



Australian  
Competition &  
Consumer  
Commission

# A guideline to the declaration provisions for telecommunications services under Part XIC of the *Competition and Consumer Act 2010*

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## Glossary

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ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
The Act	<i>Competition and Consumer Act 2010</i>
DTCS	Domestic transmission capacity service
DDAS	Digital Data Access Service
BROCs	Binding Rules of Conduct
FOAS	Fixed Originating Access Service
FTAS	Fixed Terminating Access Service
ISDN	Integrated Services Digital Network
LBAS	Local Bitstream Access Service
LCS	local carriage service
LSS	line sharing service
LTIE	long-term interests of end-users
MTAS	Mobile Terminating Access Service
NBN	National Broadband Network
NBN Co	NBN Corporation
PSTN	Public switched telephone network
SAOs	standard access obligations
SAU	special access undertaking
SFAA	standard form of access agreement
ULLS	unconditioned local loop service
WLR	wholesale line rental

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# 1. Introduction

The regulatory framework for the telecommunications industry in Australia seeks to promote the long-term interests of end-users (LTIE).

Part XIC of the *Competition and Consumer Act 2010* (the Act) is the cornerstone of this framework, establishing a regime under which service providers can access declared telecommunications services in order to supply end-users.

The right to access follows declaration of a service.

This guideline sets out the various ways in which telecommunications services can be declared and outlines the Australian Competition and Consumer Commission (ACCC's) general approach to declaration issues under Part XIC.

Its purpose is to provide clear guidance about both the processes associated with declaration and the issues which the ACCC will generally consider in declaration decisions.

It is also intended to assist those making submissions to the ACCC in the context of public inquiries considering declaration. While the ACCC will continue to consider declaration of new telecommunications services as appropriate, increasingly the public inquiries it conducts are likely to be for services already declared to determine whether declaration should be extended, revoked, varied or allowed to expire.

Originally released in July 1999, at a time when the telecommunications regulatory regime was relatively new, the guideline has been updated to reflect the various changes to Part XIC which have impacted on the way in which services can be declared (including for the National Broadband Network (NBN)). Since the regime's inception, the ACCC has been active in providing its views about legislative change. While there have been changes to the declaration processes, the key concepts to be applied by the ACCC in considering whether to declare a service are largely unchanged. The guideline has been updated to include discussion and recent examples to illustrate how the ACCC will generally consider these issues.

The guideline is structured as follows:

- Section 2 outlines the Part XIC regime
- Section 3 outlines procedural issues associated with declaration
- Section 4 explores issues relevant to the service description of a declared service
- Section 5 explores how the ACCC examines whether the LTIE will be promoted by declaration
- Sections 6, 7 and 8 examine the three objectives the ACCC must have regard to in establishing whether the LTIE will be promoted and specifically whether declaration will promote competition, achieve any-to-any connectivity and encourage economically efficient use of, and investment in, infrastructure.

## 2. Outline of the Part XIC access regime

### 2.1. Background

Part XIC of the Act has been a key element in the reform of the telecommunications industry. It seeks to promote the LTIE via a more competitive industry, with efficient investment and use of infrastructure, resulting in lower prices, service innovation, greater choice of service for customers and improved quality. Together with the *Telecommunications Act 1997*, it provides the regulatory framework that promotes the LTIE.<sup>1</sup>

While Part XIC has evolved since first introduced in 1997, its underlying intent has been to ensure reasonable access to carriage services, or services that facilitate the supply of carriage services, is available to access seekers via declaration where that will promote the LTIE. This was important given the existence of a highly integrated incumbent, in combination with the characteristics of the telecommunications infrastructure which can be natural monopolies and therefore inefficient to duplicate. In light of these potential barriers to entry, obtaining access to the incumbent's network, or other natural monopoly networks, via declaration was seen as an important step in developing competition within the telecommunications sector.

Part XIC of the Act now also recognises the changing telecommunications landscape with the establishment of the NBN Corporation (NBN Co) to progressively deploy the NBN and deliver superfast broadband services. NBN Co is providing wholesale-only, open access to the NBN services it supplies. The approach of establishing a wholesale only provider that must provide access on a non-discriminatory basis, seeks to address the barriers to entry associated with vertically integrated providers and natural monopoly infrastructure.<sup>2</sup>

Most recently the Government in its response to the Independent cost-benefit analysis of broadband and review of regulation (Vertigan Review) noted that its approach to regulation in the telecommunications market would be consistent with the following regulatory policy principles which are relevant to Part XIC and its application:

- Regulation should allow competition at both the retail and wholesale / infrastructure levels.
- To the greatest extent possible industry players should be treated consistently under the regulatory framework.
- New high speed broadband access networks should be vertically separated.<sup>3</sup>

### 2.2. How the Part XIC access regime operates

#### 2.2.1. Declaration of a service

Under Part XIC, a carriage service, or service that facilitates the supply of a carriage service, can be declared, enabling access seekers to obtain access to those services. A service provider is an access seeker if it seeks access to a declared service, or changes to some

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<sup>1</sup> The *Telecommunications Act 1997* also seeks to promote the efficiency and international competitiveness of the telecommunications industry and the availability of accessible and affordable carriage services that enhance the welfare of Australians.

<sup>2</sup> National Broadband Network Companies Bill 2010, Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010, Explanatory Memorandum, p 9.

<sup>3</sup> Australian Government, Telecommunications Regulatory and Structural Reform, December 2014, p. 4.

aspect of the existing access to the service, or alternatively the service provider allowing access (the access provider) wants to change aspects of the existing access.<sup>4</sup>

There is no general right of access without declaration.

To be declared the service must be an 'eligible service'. An eligible service is:

- a carriage service between two or more points, at least one of which is in Australia or
- a service that facilitates the supply of such a carriage service.<sup>5</sup>

There are various ways in which a service can be declared. These include:

- The ACCC can declare a service after holding a public inquiry if it is satisfied that declaration will promote the LTIE.
- A person can give the ACCC a Special Access Undertaking (SAU) in connection with access to a service. If the SAU is accepted by the ACCC and in operation the service is a declared service.
- NBN Co prepares a Standard Form of Access Agreement (SFAA) that relates to access to the service and the SFAA is available on its website (the SFAA does not need to be accepted or approved by the ACCC for the service to become a declared service).
- The ACCC was required to declare a specified Layer 2 bitstream service.

More detail about each of the above mechanisms for declaration is provided in Section 3, including an explanation of the differences between how non-NBN and NBN services can be declared.

The ACCC may only declare a service after holding a public inquiry where it is satisfied that this would promote the LTIE. An overview of the LTIE test is provided in Section 5. This requires the ACCC to have regard to the likely achievement of the following objectives: promoting competition; achieving any-to-any connectivity; and encouraging efficient use of and investment in infrastructure. Each of these are separately discussed in Sections 6 to 8.

Before accepting a SAU, the ACCC must be satisfied that the terms and conditions in the SAU are consistent with the applicable standard access obligations (SAOs), are reasonable, the SAU is consistent with any Ministerial pricing determination and that any specified conduct will promote the LTIE. Examining reasonableness also requires the ACCC to have regard to whether the proposed terms and conditions promote the LTIE among other things. These issues are discussed below and in Sections 5 to 8.

### **2.2.2. Regulation following declaration**

Once a service is declared, the access provider is subject to the SAOs. These require the access provider to provide access, on request, to an access seeker.<sup>6</sup> In doing so, for non-NBN services, the access provider must take all reasonable steps to ensure that the technical and operational quality of the service is equivalent to that which the access provider provides to itself.<sup>7</sup> The access provider must also on request:

- Provide billing information in connection with the supply of the declared service.<sup>8</sup>

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<sup>4</sup> Subsection 152AG(3) of the Act.

<sup>5</sup> Subsection 152AL(1) of the Act. See also, section 16 of the *Telecommunications Act 1997*. A carriage service is a service for carrying communications by means of guided and/or unguided electromagnetic energy under section 7 of the *Telecommunications Act 1997*.

<sup>6</sup> Subsection 152AR(3)(a) and section 152AXB(2) of the Act.

<sup>7</sup> Subsection 152AR(3)(b) of the Act.

<sup>8</sup> Subsection 152AR(6) of the Act.

- Take all reasonable steps to ensure that the service provider receives fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.<sup>9</sup>

For both non-NBN and NBN services the access provider must permit interconnection of its facilities with those of service providers.<sup>10</sup>

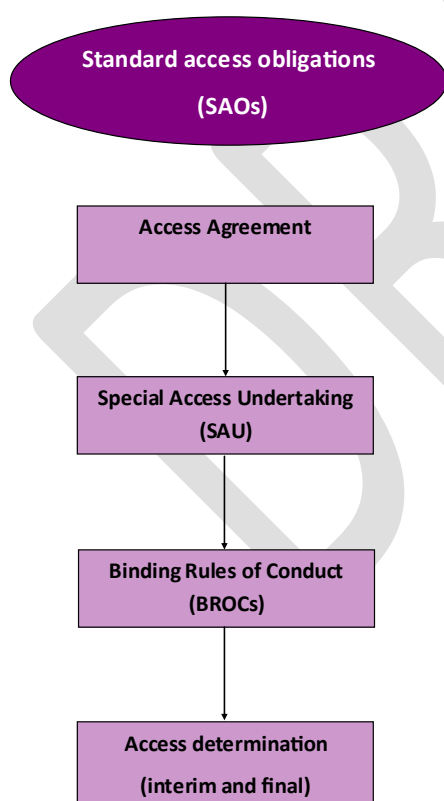
There are limited exceptions to the SAOs.<sup>11</sup>

In addition, for non-NBN services the ACCC can grant, prior to declaration of a service, an anticipatory exemption from the SAOs. This may relate to a class of access providers or to a specific access provider.<sup>12</sup>

Where an access provider is subject to the SAOs, they must be complied with on terms and conditions either commercially negotiated and set out in an access agreement, or as determined via the regulatory hierarchy. This is illustrated in Figure 1.

Under the regulatory hierarchy, the terms and conditions on a particular matter included in an access agreement will take precedence over terms and conditions on that matter set out in an SAU by an access provider. These in turn will take precedence over terms and conditions on that matter established via binding rules of conduct (BROCs) as determined by the ACCC. Finally, these take precedence over terms and conditions on that matter determined in final access determinations by the ACCC.<sup>13</sup>

**Figure 1 – Regulatory hierarchy for declared services**



<sup>9</sup> Subsection 152AR(3)(c) of the Act.

<sup>10</sup> Subsection 152AR(5) and subsection 152AXB(4) of the Act.

<sup>11</sup> Subsection 152AR(4) and subsection 152AXB(3) of the Act.

<sup>12</sup> Section 152ASA and section 152ATA of the Act.

<sup>13</sup> Section 152AY, 152BCC, 152BDB, 152BDE, 152CBIA, 152CBIB and 152CBIC of the Act.



BROCs can only be made by the ACCC<sup>14</sup> and will be put in place where it considers quick action is required to address issues affecting the supply of retail services.<sup>15</sup> As they are a temporary measure to deal with urgent matters, their duration is limited to a maximum of 12 months.

Further, the ACCC must issue access determinations for each declared service,<sup>16</sup> with terms and conditions (and any appropriate exemptions) usually set for a period between three to five years.<sup>17</sup> The ACCC can also specify in determinations 'fixed principles' which set out how specific terms and conditions should be established, such as how depreciation is treated. They can also determine that any or all of the SAOs specified in Part XIC are not applicable to a carrier, or carriage service provider, or can restrict or limit their application.<sup>18</sup>

The above model was introduced in 2010 when changes were made to streamline the operation of Part XIC once a service was declared. The previous negotiate-arbitrate model allowed parties to notify the ACCC of disputes around price or non-price terms and conditions which the ACCC would then arbitrate. There were concerns this did not lead to timely or efficient outcomes and increased uncertainty for the industry. As the ACCC now determines up-front terms and conditions, through BROCs or access determinations, access seekers and providers can commercially agree terms and conditions with this understanding and may, if they choose, agree different terms of access to those in the determination.<sup>19</sup>

### 2.3. The relationship between the Part XIC access regimes and the Part IV and XIB competitive conduct rules

Parts IV and XIB of the Act establish market conduct rules designed to prevent market participants undermining the competitive process. These rules prohibit anti-competitive conduct, with Part XIB specifically relating to such conduct within the telecommunications industry.<sup>20</sup>

Part XIB prevents a carrier or carriage service provider from engaging in anti-competitive conduct. This conduct occurs when it has a substantial degree of market power and takes advantage of that market power with the effect, or likely effect, of substantially lessening competition in a telecommunications market.<sup>21</sup>

In order for the telecommunications industry to have effective competition, new entrants must be able to obtain access to declared services, as provided for under Part XIC and outlined above. Complementary to this, Part IV and XIB enable anti-competitive conduct to be addressed and ensure that providers with a substantial degree of market power do not significantly lessen competition in the sector.

