN OTA services which resulted in the services being declared by the ACCC for a further 3 years.¹⁹⁶

In reaching this view, the ACCC noted that Telstra's PSTN network remained the dominant source of network access and therefore underpinned the provision of most fixed voice services to end-users. The ACCC also concluded that there were

195 Section 39, *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*.

196 ACCC, *Declaration inquiry for the ULLS, PSTN OTA and CLLS, Final determination*, July 2006.

substantial barriers to entry in deploying access infrastructure and this was likely to limit the extent of network deployments in the foreseeable future.¹⁹⁷

The ACCC considered that competing networks in metropolitan and regional areas were not yet sufficiently developed to provide for competition at the originating access level. Therefore, access seekers were reliant upon Telstra for originating national long distance, international and FTM calls for the foreseeable future.¹⁹⁸

The ACCC considered revoking the PSTN OA service declaration in CBD areas. However, given the uncertainties surrounding alternative networks and, in particular, future next generation network (NGN) developments such as the transition to an IP-based core network, the ACCC concluded that revocation would be premature.¹⁹⁹

The ACCC considered that declaration of the PSTN OTA services would encourage efficient use of infrastructure by facilitating product differentiation and the creation of new and innovative service bundles. The ACCC noted this would lead to price competition in the supply of voice services, which would in turn enhance productive and allocative efficiency.²⁰⁰

The ACCC also considered that declaration would encourage efficient investment in infrastructure by facilitating market entry and reducing the risks associated with infrastructure deployment by access seekers. Further, the ACCC found that Telstra's legitimate commercial interests would not be unreasonably harmed from continued declaration of the PSTN OTA services.²⁰¹

7.1.5 PSTN OA exemption decisions 2008

In October 2007, Telstra lodged two applications with the ACCC under section 152AT of the TPA seeking individual exemptions from the SAOs for PSTN OA services.²⁰²

The first application sought the removal of PSTN OA regulation in 17 ESAs in CBD areas of Sydney, Melbourne, Brisbane, Adelaide and Perth.

The second application was complementary to Telstra's July and October 2007 individual exemption applications for LCS and WLR and sought the removal of PSTN OA regulation in 397 ESAs across metropolitan Australia.²⁰³

197 Ibid. p. 52.

198 Ibid. p. 51.

199 Ibid. pp. 51–52.

200 Ibid. p. 46.

201 Ibid. pp. 46–50.

202 Telstra's individual exemption applications are available on the ACCC website at: <http://www.accc.gov.au/content/index.phtml/itemId/800828>

203 Further details on Telstra's 2007 exemption applications for LCS and WLR are available on the ACCC website at: <http://www.accc.gov.au/content/index.phtml/itemId/269268>.

On 29 October 2008, the ACCC released final decisions on Telstra's PSTN OA individual exemption applications, granting Telstra exemptions from its SAOs in 17 CBD and 248 metropolitan ESAs.²⁰⁴ The metropolitan exemption was not as broad as that requested by Telstra. The individual exemption orders were granted subject to a number of conditions and limitations. The conditions and limitations deal with impediments faced by some access seekers when seeking to use the ULLS.²⁰⁵

In November 2008, AAPT, Agile, Chime, Macquarie, PowerTel and Primus applied to the Tribunal pursuant to section 152AV of the TPA for review of the ACCC's decision to make individual exemption orders in relation to the PSTN OA. The Tribunal has the statutory power to approve, modify or reject the ACCC's exemption decisions. The Tribunal is yet to make a decision in relation to these exemptions.

7.2 Long-term interests of end-users - PSTN OA

The ACCC's view is that extending the PSTN OA declaration would promote the LTIE. The ACCC does not consider that varying or revoking this declaration, or allowing the PSTN OA declaration to expire and making a new declaration, would promote the LTIE. This is consistent with the ACCC's preliminary views as set out in the discussion paper and draft decision.

The ACCC has reached this view having given regard to the extent to which continued declaration of the PSTN OA service would result in the objectives set out in s152AB of the TPA and after considering submissions made to the discussion paper and draft decision. These are considered in turn below.

The ACCC notes that each of the 14 submissions received to the discussion paper were in agreement that the PSTN OA declaration should be extended. However, Telstra does consider the PSTN OA declaration should be narrowed in geographic scope.

Network Technology et al agree with the ACCC that PSTN OA remains an enduring bottleneck where Telstra controls access to the network and facilities necessary to provide services to end-users. Network Technology et al consider that continued declaration would promote the LTIE by allowing these carriers to provide diverse products at competitive rates. Without declaration, Network Technology et al consider that there is a reasonable potential that they would not be able to continue providing all services to consumers as Telstra's ability to impede competition would increase.²⁰⁶

204 ACCC, *Telstra's PSTN Originating Access exemption applications – CBD and Metro areas – Final Decision and Proposed Class Exemption*, October 2008.

205 The ACCC's conditions and limitations placed on the exemptions granted to Telstra addressed concerns regarding the substitutability of ULLS for PSTN OA — in particular, exchange capping, exchange queuing and migrating from the LSS to the ULLS. A detailed discussion of these conditions can be found in ACCC, *Telstra's PSTN Originating Access exemption applications – CBD and Metro areas – Final Decision and Proposed Class Exemption*, October 2008.

206 On the Net et al, *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR – Draft Decision*, June 2009, p. 1.

Optus also endorsed the ACCC's draft decision to extend the declaration.²⁰⁷

7.2.1 Would continued declaration promote competition?

In determining whether the future with declaration of the PSTN OA will promote the LTIE, the ACCC must assess whether declaration will result in the promotion of competition in the relevant markets for the service. The ACCC considers it useful to apply the 'with and without test' to undertake this assessment.

The ACCC's view is that the relevant markets for the PSTN OA service are the retail and wholesale supply of fixed voice services as well as for the retail supply of a bundle of fixed voice service and fixed broadband services.

Wholesale and retail markets for fixed voice services

In assessing the likely impact of the future with declaration of the PSTN OA service on competition, the key issue is the level of competitive constraints that exist in the market for fixed voice services.

Access seekers have three main wholesale supply options for competing in the retail fixed voice services market:

- acquiring PSTN OA from Telstra (in conjunction with other inputs such as LCS and WLR);
- acquiring fixed voice services from another wholesale provider; or
- acquiring the ULLS from Telstra in conjunction with their own DSLAM or MSAN equipment and other inputs such as transmission capacity and voice switching services.²⁰⁸

The PSTN OA service is an essential input in the provision of resale fixed voice services by access seekers. As noted in chapter 4, 16 per cent of the 9.37 million fixed voice services provided over Telstra's CAN are wholesale services. A clear majority of these wholesale services would utilise PSTN OA as an input.

The ACCC considers that the future with declaration of the PSTN OA service 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. This enables end-users to gain access to an increased choice of telephony service providers, therefore improving their access to those services and providing greater scope for price competition as well as product and services improvements.

207 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, p. 4.

208 ACCC, *Telstra's PSTN Originating Access exemption applications – CBD and Metro areas – Final Decision and Proposed Class Exemption*, October 2008, p. 144.

For the ACCC to be satisfied that the removal of the PSTN OA declarations would not lead to reduced competition, relative to the future with the declarations, it would need to be satisfied that access seekers have sufficient access to other wholesale or access-based supply options, such as HFC, to provide retail fixed voice services.

In the absence of the PSTN OA declaration, wholesale and retail providers of fixed voice services would still largely depend on access to Telstra's underlying infrastructure via use of the ULLS. The ACCC has previously noted that the ULLS enables competitors to compete in the retail market on greater dimensions of supply and allows them the opportunity to innovate their services, leading to more sustainable competition compared with pure re-sale models in the longer-term.

Although the ULLS, acting as an effective competitive alternative to PSTN OA (used in conjunction with other inputs) has the potential to broaden fixed voice competition from pure re-sale, this is contingent on there being no, or low, barriers to ULLS entry. The ACCC notes that at the wholesale voice level Telstra controls the underlying infrastructure by which the majority of fixed voice services are provided and is the main supplier of PSTN OA and ULLS to competitors. Although Telstra is vertically integrated and has market power in the retail fixed voice market, the ACCC considers that in some ESAs barriers to ULLS entry faced by access seekers should be surmountable.²⁰⁹ However, for the ACCC to be satisfied that competition would not be harmed in the future without the PSTN OA declaration it would need to be established that there were no significant barriers to ULLS entry across Australia.

The ACCC notes there are conflicting views about the viability of entry into ULLS-based supply of fixed voice services in any specific ESA. The ACCC considers that there may be legitimate reasons why ULLS-based supply of fixed voice services will be less viable in some ESAs. This may be because of issues such as the economies of scale that are achievable. Access seekers have suggested to the ACCC in various processes that they do not expect significant ULLS-based entry to occur, or to provide a competitive alternative to PSTN OA, in a number of ESAs, particularly in Band 3, Band 4 and certain ESAs in Band 2. This is reflected in data collected by the ACCC via Telstra's quarterly Customer Access Network RKR.²¹⁰

In its exemption decisions the ACCC undertook an ESA-by-ESA analysis to come to a view on the geographic areas in which promotion of competition was likely to occur absent access to regulated PSTN OA. This involved the examination of the key barriers to entry and expansion such as the size of the addressable market in an ESA, the presence of competitive backhaul, voice switching capacity and any non-price

209 Ibid. p. 8.

210 Telstra CAN RKR data can be accessed on the ACCC website at:
<<http://www.accc.gov.au/content/index.phtml/itemId/853523>>

impediments to entry.²¹¹ The ACCC's final decision was to grant conditional individual exemptions to Telstra in ESAs that met certain threshold conditions.²¹²

The ACCC notes that without the imposition of the conditions and limitations that were attached to the PSTN OA individual exemption orders, it would not have been satisfied that the exemptions would promote the LTIE. The ACCC did not consider that the ULLS would be an effective competitive alternative to the PSTN OA service without measures imposed to address genuine barriers to ULLS entry such as exchange capping and the lack of a robust LSS to ULLS migration process. The ACCC notes that it is not able to impose similar conditions and limitations on a service declaration.

The ACCC does not consider that alternative customer access networks to Telstra's CAN could provide a sufficient competitive constraint in the wholesale market for fixed voice services on a national scale. As noted in chapter 4, Telstra's CAN still remains the basis for the provision of most fixed voice services at the wholesale and retail levels.

The ACCC has noted in its consideration of the relevant markets in chapter 3 that alternative networks to Telstra's CAN, such as Optus' HFC network, may be a competitive alternative for the owners of these networks, however, they are confined to the extent to which they provide a competitive alternative for other access seekers. Optus' HFC network, which is the largest piece of alternative competitive infrastructure to Telstra's CAN, has a limited geographic footprint which ensures it can not act as a competitive alternative on a national scale.

Retail market for bundled fixed voice and fixed broadband services

The ACCC's view is that the future with declaration of the PSTN OA service will promote competition in the supply of bundled fixed voice and fixed broadband services.

A fixed voice service is an essential component of the bundle of fixed telecommunications services. Therefore, the analysis conducted above in regards to the wholesale and retail markets for fixed voice services also applies to bundled fixed voice and fixed broadband services.

Conclusion

The ACCC's view is that continued declaration of the PSTN OA will promote competition in the markets for fixed voice services and bundled fixed voice and fixed broadband services.

211 ACCC, *Telstra's PSTN Originating Access exemption applications – CBD and Metro areas – Final Decision and Proposed Class Exemption*, October 2008, p. 8.

212 The ACCC came to the view that the promotion of competition in fixed voice services, and a flow-on competition benefit in bundled voice and broadband markets, was, subject to a number of important conditions and limitations, likely to occur if exemptions were granted in the geographic area consisting of those ESAs that had 14,000 or more addressable SIOs or had four or more ULLS-based competitors (including Telstra) within the ESA.

The ACCC considers that there are not currently sufficient competitive constraints on Telstra to ensure that the PSTN OA service or an effective substitute would be provided on a national basis on reasonable terms and conditions to access seekers absent declaration.

7.2.2 Would continued declaration achieve any-to-any connectivity?

In addition to the impact of declaration on competition the ACCC must consider whether continued declaration is likely to achieve the objective of any-to-any connectivity, which enables end-users to communicate with each other, irrespective of the network to which they are connected. As the Explanatory Memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996 noted, the concept of any-to-any connectivity is not always relevant in the declaration context.²¹³

The Explanatory Memorandum stated that the objective of any-to-any connectivity will only be relevant when considering whether a particular service promotes the LTIE of a carriage service that involves communications between end-users. When considering other types of services (such as carriage services which are inputs to an end-to-end service or distributive services such as the carriage of pay television), this criterion will be given little, if any, weight compared to the other two criteria.

The ACCC's view, in the absence of any submissions on the matter, is that continued declaration of PSTN OA is consistent with the achievement of any-to-any connectivity.

7.2.3 Would continued declaration encourage the economically efficient use of, and investment in, infrastructure?

The ACCC must consider a number of issues relating to investment in infrastructure when deciding whether declaration of a service is in the LTIE.

Impact on efficient use of infrastructure

The ACCC considers that the three components of efficiency – allocative, productive and dynamic – will be enhanced with the continued declaration of the PSTN OA.

Continued declaration of the PSTN OA will enable competition in the retail markets, and can also be expected to improve productive and dynamic efficiency in these markets by providing service providers the incentive to find lower-cost means of producing the retail services. This will also encourage both access providers and access seekers to invest and innovate in ways that will ensure they produce services of a chosen quality at the lowest possible cost in the future. Further, the ACCC would expect that with continued declaration allocative efficiency is likely to be improved as it would be more likely that over time the final prices paid for retail services by end-users will better reflect the efficient costs of provision of these services.

The ACCC's competition analysis also indicates that, in the absence of declaration, Telstra continues to face little competitive constraint when negotiating the prices and terms and conditions of access to the PSTN OA. Therefore, in the absence of

213 *Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill, 1996*, pp. 40-41.

declaration Telstra is less likely to face the correct incentives to price its services in ways which promote the efficient use of infrastructure. In addition, declaration provides access seekers with access to the declared service on reasonable terms and conditions, and in doing so is likely to place competitive pressure on Telstra such that all parties will face the correct incentives to supply and price their services in ways that reflect more efficient use of the underlying infrastructure.

Accordingly, the ACCC is of the view that continued declaration is likely to promote the efficient use of infrastructure.

Technical feasibility – technology in use or availability

In regards to the technical feasibility of providing the service, Telstra has been providing third party access to the PSTN OA service since the early 1990s. Therefore, it is clear that it would be technically feasible to continue to supply and charge for the service.

Legitimate commercial interests of the access provider

The ACCC must also consider the legitimate commercial interests of the access provider. The ACCC considers that the legislative framework ensures that, in providing access to declared services, Telstra is able to earn a commercial return on its investment and the costs of providing access to the services. The ACCC, therefore, does not consider that Telstra's legitimate commercial interests would be harmed from the future with declaration of the PSTN OA service.

The ACCC acknowledges that Telstra incurs costs in supplying and charging for PSTN OA. These include the technical costs of supplying the service, costs associated with complying with the SAOs and the cost of systems to provide billing information to access seekers. The ACCC considers that these costs are reasonable, given the regulatory regime allows Telstra to recover the efficient costs of supplying and charging for the PSTN OA through the PSTN OA and other charges.

Incentives for efficient investment in existing infrastructure

Continued declaration is likely to promote efficient investment in existing infrastructure by reducing the investment risks prevalent in an industry where investment is characterised by sunk costs and economies of scale. Continued declaration is likely to reduce barriers to entry and have a positive effect on investment by access seekers. In the absence of a PSTN OA declaration, the ability of access seekers to acquire the PSTN OA, or to acquire it on reasonable terms and conditions, would be reduced and it is reasonable to conclude that access seeker's incentives for efficient investment in infrastructure may be distorted.

As noted in the preceding chapters, Optus submits that the Government's NBN announcement means that it is no longer efficient for Telstra to make further significant infrastructure investments in the CAN.²¹⁴ The ACCC is not satisfied that there is sufficient certainty regarding future market developments to reach this conclusion.

214 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, pp. 7-8.

In any event, the price that Telstra can charge competitors for the PSTN OA is a determinant of Telstra's decision to maintain, improve or expand its existing infrastructure, or whether to invest in new infrastructure. The access price will also impact on competitors' decisions whether to utilise the PSTN OA or invest in alternate infrastructure. The ACCC considers that the regulatory regime allows Telstra to recover the efficient costs of supplying and charging for the PSTN OA through the PSTN OA and other charges and therefore provide the correct incentives to Telstra and competing providers to invest efficiently in existing networks.

Incentives for efficient investment in new infrastructure

As noted in the preceding chapters, Optus states that the Government's NBN announcement is having an immediate impact on industry expectations by, for example, 'impacting the decision-making processes of market participants with regard to infrastructure-investment'.²¹⁵ Optus submits that it would be inefficient for any party to construct a new fixed-line telecommunications access infrastructure, independent of both the CAN and the proposed NBN, because it would involve inefficient duplication of infrastructure.²¹⁶

Further, Optus submits that any arguments that deregulation would promote efficient investment should be rejected given the Tribunal's reasoning in the HFC exemption judgement. Optus submits that facilitating access to the existing CAN is more efficient than attempting to duplicate the infrastructure facilities.²¹⁷

Given the Government's NBN announcement, the ACCC considers it is less likely that the construction of an additional end-to-end fixed-line access network would be economically efficient in the foreseeable future. In recognising this, the ACCC considers continued declaration of the fixed-line services will not reduce the likelihood of investment in additional fixed-line access networks.

In relation to incentives for investment in new infrastructure that flow from the declaration of a service, the ACCC considers that the future with the declaration of the PSTN OA will assist in creating the preconditions for competitors to gain the critical mass required to compete effectively and roll out their own competing infrastructure that enables greater control over the provision of services over Telstra's CAN. The discussion in chapter 4 on the state of competition in telecommunications markets is evidence that competitors are increasingly investing in additional infrastructure for the provision of traditional and next generation services. This is especially the case in CBD and metropolitan areas of major capital cities.

Conclusion

The ACCC does not consider that the future without PSTN OA declaration would lead to the economically efficient use of, and investment in, infrastructure. The ACCC considers that through the exemptions process it has been able to identify those ESAs

215 Ibid., pp. 6-7.

216 Ibid., pp. 7-8.

217 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, p. 11.

where it is satisfied that the granting of an exemption from the SAOs as they relate to the supply of the PSTN OA will promote the LTIE. These specific areas exhibit sufficient competitive characteristics to allow it to withdraw regulated access to PSTN OA, subject to the satisfaction of the conditions and limitations attached to the individual exemptions.

As noted previously, outside of these exempted ESAs ULLS-based entry may not be economically viable. In these cases, the ACCC considers it is likely to be more efficient for access seekers to use the declared PSTN OA services as an input to provide fixed voice services than incur the investment costs associated with DSLAM/MSAN infrastructure deployment.

7.2.4 ACCC's views on whether continued declaration would promote the LTIE

Given the discussion above, the ACCC's view is to extend the PSTN OA declaration. The ACCC does not consider it will promote the LTIE to revoke the declaration or allow the declaration to expire and make a new declaration.

The ACCC proposes to extend the PSTN OA declaration for five years for the reasons set out in chapter 9 of this decision.

7.2.5 Variation of the PSTN OA service description to reflect exemption decisions

The ACCC has statutory powers under Part XIC of the TPA to exempt carriers and carriage service providers, or a class of carriers or carriage services providers, from the SAOs in relation to a declared service. There are two types of exemptions available to the ACCC. Under s152AS of the TPA, the ACCC may determine that each of the members of a specified class of carrier or of a specified class of carriage service provider is exempt from any or all of the SAOs. This type of exemption is a class exemption. Under s152AT of the TPA, a carrier or a carriage service provider may apply to the ACCC for a written order exempting a particular carrier or provider from all or any of the SAOs. This type of exemption is an individual exemption.

The ACCC granted Telstra conditional individual exemptions from the SAOs for the PSTN OA service in certain CBD and metropolitan areas during 2008.²¹⁸

Telstra submits that the ACCC should 'use its class exemption power in concert with its declaration power to progressively wind back regulation of WLR, LCS and PSTN OA where ESAs meet the Commission's 3+ or 14000 line criteria'.²¹⁹

The ACCC does not consider it would promote the LTIE to exclude the ESAs subject to the individual exemption orders from an extension of the declaration for the PSTN OA. The individual exemptions granted by the ACCC were crafted to operate in conjunction with the underlying service declarations. If Telstra cannot satisfy the

218 See: ACCC, *Telstra's PSTN Originating Access exemption applications - CBD and Metropolitan areas - Final decision and Class Exemption*, October 2008.

219 Telstra, *Submission to Fixed Services Review Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR - Draft Decision*, June 2009, pp. 2-3.

conditions and limitations outlined in the individual exemption orders then the SAOs must apply in relation to PSTN OA in the ESAs in the exemption footprint.

Although the ACCC's recent domestic transmission capacity service (DTCS) declaration inquiry excluded the exempted transmission routes from the service description, the ACCC does not consider this is appropriate for the PSTN OA exemption ESAs.

The ACCC's approach to declaration of the PSTN OA differs from the approach it took in relation to the DTCS as the competitive and supply characteristics for each of the services are not the same. The ACCC exemptions for the PSTN OA service were subject to conditions and limitations that relied on the underlying declaration of the services. In contrast, the DTCS exemptions granted to Telstra for certain transmission routes were not subject to conditions or limitations and therefore not crafted to operate in conjunction with the underlying declaration.

The ACCC considers that excluding ESAs from the PSTN OA declaration where these ESAs are subject to individual exemption orders that contain conditions and limitations would be contradictory to the regulatory intent of the orders.

7.3 Long-term interests of end-users - PSTN TA

The ACCC's view is that extending the PSTN TA declaration would promote the LTIE. The ACCC does not consider that varying or revoking this declaration, or allowing the PSTN TA declaration to expire and making a new declaration, would promote the LTIE. This is consistent with the ACCC's preliminary views as set out in the discussion paper and draft decision.

The ACCC has reached this view having given regard to the extent to which declaration of the PSTN TA service would result in the objectives set out in s152AB of the TPA and after considering submissions made to the discussion paper and draft decision. These are considered in turn below.

The ACCC notes that each of the 14 submissions received to the discussion paper were in agreement that the PSTN TA declaration should be extended.

In response to the draft decision, Network Technology et al agree with the ACCC that PSTN TA remains an enduring bottleneck where Telstra controls access to the network and facilities necessary to provide services to end-users. Network Technology et al consider that continued declaration would promote the LTIE by allowing these carriers to provide diverse products at competitive rates. Without declaration, Network Technology et al consider that there is a reasonable potential that they would not be able to continue providing all services to consumers as Telstra's ability to impede competition would increase.²²⁰

220 On the Net et al, *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR – Draft Decision*, June 2009, p. 1.

Optus also endorsed the ACCC's draft decision to extend the declaration.²²¹

7.3.1 Would continued declaration promote competition?

In determining whether the continued declaration of the PSTN TA will promote the LTIE, the ACCC must assess whether declaration will result in the promotion of competition in the relevant markets for the service. The ACCC considers it useful to apply the 'with and without test' to undertake this assessment.

The ACCC's view is that the relevant markets for the PSTN TA service are the retail and wholesale supply of fixed voice services.

Wholesale and retail markets for fixed voice services

The ACCC notes the continuing utility of the PSTN TA service for access seekers in the provision of voice services to end-users. Even where there is competitive infrastructure available, the competing network still needs to interconnect with other networks to terminate services.

As each provider of call termination has exclusive control over the access to end-users on its own network, termination is considered by most competition regulators as an essential bottleneck facility. This problem may be further exacerbated if one network is substantially larger than competing networks, or if there are asymmetric traffic flows, as this would lead to a disparity in negotiating power for the provision of terminating access services.

The ACCC notes that there are currently no competing fixed-line networks that are comparable to Telstra's CAN on national scale. Absent declaration of the PSTN TA service, the ACCC considers Telstra would have the incentive to withdraw access to the service or offer it on unreasonable terms to access seekers. This is due to the asymmetry between the size and reach of networks still evident on a national scale.

The ACCC notes that Telstra's copper network still remains the basis for the provision of most fixed services at the wholesale and retail levels. At present, the technical capability and reach of Telstra's CAN is generally equivalent or superior to investments made by its competitors in alternative customer access networks. Telstra's and Optus' HFC networks represent the largest alternative fixed voice networks in Australia. These networks have a combined coverage of approximately 2.6 million premises.²²² However, this coverage is significantly less than Telstra's CAN.

Importantly, Optus has stated that it supplies residential customers via its HFC network, rather than Telstra's CAN, where the premises are serviceable by HFC. However, Optus suggests it is not able to provide all residential customer premises

221 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, p. 4.

222 ACCC, *Telstra's exemption application in respect of Optus HFC network - Final Decision*, November 2008.

located within its HFC network footprint with HFC network services.²²³ The ACCC understands that of the 2.2 million homes passed by the Optus HFC network, around 0.8 million homes are classified as ‘unserviceable’.²²⁴

The above comparison between Telstra’s CAN and its largest fixed-line competitor, Optus’ HFC network, demonstrates that there is a continued need for regulatory intervention to achieve optimal arrangements for terminating access. Therefore, the ACCC’s view is that continued PSTN TA declaration will promote competition in the provision of fixed voice services.