Since the introduction of the telecommunications regulatory regime, Telstra with its significant market share across various markets, and high degree of vertical integration, has been the dominant provider. To address both competition concerns and create an

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<sup>14</sup> Section 152BD of the Act.

<sup>15</sup> Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, Explanatory Memorandum, p. 3.

<sup>16</sup> The ACCC must make an interim access determination where it considers that it is unlikely that a final access determination will be made within 6 months after the commencement of the public inquiry, or where it considers that there is an urgent need to make an access determination before the completion of the public inquiry: see subsection 152BCG(1) of the Act.

<sup>17</sup> Sections 152BCF, 152BCG, 152BCH, 152BCI and 152BCK of the Act.

<sup>18</sup> Section 152BCD of the Act.

<sup>19</sup> Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 Explanatory Memorandum, p 45-53.

<sup>20</sup> Part XIB is supplementary to, rather than in substitution for, the competitive conduct rules on Part IV of the Act.

<sup>21</sup> Sections 151AJ and 151AK of the Act.

environment that fosters competition, connectivity and efficiency, the ACCC has used actions under both Parts XIB and XIC of the Act.

With the rollout of the NBN, the competitive landscape is changing. While the NBN is regulated under Part XIC to ensure open wholesale access, competition concerns that arise during the transition to full deployment of the network, may also be addressed under Part XIB.

## 2.4. The relationship between the Part XIC telecommunications access regime and Part IIIA access regime

Part IIIA of the Act sets out the regulatory framework for third party access to monopoly infrastructure that is uneconomic to duplicate. Part XIC is a specific access regime for the telecommunications industry, and for the supply of declared telecommunications services, and it displaces the generic access regime in Part IIIA of the Act.<sup>22</sup>

There are common aims across Part XIC and Part IIIA of the Act, with both the object of Part IIIA and the objectives to which regard must be had under the LTIE test in Part XIC including the promotion of competition and the economically efficient use of, and investment in, the infrastructure by which the services are provided. Part XIC also requires consideration of achieving any-to-any connectivity, i.e. the ability of end-users to communicate with each other, regardless of the network to which they are connected.

Further, once a service is declared under Part XIC there are SAOs which apply to carriers and carriage service providers that supply those services, which is not the case under Part IIIA. Therefore in deciding whether to declare a service under Part XIC, the ACCC must decide whether access should be provided. In contrast, under Part IIIA this question is left to the arbitration phase.<sup>23</sup> This means that issues which might be left to the arbitration phase in the context of a Part IIIA declaration, arise for consideration in the context of a Part XIC declaration. For instance, in deciding whether to declare a service under Part XIC, the ACCC will consider technical feasibility issues and the legitimate commercial interests of the access provider.

The ACCC's approach is to fully consider the provisions of Part XIC, but wherever appropriate and / or relevant adopt an approach which is consistent with the provisions of Part IIIA. This avoids unnecessary inconsistencies, fosters greater certainty as to how the legislation will be interpreted and applied and aligns telecommunications regulation more closely with general competition regulation.

To be clear, this guideline applies to telecommunications services under Part XIC of the Act and does not apply to decisions made by the ACCC under Part IIIA of the Act.

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<sup>22</sup> Section 152CK of the Act.

<sup>23</sup> In this regard, it should be noted that declaration under Part IIIA of the Act does not give rise to a right of access, but rather a right to negotiate backed up by compulsory arbitration. When undertaking the compulsory arbitration, the ACCC considers whether access should be provided, and if so, the terms and conditions of access. See subsection 44V(3) of the Act.

## 3. Procedural issues

This section of the guideline sets out and explains the four ways in which a service can be declared. In particular:

- The ACCC may declare a service after holding a public inquiry if it is satisfied declaration will promote the LTIE.
- A person can give the ACCC a SAU in connection with access to a service. If the SAU is accepted by the ACCC and in operation, the service supplied by the person is a declared service.<sup>24</sup>
- NBN Co prepares a SFAA that relates to access to the service and the SFAA is available on the NBN Co's website.<sup>25</sup>
- The ACCC was required to declare a specified Layer 2 bitstream service.<sup>26</sup>

The process for declaration under each of the above is set out in the following sections. Figure 2 illustrates the various steps in each of these processes.

### 3.1. Declaration following a public inquiry

The ACCC may declare a service following a public inquiry if it considers declaration will promote the LTIE.<sup>27</sup> Sections 5 to 8 discuss the LTIE test and the issues the ACCC must consider.

The ACCC may decide to hold a public inquiry on its own initiative<sup>28</sup> or following a request by a person to hold a public inquiry<sup>29</sup> (noting it is not required to consider a request to hold a public inquiry).<sup>30</sup> The ACCC must hold a public inquiry if the Minister gives it a written direction to do so.<sup>31</sup>

The public inquiry process is the same regardless of whether the ACCC is considering making a new non-NBN declaration<sup>32</sup> (e.g. the wholesale ADSL), or the declaration is for a NBN service<sup>33</sup>, or a declaration is expiring and consideration is being given to whether it should be extended, revoked, varied or allowed to expire (e.g. the various fixed line services including unconditioned local loop service (ULLS) the line sharing service (LSS), the local carriage service (LCS), the wholesale line rental (WLR) service the fixed originating access service (FOAS) and fixed terminating access service (FTAS)).<sup>34</sup>

#### 3.1.1. Who may request a public inquiry into declaration?

Typically, the ACCC would expect requests to hold a public inquiry to be made by access seekers. However, the ACCC may consider a request to hold a public inquiry from anyone.

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<sup>24</sup> Subsections 152CBA, 152CBC, 152CBD of the Act.

<sup>25</sup> Subsection 152AL(8D) of the Act.

<sup>26</sup> Subsection 152AL(3C) of the Act.

<sup>27</sup> Subsection 152AL(3) and (8A) of the Act

<sup>28</sup> Subsection 152AM(2)(a) of the Act.

<sup>29</sup> Subsection 152AM(2)(b) of the Act.

<sup>30</sup> Subsection 152AM(3) of the Act, noting that this subsection was amended, with effect from 1 January 2011, to streamline the operation of the framework by removing the requirement for the ACCC to consider each request that it receives to hold an inquiry and to provide reasons if it decides not to proceed with an inquiry.

<sup>31</sup> Section 496 of the *Telecommunications Act 1997*.

<sup>32</sup> Subsection 152AL(3) of the Act.

<sup>33</sup> Subsection 152AL(8A) of the Act.

<sup>34</sup> Subsection 152ALA(7) of the Act.

### 3.1.2. What is required to request a public inquiry?

Requests to hold a public inquiry must be in writing.<sup>35</sup> Requests should be made with supporting information that addresses the issues the ACCC may consider in deciding whether to hold a public inquiry. These issues are listed below in Section 3.1.3.

Unless the person making the request indicates that particular information is confidential, the request for the public inquiry will be treated as a public document. The ACCC will consider confidentiality requests on a case-by-case basis and the person making the request should put forward reasons in support of the confidentiality claim.<sup>36</sup> Further information regarding the ACCC's general policies on the collection, use and disclosure of confidential information can be found in the *ACCC/AER Information Policy*.<sup>37</sup>

### 3.1.3. Considering requests to hold a declaration inquiry

The ACCC may hold a public inquiry if it considers that it is 'appropriate and practicable' to do so.<sup>38</sup> If the ACCC decides to consider a request from a person to hold a public inquiry, matters that it is likely to take into account include:

- the description of the service
- whether the service is an eligible service and would be an 'active' declared service
- whether the service is already subject to access obligations or likely to be so in the future
- efforts made to obtain access to the service
- whether the service, if declared, would be an 'active' declared service
- if the service is not already supplied, whether it is capable of being supplied
- whether there is likely to be demand for the service and how it will be used, including in downstream markets.

Each of these matters is discussed in greater detail below. The ACCC is also likely to consider these issues if it is deciding to initiate a public inquiry. It will also consider any other matters that it thinks are relevant.

The ACCC will have regard to information provided by the person requesting the inquiry. Where appropriate, it will also consult other persons who may have an interest in the ACCC's decision to hold an inquiry.

The ACCC will generally determine whether or not to hold an inquiry within 30 days of receiving the written request, subject to receiving adequate information within the request for it to make this decision.

#### ***Service description***

The ACCC will examine the proposed service description to be the subject of the public inquiry into declaration. Service description issues are discussed in Section 4.

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<sup>35</sup> Subsection 152AM(2)(b) of the Act.

<sup>36</sup> ACCC/AER, *ACCC/AER Information Policy*, June 2014, p. 5.

<sup>37</sup> ACCC/AER, *ACCC/AER Information Policy*, June 2014.

<sup>38</sup> Section 497 of the Telecommunications Act.

## **Eligible service**

The ACCC can only hold public inquiries into the declaration of those services which are eligible services. An eligible service is:

- a carriage service between two or more points, at least one of which is in Australia<sup>39</sup> or
- a service that facilitates the supply of such a carriage service
- where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider.<sup>40</sup> A carriage service is 'a service for carrying communications by means of guided and/or unguided electromagnetic energy'.<sup>41</sup>

Where a proposed service is not 'active', it should at least be 'capable of being supplied' to be an eligible service. Therefore when considering whether to hold a public inquiry, the ACCC may take into account information relevant to the technical feasibility of supplying and charging for the proposed service. Issues of technical feasibility would be considered more fully during the course of a public inquiry.

Eligible services are referred to as services in the remainder of these guidelines.

Consistent with Part IIIA, the telecommunications access regime in Part XIC provides for the declaration of a service as distinct from particular facilities. This recognises that a facility may be used to provide multiple services, thus allowing greater flexibility in the declaration context.

The declaration of services that facilitate the supply of carriage services, as opposed to carriage services themselves, is intended to perform two functions:

- to avoid disputes over whether a particular service proposed to be declared is properly characterised as a carriage service
- to facilitate the unbundling of services where that is justified.<sup>42</sup>

A service that facilitates the supply of a carriage service does not include the use of intellectual property except to the extent that it is an integral but subsidiary part of the declared service.<sup>43</sup>

## **Access obligations**

The ACCC will consider if the service is already subject to access obligations. It may decide not to hold a public inquiry into the declaration of a service if:

- equivalent access obligations already exist in relation to that service, or
- other processes are in train which are expected to provide access obligations in relation to that service earlier than would be possible through declaration of that service after a public inquiry.

Access obligations may exist as a result of the service already being declared,<sup>44</sup> or as a result of other legislative provisions. Unless the nature of the access obligations arising as a result of the declaration would be materially different to any existing access obligations, it

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<sup>39</sup> Section 16 of the *Telecommunications Act 1997*.

<sup>40</sup> Subsection 152AL(1) of the Act.

<sup>41</sup> Section 7 of the *Telecommunications Act 1997*.

<sup>42</sup> Trade Practices (Telecommunications) Amendment Bill 1996, Explanatory Memorandum, Item 6, proposed section 152AL.

<sup>43</sup> Subsection 152AL(6) of the Act.

<sup>44</sup> As set out in section 2.2.2 of this guideline, service declaration creates access obligations in relation to that particular service and specifically the category A SAOs for non-NBN services and the category B SAOs for NBN services.

may be unnecessary for the ACCC to consider declaring such a service through a public inquiry.