7.3.2 Would continued declaration achieve any-to-any connectivity?

The ACCC’s view is that any-to-any connectivity is still a key consideration in assessing the need for continued declaration of the PSTN TA service. As the ACCC has noted in the past, access to customers is necessary both for successful entry and for continued competition. The need for any-to-any connectivity confers on telecommunications network owners market power in access to their customers.

Even where a new entrant employs its own network facilities, it will need to interconnect its network with Telstra’s ubiquitous PSTN so that its subscribers can make calls to and receive calls from Telstra’s customers.

For a service provider to compete effectively in the long-distance markets it requires ubiquitous terminating access. Being unable to terminate a long-distance call would severely limit the ability of the service provider to compete in the long-distance market. Similarly, a high proportion of calls from mobile phone users are to end-users on fixed networks.

The ACCC’s view is that continued declaration of the PSTN TA service would promote any-to-any connectivity.

7.3.3 Would continued declaration encourage the economically efficient use of, and investment in, infrastructure?

The ACCC considers that the future with declaration of the PSTN TA service would enable access seekers to combine existing network access infrastructure with their own 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.

Impact on efficient use of infrastructure

The ACCC considers that the three components of efficiency – allocative, productive and dynamic – will be enhanced with the continued declaration of the PSTN TA.

Continued declaration of the PSTN TA will enable competition in the retail and wholesale markets, and also be expected to improve productive and dynamic efficiency in these markets by providing service providers the incentive to find lower-

223 Optus, *Optus submission to the Australian Competition and Consumer Commission on Telstra’s December 2007 Exemption Application for Fixed-line Services in the Optus HFC Area*, March 2008. p. 4.

224 Ibid. p. 10.

cost means of producing the retail services. This would also encourage both access providers and access seekers to invest and innovate in ways that will ensure they produce services of a chosen quality at the lowest possible cost in the future. Further, the ACCC would expect that with declaration, allocative efficiency is likely to be improved as it would be more likely that over time the final prices paid for retail services by end-users will better reflect the efficient costs of provision of these services.

The ACCC's competition analysis also indicates that, in the absence of declaration, Telstra continues to face little competitive constraint when negotiating the prices and terms and conditions of access to the PSTN TA. Therefore, in the absence of declaration Telstra is less likely to face the correct incentives to price its services in ways which promote the efficient use of infrastructure. Conversely, declaration provides access seekers with access to the declared service on reasonable terms and conditions, and in doing so is likely to place competitive pressure on Telstra such that all parties will face the correct incentives to supply and price their services in ways which reflect more efficient use of the underlying infrastructure.

Accordingly, the ACCC is of the view that declaration is likely to promote the efficient use of infrastructure.

Technical feasibility – technology in use or availability

In regards to the technical feasibility of providing the service, Telstra has been providing third party access to the PSTN TA service since the early 1990s. Therefore, it is clear that it would be technically feasible to continue to supply and charge for the service.

Legitimate commercial interests of the access provider

The ACCC must also consider the legitimate commercial interests of the access provider. The ACCC considers that the legislative framework ensures that, in providing access to declared services, Telstra is able to earn a commercial return on its investment and the costs of providing access to the services. Therefore, the ACCC does not consider that Telstra's legitimate commercial interests would be harmed from continued declaration of the PSTN TA service.

Incentives for efficient investment in existing infrastructure

Continued declaration is likely to promote efficient investment in existing infrastructure by reducing the investment risks prevalent in an industry where investment is characterised by sunk costs and economies of scale. Declaration is likely to reduce barriers to entry and have a positive effect on investment by access seekers. In the absence of a PSTN TA declaration, the ability of access seekers to acquire the PSTN TA, or to acquire it on reasonable terms and conditions, would be reduced and it is reasonable to conclude that access seekers incentives for efficient investment in infrastructure may be distorted.

As noted in the preceding chapters, Optus submits that the Government's NBN announcement means that it is no longer efficient for Telstra to make further

significant infrastructure investments in the CAN.²²⁵ The ACCC is not satisfied that there is sufficient certainty regarding future market developments to reach this conclusion.

In any event, the price that Telstra can charge competitors for the PSTN TA is a determinant of Telstra's decision to maintain, improve or expand its existing infrastructure, or whether to invest in new infrastructure. The access price will also impact on competitors' decisions whether to utilise the PSTN TA or invest in alternate infrastructure. The ACCC considers that the regulatory regime allows Telstra to recover the efficient costs of supplying and charging for the PSTN TA through the PSTN TA and other charges and therefore provide the correct incentives to Telstra and competing providers to invest efficiently in existing networks.

Incentives for efficient investment in new infrastructure

The ACCC must consider is the incentives for investment in new infrastructure that flow from declaration of a service. Investment in new infrastructure can be considered both from the perspective of the incentives on Telstra to invest in new networks and the incentives on access seekers to invest in their own facilities or networks.

The ACCC considers there is no evidence to suggest that the future with declaration of the PSTN TA service is likely to negatively impact on Telstra's incentives to undertake investment in new infrastructure. This is based on the view that the PSTN TA service has been declared for a long period and there has been a high level of investment in PSTN infrastructure during this time.

As noted in the preceding chapter, Optus states that the Government's NBN announcement is having an immediate impact on industry expectations by, for example, 'impacting the decision-making processes of market participants with regard to infrastructure-investment'.²²⁶ Optus submits that it would be inefficient for any party to construct a new fixed-line telecommunications access infrastructure, independent of both the CAN and the proposed NBN, because it would involve inefficient duplication of infrastructure.²²⁷

Further, Optus submits that any arguments that deregulation would promote efficient investment should be rejected given the Tribunal's reasoning in the HFC exemption judgement. Optus submits that facilitating access to the existing CAN is more efficient than attempting to duplicate the infrastructure facilities.²²⁸

Given the Government's NBN announcement, the ACCC considers it is less likely that the construction of an additional end-to-end fixed-line access network would be economically efficient in the foreseeable future. In recognising this, the ACCC

225 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, pp. 7-8.

226 Ibid., pp. 6-7.

227 Ibid., pp. 7-8.

228 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, p. 11.

considers continued declaration of the fixed-line services will not reduce the likelihood of investment in additional fixed-line access networks.

The ACCC considers that declaration of the PSTN TA has assisted in creating the preconditions for competitors to gain the critical mass required to compete effectively and roll out their own competing infrastructure that enables greater control over the provision of services over Telstra's CAN. The discussion in chapter 4 on the state of competition in telecommunications markets is evidence that competitors are increasingly investing in alternative infrastructure for the provision of traditional and next generation services. This is especially the case in CBD and metropolitan areas of major capital cities.

Conclusion

Overall, the ACCC is of the view that the future with declaration of the PSTN TA will not inhibit efficient investment in new infrastructure by access providers to supply fixed broadband and fixed voices services. The ACCC also considers that declaration promotes efficient investment by access seekers in both alternative infrastructure and retail markets.

The ACCC notes that without regulated access to the PSTN TA service it is likely that competition in the provision of voice services would be lessened relative to the future with declaration. The ACCC would expect to observe the exit of some competitors from the sector if they were unable to come to acceptable commercial terms with Telstra for provision of the PSTN TA service. This would most likely lead to a decline in total investment in infrastructure.

7.3.4 ACCC's views on whether continued declaration would promote the LTIE

The ACCC's view is that continued PSTN TA regulation would promote competition in the provision of voice services. This is due to the asymmetry between the size and reach of networks still evident on a national scale. The ACCC notes that even where competitive infrastructure is available, the competing network will still need to interconnect with other networks to terminate services.

The ACCC notes that continued declaration of the PSTN TA service promotes the LTIE by achieving the objective of any-to-any connectivity. Access to customers is necessary both for successful entry and for continued competition. Without access to the PSTN TA service competitors would be unable to terminate calls on Telstra's network. Being able to interconnect to Telstra's network is central to its competitors' ability to compete in the provision of local, long-distance and international voice services.

The ACCC also considers that continued declaration of the PSTN TA service would encourage the economically efficient use of, and investment in, infrastructure.

Therefore, given the discussion above, the ACCC view is to extend the PSTN TA declaration. The ACCC does not consider it will promote the LTIE to revoke the declaration or allow the declaration to expire and make a new declaration.

The ACCC proposes to extend the PSTN TA declaration for five years for the reasons set out in chapter 9 of this decision.

Chapter 8 Local carriage service and wholesale line rental service

In this chapter, the ACCC sets out its views on whether the continued declaration of the LCS and WLR services would promote the LTIE, in particular through the extent to which it is likely to promote competition in relevant markets; achieve any-to-any connectivity; and encourage economically efficient use of, and investment in, infrastructure.

The two services are considered together in this chapter as they are predominantly acquired as part of a wholesale bundle in order to provide fixed voice services in retail markets.

An overview of the legislative criteria for assessing whether to declare a service, and the ACCC's approach, are contained in Appendix A of this report. Appendix F contains the service description for the LCS and Appendix G contains the service description for WLR.

8.1 Background

8.1.1 What is the local carriage service?

The LCS is a wholesale local call service that allows access seekers to resell local calls without deploying substantial alternative infrastructure. It involves the carriage of a telephone call from one end-user to another end-user in the same standard zone.

8.1.2 What is the wholesale line rental service?

The WLR service involves the provision of a basic line rental service that allows the end-user to connect to the access provider's PSTN.

8.1.3 Initial declaration of the LCS

In its 1999 *Declaration of local telecommunications services* report, the ACCC decided to declare the LCS.²²⁹ The ACCC noted that the LCS would be used to supply retail local call services to end-users.

In coming to its decision, the ACCC considered that:

The ability of service providers to compete effectively in the local telephony market through re-supplying local telephony services is largely influenced by the terms and conditions on which local call services are supplied to them. Declaration of the local carriage service would constrain the ability of suppliers to influence competition in the local telephony services market.²³⁰

The ACCC found that declaring the LCS would promote competition in the market for local telephony services (and in the long distance market where there was

229 ACCC, *Declaration of local telecommunications services*, July 1999.

230 Ibid. p. 110.

bundling) and also encourage efficient investment in infrastructure. Consequently, the ACCC was satisfied that declaration of the LCS would promote the LTIE.²³¹

During the course of the inquiry the ACCC received requests to formally declare certain line related services, including a line rental service. In coming to its decision not to declare line related services, the ACCC acknowledged that these services were implicitly declared as they tended to be purchased as a bundle from Telstra. The ACCC identified that the bundle usually consisted of line rental, supplementary services (such as call waiting) and local calls.²³²

The ACCC's primary concern was that declaration of line related services would inhibit initiatives being progressed by Telstra at the time to reform its line lessee model under which service providers acquired local telephony services.²³³

8.1.4 LCS exemption decision 2002

In June 2000, Telstra applied to the ACCC under section 152AT of the TPA for an individual exemption for the SAOs in relation to supply of the LCS. The exemption application related to the supply of the LCS within the CBD areas of Sydney, Melbourne, Brisbane, Adelaide and Perth.

After assessing the merits of this exemption application, the ACCC decided to grant the exemption subject to a transition period of one year and a number of conditions.²³⁴ It also decided to grant a class exemption immediately for all other carriers and carriage service providers without conditions.²³⁵

In reaching this decision, the ACCC considered that there was sufficient alternative infrastructure (such as fibre loops) and access to declared services (local PSTN OA and ULLS) for originating calls in CBD areas to adequately serve as substitutes for the LCS, and to also act as a constraint on Telstra's wholesale LCS price in the absence of regulation. The ACCC also considered that the availability of the LCS may have been preventing the efficient use of, and investment in, infrastructure relating to the provision of these substitute services. Consequently, the ACCC took the view that granting the exemptions would promote the LTIE.²³⁶

8.1.5 Local Services Review 2006

As part of its 2006 *Local Services Review*, the ACCC decided not to declare LCS or WLR in the CBD areas of Sydney, Melbourne, Adelaide, Brisbane and Perth. This decision accepted the rationale of the previous exemption granted in those regions for the LCS and extended it to the provision of WLR services.

231 Ibid. p. 110.

232 Ibid. p. 112.

233 Ibid. p. 113.

234 ACCC, *Future scope of the Local Carriage Service – final decision*, July 2002, p. 2.

235 Ibid. p. 2.

236 Ibid. p. 64.

LCS declaration

The ACCC decided to continue the declaration of the LCS for three years until July 2009.²³⁷ The ACCC considered that the continued declaration of the LCS was likely to promote the LTIE by both promoting competition and encouraging economically efficient use of and investment in infrastructure.²³⁸

In the review the ACCC found that:

Continued declaration of the LCS would mandate access on reasonable terms and constrain Telstra's ability to influence competition in the retail local market. Declaration would also promote competition in the long-distance market where local telephony services are bundled with long-distance calls for end-users who prefer a single provider.²³⁹

In regard to economic efficiency, the ACCC took the view that continued declaration of the LCS was likely to encourage efficient investment in infrastructure used to supply local telephony (and possibly other) services outside of the previously exempted CBD areas of Sydney, Melbourne, Brisbane, Adelaide and Perth. The ACCC considered that this would:

...continue to facilitate market entry and enable service providers to obtain information about demand characteristics and the likely responses of competitors, thus reducing the risks associated with infrastructure deployment. This will enable service providers to make efficient decisions about when to deploy competing facilities.²⁴⁰

WLR declaration

The *Local Services Review* also considered whether to declare a wholesale line rental service. The ACCC took the view that, while WLR had been implicitly declared as part of a bundle with local calls since 1999, there were strong reasons justifying the independent, explicit and transparent declaration of WLR as a separate service.²⁴¹

The ACCC considered that formally declaring a separate line rental service would promote competition in downstream retail markets. Declaration would achieve this by providing greater certainty to access seekers on the provision and pricing of the service and enabling the line rental service to be used to provide other services rather than just as part of a bundled voice-access service.²⁴²

237 ACCC, *Local Services Review – Final Decision*, July 2006.

238 Ibid. p. 7.

239 Ibid. p. 46.

240 Ibid. p. 46.

241 Ibid. p. 8.

242 Ibid. p. 8.

The ACCC also considered that a WLR declaration would encourage economically efficient use of and investment in infrastructure by creating the appropriate incentives to access providers and access seekers.²⁴³

8.1.6 LCS/WLR exemption decisions 2008

In July 2007, Telstra lodged applications with the ACCC under section 152AT of the TPA seeking individual exemptions from the SAOs for the LCS and WLR declared services in 371 ESAs in metropolitan areas of Australia. In October 2007, Telstra lodged two further applications, seeking exemptions for these services in an additional 16 ESAs in metropolitan areas.

In its final decision in August 2008 the ACCC considered that it was in the LTIE to grant Telstra an exemption from the SAOs for the supply of LCS and WLR in 248 out of the 387 ESAs in which Telstra had sought exemptions.²⁴⁴ The individual exemption orders were granted subject to a number of conditions and limitations.

On 12 September 2008, Chime applied to the Tribunal pursuant to section 152AV of the TPA for review of the ACCC's individual exemption decisions for both the WLR and LCS. On 22 December 2008, the Tribunal set aside the ACCC's individual exemption orders.

Telstra commenced proceedings for judicial review of the Tribunal decision on 13 January 2009. The Full Federal Court remitted the decision back to the Tribunal for a rehearing.

On 27 May 2009, following the rehearing, the Tribunal advised the parties that it would make exemption orders subject to conditions and limitations in relation to Telstra's supply of the WLR and LCS. The Tribunal's reasons for making the orders and the draft orders were not publicly released at that time.

On 8 July 2009, the Tribunal published its WLR and LCS reasons. The reasons support granting Telstra individual exemptions from the SAOs in relation to these services in certain ESAs, subject to conditions and limitations. The form of the individual exemption orders are yet to be finalised. However, it is apparent from the Tribunal's reasons that its intended orders rely on the underlying declaration of the WLR and LCS services.

8.2 The long-term interests of end-users

The ACCC notes that there will be many similarities between the LTIE assessment for the LCS/WLR and PSTN OA services. This is because access seekers, in most cases, utilise these declared services in conjunction to provide a suite of fixed voice services to end-users. There are also underlying structural issues relating to the delivery of fixed-line services which are applicable to LCS, WLR and PSTN OA.

243 Ibid. p. 8.

244 ACCC, *Telstra's local carriage service and wholesale line rental applications – Final decision and Class exemption*, 2008, p. 10.

The ACCC's view is that extending the LCS and WLR declarations would promote the LTIE. The ACCC does not consider that varying or revoking these declarations, or allowing the LCS and WLR declarations to expire and making new declarations, would promote the LTIE. This is consistent with the ACCC's preliminary views as set out in the discussion paper and draft decision.

The ACCC has reached this view having given regard to the extent to which continued declaration of the LCS and WLR services would result in the objectives set out in s152AB of the TPA and after considering submissions made to the discussion paper and draft decision.

The ACCC notes that each of the 14 submissions received to the discussion paper were in agreement that the LCS and WLR declarations should be extended. However, Telstra does consider that both declarations should be narrowed in geographic scope to reflect the criteria the ACCC used in its exemptions analysis. This is discussed in detail below.

In response to the draft decision, Network Technology et al agree with the ACCC that LCS and WLR remains an enduring bottleneck where Telstra controls access to the network and facilities necessary to provide services to end-users. Network Technology et al consider that continued declaration would promote the LTIE by allowing these carriers to provide diverse products at competitive rates. Without declaration, Network Technology et al consider that there is a reasonable potential that they would not be able to continue providing all services to consumers as Telstra's ability to impede competition would increase.²⁴⁵

Optus also endorsed the ACCC's draft decision to extend the declaration.²⁴⁶

8.2.1 Would continued declaration promote competition?

In determining whether the continued declaration of the LCS and WLR would promote the LTIE, the ACCC must assess whether this would result in the promotion of competition in the relevant markets for these services.

The ACCC's view is that the relevant markets for the LCS and WLR are the retail and wholesale supply of fixed voice services as well as for the retail supply of a bundle of fixed voice and fixed broadband services. The ACCC considers it useful to apply the 'with and without test' to undertake this assessment.

Wholesale and retail markets for fixed voices services

Fixed telephony services already have a high level of penetration in Australia. Therefore, continued declaration is not expected to significantly increase the penetration of telephony services. However, the ACCC considers that the future with declaration is likely to provide end-users with additional choices in terms of service provider, increased competition on the retail service dimensions, and, depending on

245 On the Net et al, *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR – Draft Decision*, June 2009, p. 1.

246 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, p. 4.

the service provider's costs, lead to lower priced local calls and bundled services for end-users. In the future with declaration, these benefits are likely to continue to be enjoyed on an ongoing basis by those end-users who are unlikely to be served by alternative customer access infrastructure in the foreseeable future.

In assessing the likely impact of the declaration of the LCS and WLR services on competition, the key issue is the level of competitive constraints that exist in the market for fixed voice services.

Access seekers have three main wholesale supply options for competing in the retail fixed voice services market:

- acquiring LCS and WLR from Telstra (in conjunction with other inputs such as PSTN OA)
- acquiring fixed voice services from another wholesale provider, or
- acquiring the ULLS from Telstra in conjunction with their own DSLAM or MSAN equipment and other inputs such as transmission capacity and voice switching services.²⁴⁷

The LCS and WLR services are essential inputs in the provision of resale fixed voice services by access seekers. As noted in chapter 4, 16 per cent of the 9.37 million fixed voice services provided over Telstra's CAN are wholesale services. The ACCC understands that a clear majority of these wholesale services would utilise LCS and WLR as inputs.²⁴⁸

The ACCC considers that the future with declaration of the 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. This enables end-users to gain access to an increased choice of telephony service providers, therefore improving their access to those services and providing greater scope for price competition as well as product and services improvements.

For the ACCC to be satisfied that the removal of the LCS and WLR declarations would not lead to reduced competition, relative to the future with the declarations, it would need to be satisfied that access seekers have sufficient access to other wholesale or access-based supply options, such as HFC, to provide retail fixed voice services.

In the future without the LCS and WLR declarations, wholesale and retail providers of fixed voice services would still largely depend on access to Telstra's underlying infrastructure via use of the ULLS. The ACCC has previously noted that the ULLS

²⁴⁷ ACCC, *Telstra's local carriage service and wholesale line rental applications – Final decision and Class exemption*, 2008, p. 5.

²⁴⁸ As there were approximately 520 600 SIOs at 30 June 2008, the rest of the wholesale SIOs would be utilising LCS, WLR.

enables competitors to compete in the retail market on greater dimensions of supply and allows them the opportunity to innovate their services, leading to more sustainable competition compared with pure re-sale models in the longer-term.

However, although the ULLS, as an effective competitive alternative to LCS and WLR (used in conjunction with other inputs) has the potential to broaden fixed voice competition from pure re-sale, this is contingent on there being no, or low, barriers to ULLS entry. The ACCC notes that at the wholesale voice level Telstra controls the underlying infrastructure by which the majority of fixed voice services are provided and is the main supplier of LCS/WLR and ULLS to competitors. Although Telstra is vertically integrated and has market power in the retail fixed voice market, the ACCC has previously noted that in some ESAs barriers to ULLS entry faced by access seekers should be surmountable.²⁴⁹ However, for the ACCC to be satisfied that competition in the absence of the LCS/WLR declaration would be promoted, relative to the future with or without the declaration, it would need to be established that there were no significant barriers to ULLS entry across Australia.

The ACCC notes there are conflicting views about the viability of entry into ULLS-based supply of fixed voice services in any specific ESA. The ACCC considers that there may be legitimate reasons why ULLS-based supply of fixed voice services will be less viable in some ESAs. This may be because of issues such as the economies of scale that are achievable. Access seekers have suggested to the ACCC in various processes that they do not expect significant ULLS-based entry to occur, or to provide a competitive alternative to LCS and WLR services, in a number of ESAs, particularly in Band 3, Band 4 and certain ESAs in Band 2. This is reflected in data collected by the ACCC via Telstra's quarterly Customer Access Network RKR.²⁵⁰

In assessing whether to grant exemptions, the ACCC undertook an ESA-by-ESA analysis to come to a view on the geographic areas in which promotion of competition was most likely to occur absent access to regulated LCS and WLR. This involved the examination of the key barriers to entry and expansion such as the size of the addressable market in an ESA, the presence of competitive backhaul, voice switching capacity and any non-price impediments to entry.²⁵¹ The ACCC's final decision was to grant conditional individual exemptions to Telstra in ESAs that met certain threshold conditions.

The ACCC notes that without the imposition of the conditions and limitations that were attached to the LCS and WLR individual exemption orders, it would not have been satisfied that the exemptions would promote the LTIE. As noted above, the ACCC's exemption decisions on the WLR and LCS have been reviewed by the Tribunal. The Tribunal published its reasons on the WLR and LCS matter on 8 July 2009. While the orders are yet to be finalised, it is apparent from the reasons that the

249 ACCC, *Telstra's local carriage service and wholesale line rental applications – Final decision and Class exemption*, 2008, p. 5.

250 Telstra CAN RKR data can be accessed on the ACCC website at: <http://www.accc.gov.au/content/index.phtml/itemId/853523>.

251 ACCC, *Telstra's local carriage service and wholesale line rental applications – Final decisions and class exemption*, 2008, p. 5.

Tribunal intends to grant exemption orders that also rely on the underlying declaration of the LCS and WLR services. The ACCC notes that it is not possible to impose similar conditions and limitations on service declarations.

The ACCC does not consider that alternative customer access networks could provide a sufficient competitive constraint in the wholesale market for fixed voice services on a national scale. As noted in chapter 4, Telstra's CAN still remains the basis for the provision of most fixed voice services at the wholesale and retail levels.

The ACCC has noted in its consideration of the relevant markets in chapter 3 that alternative networks to Telstra's CAN, such as Optus' HFC network, may be a competitive alternative for the owners of these networks, however, they are confined to the extent to which they provide a competitive alternative for other access seekers. Optus' HFC network, which is the largest piece of alternative competitive infrastructure to Telstra's CAN, has a limited geographic footprint which ensures it cannot act as a competitive alternative on a national scale.

Retail market for bundled fixed voice and fixed broadband services

The ACCC's view is that continued declaration of the LCS and WLR services will promote competition in the supply of bundled fixed voice and fixed broadband services.

A fixed voice service is an essential component of the bundle of fixed telecommunications services. Therefore, the analysis conducted above in regard to the wholesale and retail markets for fixed voice services also applies to bundled fixed voice and fixed broadband services.

Conclusion

The ACCC's view is that the future with regulated access to LCS and WLR services will promote competition in the markets for fixed voice services and bundled fixed voice and fixed broadband services.

The ACCC considers that there are not currently sufficient competitive constraints on Telstra to ensure that the LCS and WLR services or an effective substitute would be available on a national basis on reasonable terms and conditions to access seekers absent declaration.

8.2.2 Would continued declaration achieve any-to-any connectivity?

In addition to the impact of declaration on competition the ACCC must consider whether continued declaration is likely to achieve the objective of any-to-any connectivity, which enables end-users to communicate with each other, irrespective of the network to which they are connected. The Explanatory Memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996 noted that the concept of any-to-any connectivity is not always relevant in the declaration context.²⁵²

The Explanatory Memorandum stated that the objective of any-to-any connectivity will only be relevant when considering whether a particular service promotes the

252 *Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill, 1996*, pp. 40-41.

LTIE of a carriage service that involves communications between end-users. When considering other types of services (such as carriage services which are inputs to an end-to-end service or distributive services such as the carriage of pay television), this criterion will be given little, if any, weight compared to the other two criteria.