It may also be unnecessary for the ACCC to hold a public inquiry into the declaration of a service if it expects equivalent access obligations to be established by an alternative process before a public inquiry would be undertaken.

### ***Efforts to obtain access and likelihood of provision without declaration***

Where the person requesting the inquiry is seeking access to the service, that person should demonstrate the efforts made to obtain access through commercial negotiation. Where no efforts have been made, the need for the ACCC to hold a public inquiry may be difficult to establish.

### ***Demand for the service and how it will be used***

When considering whether to hold a public inquiry, the ACCC may take into account information about likely demand for the service and how it will be used, including its use to supply services in downstream markets.

#### **3.1.4. Conducting a public inquiry**

If the ACCC decides to hold a public inquiry, the relevant procedures are set out in Part 25 of the *Telecommunications Act 1997*. Specifically it must:

- publish notice of certain matters relating to the inquiry<sup>45</sup>
- provide a reasonable opportunity for submissions from the public<sup>46</sup>
- publish a report on the inquiry.<sup>47</sup>

In addition, in conducting a public inquiry, the ACCC may:

- publish a discussion paper<sup>48</sup>
- hold one or more hearings<sup>49</sup>
- undertake market inquiries
- seek expert advice on particular issues (for example, advice on technical feasibility issues).

These matters are explored in further detail below.

### ***Notice to the public***

The ACCC must publish, in whatever ways it thinks appropriate, notice of:

- the fact that it is holding the inquiry
- the period during which the inquiry is to be held
- the nature of the matter to which the inquiry relates
- the period within which, and the form in which, members of the public may make submissions to the ACCC

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<sup>45</sup> Section 498 of the *Telecommunications Act 1997*.

<sup>46</sup> Section 500 of the *Telecommunications Act 1997*.

<sup>47</sup> Section 505 of the *Telecommunications Act 1997*.

<sup>48</sup> Section 499 of the *Telecommunications Act 1997*.

<sup>49</sup> Sections 501 to 504 of the *Telecommunications Act 1997*.

- the matters that the ACCC would like such submissions to deal with
- the address/es to which submissions may be sent.<sup>50</sup>

The ACCC will usually provide notice of the fact that it is holding an inquiry by issuing a media release (see <https://www.accc.gov.au/media/media-releases>). The media release will not necessarily include all the matters referred to above. Notice of some of the matters may be given in a discussion paper or another publication.

### ***Indicative time frames***

When a public inquiry is announced, the ACCC will outline the timeframe for the inquiry. This may include:

- the timeframes for issuing a discussion paper
- the period set aside for comments from interested parties
- dates for any public hearings that are held
- indicative timeframes for the release of the draft report and final report.

The ACCC will typically take 6-12 months to complete a public inquiry process. In some situations, the public inquiry may take longer and it may be necessary to extend these timeframes due to the complexity of the declaration decision or unforeseen events. Where this is the case, the ACCC will state the reasons for the extension. In other circumstances the ACCC may complete a public inquiry more quickly, particularly where it has previously considered the issue.

Figure 2 at the end of this section outlines the public inquiry process and indicative time frames.

### ***Discussion paper***

The ACCC may, but is not required to, prepare a discussion paper which:

- identifies the relevant issues
- sets out background material about, and discussion of, those issues<sup>51</sup>
- seeks the views of interested parties on specific issues.

In most cases, the ACCC will release a discussion paper and for more complex inquiries it may supplement an initial discussion paper with further discussion papers to explore particular issues that emerge during the inquiry.

If a discussion paper is prepared, the ACCC makes it available at its website:

[www.accc.gov.au](http://www.accc.gov.au).

### ***Submissions***

The ACCC will provide a reasonable opportunity for any member of the public to make a written submission as part of the public inquiry.<sup>52</sup> This period must be at least 28 days.<sup>53</sup>

<sup>50</sup> Section 498 of the *Telecommunications Act 1997*. The ACCC is not required to publish at the same time, or in the same way, notice of all of the matters referred to above.

<sup>51</sup> Section 499 of the *Telecommunications Act 1997*.

<sup>52</sup> Section 500 of the *Telecommunications Act 1997*.

<sup>53</sup> Subsection 500(2) of the *Telecommunications Act 1997*.

In making submissions the ACCC encourages parties to include any necessary confidential information to explain and justify their positions. The availability of such information will assist the ACCC in making decisions that are robust and based on good evidence. At the same time, the ACCC is committed to ensuring that there is an appropriate balance between protecting parties' genuinely confidential information and promoting confidence in the robustness of the ACCC's regulatory processes by providing sufficient transparency. The *Confidentiality Guideline for submitting confidential material to ACCC communications inquiries*<sup>54</sup> contains more information about the ACCC's approach to confidentiality.

## **Hearings**

The ACCC may hold hearings for the purposes of the inquiry<sup>55</sup> to receive submissions or to provide a forum for public discussions of relevant issues.

Any hearing would usually take place in public and the ACCC is also required to give reasonable public notice of the conduct of a hearing.<sup>56</sup> However, a hearing may be conducted in private if the ACCC is satisfied that:

- evidence that may be given, or a matter that may arise, during the hearing is of a confidential nature, or
- hearing a matter, or part of a matter, in public would not be conducive to the due administration of the *Telecommunications Act 1997*.<sup>57</sup>

In practice the ACCC rarely holds hearings for public inquiries considering declaration.

The ACCC will occasionally invite parties to attend forums without public notice where it is appropriate to explore specific issues that have arisen.

## **Market inquiry**

During the course of a public inquiry, the ACCC may conduct market inquiries to enable issues to be explored in greater detail with interested persons. They are particularly useful for testing information, proposals and submissions, and also enable the ACCC to gather additional information relevant to promoting the LTIE.

## **Expert advice**

In some inquiries, the ACCC may seek expert advice on particular issues. For instance, the ACCC may wish to seek independent advice on technical feasibility issues so that it can better understand submissions or seek information about issues not fully addressed in submissions. The ACCC will generally post a public version of the advice on its website at: [www.accc.gov.au](http://www.accc.gov.au).

The ACCC may also consult with other government agencies, such as the Australian Communications and Media Authority (ACMA), on matters in which they have expertise.

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<sup>54</sup> *Confidentiality Guideline for submitting confidential material to ACCC communications inquiries*, April 2014.

<sup>55</sup> Section 501 of the *Telecommunications Act 1997*.

<sup>56</sup> Section 502 of the *Telecommunications Act 1997*.

<sup>57</sup> Subsection 502(3) of the *Telecommunications Act 1997*.



## **Report of the inquiry**

The ACCC must prepare a report on its findings as a result of the public inquiry.<sup>58</sup> During the public inquiry, the ACCC may choose to publish the report in draft form, with a view to seeking submissions on the decision the ACCC proposes to make.

If the public inquiry is held at the request of a person, the ACCC will give the person a copy of the report.<sup>59</sup> If it was held because of a direction given by the Minister, the ACCC will give a copy of the report to the Minister.<sup>60</sup> In all public inquiries, the ACCC will give ACMA a copy of the report.<sup>61</sup> This will typically be an electronic copy.

If the ACCC decides to declare a service, the report will be published within the 180-day period ending when the declaration was made.<sup>62</sup>

## **Combined inquiries**

The ACCC may hold combined public inquiries into whether to declare two or more services. Combined inquiries allow for efficiencies such as a single notice to the public, a single discussion paper and a single hearing process. Further, they enable the ACCC to consider simultaneously services falling under the same category, such as data transmission which covers a range of service types. With combined inquiries, the ACCC can prepare a single report or separate reports for matters covered by the combined inquiry.<sup>63</sup>

An example of a combined public inquiry is the fixed line services declarations inquiry, which considered the ULLS, LSS, LCS, WLR service and the FOAS and FTAS.<sup>64</sup>

### **3.1.5. If the ACCC declares the service via a public inquiry**

If the ACCC considers declaration will promote the LTIE, it may declare the service by written instrument.<sup>65</sup> The service will then be subject to the regulatory framework as set out in Section 2.2.2.

The ACCC will then publish a copy of the declaration in the *Gazette*,<sup>66</sup> and details of the declared service will be published on the ACCC's register of declared services.<sup>67</sup> The register of declared services is available at:

<http://registers.accc.gov.au/content/index.phtml/itemId/323824>.

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<sup>58</sup> Section 505 of the *Telecommunications Act 1997*.

<sup>59</sup> Subsection 152AM(5) of the Act.

<sup>60</sup> Subsection 505(2) of the *Telecommunications Act 1997*.

<sup>61</sup> Subsection 152AM(4) of the Act.

<sup>62</sup> Subsection 152AL(3)(c) of the Act.

<sup>63</sup> Subsection 152AN(2)(d) of the Act.

<sup>64</sup> *Public inquiry into the fixed line services declarations – final report*, April 2014. Note that the ACCC also determined in this public inquiry that Public Switched Telephone Network Originating Access Terminating Access would be called Fixed Originating Access Service (FOAS) and Fixed Terminating Access Service (FTAS).

<sup>65</sup> Subsection 152AL(3) of the Act.

<sup>66</sup> Subsection 152AL(5) of the Act.

<sup>67</sup> Section 152AQ of the Act.

### 3.1.6. Expiry of declaration made via a public inquiry

A declaration made by the ACCC following a public inquiry must specify an expiry date for the declaration.<sup>68</sup> The expiry date must be between three and five years after the declaration is made, unless the ACCC considers that there are circumstances warranting a shorter or longer period.<sup>69</sup> The ACCC will take into account a variety of issues when determining the expiry date, including current market and policy settings, any changes that are expected to occur and providing regulatory certainty for access seekers and providers. Typically the ACCC will set the expiry date five years after the declaration is made.

The ACCC may extend the expiry date of the declaration by not more than five years, by publishing a notice in the *Gazette*.<sup>70</sup>

The ACCC must hold a public inquiry during the 18-month period ending on the expiry date of the declaration about whether to:

- extend or further extend the expiry date
- revoke the declaration
- vary the declaration
- allow the declaration to expire and whether to make a new declaration.<sup>71</sup>

The ACCC must publish a report about the inquiry during the 180-day period ending on the expiry date of the existing declaration.

The ACCC will revoke or allow the declaration to expire following the public inquiry where it is no longer satisfied that declaration will promote the LTIE.

#### **Example: Digital Data Access Services and Integrated Services Digital Network**

In 2008 the ACCC conducted a public inquiry as the declarations for the Digital Data Access Service (DDAS) and Integrated Services Digital Network (ISDN) in regional areas were due to expire on 30 June 2008. It decided to extend the declarations for DDAS and ISDN services in regional areas for a period of 12 months as it considered this would promote the LTIE. Specifically, while noting the declining importance of these services, it decided the extension would encourage the transition to alternative networks by access seekers and encourage the economically efficient investment in infrastructure.<sup>72</sup>

The ACCC conducted a further public inquiry in 2009 and decided to allow the declarations for the DDAS and the ISDN services in regional areas to expire on 30 June 2009. It considered this would promote the LTIE and that allowing the declaration to expire would encourage the ongoing transition to alternative services, potentially encouraging the provision of new services. Further, this reflected concern that declaration may stifle investment in alternative infrastructure.<sup>73</sup>

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<sup>68</sup> Subsection 152ALA(1) of the Act.

<sup>69</sup> Subsection 152ALA(2) of the Act.

<sup>70</sup> Subsection 152ALA(4) of the Act.

<sup>71</sup> Subsection 152ALA(7) of the Act.

<sup>72</sup> *An ACCC Final Report reviewing the declarations for the digital data access service and integrated services digital networks*, ACCC, June 2008.

<sup>73</sup> *An ACCC Final Report reviewing the declarations for the digital data access service and integrated services digital networks*, ACCC, June 2009.