Based on the above view, and in the absence of any submissions on the matter, the ACCC's views are that continued declaration of LCS and WLR will have no impact on the objective of achieving any-to-any connectivity.

8.2.3 Would continued declaration encourage the economically efficient use of, and investment in, infrastructure?

The ACCC's view is that the future with declaration of the LCS and WLR is likely to encourage efficient investment in infrastructure used to supply fixed voice and fixed broadband services.

Impact on efficient use of infrastructure

The ACCC considers that the three components of efficiency – allocative, productive and dynamic – will be enhanced with the continued declaration of the LCS and WLR.

Continued declaration of the LCS and WLR will enable competition in the retail markets, and also be expected to improve productive and dynamic efficiency in these markets by providing service providers the incentive to find lower-cost means of producing the retail services. This would also encourage both access providers and access seekers to invest and innovate in ways that will ensure they produce services of a chosen quality at the lowest possible cost in the future. Further, the ACCC would expect that with continued declaration, allocative efficiency is likely to be improved as it would be more likely that over time the final prices paid for retail services by end-users will better reflect the efficient costs of provision of these services.

The ACCC's competition analysis also indicates that, in the absence of declaration, Telstra continues to face little competitive constraint when negotiating the prices and terms and conditions of access to the LCS and WLR. Therefore, in the absence of declaration Telstra is less likely to face the correct incentives to price its services in ways which promote the efficient use of infrastructure. Conversely, declaration provides access seekers with access to the declared service on reasonable terms and conditions, and in doing so is likely to place competitive pressure on Telstra such that all parties will face the correct incentives to supply and price their services in ways which reflect more efficient use of the underlying infrastructure.

Accordingly, the ACCC is of the view that declaration is likely to promote the efficient use of infrastructure.

Technical feasibility – technology in use or availability

In regard to the technical feasibility of providing the service, Telstra has been providing third party access to the LCS and WLR services for several years. Therefore, it is clear that it would be technically feasible to continue to supply and charge for the service.

Legitimate commercial interests of the access provider

The ACCC must also consider the legitimate commercial interests of the access provider. The ACCC considers that the legislative framework ensures that, in providing access to declared services, Telstra is able to earn a commercial return on its investment and the costs of providing access to the services. The ACCC, therefore, does not consider that Telstra's legitimate commercial interests would be harmed from continued declaration of the LCS and WLR services.

The ACCC acknowledges that Telstra incurs costs in supplying and charging for LCS and WLR. These include the technical costs of supplying the service, costs associated with complying with the SAOs and the cost of systems to provide billing information to access seekers. The ACCC considers that these costs are reasonable, given the regulatory regime allows Telstra to recover the efficient costs of supplying and charging for the WLR and LCS through the LCS and WLR and other charges.

Incentives for efficient investment in existing infrastructure

Declaration is likely to promote efficient investment in existing infrastructure by reducing the investment risks prevalent in an industry where investment is characterised by sunk costs and economies of scale. Declaration is likely to reduce barriers to entry and have a positive effect on investment by access seekers. In the absence of the LCS and WLR declaration, the ability of access seekers to acquire the LCS and WLR, or to acquire it on reasonable terms and conditions, would be reduced and it is reasonable to conclude that access seekers incentives for efficient investment in infrastructure may be distorted.

As noted in the preceding chapters, Optus submits that the Government's NBN announcement means that it is no longer efficient for Telstra to make further significant infrastructure investments in the CAN.²⁵³ The ACCC is not satisfied that there is sufficient certainty regarding future market developments to reach this conclusion.

In any event, the price that Telstra can charge competitors for the LCS and WLR is a determinant of Telstra's decision to maintain, improve or expand its existing infrastructure, or whether to invest in new infrastructure. The access price will also impact on competitors' decisions whether to utilise the LCS and WLR or invest in alternate infrastructure. The ACCC considers that the regulatory regime allows Telstra to recover the efficient costs of supplying and charging for the LCS and WLR through the LCS and WLR and other charges and therefore provide the correct incentives to Telstra and competing providers to invest efficiently in existing networks.

Incentives for efficient investment in new infrastructure

As noted in the preceding chapter, Optus states that the Government's NBN announcement is having an immediate impact on industry expectations by, for example, 'impacting the decision-making processes of market participants with regard

253 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, pp. 7-8.

to infrastructure-investment'.²⁵⁴ Optus submits that it would be inefficient for any party to construct a new fixed-line telecommunications access infrastructure, independent of both the CAN and the proposed NBN, because it would involve inefficient duplication of infrastructure.²⁵⁵

Further, Optus submits that any arguments that deregulation would promote efficient investment should be rejected given the Tribunal's reasoning in the HFC exemption judgement. Optus submits that facilitating access to the existing CAN is more efficient than attempting to duplicate the infrastructure facilities.²⁵⁶

Given the Government's NBN announcement, the ACCC considers it is less likely that the construction of an additional end-to-end fixed-line access network would be economically efficient in the foreseeable future. In recognising this, the ACCC considers continued declaration of the fixed-line services will not reduce the likelihood of investment in additional fixed-line access networks.

In relation to incentives for investment in new infrastructure that flow from the declaration of a service, the ACCC considers that the future with declaration of the LCS and WLR services will assisted in creating the preconditions for competitors to gain the critical mass required to compete effectively and roll out competing access-based infrastructure that enables greater control over the provision of services over Telstra's CAN. The discussion in chapter 4 on the state of competition in telecommunications markets provides evidence that competitors are increasingly investing in additional infrastructure for the provision of traditional and next generation services. This is especially the case in CBD and metropolitan areas of major capital cities.

Conclusion

The ACCC does not consider that the withdrawal of regulated access to LCS and WLR would lead to the economically efficient use of, and investment in, infrastructure. The ACCC considers that through the exemptions process it has been able to identify those ESAs where it is satisfied that the granting of an exemption from the SAOs as they relate to the supply of the LCS and WLR will promote the LTIE. These specific areas exhibit sufficient competitive characteristics to allow it to withdraw regulated access to LCS and WLR, subject to the satisfaction of the conditions and limitations attached to the individual exemptions.

As noted previously, outside of these exempted ESAs ULLS-based entry may not be economically viable. In these cases, the ACCC considers it is likely to be more efficient for access seekers to use the declared LCS and WLR services as an input to provide fixed voice services than incur the investment costs associated with DSLAM/MSAN infrastructure deployment.

254 Ibid., pp. 6-7.

255 Ibid., pp. 7-8.

256 Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, p. 11.

8.2.4 ACCC's views on whether continued declaration would promote the LTIE

Given the discussion above, the ACCC's view is that the WLR and LCS declaration should be extended. As such, the ACCC does not consider that revoking the declaration or allowing the declaration to expire would promote the LTIE. Nor does the ACCC presently consider that the LTIE would be promoted by allowing the current declaration to expire and making a new declaration, or by varying the current declaration.

The ACCC's view is that the WLR and LCS declarations should be extended for five years for the reasons set out in chapter 9 of this decision.

8.2.5 Variation of the LCS and WLR service descriptions to reflect exemption decisions

The ACCC has statutory powers under Part XIC of the TPA to exempt carriers and carriage service providers, or a class of carriers or carriage services providers, from the SAOs in relation to a declared service. There are two types of exemptions available to the ACCC. Under s152AS of the TPA, the ACCC may determine that each of the members of a specified class of carrier or of a specified class of carriage service provider is exempt from any or all of the SAOs. This type of exemption is a class exemption. Under s152AT of the TPA, a carrier or a carriage service provider may apply to the ACCC for a written order exempting a particular carrier or provider from all or any of the SAOs. This type of exemption is an individual exemption.

The ACCC granted Telstra conditional individual exemptions from the SAOs for the WLR and LCS in certain metropolitan areas during 2008.²⁵⁷ As noted above, the ACCC's decision was appealed and the Tribunal published reasons in relation to the matter on 8 July 2009. The Tribunal's reasons support granting Telstra individual exemptions from the SAOs in relation to these services in certain ESAs, subject to conditions and limitations.

Telstra submits that the ACCC should 'use its class exemption power in concert with its declaration power to progressively wind back regulation of WLR, LCS and PSTN OA where ESAs meet the Commission's 3+ or 14000 line criteria'.²⁵⁸

The ACCC does not consider it would promote the LTIE to exclude the ESAs subject to limited and conditional individual exemption orders from an extension of the declaration for the WLR and LCS. The individual exemptions granted by the ACCC were crafted to operate in conjunction with the underlying service declarations.

Although the ACCC's recent domestic transmission capacity service (DTCS) declaration inquiry excluded the exempted transmission routes from the service

257 See: ACCC, *Telstra's PSTN Originating Access exemption applications - CBD and Metropolitan areas - Final decision and Class Exemption*, October 2008.

258 Telstra, *Submission to Fixed Services Review Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR -Draft Decision*, June 2009, pp. 2-3.

description, the ACCC does not consider this is appropriate for the WLR and LCS exemption ESAs.

The DTCS exemptions granted to Telstra for certain transmission routes were not subject to conditions or limitations and therefore not crafted to operate in conjunction with the underlying declaration.

The ACCC considers that excluding ESAs from the WLR and LCS declarations where these ESAs may be subject to individual exemption orders that contain conditions and limitations would be contradictory to the regulatory intent of such exemption orders.

It is apparent from the Tribunal's reasons that its intended exemption orders also rely on the underlying declaration of the WLR and LCS services.

Chapter 9 Duration of extensions for the fixed-line services declarations

In this chapter, the ACCC considers the duration of the proposed extensions for the fixed-line services declarations. Section 152ALA(1) of the TPA requires the ACCC to specify an expiry date for a declaration. The expiry date must occur in the five year period beginning when the declaration was made. Subsection 152ALA(4) allows the ACCC to extend or further extend the expiry date of a specified declaration, so long as the extension or further extension is for a period of not more than five years.

9.1 ACCC's preliminary views and submissions in response

The ACCC's preliminary view in the discussion paper was that it was appropriate to extend the fixed-line services declarations for a period of 12 months from their expiry on 31 July 2009 to 31 July 2010. The ACCC considered that a short-term extension of all declarations would minimise the likelihood of regulatory uncertainty and allow the Government's decision on the NBN, in particular, to be finalised prior to considering longer term regulatory arrangements.²⁵⁹

Most of the submissions received in response to the discussion paper supported an extension to the fixed-line services declarations of at least two years. The ACCC notes that the deadline for submissions was prior to the Government's announcement regarding a FTTP network.

AAPT submitted that the ACCC should extend each of the declared services for at least another two years.²⁶⁰ AAPT considered that a 12 month extension would not benefit industry participants and would instead introduce another layer of uncertainty which will stifle investment.²⁶¹ AAPT noted that the ACCC has the flexibility under Part XIC of the TPA to investigate a review of a declared service at any time.²⁶²

Adam Internet, along with seven other access seekers that provided identical submissions to the discussion paper,²⁶³ submitted that the impact of the NBN rollout will not be felt until well after 31 July 2010. Adam Internet submitted that to avoid

259 ACCC, *Fixed Services Review Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, discussion paper, November 2008, p. 92.

260 AAPT Limited, *Response to Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR – a discussion paper*, dated November 2008, March 2009, p. 3.

261 *Ibid.* p. 2.

262 *Ibid.*

263 These parties were Amcom Telecom, Chime Communications, EFTel, Internode, Netspace Networks, Primus Telecom and Wideband Networks.

duplication of resources focused on reviewing the declarations in a year's time, the ACCC should extend the fixed service declarations until at least 30 July 2011.²⁶⁴

The CCC submitted that the ACCC should extend the declarations of the services under review for at least two years.²⁶⁵ The CCC considered the most important issue with regard to extending the declarations is to provide regulatory certainty for the industry.²⁶⁶ The CCC noted the ACCC has sufficient powers under the TPA to ensure the declarations 'keep pace' with any developments flowing from the Government's NBN announcement.²⁶⁷

Macquarie submitted that the extension of the declarations should be for a period of at least two years because of the need to encourage investment by providing a more stable regulatory environment. Macquarie noted that services such as line rental and local calls are typically contracted for two to three years in the corporate market in which Macquarie competes for customers therefore regulatory certainty for at least this period is necessary.²⁶⁸

Optus submitted that extending the fixed-line services declarations for only 12 months would create further uncertainty. Optus considered there is no reason why the NBN should preclude further extension of the declarations.²⁶⁹ Optus also submitted that the ULLS declaration should be extended to a date that encompasses the early deployment stage of the NBN, or approximately three years.²⁷⁰ Optus considered that the declaration period for all of the fixed-line services could be extended to align with the 31 December 2012 expiry currently set for the PSTN OA, WLR and LCS exemption applications.²⁷¹

ATUG agreed with the ACCC's preliminary view that a 12 month extension of all declared services would be appropriate due to the NBN process.²⁷²

264 Adam Internet et al., *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 3.

265 Competitive Carriers' Coalition, *Submission to the Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, LCS and WLR*, March 2009, p. 4.