### 3.1.7. Variation or revocation of declaration

While the ACCC may vary or revoke a declaration where it considers that to do so would promote the LTIE, it must first hold a public inquiry about the proposed variation or revocation.<sup>74</sup> This requires the same considerations and processes as detailed in 3.1.1 to 3.1.4, including whether varying or revoking declaration would promote the LTIE. This enables the ACCC to consider changing the scope of declaration or removing it entirely.

The ACCC is not required to hold a public inquiry where it proposes to revoke a declaration for a service of minor importance,<sup>75</sup> or proposes to vary a declaration where, under the Procedural Rules, the variation is taken to be of a minor nature.<sup>76</sup>

### 3.2. Declaration via SAU

Another way in which a service may be declared is if:

- a carrier or carriage service provider gives the ACCC an SAU
- the SAU is in operation (after being accepted by the ACCC)
- the carrier or carriage service provider supplies the service or proposed service (whether to itself or to other persons).<sup>77</sup>

A carrier or a carriage service provider other than an NBN corporation may give a SAU to the ACCC<sup>78</sup> in connection with access to a service, so long as the service is not a declared service.<sup>79</sup> An NBN corporation may give a SAU to the ACCC in connection with access to a service, so long as the service is not declared by the ACCC and there is no access determination that applies in relation to access to the service.<sup>80</sup>

It is noted that the ACCC may declare a service, if after holding a public inquiry it is satisfied that the making of the declaration will promote the LTIE, even if the service is, to any extent, covered by a SAU.<sup>81</sup>

A SAU must be in a form approved in writing by the ACCC.<sup>82</sup> It must include certain commitments:

- The undertaking must state the person agrees to be bound by the category A SAOs, or if NBN Co – category B SAOs, and must state that the person undertakes to comply with the terms and conditions specified in the undertaking in relation to the SAOs.<sup>83</sup>
- The undertaking must specify the expiry time of the undertaking,<sup>84</sup> and may provide for the person to extend, or further extend, the expiry time if the extension, or further extension, is approved by the ACCC in accordance with the criteria as specified in the undertaking.<sup>85</sup>

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<sup>74</sup> Subsection 152AO(1) of the Act.

<sup>75</sup> Subsection 152AO(1A) of the Act.

<sup>76</sup> Subsection 152AO(3) of the Act.

<sup>77</sup> Subsection 152AL(7) of the Act; if NBN Co – subsection 152AL(8E) of the Act.

<sup>78</sup> Subsections 152CBA(1) and 152CBA(2) of the Act.

<sup>79</sup> Subsection 152CBA(1)(a) of the Act.

<sup>80</sup> Subsections 152CBA(1)(b)(iii) and 152CBA(1)(b)(iv) of the Act.

<sup>81</sup> Subsections 152AL(8); if NBN Co – subsection 152AL(8F).

<sup>82</sup> Subsection 152CBA(4) of the Act.

<sup>83</sup> Subsection 152CBA(3) of the Act; if NBN Co – subsection 152CBA(3A) of the Act.

<sup>84</sup> Subsection 152CBA(6) of the Act.

<sup>85</sup> Subsection 152CBA(9) of the Act.

Further, the SAU may:

- In the event that the person supplies the service (whether to itself or others) state that the person will engage in specified conduct in relation to access to the service, and will do so on such terms and conditions as are specified in the undertaking.<sup>86</sup>
- Provide for the ACCC to perform functions and exercise powers in relation to the undertaking.<sup>87</sup>
- Provide that a term or condition specified in the undertaking is a fixed principles term or condition for a certain period of time.<sup>88</sup>
- If the person giving the SAU is NBN Co, the undertaking may also state that NBN Co will engage in specified conduct relating to other matters (such as developing a new eligible service, enhancing declared service and giving information to service providers in relation to those activities).<sup>89</sup>

### **3.2.1. Acceptance of a SAU**

After considering the SAU, the ACCC must decide whether to accept or reject the SAU.<sup>90</sup>

The ACCC must not accept the SAU unless it is satisfied that the terms and conditions specified in the undertaking would be consistent with the applicable SAOs and that those terms and conditions are reasonable.<sup>91</sup>

In determining whether particular terms and conditions are reasonable, the ACCC must have regard to the following:

- whether the terms and conditions promote the LTIE
- the legitimate business interests of the carrier or carriage service provider concerned, and the carrier or carriage service provider's investment in facilities used to supply the declared services concerned
- the interests of persons who have rights to use the declared service concerned
- the direct costs of providing access to the declared service concerned
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- the economically efficient operation of a carriage service, a telecommunications network or a facility.<sup>92</sup>

Sections 5 to 8 discuss the LTIE test and the relevant issues the ACCC must consider, including those outlined above in relation to reasonableness.

The ACCC must not accept the SAU unless the ACCC is satisfied that the SAU is consistent with any Ministerial pricing determination.<sup>93</sup>

If the SAU states that the person will engage in specified conduct in relation to access to the service, and will do so on such terms and conditions as are specified in the undertaking,<sup>94</sup>

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<sup>86</sup> Subsection 152CBA(3B) of the Act.

<sup>87</sup> Subsection 152CBA(10A) of the Act.

<sup>88</sup> Subsection 152CBAA(1) of the Act.

<sup>89</sup> Subsection 152CBA(3C) of the Act.

<sup>90</sup> Subsection 152CBC(2) of the Act.

<sup>91</sup> Subsection 152CBD(2)(a) of the Act;/ if NBN Co – subsection. 152CBD(2)(b) of the Act.

<sup>92</sup> Subsection 152AH of the Act.

<sup>93</sup> Subsection 152CBD(2)(c) of the Act.

<sup>94</sup> Subsection 152CBA(3B) of the Act.

the ACCC must not accept the SAU unless it is satisfied that the conduct will promote the LTIE and the terms and conditions on which it will engage in such conduct are reasonable.<sup>95</sup>

To accept the SAU the ACCC must publish the SAU, invite people to make submissions on the SAU and consider any submissions received within the time limit specified when the SAU was published.<sup>96</sup>

Further, if the SAU specifies a fixed principles term or condition, the ACCC must not accept the SAU if it considers that:

- The fixed principles term or condition should not be a fixed principles term or condition.<sup>97</sup>
- The notional period for the fixed principles term or condition should not be the notional fixed period.<sup>98</sup>
- If the SAU provides that one or more specified circumstances are qualifying circumstances in relation to the fixed principles term or condition — any of the qualifying circumstances should not be qualifying circumstances.<sup>99</sup>
- If the SAU does not provide that particular circumstances are qualifying circumstances, those circumstances should be qualifying circumstances in relation to the fixed principles term or condition.<sup>100</sup>

In addition to the circumstances where the ACCC must not accept the SAU, there are three reasons for which the ACCC must not reject the SAU:

- If the ACCC has previously accepted an SAU given by a person that contains fixed principles terms or conditions that are in effect, the ACCC must not reject another undertaking given by this person in relation to the same service for a reason that concerns those fixed principles terms or conditions.<sup>101</sup>
- If certain conduct is authorised under Part XIB of the CCA the ACCC must not reject the undertaking for a reason that concerns this conduct.<sup>102</sup>
- If the undertaking contains price-related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible NBN services, the ACCC must not reject the undertaking for a reason that concerns those price-related terms and conditions.<sup>103</sup>

The ACCC notes that the Government has foreshadowed potential changes to Part XIC to improve the operation of the provisions relating to SAUs and fixed principles.<sup>104</sup>

If the ACCC accepts a SAU, it must give the person a written notice stating that the undertaking has been accepted.<sup>105</sup> If the ACCC rejects a SAU, it must give the person a written notice stating that the undertaking has been rejected and setting out the reasons for the rejection.<sup>106</sup>

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<sup>95</sup> Subsection 152CBD(2)(ca) of the Act.

<sup>96</sup> Subsection 152CBD(2)(d) of the Act.

<sup>97</sup> Subsection 152CBD(4)(a) of the Act.

<sup>98</sup> Subsection 152CBD(4)(b) of the Act.

<sup>99</sup> Subsection 152CBD(4)(c) of the Act.

<sup>100</sup> Subsection 152CBD(4)(d) of the Act.

<sup>101</sup> Subsection 152CBAA(5)(h) of the Act.

<sup>102</sup> Subsection 152CBD(5C) of the Act.

<sup>103</sup> Subsection 152CBD(5A) of the Act.

<sup>104</sup> *Telecommunications Regulatory and Structural Reform*, Australian Government, December 2014, p 6.

<sup>105</sup> Subsection 152CBC(3) of the Act.

<sup>106</sup> Subsection 152CBC(4) of the Act.

If the ACCC does not make a decision to accept or reject the SAU within 6 months of receiving the undertaking, the ACCC is taken to have accepted the undertaking at the end of that 6-month period.<sup>107</sup> The ACCC may extend, or further extend, the 6-month period by giving written notice to the person.<sup>108</sup> In calculating the 6-month period, certain periods of time are to be disregarded, e.g. if the ACCC has requested further information in relation to the undertaking any time the request remains unfulfilled.<sup>109</sup>

The ACCC must maintain a register of undertakings that have been accepted and all variations of access undertakings.<sup>110</sup> The register of access undertakings is at: <http://registers.accc.gov.au/content/index.phtml/itemId/329658>.

### **3.2.2. Expiry of an accepted SAU**

As noted above, the SAU must specify the expiry time of the undertaking.<sup>111</sup> However, Part XIC does not prevent the carrier or carriage service provider from giving a fresh SAU in the same terms as the expired undertaking.<sup>112</sup>

### **3.2.3. Variation and withdrawal of an accepted SAU**

Part XIC provides for a person that has an accepted SAU to vary or withdraw the undertaking while it is in operation, as follows:

- If the person gives a variation of the SAU to the ACCC,<sup>113</sup> the ACCC must decide whether to accept or reject the variation.<sup>114</sup> In assessing a variation, the ACCC must apply the same criteria as set out above for assessing a SAU.<sup>115</sup>
- The person may withdraw the SAU while it is in operation by giving notice to the ACCC.<sup>116</sup> If the service to which the undertaking relates is not a declared service (other than by virtue of acceptance of the SAU by the ACCC), the person must also inform the ACCC in writing, at least 12 months before giving the notice to the ACCC, that it proposes to withdraw the undertaking.<sup>117</sup>

There is no provision under Part XIC of the Act for the ACCC to otherwise vary or set aside the terms of a SAU once it has been accepted by the ACCC.

## **3.3. Declaration following publication of a SFAA by NBN Co**

A NBN service can also become a declared service if NBN Co formulates a SFAA that relates to access to the service and the SFAA is available on its website.<sup>118</sup> The terms and conditions that comprise these offers are known as a SFAA.

The ACCC does not have any role in declaring these NBN services.

If an SFAA is available on the NBN Co's website, and an access seeker requests NBN Co to enter into an access agreement that sets out terms and conditions that are the same as the

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<sup>107</sup> Subsection 152CBC(5) of the Act; See subsection. 152CBC(6) of the Act for calculating the 6-month period.

<sup>108</sup> Subsection 152CBC(7) of the Act.

<sup>109</sup> Subsection 152CBC(6) of the Act.

<sup>110</sup> Subsection 152CC(1) of the Act.

<sup>111</sup> Subsection 152CBA(6) of the Act.

<sup>112</sup> Subsection 152CBA(10) of the Act.

<sup>113</sup> Subsection 152CBG(2) of the Act.

<sup>114</sup> Subsection 152CBG(3) of the Act.

<sup>115</sup> Subsection 152CBG(4) of the Act.

<sup>116</sup> Subsection 152CBI(2) of the Act.

<sup>117</sup> Subsection 152CBI(2)(b) of the Act.

<sup>118</sup> Subsections 152AL(8D), 152CJA(2)(b) and 152CJF of the Act.

terms and conditions in the SFAA, NBN Co is obliged to enter into such an agreement.<sup>119</sup> An SFAA therefore provides one means by which an access seeker may obtain access to NBN Co's services.

Entry into an Access Agreement based on an SFAA is a commercial decision for persons who may wish to provide services utilising NBN Co's network.

### 3.4. Mandatory declaration – Layer 2 bitstream service

The ACCC was required to declare that a specified Layer 2 bitstream service is a declared service.<sup>120</sup>

The ACCC declared a Layer 2 bitstream service called the Local Bitstream Access Service (LBAS), which commenced on 13 April 2012.

It remains in force indefinitely<sup>121</sup> and cannot be varied or revoked by the ACCC.

### 3.5. Regulatory costs and benefits associated with declaration

Key principles in the *Australian Government Guide to Regulation* are that:

- Regulation should not be the default option for policy makers and that the option offering the greatest net benefit should always be the recommended option.
- Regulation should be imposed only when it can be shown to offer an overall net benefit.
- The cost burden of new regulation must be fully offset by reductions in existing regulatory burden,<sup>122</sup> noting that regulatory cost offsets may be met over time rather than requiring these to be offset at the point of decision for each proposal.<sup>123</sup>

Other key principles also included in the *Australian Government Guide to Regulation* are about how decisions should be made in relation to regulation, e.g. the consultation which should underpin decisions and the information on which the decision is based.

To account for these key principles, the *Australian Government Guide to Regulation* states that every policy option must be assessed, its likely impact costed and a range of viable alternatives considered in a transparent and accountable way against the default position of no new regulation. As a result, every policy proposal designed to introduce or abolish regulation must now be accompanied by an Australian Government Regulation Impact Statement (RIS).<sup>124</sup>

Declaration of a carriage service is likely to have associated costs and benefits, including possible changes to the regulatory burden for a carrier or carriage service provider. The ACCC's general position is that its analysis of whether declaration will promote the LTIE, and consideration of the other issues required to determine whether a SAU should be accepted, satisfy the RIS requirements.

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<sup>119</sup> Subsections 152CJA(2)(c) and 152CJA(d) of the Act.

<sup>120</sup> Subsection 152AL(3C) of the Act.

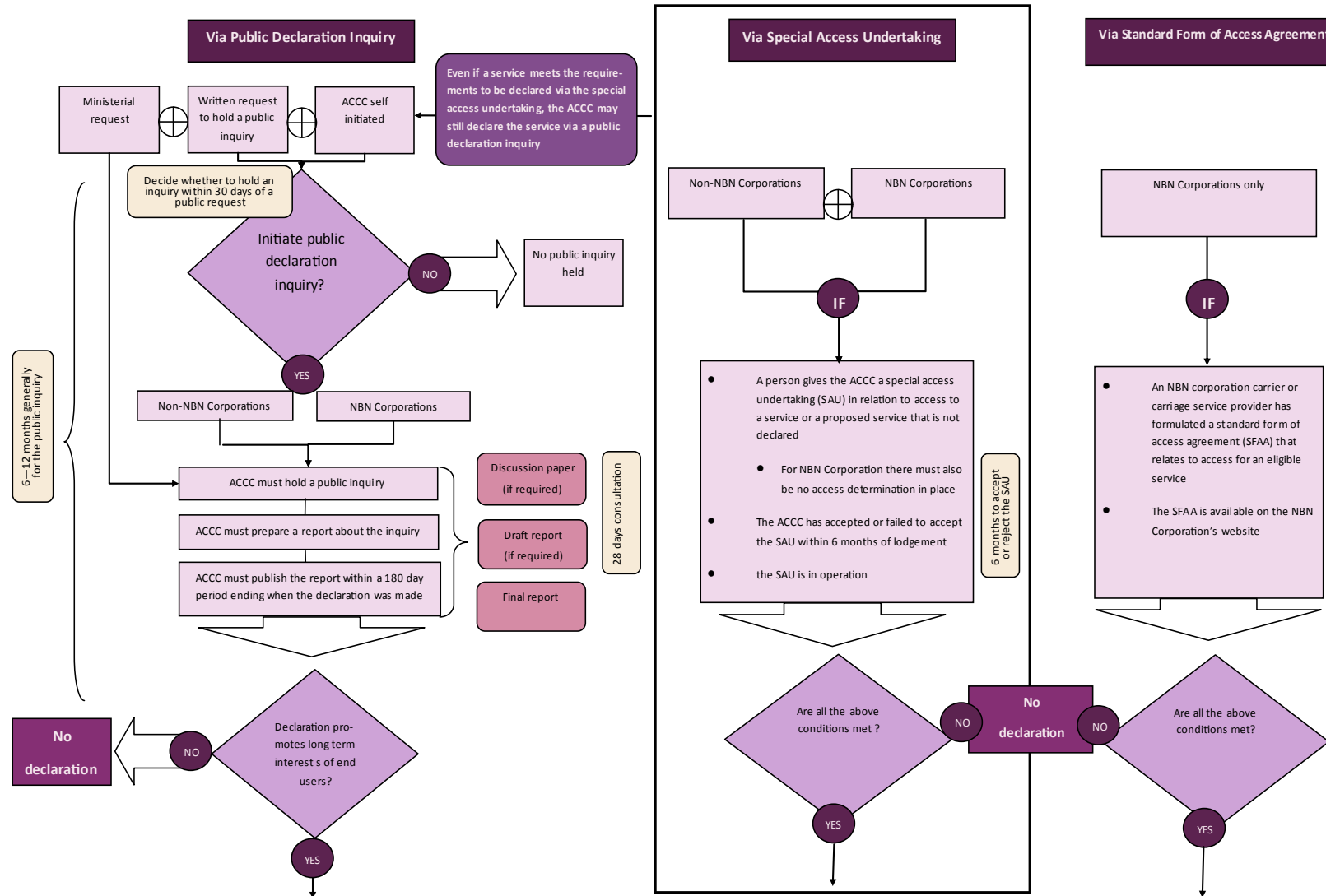
<sup>121</sup> Subsection 152ALA(5A) of the Act.

<sup>122</sup> *The Australian Government Guide to Regulation*, Department of Prime Minister and Cabinet, 2014, p 2.

<sup>123</sup> *Regulatory Burden Measurement Framework*, Guidance Note, Department of Prime Minister and Cabinet, 2016, p 1.

<sup>124</sup> *The Australian Government Guide to Regulation*, Department of Prime Minister and Cabinet, 2014, p 4.

Figure 2 – Declaration processes





## 4. Service description

This section of the guideline sets out the key issues the ACCC will consider in determining the appropriate service description for a declared service; the general principles it will apply; and the issue of unbundling of telecommunication services in establishing service descriptions.

At a high level, in establishing the description for a declared service, services may be specified by name, by inclusion in a specified class or in any other way.<sup>125</sup>

The ACCC has a large degree of flexibility in how it describes the service but will be guided in setting the service description by the object of Part XIC which is to promote the LTIE.<sup>126</sup> Where it is determined that declaration will promote the LTIE, the ACCC will seek to describe the services as accurately as possible to reflect that outcome.

### 4.1. General principles

In establishing the service description the ACCC generally applies the following principles:

- The ACCC's preference is to describe the service in functional terms using a technology neutral basis as far as possible. This provides the access provider with the flexibility to determine the most efficient way of supplying the service. It also ensures that with technological or innovative developments the service continues to be declared but avoids distorting any such developments. Technical terms may, however, be included where a functional description would provide scope for ambiguity which could be exploited by the access provider in a manner that hinders access.
- The service should be described in a manner which provides sufficient clarity for application of the SAOs.
- The service will not generally be specified with reference to a particular provider.
- The service should be technically feasible to supply, charge for and be one which potential access providers are capable of supplying to themselves or others. The ACCC will generally use the inquiry process to explore these issues.
- The ACCC generally considers that an approach to regulation providing access seekers with greater control over their own business and products, to the extent that it is economically efficient, is likely to promote competition and investment in new services, and promote the LTIE. Accordingly, access to services should be provided as close to the bottleneck as feasible.
- The ACCC will not include terms and conditions of access in the service description. In deciding to declare a service, the ACCC is limited to specifying the service (as distinct from the manner in which the service is to be provided). The terms and conditions of access are, in the first instance, a matter for access providers and seekers. These terms and conditions can also be specified in a SAU, BROCs or an access determination.<sup>127</sup> Nevertheless, in some instances, there may be a 'grey area' between specifying the service and the terms and conditions upon which it is supplied. The ACCC will consider this issue on a case-by-case basis.
- The ACCC will generally try to avoid including exclusions or exceptions in the service description. This provides clarity around the scope of the service and as a result greater

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<sup>125</sup> Notes to subsection 152AL(3) of the Act.

<sup>126</sup> Trade Practices (Telecommunications) Amendment Bill 1996, Explanatory Memorandum, Item 6, proposed section 152AL.

<sup>127</sup> The instruments in order of priority are: access agreements; SAUs; BROCs and access determinations. See section 2.2.2 on the Part XIC regulatory hierarchy.

certainty for access seekers and access providers. Exclusions may, however, be appropriate, for example, where a service provided via a particular technology is already declared or there is competitive supply of the service in a particular geographic area or to a particular class of customer.

In some circumstances, the ACCC may depart from these principles and/or adopt additional considerations as is illustrated by the following examples.

#### **Example: Wholesale ADSL declaration**

In 2011 the ACCC declared the wholesale ADSL service with a service description which is not technology neutral as it is for a specific technology used to supply broadband services and not for the supply of broadband services. This reflects specific competition concerns about the supply of this service and Telstra's ability to leverage its market power in the supply of this service to impede competition through restrictive contractual terms and potentially anti-competitive price discrimination between wholesale ADSL providers.<sup>128</sup>

#### **Example: Domestic transmission capacity service**

In 2014 the ACCC declared the Domestic transmission capacity service (DTCS) but those inter-capital, regional and metropolitan transmission routes found to be competitive were excluded from the scope of regulation and the declared service.<sup>129</sup>

## 4.2. Unbundling

Often, services can be seen as bundles of particular network elements, and consequently, in developing a service description, the ACCC will form a view as to the degree of unbundling that is appropriate. This issue arises when, for example, the ACCC is faced with a choice of declaring a higher level service (such as an end-to-end LCS or wholesale ADSL) or declaring the components making up that service (such as the interconnection services Fixed Originating Access Service (FOAS) or Fixed Terminating Access Service (FTAS) or the unconditioned local loop service).<sup>130</sup>

The appropriate degree of unbundling is an important matter that is likely to influence the effect of declaration. Accordingly, the ACCC's approach to unbundling will be guided by the criteria relevant to the LTIE objective.

Some of the factors which may be relevant include:

- *Will unbundling lead to any loss of efficiencies?* Separation of internal processes so that each element can be provided as a separate service may involve transaction costs that would not be incurred with full integration.
- *Will unbundling impact investment decisions?* Declaration of an unbundled service may promote facilities based investment rather than service based investment and it may be preferable to declare an unbundled service.
- *Is there any demand for the unbundled elements?* In the absence of actual or potential demand for unbundled elements, there may be little point in requiring unbundling. Demand for unbundled elements may also be relevant when assessing whether declaration will promote competition.

<sup>128</sup> Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final Decision, February 2012, p 1.

<sup>129</sup> An ACCC Final Report on the review of the declaration for the Domestic Transmission Capacity Service, March 2014, p 65.

<sup>130</sup> Public Inquiry into the fixed line service declarations, Final Report, April 2014.

- *Does the bundled service contain both contestable<sup>131</sup> and non-contestable elements?* Where this is so, it may be preferable to unbundle the service and declare only those elements of the service that are non-contestable.

### **Example: ULLS and wholesale ADSL**

The ULLS was initially declared in 1999 because it would allow access seekers to provide new and innovative services. The ACCC considered that with declaration access seekers would be able to access the ULLS and add their own infrastructure, such as DSLAMs to provide ADSL services. No longer would they have to rely solely on Telstra's choices in terms of service range and timing of deployment of ADSL services.

In July 2006, the ACCC decided not to declare a wholesale ADSL service on the basis that to do so could adversely affect competition by delaying the uptake of ULLS.<sup>132</sup> At the same time, through a separate process, it declared ULLS.<sup>133</sup> This is an illustration of the ACCC declaring (at that time) one particular unbundled network element (ULLS) but not a bundle of several network elements (i.e. the local access component and a transmission component between the DSL enabled exchange and points of interconnect to form wholesale ADSL).