266 Ibid. p. 2.

267 Ibid. p. 3.

268 Macquarie Telecom, *Submission to the Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 3.

269 Optus, *Response to ACCC Fixed Services Review (FSR) Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper*, March 2009, paragraph 10.1.

270 Ibid. paragraph 10.8.

271 Ibid. paragraph 10.7.

272 ATUG, *Fixed Services Review Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR discussion paper November 2008*, March 2009, p. 1.

Telstra considered that where a declaration is to be extended, the extension should not exceed 12 months due to the possible implications from the Government's NBN process and the ongoing development of wireless competition as well as other commercial and technological developments which are occurring within the industry at this time regarding potential substitutes for the services under consideration.²⁷³

9.2 Developments in the telecommunications sector

Since the ACCC released the discussion paper in November 2008 there have been significant developments in the telecommunications sector which have the potential to substantially alter the competitive and regulatory environments.

When considering the duration of extensions to the fixed-line services declarations, the ACCC noted in the discussion paper that it was mindful of the potential for regulatory and legislative change to occur as a result of the Government's NBN RFP process. The ACCC noted in the discussion paper that the timing and architecture of a functioning NBN was yet to be determined.²⁷⁴ It was further noted that this had a direct impact on the ACCC's assessment of whether continued declaration of the fixed-line services would promote the LTIE, as this is a forward-looking assessment.²⁷⁵

On 7 April 2009 the Government announced that it had terminated the NBN tender process and announced that it would instead establish a new company to build a national broadband network over eight years. The rollout is expected to commence in Tasmania in 2009 and in mainland Australia in 2010.²⁷⁶

According to the Government's announcement, the new network is to be a national, wholesale-only, open access broadband network using FTTP to 90 per cent of all homes, schools and workplaces and wireless and satellite technologies providing speeds of up to 12 Mbps to the remaining 10 per cent of premises in rural and remote areas.²⁷⁷

The geographic scale of the project to build a national FTTP network is similar to the construction of the ubiquitous copper network last century. Individual fibre connections will be rolled out to each premise within the network footprint. The deployment of wireless and satellite technologies to the population not covered by the FTTP network will ensure that most Australians have access to improved broadband internet services once construction is complete. The Government has indicated that it could take up to eight years to roll out the network.

273 Telstra, *Response to ACCC discussion paper – Fixed Services Review, Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, March 2009, p. 13.

274 ACCC, *Fixed Services Review Declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, discussion paper*, November 2008, p. 91.

275 Ibid, p. 92.

276 Joint media release of the Prime Minister, Treasurer, Minister for Finance and Minister for Broadband, *New National Broadband Network*, 7 April 2009.

277 Ibid.

As noted in Section 2.2, the Government released a discussion paper on options to reform the regulatory framework. Submissions to the discussion paper closed on 3 June 2009. There have been no announcements by Government as to what, if any, changes to the existing regulatory regime will be made as a result of this review.

9.3 ACCC's views on the appropriate extension of the declarations

The ACCC noted in the draft decision that a number of the parties responding to the discussion paper considered that the proposed 12 month extension to the fixed services declarations would be insufficient.

The ACCC acknowledged that submissions to the discussion paper were made in the context of the Government's previous NBN RFP process. However, the ACCC considered that submissions regarding the need for regulatory certainty while an NBN rollout is underway continue to be relevant in this new context.

The ACCC's draft decision was that all fixed-line services declarations under review should be extended for a five year period until 31 July 2014. The ACCC considered that the continued declaration of each of the fixed-line services would promote the LTIE. The ACCC also considered that it was appropriate to utilise the full statutory period allowed for extensions of declarations.

A five year declaration for each service takes into account the need for regulatory certainty during the transition period from fixed-line competition, which currently occurs primarily over Telstra's CAN. This transition period is likely to extend for several years, due to the time required to roll out the new FTTP and wireless/satellite network and the time required for downstream providers and customers to transition to the new network.

The ACCC noted in the draft decision that one of the most important issues for this declaration inquiry is to ensure that telecommunications providers are able to operate in an environment of maximum regulatory certainty while significant structural and competitive changes occur in the industry. The extent of industry change that will likely occur during the transition period is unprecedented since the implementation of the open competition telecommunications regime in 1997.

In response to the draft decision, Optus submits that the proposed five year declaration period will greatly assist in providing regulatory certainty to all industry participants in a period of significant change and uncertainty.²⁷⁸ Optus considers that the extension of the existing declaration is sensible and a measured approach taken by the ACCC in the current circumstances.²⁷⁹

²⁷⁸ Optus, *Submission to ACCC in response to Draft Decision Fixed Services Review Declaration Inquiry*, June 2009, p. 3.

²⁷⁹ *Ibid.*, p. 4.

Macquarie Telecom submits that it fully supports the ACCC's draft decision and the rationale on which it is based, in particular to provide as much regulatory certainty as possible regarding the access arrangements that apply to fixed network services.²⁸⁰

Network Technology et al. submit that:

the ACCC has made the correct decision to extend the declaration for the maximum five year period to allow continued competition during the transition towards the NBN.²⁸¹

Telstra submits that during and after the transition to the NBN it is important for the ACCC to strike a balance between ensuring that regulatory solutions cater for the emerging market and technology trends while at the same time acknowledging that the solutions must be sufficiently flexible to cope with unexpected changes in the environment.²⁸² Telstra suggests that the industry will be best served by clear processes and clear ongoing communications regarding how regulatory arrangements can and should evolve in response to both the NBN and other developments.²⁸³

Telstra submits that it shares the ACCC's concerns regarding regulatory certainty, however it considers that a five-year declaration alone will not achieve regulatory certainty.²⁸⁴ Telstra submits that the ACCC should provide as much guidance as possible regarding the process for regulatory wind-back over the proposed declaration period. Telstra suggests that the ACCC clearly set out its intentions as regards how it will monitor and review market conditions and developments, and what mechanisms it may seek to use to give effect to its conclusions.²⁸⁵

The ACCC notes the submissions received in response to the draft decision. The ACCC remains of the view that one of the most important issues for this declaration inquiry is to ensure that telecommunications providers are able to operate in an environment of maximum regulatory certainty while significant structural and competitive changes occur in the industry.

As stated above, the ACCC considers that a five year declaration for each service takes into account the need for regulatory certainty during the transition period to an NBN environment.

The ACCC also notes that there are sufficient statutory mechanisms available to review a declared service earlier if market conditions or other developments indicate that such a review would be appropriate. For example, the ACCC may issue record

280 Macquarie Telecom, *Submission to Fixed Services Review Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR Draft Decision*, June 2009, p. 1.

281 Network Technology et al, *Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR – Draft Decision*, June 2009, p. 1.

282 Telstra, *Submission to Fixed Services Review Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS, and WLR –Draft Decision*, June 2009, p. 2.

283 Ibid., p. 3.

284 Ibid., p. 2.

285 Ibid. p. 2.

keeping rules under section 151BU of the TPA in order to obtain up-to-date information on market developments, such as carriers' infrastructure rollouts and access seekers' utilisation of declared services. In addition, the ACCC may instigate public declaration inquiries to investigate whether a declaration should be extended, varied or revoked. The ACCC can also make direct market inquiries where necessary, to ensure it has an accurate understanding of current market conditions.

The ACCC considers that the provisions of Part XIC of the TPA allow it to ensure regulation remains responsive to changing technological and competitive environments within the telecommunications sector.

In addition, the ACCC further notes that in the event that the NBN weakens the need for regulation of existing services, this is likely to manifest itself in diminished demand for regulatory intervention to determine terms and conditions of access. As such, the impact of declaration will diminish.

The ACCC therefore concludes that all fixed-line services declarations under review should be extended for a five year period until 31 July 2014.

Appendix A Legislative background

A.1 The access regime

Part XIC of the TPA sets out a telecommunications access regime. The ACCC may determine that particular carriage services and related services are declared services. Once a service is declared, carriage service providers (CSPs) are required to comply with SAOs in relation to supply of the declared service. The SAOs facilitate the provision of access to declared services by service providers in order that service providers can provide carriage services and/or content services. In addition to its SAOs, a carrier, CSP or related body must not prevent or hinder access to a declared service.

A.1.1 Declaration inquiries

Section 152ALA(7) of the TPA requires the ACCC to hold a public inquiry under Part 25 of the Telco Act about:

- (i) whether to extend or further extend the expiry date of a declaration
- (ii) whether to revoke the declaration
- (iii) whether to vary the declaration
- (iv) whether to allow the declaration to expire without making a new declaration under section 152AL, and
- (v) whether to allow the declaration to expire and then to make a new declaration under section 152AL

during the 12 month period prior to the expiry of a declaration.

Section 498 of Part 25 of the *Telecommunications Act* provides that if the ACCC holds a public inquiry, it must publish a notification setting out, inter alia, the time allowed for and the process to be followed by members of the public in making of submissions. Section 499 provides that after deciding to hold a public inquiry, the ACCC may prepare a discussion paper identifying the issues that the ACCC believes are relevant and set out as much background and discussion of those issues as the ACCC thinks appropriate.

Section 152ALA(4) provides that declaration can be extended or further extended as long as the extension or further extension is for a period no longer than 5 years.

Section 152AN of the TPA provides that the ACCC may combine public declaration inquiries.

A1.2 The ACCC's approach to the LTIE test

The ACCC must decide whether declaring the service would promote the LTIE of carriage services, or of services supplied using carriage services ('listed services').

Section 152AB of the TPA provides that, in determining whether declaration promotes the LTIE, regard must be had only to the extent to which declaration is likely to result in the achievement of the following objectives.

- promoting competition in markets for listed services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied.

Section 152AB also provides further guidance in interpreting these objectives.

The three objectives are discussed below.

Promoting competition

Subsections 152AB(4) and (5) provide that, in interpreting this objective, regard must be had to, but is not limited to, the extent to which the arrangements will remove obstacles to end-users gaining access to listed services. The Explanatory Memorandum to Part XIC of the TPA states that:

...it is intended that particular regard be had to the extent to which the...[declaration]... would enable end-users to gain access to an increased range or choice of services.²⁸⁶

This criterion requires the ACCC to make an assessment of whether or not declaration would be likely to promote competition in the markets for listed services.

The concept of competition is of fundamental importance to the TPA and has been discussed many times in connection with the operation of Part IIIA, Part IV, Part XIB and Part XIC of the TPA.

In general terms, competition is the process of rivalry between firms, where each market participant is constrained in its price and output decisions by the activity of other market participants. The Trade Practices Tribunal (now the Australian Competition Tribunal) stated that:

In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.

Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate.²⁸⁷

286 Trade Practices Amendment (Telecommunications) Act 1997 (Cth) Explanatory Memorandum.

287 Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd (1976) ATPR 40-012, 17,245.

Competition can provide benefits to end-users including lower prices, better quality and a better range of services over time. Competition may be inhibited where the structure of the market gives rise to market power. Market power is the ability of a firm or firms profitably to constrain or manipulate the supply of products from the levels and quality that would be observed in a competitive market for a significant period of time.

The establishment of a right for third parties to negotiate access to certain services on reasonable terms and conditions can operate to constrain the use of market power that could be derived from the control of these services. Accordingly, an access regime such as Part IIIA or Part XIC addresses the *structure* of a market, to limit or reduce the sources of market power and consequent anti-competitive conduct, rather than directly regulating conduct which may flow from its use, which is the role of Part IV and Part XIB of the TPA. Nonetheless, in any given challenge to competition, both Parts XIB (or IV) and XIC may be necessary to address anti-competitive behaviour.

To assist in determining the impact of potential declaration on downstream markets, the ACCC will first need to identify the relevant market(s) and assess the likely effect of declaration on competition in each market.

Section 4E of the TPA provides that the term ‘market’ includes a market for the goods or services under consideration and 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 its *Merger Guidelines*, November 2008.

The second step is to assess the likely effect of declaration on competition in each relevant market. As noted above, subsection 152AB(4) requires that regard must be had to the extent to which declaration will remove obstacles to end-users gaining access to listed services.

The ACCC considers that denial to service providers of access to necessary upstream services on reasonable terms is a significant obstacle to end-users gaining access to services. In this regard, declaration can remove such obstacles by facilitating entry by service providers, thereby providing end-users with additional services from which to choose. For example, access to a mobile termination service may enable more service providers to provide fixed to mobile calls to end-users. This gives end-users more choice of service providers.

Where existing market conditions already provide for the competitive supply of services, the access regime should not impose regulated access.²⁸⁸ This recognises the costs of providing access, such as administration and compliance, as well as potential disincentives to investment. Regulation will only be desirable where it leads to benefits in terms of lower prices, better services or improved service quality for end-users that outweigh any costs of regulation.