Subsequent to this in 2012 the ACCC decided to declare the wholesale ADSL service as a result of concerns about the level and structure of Telstra's wholesale ADSL pricing and its ability to leverage market power in the supply of wholesale ADSL to impede competition. Declaration was considered likely to promote competition with the ability to address these concerns. This was further supported by the slowing expansion of the 'footprint' in which wholesale ADSL services was supplied using competitive infrastructure (ULLS) and that further significant expansion was considered unlikely.<sup>134</sup>

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<sup>131</sup> Contestable elements are those which could be supplied by other service providers in competition with the potential access provider.

<sup>132</sup> *A strategic review of the regulation of fixed network services – ACCC position paper*, June 2006, p 88-90.

<sup>133</sup> *Declaration inquiry for the ULLS, PSTN OTA and CLLS*, Final determination, July 2006.

<sup>134</sup> *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010*, Final Decision, February 2012, p1-2.

## 5. The long-term interests of end-users

This section of the guideline sets out the scope of the LTIE test and how it is applied.

In deciding to declare a service, the ACCC must be satisfied that declaring the service will promote the LTIE of carriage services, or services provided by means of carriage services.

To determine whether declaration will promote the LTIE, the ACCC must have regard to the extent to which declaration is likely to result in the achievement of the following three objectives:

- Promoting competition in markets for carriage services, or services provided by means of carriage services.
- Achieving any-to-any connectivity in relation to carriage services that involve communication between end-users.<sup>135</sup>
- Encouraging the economically efficient use of, and economically efficient investment in, infrastructure by which listed services are supplied and any other infrastructure by which listed services are, or are likely to become capable of, being supplied.<sup>136</sup>

These objectives are discussed in more detail separately in Sections 6 to 8 of the guideline. The ACCC's considerations are limited to these matters, although as set out in the following sections, the issues to be considered within this scope are quite wide.

### 5.1. Scope of the LTIE test

#### 5.1.1. What are the interests?

The ACCC considers the term LTIE refers to the end-users' economic interests, which include lower prices, increased quality of service and greater diversity and scope in product offerings.<sup>137</sup>

#### 5.1.2. What are the services?

The services are either:

- carriage services or
- services supplied by means of carriage services.<sup>138</sup>

Carriage service is a service for carrying communications by means of guided and/or unguided electromagnetic energy.<sup>139</sup>

#### 5.1.3. Who are end-users?

End-users are the consumers of carriage services and other services supplied using carriage services, rather than the suppliers of these services.

The term 'end-users' includes both consumers with a direct contractual relationship with a carrier or service provider (i.e. customers) and other end-users such as members of the

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<sup>135</sup> This objective is only relevant for carriage services involving communication between end-users. See section 7 on any-to-any connectivity.

<sup>136</sup> Subsection 152AB(2) of the Act.

<sup>137</sup> This is also supported by the Australian Competition Tribunal's decision in *Re Seven Network (No 4)* [2004] ACompT 11 at [120].

<sup>138</sup> Subsection 152AB(2) of the Act.

<sup>139</sup> Section 7 of the *Telecommunications Act 1997*.

customer's household.<sup>140</sup> End-users are not limited to households or individuals and include business, including small business, for example a business which uses telecommunications services in the supply of its goods or services. The ACCC will consider the impact on consumers and businesses when examining the competition, any-to-any connectivity and efficiency issues set out in the following sections.

End-users include both actual and potential end-users.<sup>141</sup>

#### **5.1.4. What is the long-term?**

The ACCC will consider the long-term consequences of declaration on end-users' interests. This does not mean the ACCC will exclude consideration of the short to medium-term, but it will consider the consequences of declaration over a period beginning with the immediate future and extending to the long-term.

In most cases, the ACCC will identify the likely short to medium-term impacts as a result of declaration in order to form a view as to the consequences of declaration. These impacts can be then used to form a view as to the consequences of declaration over the long-term. For example, if the ACCC is of the view that declaration is likely in the short to medium-term to promote competition by reducing barriers to market entry, it can form a view about the consequences of reduced barriers to entry in terms of the end-users' interests over the long-term when such entry would be expected to have occurred.

The ACCC interprets the expression 'long-term' from an economic perspective.<sup>142</sup> Accordingly, the 'long-term' is not a set period; it is the time over which the full effects of the declaration decision will be felt.<sup>143</sup>

### **5.2. Applying the LTIE test**

While the object of Part XIC and declaration is to promote the LTIE, the immediate impact of a declaration decision is on the economic interests of service providers. This is because a declaration applies to the (input) services acquired or sought to be acquired by access seekers from access providers.

To evaluate the consequences of declaration on the interests of end-users, the ACCC will be concerned with the effect on access seekers in terms of rivalrous behaviour and investment decisions. This should enable the ACCC to form a view about the economic benefits likely to flow to end-users in terms of price, quality and diversity of services as a result of declaration.

As noted above, in determining whether declaration will promote the LTIE the ACCC must have regard to the extent to which declaration is likely to result in the achievement of the following three objectives: promoting competition; achieving any-to-any connectivity; and encouraging the economically efficient use of, and investment in, infrastructure. In practice, the ACCC must balance each of these objectives when deciding whether a particular course of action would promote the LTIE.<sup>144</sup>

The ACCC's analytical process when having regard to the achievement of the objective of promoting the LTIE generally involves three steps:

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<sup>140</sup> Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum, Item 6, proposed section 152AB.

<sup>141</sup> *Re Seven Network (No 4)* [2004] ACompT 11 at [120].

<sup>142</sup> In this regard, the 'long-term' is the time within which suppliers can vary all factors of production (e.g. in response to an increase in customer demand).

<sup>143</sup> *Re Seven Network (No 4)* [2004] ACompT 11 at [120].

<sup>144</sup> This is also supported by *Telstra v ACT* [2009] FCAFC 23 at [270 and 272].

- **First**, the ACCC considers the likely result of declaration in terms of each supporting objective: promoting competition; achieving any-to-any connectivity; and encouraging the economically efficient use of, and investment in, infrastructure.
- **Second**, the ACCC considers whether the likely result of declaration on each objective will promote the LTIE.
- **Third**, the ACCC must make an overall assessment of whether, having regard to the overall effect of declaration on the objectives, declaration will promote the LTIE.

Depending on the case before the ACCC, this three stage analysis may be undertaken as discrete steps or be undertaken simultaneously. For instance, in considering the likely result of declaration on the promotion of competition, it may be useful to consider the likely impact in terms of price, quality and diversity of services supplied to end-users.

The ACCC will conduct a case-by-case analysis for each potential service declaration to form a view about the likely result of declaration on the achievement of each objective. This ensures that the ACCC considers the impact of declaration in terms of each objective, and assists the ACCC to reach a decision on the overall effect on the promotion of the LTIE where declaration is likely to have mixed effects.

### 5.2.1. 'With and without' test

The ACCC considers it helpful to apply the future with and without test as one way to determine whether the LTIE will be promoted by declaration.<sup>145</sup> The test compares the likely future situation with declaration, and the likely future situation without the declaration before deciding which situation will promote the LTIE.

If there is direct reliable material which can be used to determine the likely future situation that clearly demonstrates the LTIE is promoted, then this makes it easier for the ACCC to form such a conclusion.<sup>146</sup> However, if there is only indirect or circumstantial material, simple modelling, or modelling that is contested, the ACCC's task to make such a conclusion is more difficult because a number of conclusions may be open.<sup>147</sup> In such circumstances, the ACCC will take particular care before reaching the required conclusion that declaration will promote the LTIE.<sup>148</sup>

#### **Example: Fixed line services declarations inquiry<sup>149</sup>**

In the 2014 fixed line services declaration inquiry the ACCC considered whether declaration of network access services (ULLS and LSS) would promote the LTIE. In examining the future, the ACCC considered that without declaration, Telstra would have significant market power to charge higher prices for network access services and compromise the ability of access seekers to compete in retail markets. Further that access seekers' incentives for efficient investment in infrastructure may be distorted, particularly as it was considered the implementation of the NBN would take some time. In contrast, the ACCC considered extending the declaration would promote greater competition in related downstream markets and provide access seekers with greater flexibility to develop products which meet the needs of their end-users. Further, that with greater competition in retail markets this would improve productive and dynamic efficiency. Accordingly, the ACCC concluded that declaration of network access services would promote the LTIE.

<sup>145</sup> This is also supported by *Re Seven Network (No 4)* [2004] ACompT 11 at [119].

<sup>146</sup> *Re Chime Communications Pty Ltd (No 2)* A CompT 2 at [19].

<sup>147</sup> *Re Chime Communications Pty Ltd (No 2)* A CompT 2 at [19].

<sup>148</sup> *Re Chime Communications Pty Ltd (No 2)* A CompT 2 at [19].

<sup>149</sup> *Public Inquiry into the fixed line service declarations*, Final Report, April 2014.

### 5.3. Must the interests of all end-users be promoted?

The ACCC considers that it need not be satisfied that all end-users will benefit. In some instances, the benefits may be confined to a group of end-users, while in other instances some end-users may be adversely affected. Where this is the case, the ACCC is likely to group the end-users and identify the benefits and costs for each group of end-users. It will then determine whether there is a net benefit across all end-users (i.e. whether benefits to one group of end-users are likely to be outweighed by harm to another group of end-users). For instance, the ACCC may consider whether benefits to end-users through increased competition are likely to be short-lived and outweighed by losses due to reduced innovation and investment by service providers building their own infrastructure.

Forming a view about the net impact on end-users is likely to be a qualitative assessment involving judgments about the benefits and costs arising from declaration, and the spread of those costs and benefits. While this is an inherently difficult exercise, the ACCC will use available information, including any quantitative evidence, to assist it in making a decision on these matters.

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## 6. Promoting competition

This section of the guideline discusses the objective to which the ACCC must have regard in applying the LTIE test of promoting competition. In particular, the objective of promoting competition in markets for carriage services and services supplied by means of carriage services.<sup>150</sup>

As stated by the Trade Practices Tribunal (now the Australian Competition Tribunal) in *Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd*:<sup>151</sup>

*... 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.*

...

Further, the Australian Competition Tribunal in *Re Sydney Airport Corp Ltd*<sup>152</sup> observed:<sup>153</sup>

*The Tribunal does not consider that the notion of 'promoting' competition... requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition... involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.*

The Act directs the ACCC's attention to the market(s) in which competition may be promoted. In most cases, this is likely to be the market(s) for downstream services (i.e. the market(s) in which the service under consideration is used, potentially to supply a service to a customer) rather than the market in which the service is supplied (where these markets are separate). Where relevant the ACCC can also consider the market in which the service is supplied.

In summary, the ACCC may consider both:

- the market in which the service under consideration is, or would be, supplied
- the market/s in which competition may be promoted (where these are separate markets).<sup>154</sup>

The ACCC's approach to assessing the extent to which declaration is likely to result in the achievement of the objective of promoting competition in markets for listed services<sup>155</sup> involves:

- identifying and defining the relevant market/s

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<sup>150</sup> Subsection 152AB(2) of the Act.

<sup>151</sup> (1976) ATPR ¶40-012, at p 17, 246.

<sup>152</sup> (2000) 156 FLR 10.

<sup>153</sup> At the time the case was decided, the section under consideration (i.e. section 44H(4)(a)) required the minister to be satisfied that access would "promote competition", rather than access would "promote a material increase in competition" as is currently stated.

<sup>154</sup> Unlike Part IIIA of the Act, paragraph 152AB(2)(c) does not require the market in which competition is promoted to be separate from the market for the service.

<sup>155</sup> 'Listed services' is either (a) carriage services or (b) services supplied by means of carriage services: subsection 152AB(2) of the Act. 'Listed services' will subsequently be referred to as 'services' in this guide.



- assessing the current state of competition in those markets
- considering the likely future state of competition in those markets with and without declaration.

Each of these issues is discussed in Sections 6.1 to 6.3.