In the context of considering whether declaration will promote competition, it is therefore appropriate to examine the impact of the proposed service description on each relevant market, and compare the state of competition in that market with and

288 Trade Practices Amendment (Telecommunications) Act 1997 (Cth) Explanatory Memorandum.

without declaration. In examining the market structure, the ACCC considers that competition is promoted when market structures are altered such that the exercise of market power becomes more difficult; for example, because barriers to entry have been lowered (permitting more efficient competitors to enter a market and thereby constrain the pricing behaviour of the incumbents) or because the ability of firms to raise rivals' costs is restricted.²⁸⁹

Any-to-any connectivity

Subsection 152AB(8) provides that the objective of any-to-any connectivity is achieved if, and only if, each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, or a similar service, with other end-users whether or not they are connected to the same network. The reference to 'similar' services in the TPA enables this objective to apply to services with analogous, but not identical, functional characteristics, such as fixed and mobile voice telephony services or Internet services which may have differing characteristics.

The any-to-any connectivity requirement is particularly relevant when considering services that involve communications between end-users.²⁹⁰ When considering other types of services (such as carriage services that are inputs to an end-to-end service or distribution services such as the carriage of pay television), the ACCC considers that this criterion will be given less weight compared to the other two criteria.

Efficient use of, and investment in, infrastructure

Subsections 152AB(6) and (7) provide that, in interpreting this objective, regard must be had to, but not limited to, the following:

- whether it is technically feasible for the services to be supplied and charged for, having regard to
 - The technology that is in use or available
 - Whether the costs that would be involved in supplying, and charging for, the services are reasonable
 - The effects, or likely effects. That supplying, and charging for, the services would have on the operation, or performance, of telecommunications networks
- The legitimate commercial interests of the supplier or suppliers of the service, including the ability of the supplier or suppliers to exploit economies of scale and scope
- The incentives for investment in:

289 See also *Re Sydney International Airport* [2000] ACompT 1 at paragraph 106 for discussion on when competition is promoted.

290 Trade Practices (Telecommunications) Amendment Act 1997 (Cth) Explanatory Memorandum.

- The infrastructure by which the services are supplied, and
 - Any other infrastructure by which the services are, or are likely to become, capable of being supplied
- In determining the extent to which a particular thing is likely to encourage the efficient investment in other infrastructure, the ACCC must have regard to the risks involved in making the investment

These matters are interrelated. In many cases, the LTIE may be promoted through the achievement of two or all of these criteria simultaneously. In other cases, the achievement of one of these criteria may involve some trade-off in terms of another of the criteria, and the ACCC will need to weigh up the different effects to determine whether declaration promotes the LTIE. In this regard, the ACCC will interpret long-term to mean the period of time necessary for the substantive effects of declaration to unfold.

Economic efficiency has three components.

Productive efficiency refers to the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs.

Allocative efficiency refers to the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers. It also refers to the distribution of production costs amongst firms within an industry to minimise industry-wide costs.

Dynamic efficiency refers to the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

The ACCC will need to ensure that the access regime does not discourage investment in networks or network elements where such investment is efficient. The access regime also plays an important role in ensuring that existing infrastructure is used efficiently where it is inefficient to duplicate investment in existing networks or network elements.

The technical feasibility of supplying and charging for particular services

This incorporates a number of elements, including the technology that is in use or available, the costs of supplying, and charging for, the services and the effects on the operation of telecommunications networks.

In many cases, the technical feasibility of supplying and charging for particular services given the current state of technology may be clear, particularly where there is a history of providing access. The question will be more difficult where there is no prior access, or where conditions have changed. Experience in other jurisdictions, taking account of relevant differences in technology or network configuration, will be helpful. Generally the ACCC will look to an access provider to demonstrate that supply is not technically feasible.

The legitimate commercial interests of the supplier or suppliers, including the ability of the supplier to exploit economies of scale and scope

A supplier's legitimate commercial interests encompass its obligations to the owners of the firm, including the need to recover the cost of providing services and to earn a normal commercial return on the investment in infrastructure. The ACCC considers that allowing for a normal commercial return on investment will provide an appropriate incentive for the access provider to maintain, improve and invest in the efficient provision of the service.

A significant issue relates to whether or not capacity should be made available to an access seeker. Where there is spare capacity within the network, not assigned to current or planned services, allocative efficiency would be promoted by obliging the owner to release capacity for competitors.

Paragraph 152AB(6)(b) also requires the ACCC to have regard to whether the access arrangement may affect the owner's ability to realise economies of scale or scope. Economies of scale arise from a production process in which the average (or per unit) cost of production decreases as the firm's output increases. Economies of scope arise from a production process in which it is less costly in total for one firm to produce two (or more) products than it is for two (or more) firms to each separately produce each of the products.

Potential effects from access on economies of scope are likely to be greater than on economies of scale. A limit in the capacity available to the owner may constrain the number of services that the owner is able to provide using the infrastructure and thus prevent the realisation of economies of scope associated with the production of multiple services. In contrast, economies of scale may simply result from the use of the capacity of the network and be able to be realised regardless of whether that capacity is being used by the owner or by other carriers and service providers. Nonetheless, the ACCC will assess the effects of the supplier's ability to exploit both economies of scale and scope on a case-by-case basis.

The impact on incentives for investment in infrastructure

Firms should have the incentive to invest efficiently in infrastructure. Various aspects of efficiency have been discussed already. It is also important to note that while access regulation may have the potential to diminish incentives for some businesses to invest in infrastructure, it also ensures that investment is efficient and reduces the barriers to entry for other (competing) businesses or the barriers to expansion by competing businesses.

There is also a need to consider the effects of any expected disincentive to investment from anticipated increases in competition to determine the overall effect of declaration on the LTIE. The ACCC will be careful to ensure that services are not declared where there is a risk that incentives to invest may be dampened, such that there is little subsequent benefit to end-users from the access arrangements.

Appendix B Service description for the ULLS

The unconditioned local loop service is the use of unconditioned communications wire between the boundary of a telecommunications network at an end-user's premises and a point on a telecommunications network that is a potential point of interconnection (POI) located at or associated with a customer access module and located on the end-user side of the customer access module.

Definitions

Where words or phrases used in this declaration are defined in the TPA or the *Telecommunications Act 1997*, they have the meaning given in the relevant Act.

In this Appendix:

boundary of a telecommunications network is the point ascertained in accordance with section 22 of the *Telecommunications Act 1997*;

communications wire is a copper based wire forming part of a public switched telephone network;

customer access module is a device that provides ring tone, ring current and battery feed to customers' equipment. Examples are Remote Subscriber Stages, Remote Subscriber Units, Integrated Remote Integrated Multiplexers, Non-integrated Remote Integrated Multiplexers and the customer line module of a Local Access Switch;

public switched telephone network is a telephone network accessible by the public providing switching and transmission facilities utilising analogue and digital technologies.

Appendix C Service description for the LSS

The High Frequency Unconditioned Local Loop Service is the use of the non-voiceband frequency spectrum of unconditioned communications wire (over which wire an underlying voiceband PSTN service is operating) between the boundary of a telecommunications network at an end-user's premises and a point on a telecommunications network that is a potential point of interconnection located at, or associated with, a customer access module and located on the end-user side of the customer access module.

Definitions

Where words or phrases used in this declaration are defined in the TPA or the Telecommunications Act 1997, they have the same meaning given in the relevant Act.

In this Appendix:

boundary of a telecommunications network is the point ascertained in accordance with section 22 of the *Telecommunications Act 1997*;

communications wire is a copper or aluminium wire forming part of a public switched telephone network;

customer access module is a device that provides ring tone, ring current and battery feed to customers' equipment. Examples are Remote Subscriber Stages, Remote Subscriber Units, Integrated Remote Integrated Multiplexers, Non-integrated Remote Integrated Multiplexers and the customer line module of a Local Switch;

public switched telephone network is a telephone network accessible by the public providing switching and transmission facilities utilising analogue and digital technologies;

voiceband PSTN service is a service provided by use of a public switched telephone network and delivered by means of the voiceband portion of the frequency spectrum of a metallic line.

Appendix D Service description for the PSTN OA

Domestic PSTN originating access service description

Service description and definitions

An access service for the carriage of telephone (i.e. PSTN and PSTN equivalent such as voice from ISDN) calls (i.e. voice, data over the voice band) to a POI from end-customers assigned numbers from the geographic number ranges of the Australian Numbering Plan and directly connected to the Access Provider's network.

For the avoidance of doubt, the service also includes a service for the carriage of telephone calls from customer equipment at an end-user's premises to a POI, or potential POI, located at or associated with a local switch (being the switch closest to the end-user making the telephone call) and located on the outgoing trunk side of the switch.

The Service as described comprises a number of different elements as follows:

- Access via Preselection, AS number ranges such as those numbers listed in POASD7 or 14xy Override code as required to achieve the objective of any-to-any connectivity
- Call Barring
- POI Location
- Forwarding a call beyond the POI of table OASD2 to OASD3 where applicable (see POIs below)
- Signalling
- CLI provision
- Provision of Switchports
- Network Conditioning
- Fault Handling
- Inter C/CSP Billing

Restrictions on availability and others factors relating to the provision of Access are further described below.

In accordance with Part XIC of the TPA, these elements:

- may not be available from all APs
- may have restrictions in their availability

Availability

The availability of the services may vary depending on the geographic and technical capability of the AP's network at the time at which a request for the service is made or the service is delivered.

The AP will make available to ASs documents describing the availability of this service on its network. See Services & Interconnection hand over arrangements below.

Channel Capacity

The service will establish a connection for the purposes of voice communication with the standard bandwidth of 3.1kHz.

The service will establish a connection for the purpose of the provision of services over the voice band with the standard bit rate of 64 Kbit/s.

Services

The service is provided on a call that is made with:

- preselection, or
- a AS specific code including Special Services codes and number ranges (with some exceptions) as per table POASD7, or
- a long distance, international or shared operator codes dialled with an over-ride/access code in accordance with the Australian Numbering Plan.

The AP will publish at least half yearly, tables detailing the geographic number ranges where there are restrictions on the provision of this service.

Service Restrictions

At least annually, the AP will advise of end-customer services that may restrict the provision of this service e.g. Real Time Metering in a Table POASD5.

Barring

The AP may provide a service that will allow barring of over-ride codes at the request of the end -customer.

End-customers may request generic barring services which may restrict access to these services.

The AP should detail this barring in a table POASD6.

Interconnection handover arrangements

The AP and the AS are each responsible for the provision, installation, testing, making operational and monitoring of all the network on their respective sides of the POI.

POIs

"Point of Interconnection" or "POI" means an agreed location which:

- is a physical point of demarcation between the networks nominated by the AS and the AP; and
- is associated (but not necessarily co-located with) with one or more gateway exchanges of each of the networks nominated by the AS and the AP in respect of the POIs nominated by the AP.

Calls originated by the A-party will be handed over to the AS at Points of Interconnection agreed by the AS and the AP in accordance with POI locations and POI designation for codes.

POI locations

The AP will provide a table (Table POASD1) listing of POIs where this service may be provided. This listing will be updated at least annually. The AS may request a point of interconnect with the AP's network at a location other than one specified by the AP. The AP must, to the extent technically and operationally feasible, permit the location of a point of interconnect at that location.

POI designation for codes

The AP will provide a table (Table POASD2) listing of the geographic number ranges associated with each POI. When Originating Access is being provided access from these codes will be provided at the corresponding POI. The POIs in table POASD2 will be the POI for "near end handover" of calls from the origins listed.

The AP will provide a table (Table POASD3) listing of POIs and of associated POIs from which traffic that could have been handed over as per table POASD2 may be collected. [Different charges will be payable where traffic that could have been collected at the POI in table POASD2 is collected at a POI in table POASD3.]

The AP will indicate how these tables POASD2 and POASD3 apply to the different call types of paragraph 1.3.

The provisions of this Service Description apply to traffic collected at POIs listed in Table POASD2 or POASD3.

Signalling

Signals for this service will use CCS#7 signalling. Unless otherwise agreed, this CCS#7 signalling will be in accordance with the NIIF/ACIF Interconnection-ISUP specification.

The AP will provide a table (Table OASD4) of the locations where the AS may interconnect its CCS#7 signalling network with that of the AP for the purpose of accepting this service.

Signalling interconnection may not be provided at all POIs. The POIs of 1.4.1.1 may provide for interconnection of only voice circuits. Control of voice circuits where direct signalling interconnection is not provided, will be via "quasi-associated

signalling" using Signalling Transfer Point (STP) operation, with signalling via a nominated other gateway where signalling interconnection is provided.

CLI

The CLI of the A-party will be provided as part of the CCS#7 signalling for this service.

Nature of switchports

At POIs the calls will be delivered to the AS at 2.048Mbit/sec Switchports. The switchports will operate at 2.048Mbit/sec in accordance with the ITU Recommendations G.703, G. 704 and G.732 (Blue Book).