## 6.1. Identifying the relevant markets

By identifying the relevant markets, the ACCC is then able to analyse the effectiveness of competition with and without declaration.

Part XIC of the Act does not require the ACCC to take a definitive stance on market definition.<sup>156</sup> As a result, market analysis under Part XIC should be seen in the context of shedding light on how declaration may promote competition rather than in the context of developing ‘all purpose’ market definitions.

Section 4E of the Act provides that the term ‘market’:

*... means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.*

Applying this definition, the Trade Practices Tribunal (now Australian Competition Tribunal) has said:

*A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them ... Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So the market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.<sup>157</sup>*

The process of market definition involves identifying the sellers and buyers which effectively constrain the price and output decisions of firms supplying the service(s) under consideration. As noted by the High Court:

*... The process of defining the market by substitution involves both including products which compete with the defendant's and excluding those which because of differentiating characteristics do not compete.<sup>158</sup>*

To define a market the ACCC can examine its product, geographic, functional and temporal dimensions. Consistent with the *2008 Merger Guidelines* the focus in a declaration inquiry typically is on the product and geographic dimensions as the functional and temporal considerations generally form part of the product and geographic dimension analysis.

### 6.1.1. Market in which the service under consideration is supplied

To define this market, the ACCC begins with the service in question. The service is likely to be an input (i.e. wholesale) service. It is described in terms of likely uses or functions and

<sup>156</sup> See *Foxtel Management Pty Ltd v Australian Competition and Consumer ACCC* [2000] FCA 589 at [172] per Wilcox J.

<sup>157</sup> *Re Queensland Cooperative Milling Association* at p. 17, 247, cited with approval by the High Court in *Queensland Wire Industries Pty Ltd v. The Broken Hill Proprietary Company Limited* (1989) ATPR ¶40-925.

<sup>158</sup> *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) ATPR ¶40-925 at p. 50,008 per Mason CJ and Wilson J.

areas of supply. Where the service under consideration is not being supplied to third parties, the ACCC may view the market as a potential market.

The ACCC then considers services which are substitutes and defines the market to include the close demand and supply substitutes which effectively constrain the price and output decisions of the supplier/s of the service under consideration.

When considering whether a product is a substitute, the ACCC may consider customer attitudes, the function or end use of the technology, past behaviours of buyers, relative price levels, and physical and technical characteristics of a product.<sup>159</sup>

It may also use the hypothetical monopolist test to gauge the boundaries of product and geographic substitution. This establishes an area of product and geographic space over which a hypothetical monopolist could impose a 'small but significant non-transitory increase in price' (SSNIP). Generally a price rise of 5 to 10 per cent for the foreseeable future is examined.<sup>160</sup>

### **6.1.2. Market(s) in which declaration may promote competition**

Often the market (or markets) in which competition is likely to be promoted as a result of declaration of the service under consideration will be downstream markets. The ACCC will seek to identify only those downstream markets in which declaration is likely to have a material effect.

To identify the downstream markets, it will often be useful to examine how the service under consideration is being, and will be, used in the absence of declaration, and what is likely to happen if it is declared. For example, declaration may lead to changes in the terms and conditions on which access to the service is provided, and this in turn may encourage new entry in downstream markets. In some cases declaration may lead to the development of new downstream services.

The relevant downstream markets are defined to include the relevant downstream service and all close substitutes which effectively constrain the price and output decisions of the supplier (or suppliers) of the downstream service.

The relevant downstream markets will often be retail markets — i.e. markets in which the downstream services are acquired by end-users rather than service providers. The benefits of increased competition in these markets will flow directly to end-users.

## **6.2. The current state of competition in the relevant markets**

To assess the likely impact of declaration on competition, the ACCC will first examine the present effectiveness of competition.

If competition in the relevant markets is already effective without the threat of potential declaration, then declaration of the service is not likely to have much effect in terms of promoting further competition.

*... 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.<sup>161</sup>*

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<sup>159</sup> A useful list of information the ACCC may consider when identifying close substitutes to the relevant product is contained in the *Merger Guidelines*, 2008, p. 19.

<sup>160</sup> ACCC, *Merger Guidelines*, November 2008, pp. 17-18.

<sup>161</sup> Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum, Item 6, proposed section 152AB.

The following summarises some of the factors that the ACCC may examine when assessing the effectiveness of competition. For a more comprehensive discussion of these factors, refer to the *2008 Merger Guidelines*.

- **Market share and concentration levels** which provide an indication of the potential for coordinated conduct, including both overt and tacit collusion, price leadership, and unilateral exercise of market power. Significant market share and high concentration levels do not necessarily mean that competition is ineffective, for example where the market is characterised by low barriers to entry, incumbent firms may only have transitory market power and may be constrained by the threat of potential competition.
- **Barriers to entry** are any feature of a market that place an efficient prospective entrant at a significant disadvantage compared with incumbent firms and deter entry. They may be due to sunk costs, economies of scale and scope, legal or regulatory barriers, product differentiation and brand loyalty, and the threat of retaliatory action by incumbents.
- **Sunk costs** that will not be recovered if a firm exits the market, creating a risk for entry, particularly if they are relatively large; their extent depends on factors such as capital specificity, and requirements for investment in advertising and promotion.
- **Economies of scale** where the average cost of production decreases as the firm's output increases and **economies of scope** where 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 produce separate products. These characteristics may inhibit entry depending on expected post-entry prices, which in turn will depend on factors such as the minimum efficient scale of entry, cost penalties associated with sub-optimal plant utilisation, price elasticity of demand and market growth.
- **Legal or regulatory barriers** such as price regulation, licensing requirements, planning or environmental controls or industry standards, which may directly limit the number of competitors in a market, or affect the ability of entrants to deploy infrastructure.
- **Product differentiation and brand loyalty** may affect both the level and elasticity of demand faced by a new entrant compared to an incumbent firm and add to the sunk cost of entry in the form of advertising and promotion costs.
- **The threat of retaliatory action by incumbents** may also create a barrier to entry. Potential entrants may anticipate predatory behaviour by incumbent firms on the basis of past behaviour in this or other markets. Such threats may pose an effective deterrent, even in markets which may otherwise appear to have relatively low barriers to entry.
- **Vertical relationships** which are likely to create incentives for the provider of the service to affect competition in the downstream retail market.
- **The importance of the service** in the downstream market as it may constrain the ability of the provider of the service to affect competition in that market, i.e. low importance of the services may result in market pricing power.

Examining the linkage between supply of the service under consideration and the supply of downstream services will often help to identify any relationship between the effectiveness of competition in both of these markets.

Other features that the ACCC may consider include the presence and extent of any price competition, whether service providers constrain the behaviour of access provider and the dynamic characteristics of the market (including growth, innovation, product differentiation, changing consumption trends, and changes to regulation or licensing requirements). Markets that are growing rapidly are more likely to see new entry and the erosion of market shares over time. Markets that are characterised by rapid product innovation may see market leaders rapidly replaced. Markets with changing regulation or licensing requirements may see market entry or exit in response.

When assessing the effectiveness of competition, the ACCC will not only consider current conditions and behaviour. It will also consider features likely to affect the competitive supply of services in the future, which include the potential for sustainable competition to emerge and the extent to which the threat of entry (or expansion of existing suppliers) constrains pricing and output decisions.

#### **Example: Declaration of the DTCS<sup>162</sup>**

In its 2014 declaration inquiry, the ACCC developed a revised methodology for assessing the state of competition in the DTCS markets and along the various transmission routes. This required as a starting point that there be a minimum of three independent fibre providers, that is, Telstra and two additional providers, at, or within a very close proximity, to a Telstra exchange. Once this initial threshold was met, the ACCC applied a number of additional quantitative and qualitative assessments to determine whether a route should be declared or deregulated including:

- the independence of fibre providers
- potential for interconnection and proximity to the point of interconnection
- the presence of major transmission providers
- connectivity to CBD Exchange Service Areas
- likely demand
- pricing of transmission services
- availability of transmission services.

### **6.3. The extent to which declaration would promote competition**

When assessing the extent to which declaration is likely to promote competition in the relevant markets, the ACCC considers the likely future state of competition in the relevant markets with and without the declaration.

The future without declaration is examined by taking into account the current state of competition (as outlined above), including current provision of access without declaration, the impact of the threat of potential declaration, and the current and past behaviour of the provider of the service.<sup>163</sup>

Once the ACCC has formed a view about the effectiveness of competition without declaration it is able to form a view about the impact of declaration on competition and compare this to a future without declaration. This enables the ACCC to form a view about the likelihood that declaration will promote competition.

The question of whether competition will actually improve or increase is important, but the key issue is whether declaration will assist in establishing conditions by which such improvement will be more likely to occur.

Factors relevant to examining the effectiveness of competition without declaration are also likely to be relevant to forming a view about the impact of declaration. These include:

- **Effectiveness of competition in relation to the supply of the service.** Because declaration constrains the conduct of suppliers of the service, it is expected that declaration is more likely to promote competition in situations where competition for supply of the service is not effective.

<sup>162</sup> An ACCC Final Report on the review of the declaration for the Domestic Transmission Capacity Service, March 2014.

<sup>163</sup> *Sydney Airport Corporation Ltd v Australian Competition Tribunal and Others* (2006) 232 ALR 454 at [157].

- **Supply of the service or a similar service.** Declaration may be expected to have a greater impact on competition in circumstances where the service would not be supplied in the absence of declaration. This is not to suggest that the supply of the service negates the case for declaration; even where the service would be supplied, declaration may promote competition, for example where the unregulated supply is at a price significantly above total service long-run incremental cost.
- **Importance of the service to downstream competition.** If, for instance, the service is an input that must be used by competitors and it represents a major component of competitors' costs, then declaration may be expected to promote competition to a greater extent than in other circumstances.
- **Sufficiency of existing regulation.** If existing regulation is sufficient to constrain the conduct of supplier(s) of the service, then declaration may be unlikely to deliver any further benefits to end-users.
- **Competitive dimensions.** For more complex services, declaration of a service may promote competition by improving the scope for the introduction of new and innovative services, whereas for more basic services, declaration of a service may lead to competitors supplying substantially identical services and competing mainly on price.

#### **Example: Declaration of the Mobile Terminating Access Service<sup>164</sup>**

In its 2014 inquiry about whether to declare the Mobile Terminating Access Service (MTAS) the ACCC determined declaration would promote competition in the downstream markets for retail mobile services and fixed voice services by ensuring wholesale mobile voice termination charges are cost based. The ACCC considered that in the wholesale market each mobile network operator continued to have a monopoly over terminating voice calls on their networks (in the absence of effective substitutes). Further, that mobile network operators may have an incentive to exercise their market power to deny the provision of this input on reasonable terms, or to set the price of access at inefficiently high levels. MTAS was seen an important input to the supply of mobile and fixed retail services and that declaration would promote competition in those downstream markets. Specifically that:

- The absence of declaration would create a higher retail price floor and may lead to on-net/off-net price discrimination at the retail level.
- Declaration would reduce the competitive advantage that a horizontally integrated operator has over its non-integrated competitors.
- Declaration would provide operators with greater flexibility in making retail offers, which encourages competition.

In forming a view about the likely impact of declaration on competition, the ACCC must consider not only whether declaration would be likely to promote competition but also 'the extent' to which this would be likely to occur.<sup>165</sup> This suggests that the ACCC ought to give greater weight to a situation where the likely effect of declaration on competition is substantial than where the effect is minor.

Competition is a process of rivalry and accordingly it may be difficult to describe (particularly in quantitative terms) the extent to which declaration would be likely to promote competition through simply examining its likely impact on that process. In many cases, it will be more instructive to examine the extent to which declaration promotes competition from the perspective of end-users; i.e. to have regard to the likely results from increased competition

<sup>164</sup> *Domestic Mobile Terminating Access Service Declaration Inquiry - ACCC's Final Decision*, ACCC, June 2014.

<sup>165</sup> Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum — item 6, proposed section 152AB.

in terms of price, quality and service diversity. This is consistent with the objective of Part XIC, and ensures that the ACCC relates the competitive impact back to promoting the LTIE.