Send and receive speech levels

The send and receive levels for speech will be -13 dB_r unless specified otherwise in the Australian Network Performance Plan.

The AP will not provide Echo Control unless this is a requirement within the AP's own network for calls between the end customer and the AP's gateway exchange.

Forecasting, ordering and provisioning arrangements

Interconnection forecasting and planning requirements

Forecast of port requirements

For each POI the AS should provide forecasts, at least half yearly, of switchport requirements for 6, 12, 18, 24, 30 and 36 months from the time of the forecast. Forecasts should be provided on dates to be agreed between the AP and the AS and forecast the switchport requirements from operative dates of 31 December and 30 June. Forecasts will be discussed by the AP and the AS with a view to agreement within 30 Business Days. Forecasts will be used by the AP for network planning and not for charging purposes.

Forecast of network capacity requirements

For each POI and for each of the AP's charging districts the AS should provide forecasts, at least half yearly, of traffic requirements for 6, 12, 18, 24, 30 and 36 months from the time of the forecast. These forecasts should provide daily and weekly profiles for the traffic forecasted and advice of any material non-uniformities in the dispersion of the sources of originating access traffic. Forecasts should be provided on dates to be agreed between the AP and the AS and forecast the traffic requirements from operative dates of 31 December and 30 June. Forecasts will be discussed by the AP and the AS with a view to agreement within 30 Business Days.

Ordering of Switchports

The AP will accept orders for switchports up to the level of the agreed forecasts for each POI. The AS should order switchports allowing 6 months for their provision.

The AP will provide access up to the level of the agreed traffic forecasts for each POI.

The AS may request and the AP will give reasonable consideration to such provision, but is under no obligation to provide access of switchports above the level of the agreed forecasts. If such access is provided, delivery times may be longer than those specified in Ordering of Switchports.

Interconnection Ordering Requirements

Compliance testing

The AS will be required to demonstrate compliance with the agreed CCS#7 signalling System prior to the provision of the service.

The AP and the AS will develop an agreed test plan and the AS will provide results of tests to this plan from an appropriate test house or other such party. The AP will provide results of such tests if it is not otherwise seeking a switched access service from the AS.

The AP and the AS shall review the test results of the agreed test plan within 20 business days and if the AP accepts that the test results of the agreed test plan are satisfactory then the AP and the AS will agree a date for commissioning tests.

The test results of the agreed test plan will form the prime documentary basis for ongoing operations, fault analysis and fault management of signalling between the AP and the AS.

Network Conditioning

Network Conditioning of the AP's network will be required before the provision of the service.

Operational and Fault handling arrangements

The AP will provide a contact point for the Operation and Maintenance of the service. Faults may be reported to this centre which will manage the clearance of these faults.

Inter C/CSP Billing frequency

The AP will invoice the AS on a monthly basis for this service.

Provision of Tones and Network Announcements

Where calls attempting this service do not progress to the POI the call may be connected to tones as per AUSTEL Technical Standard TS002 or to a network RVA in the AP's network.

Customer Billing

Customer billing should be in accordance with an approved telecommunications access code.

Appendix E Service description for the PSTN TA

Service description and definitions

An access service for the carriage of telephone (i.e. PSTN and PSTN equivalent such as voice from ISDN) calls (i.e. voice, data over the voice band) from a POI to end-customer assigned numbers from the geographic number ranges of the Australian Numbering Plan and directly connected to the Access Provider's network.

For the avoidance of doubt, the service also includes a service for the carriage of telephone calls from a POI, or potential POI, located at or associated with a local switch and located on the incoming trunk side of the switch to customer equipment at an end-user's premises.

The Service as described comprises a number of different elements as follows:

- Access for calls forwarded for termination in the AP's fixed network
- POI Location
- Forwarding a call beyond the POI of table TPASD3 to TPASD2 where applicable (see POIs below)
- Signalling
- CLI provision
- Provision of Switchports
- Network Conditioning
- Fault Handling -
- Inter C/CSP Billing
- Restrictions on availability and others factors relating to the provision of Access are further described below.

In accordance with Part XIC of the TPA these elements:

- may not be available from all APs
- may have restrictions in their availability

Availability

The availability of the services may vary depending on the geographic and technical capability of the AP's network at the time at which a request for the service is made or the service is delivered.

The AP will make available to ASs documents describing the availability of this service on its network. See Services & Interconnection Handover arrangements

Channel Capacity

The service will establish a connection for the purposes of voice communication with the standard bandwidth of 3.1kHz.

The service will establish a connection for the purpose of the provision of services over the voice band with the standard bit rate of 64 Kbit/s.

Services

The service is provided on a call that is handed over for termination to a customer directly connected to the AP's network with numbering in accordance with the Australian Numbering Plan.

Service Restrictions

At least annually, the AP will advise of end-customer services that may restrict the provision of this service e.g. Services barred from accepting Reverse Charge Calls in a Table PTASD5.

Interconnection Handover arrangements

The AP and the AS are each responsible for the provision, installation, testing, making operational and monitoring of all the network on their respective sides of the POI.

POIs

"Point of Interconnection" or "POI" means an agreed location which:

- is a physical point of demarcation between the networks nominated by the AS and the AP; and
- is associated (but not necessarily co-located with) with one or more gateway exchanges of each of the networks nominated by the AS and the AP.

Calls originated by the A-party will be handed over to the AS at Points of Interconnection agreed by the AS and the AP in respect of the POIs nominated by the AP in accordance with POI locations and POI designation for codes.

POI locations

The AP will provide a table (Table PTASD1) listing of POIs where this service may be provided. This listing will be updated at least annually. The AS may request a point of interconnect with the AP's network at a location other than one specified by the AP. The AP must, to the extent technically and operationally feasible, permit the location of a point of interconnect at that location.

POI designation for codes

The AP will provide a table (Table PTASD2) listing of the geographic number ranges associated with each POI. When Terminating Access is being provided access to these codes will be provided at the corresponding POI. The POIs in table PTASD2 will be the POI for "far end handover" of calls to the destinations listed.

The AP will provide a table (Table PTASD3) listing of POIs and of associated POIs from which traffic that could have been handed over as per table TPASD2 may be handed over for termination. [Different charges will be payable where traffic that could have been handed over at the POI in table TPASD2 is handed over at a POI in table TPASD3.]

The provisions of this Service Description apply to traffic handed over at POIs listed in Table PTASD2 or PTASD3.

Signalling

Signals for this service will use CCS#7 signalling. Unless otherwise agreed, this CCS#7 signalling will be in accordance with the NIIF/ACIF Interconnection-ISUP specification.

The AP will provide a table (Table PTASD4) of the locations where the AS may interconnect its CCS#7 signalling network with that of the AP for the purpose of accepting this service.

Signalling interconnection may not be provided at all POI's. These POI's would provide for interconnection of voice circuits only. Control of voice circuits where direct signalling interconnection is not provided, will be via "quasi-associated signalling" using Signalling Transfer Point (STP) operation, with signalling via a nominated other gateway where signalling interconnection is provided.

CLI

Unless otherwise agreed the CLI of the A-party should be provided as part of the CCS#7 signalling for this service.

Nature of switchports

At POIs the calls will be delivered to the AS at 2.048Mbit/sec Switchports. The switchports will operate at 2.048Mbit/sec in accordance with the ITU Recommendations G.703, G. 704 and G.732 (Blue Book).

Send and receive speech levels

The send and receive levels for speech will be -13 dB_r unless specified otherwise in the Australian Network Performance Plan.

The AP will not provide Echo Control unless this is a requirement within the AP's own network for calls between the end customer and the AP's gateway exchange.

Interconnection Forecasting, ordering and provisioning arrangements

Forecasting and planning requirements

Forecast of port requirements

For each POI the AS should provide forecasts, at least half yearly, of switchport requirements for 6, 12, 18, 24, 30 and 36 months from the time of the forecast. Forecasts should be provided on dates to be agreed between the AP and the AS and

forecast the switchport requirements from operative dates of 31 December and 30 June. Forecasts will be discussed by the AP and the AS with a view to agreement within 30 Business Days. Forecasts will be used by the AP for network planning and not charging purposes.

Forecast of network capacity requirements

For each POI and for each charging district of the AP the AS should provide forecasts, at least half yearly, of traffic requirements for 6, 12, 18, 24, 30 and 36 months from the time of the forecast. These forecasts should provide daily and weekly profiles for the traffic forecasted and advice of any material non-uniformities in the dispersion of the terminating access traffic. Forecasts should be provided on dates to be agreed between the AP and the AS and forecast the traffic requirements from operative dates of at the end of the quarters i.e. 31 December and 30 June. Forecasts will be discussed by the AP and the AS with a view to agreement within 30 Business Days.

Ordering of Switchports

The AP will accept orders for switchports up to the level of the agreed forecasts for each POI. The AS should order switchports allowing 6 months for their provision.

The AP will provide access up to the level of the agreed traffic forecasts for each POI.

The AS may request and the AP will give reasonable consideration to, and use reasonable endeavours to provide, such provision, but is under no obligation to provide access or switchports above the level of the agreed forecasts. If such access is provided, delivery times may be longer than those specified in Ordering of Switchports.

Interconnection Ordering Requirements

Compliance testing

The AS will be required to demonstrate compliance with the agreed CCS#7 signalling system prior to the provision of the service.

The AP and the AS will develop an agreed test plan and the AS will provide results of tests to this plan from an appropriate test house or other such party. The AP will provide the results of such tests if it is not otherwise seeking a switch access service from the AS.

The AP and the AS shall review the test results of the agreed test plan within 20 business days and if the AP accepts that the test results of the agreed test plan are satisfactory then the AP and the AS will agree a date for commissioning tests.

The test results of the agreed test plan will form the prime documentary basis for ongoing operations, fault analysis and fault management of signalling between the AP and the AS.

Network Conditioning

Network Conditioning of the AP's network will be required before the provision of the service.

Operational and Fault handling arrangements

The AP will provide a contact point for the Operation and Maintenance of the service. Faults may be reported to this centre which will manage the clearance of these faults.

Inter C/CSP Billing frequency

The AP will invoice the AS on a monthly basis for this service.

Provision of Tones and Network Announcements

Where calls attempting this service do not progress to the end customer the call may be connected to tones as per AUSTEL Technical Standard TS002 or to a network RVA in the AP's network.

Customer Billing

Customer billing should be in accordance with an approved telecommunications access code.

Appendix F Service description for LCS

The local carriage service is a service for the carriage of telephone calls from customer equipment at an end-user's premises to separately located customer equipment of an end-user in the same standard zone, however, the local carriage service does not include 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.

Definitions

Where words or phrases used in this declaration are defined in the TPA or the *Telecommunications Act 1997*, they have the meaning given in the relevant Act.

In this Appendix:

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.

public switched telephone network is a telephone network accessible by the public providing switching and transmission facilities utilising analogue and digital technologies.

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

telephone calls are calls for the carriage of communications at 3.1kHz bandwidth solely by means of a public switched telephone network.

Appendix G Service description for WLR

The line rental service is a line rental telephone service which allows an end-user to connect to a carrier or carriage service provider's public switched telephone network, and provides the end-user with:

- (a) an ability to make and receive any 3.1khz bandwidth calls (subject to any conditions that might apply to particular types of calls), including, but not limited to, local calls, national and international long distance calls; and
- (b) a telephone number

except where the supply of the line rental telephone service is within the Central Business District Area of Sydney, Melbourne, Brisbane, Adelaide and Perth.

Definitions

Where words or phrases used in this declaration are defined in the TPA or the *Telecommunications Act 1997*, they have the same meaning given in the relevant Act.

In this Appendix:

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 declaration.

public switched telephone network is a telephone network accessible by the public providing switching and transmission facilities utilising analogue and digital technologies.

Appendix H List of submissions received

Submissions received in response to the discussion paper

In response to the Fixed Services Review discussion paper released in November 2008, the ACCC received 14 submissions. Submissions were received from:

- Telstra Corporation Limited
- Singtel Optus Pty Ltd
- AAPT Limited
- Adam Internet Pty Ltd
- Amcom Telecommunications Ltd
- Competitive Carriers' Coalition
- Chime Communications Pty Ltd
- EFTel Ltd
- Internode Pty Ltd
- Netspace Networks Pty Ltd
- Primus Telecommunications Pty Ltd
- Wideband Networks Pty Ltd
- ATUG Limited
- Macquarie Telecom Pty Ltd

Submissions received in response to the draft decision

In response to the Fixed Services Review draft decision released in June 2009, the ACCC received eight submissions. Submissions were received from:

- Telstra Corporation Limited
- Singtel Optus Pty Ltd
- Saunders Properties Pty Ltd
- Network Technology (Aust) Pty Ltd
- Adam Internet Pty Ltd
- Amcom Telecommunications Ltd
- Wideband Networks Pty Ltd
- Macquarie Telecom Pty Ltd