In determining the extent to which declaration is likely to promote competition, the Act provides that:

*... regard must be had to the extent to which the thing will remove obstacles to end-users of listed service gaining access to listed services.*<sup>166</sup>

The explanatory memorandum for this provision states:

*... it is intended that particular regard be had to the extent to which the particular thing would enable end-users to gain access to an increased range or choice of services.*<sup>167</sup>

Where, for example, declaration is likely to result in increased service diversity, this will enable end-users to gain access to an increased range or choice of services. In such a situation, typically for more complex services, declaration may be expected to promote competition to a greater extent than where it is likely to lead to an increase in the number of suppliers, but with all suppliers essentially offering the same service at the same price. This would need to be examined in the context of what customers value and the importance they placed on service diversity as compared to price.

#### 6.4. Facilities-based and service-based competition

The nature of competition likely to flow from declaration will be influenced by the scope of the service description. Where the service is not an end-to-end service (for example, FTAS and FOAS), at least some competitors will need to establish their own network elements in order to supply an end-to-end service. On the other hand, where an end-to-end service is declared, then competitors could engage in competition by resupplying the entire service.<sup>168</sup> For this reason, description of the service is sometimes seen as involving a choice between facilities-based competition and service-based competition.

Initial reform of the telecommunications industry in the 1990s was characterised by an emphasis on developing facilities-based competition. In part, this occurred through providing the new carriers (Optus and Vodafone) with more favourable access rights than were available to other service providers.<sup>169</sup> A degree of service-based competition was also involved in the sense that the new carriers still used components of the incumbent's services in order to supply customers with an end-to-end service. When introducing the Part XIC legislation in 1997, the Government indicated that the reforms it introduced would give service providers the freedom to pursue the business strategy they choose and remove the 'blanket distinctions between the access rights of carriers and service providers'.<sup>170</sup> This reflected its underlying approach of applying competition policy principles to telecommunications regulation.

The ACCC's general approach is that for those elements of a network where an enduring bottleneck does not persist, competition is likely to be promoted where those elements are contestable (i.e. unbundled). This approach is based on the principle that rivals are able to differentiate their services and compete more vigorously across greater elements of the network supply chain.

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<sup>166</sup> Subsection 152AB(4) of the Act. Subsection 152AB(5) provides that subsection 152AB(4) does not, by implication, limit the matters to which regard may be had.

<sup>167</sup> Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum, Item 6, proposed section 152AB.

<sup>168</sup> There are various types of resale, ranging from 'simple resale' where the service provider essentially re-bills the network services, to situations where there is significant value adding by the service provider.

<sup>169</sup> In this regard, see Austel, Resale — *Report to the Minister for Transport and Communications*, December 1990, p 9, 33.

<sup>170</sup> *Hansard* Parliamentary Debates, Senate, Tuesday 25 February 1997 at p 894-895.

While facilities-based competition is important in that it may increase the market dimensions on which service providers can compete, competition at the retail service level is also an important element of the evolving telecommunications environment. There are also likely to be cases which do not involve a choice between service-based competition and facilities-based competition. For instance, it may be that competition through declaration of an end-to-end service will not only facilitate competition at the retail service level but also facilitate the development of alternative networks through helping to develop a customer base and reducing the risks associated with investment.

Accordingly, the ACCC does not view facilities-based competition and service-based competition as mutually exclusive. In deciding whether to declare a service, the ACCC will adopt a balanced approach where each case will be evaluated on its merits without reference to any presumption for, or against, a particular type of competition. This is illustrated by the declaration of ULLS and LSS which seek to promote facilities-based competition and the declaration of the NBN and wholesale ADSL which seek to promote service-based competition.

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## 7. Achieving any-to-any connectivity

This section of the guideline discusses the objective to which the ACCC must have regard in applying the LTIE test of achieving any-to-any connectivity.

The Act 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 each other whether or not they are connected to the same network.<sup>171</sup>

The explanatory memorandum for this provision adds:

*... Reference to similar services is intended to enable consideration of the need for any-to-any connectivity between end-users of services which have similar, but not identical, functional characteristics, such as end-users of a fixed voice telephony service and end-users of a mobile voice telephony service, or end-users of internet services which have differing characteristics.*<sup>172</sup>

The achievement of any-to-any connectivity is particularly relevant when considering services that require interconnection between different networks. 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 generally considers that this matter will be given less weight.

The following examples illustrate how the above approach to the any-to-any connectivity test has been applied in previous declaration inquiries by the ACCC.

### **Example: Fixed originating and terminating access service**<sup>173</sup>

The ACCC concluded that the ongoing declaration of the interconnection services FTAS and FOAS (special numbers) would likely to promote the achievement of any-to-any connectivity.<sup>174</sup> These services via their switching capabilities enable communication between end-users on different networks. Network operators have market power in respect of calls terminating on their network and calls to special numbers that originate on their network and have the ability and incentive to use that market power to either deny interconnection or to impose above cost charges for these interconnection services. Declaration was therefore seen to achieve any-to-any connectivity.

### **Example: Wholesale ADSL**<sup>175</sup>

The ACCC did not consider that declaration of wholesale ADSL services would have an impact on the objective of achieving any-to-any connectivity. This reflects that the service is an input to an end-to-end service and with no switching capability does not in and of itself involve communications between end-users.

In considering whether declaration is likely to achieve this objective, generally the ACCC will examine whether any-to-any connectivity will be agreed between service providers in the absence of declaration. This might involve considering the length of time and costs

<sup>171</sup> Subsection 152AB(8) of the Act.

<sup>172</sup> Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum, Item 6, proposed section 152AB.

<sup>173</sup> *Public inquiry into the fixed line services declarations – final report*, April 2014, p. 53.

<sup>174</sup> The FTAS facilitates the carriage of telephone calls from a point of interconnection on the access seeker's network to the called-party on the access provider's network while the FOAS is an interconnection service for the handover of telephone calls between network operators and performs the two functions of pre-selection and override, and special numbers.

<sup>175</sup> *Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010 – final decision*, February 2012, p.47.



associated with negotiating any-to-any connectivity arrangements. Where the arrangements are expected to involve negotiations between multiple parties declaration may have the potential to settle interconnection arrangements more quickly and efficiently, through application of the SAOs.

Achieving any-to-any connectivity may involve costs in terms of investment to enable the connection of calls to and from other networks as well as potential risks to network integrity. These matters will be considered in the context of the efficiency objective (i.e. whether declaration will promote the efficient use of infrastructure). Where these arise, the ACCC will balance these against the likely benefits (and long-term interests) to end-users if a declaration is made.

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## 8. Economically efficient use of, and investment in, infrastructure

This section of the guideline discusses the objective to which the ACCC must have regard in applying the LTIE test of encouraging economically efficient use of, and investment in, infrastructure.<sup>176</sup>

The ACCC will examine efficiency from an economic perspective, as outlined below.

The economic concept of efficiency consists of three components:

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

The key question is the extent to which declaration is likely to encourage such efficiencies. Whether efficiency will be improved is highly relevant to, but not determinative of, this issue. A key issue is whether declaration will create an environment in which participants have increased incentives to undertake efficient use of, and investment in, infrastructure. Further, it may not always be possible to promote one component of efficiency without reducing another e.g. promoting allocative efficiency may have negative implications for productive and dynamic efficiency. The ACCC will take this into account in its considerations.

The ACCC will apply these concepts of efficiency when having regard to the following matters that it must consider:

- Whether it is, or is likely to become, technically feasible for the services to be supplied and charged for.
- The legitimate commercial interests of the supplier or suppliers of the services, including the ability of the suppliers to exploit economies of scale and scope.
- The incentives for investment in infrastructure, including:
  - the infrastructure by which the services are supplied
  - any other infrastructure by which the services are, or are likely to become, capable of being supplied.

### 8.1. Competition and efficiency

Reflecting the strong relationship between competition and efficiency, the ACCC's analysis of whether supply of the service is subject to effective competition, and the likely impact of declaration on competition, will inform the ACCC's analysis of the impact of declaration on efficiency.

For instance, if the ACCC is of the view that supply of the service is not subject to effective competition, then it could conclude that declaration would be likely to result in:

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<sup>176</sup> Subsection 152AB(2)(e) of the Act.

- the service being supplied to service providers at a price which is closer to underlying costs, resulting in a more efficient allocation of resources
- prevention of inefficient duplication of infrastructure used to supply the service.

Declaration is, however, likely to have other impacts on efficiency. For instance, declaration may result in regulatory compliance costs as potential access providers comply with the SAOs. Declaration may also impact efficiency via the investment incentives it creates (discussed in Section 8.4).

The ACCC will therefore have a specific focus on the likely impact of declaration on efficiency, as well as the impact of competition and any flow on impacts for efficiency.

Sections 8.2 to 8.4 discuss the issues the ACCC will examine when having regard to the matters it must consider as outlined above.

## 8.2. Technical feasibility

The ACCC must consider whether it is 'technically feasible' to supply and charge for the services which are under consideration for declaration.<sup>177</sup> In particular, it must have regard to the following matters:

- the technology that is in use, available or likely to become available
- whether the costs that would be involved in supplying, and charging for, the services are reasonable or likely to become reasonable
- the effects, or likely effects, that supplying and charging for the service would have on the operation or performance of telecommunications networks.

At a high level, the ACCC assesses technical feasibility of supplying the relevant service by examining the ability of relevant access providers to provide access and considering experiences in other jurisdictions where relevant.

### 8.2.1. Technology in use or available

The ACCC must have regard to whether the technology that is in use or available makes it feasible to supply and charge for the service.<sup>178</sup> In many cases this may be clear, particularly where there is a history of providing third party access. In other cases, where there is no prior third party access, or where the service under consideration differs from that previously supplied, this will be less clear.

Where it is not technically possible to supply and charge for the service, the ACCC would expect potential access providers to demonstrate why this is the case. In considering the merits of the access provider's case, particularly where there is no prior provision of access, the ACCC may examine experiences in other jurisdictions, taking account of relevant differences in technology or network configuration, and may seek independent expert technical advice. Where the access provider claims that capacity constraints would inhibit its ability to supply and charge for the service, the ACCC may consider whether capacity can be increased.

### 8.2.2. Supply costs

Declaration of a service means the access providers are subject to the SAOs. These may result in 'compliance' costs for the access provider. For example, the obligation to permit interconnection of networks may involve a cost to the access provider in configuring its

<sup>177</sup> Subsection 152AB(6)(a) of the Act.

<sup>178</sup> Subsection 152AB(6)(a)(i) of the Act.

network and in developing support interfaces which provide information to access seekers while maintaining the integrity of the provider's own systems and addressing privacy issues.

In the declaration context, the ACCC will take account of the direct costs necessary to comply with these SAOs. It will not, however, take account of consequential or indirect costs, such as those resulting from increased competition in the markets in which it competes.

The ACCC would expect potential access providers to provide information enabling these costs to be identified and where appropriate quantified. In addition, the ACCC may obtain independent expert advice and/or examine experiences in other jurisdictions.

Once the ACCC has identified and, as far as possible, quantified the costs involved in supplying and charging for the service, it will consider whether they are or are likely to be 'reasonable'.<sup>179</sup> In the ACCC's view, 'reasonableness' is evaluated from a commercial perspective and as it is a relative concept will depend on all the circumstances of each particular case. For example they are likely to be unreasonable if there is no prospect of the costs being recovered (for example, from access seekers as part of the terms and conditions of access).

The ACCC notes that reasonableness is just one of the objectives to which it must have regard. While highly relevant, a conclusion that the costs involved in supplying and charging for the service are not reasonable does not prevent the ACCC declaring the service where it is of the view that there are likely to be (other) countervailing benefits in terms of efficiency and/or competition.

### **8.2.3. Effect on telecommunications networks**

The requirement to provide access may also result in changed network operation and performance.<sup>180</sup> These issues will also be taken into account in declaration decisions.

The ACCC would expect potential access providers to provide information in relation to these issues and the ACCC may seek independent expert technical advice and also consider options which could minimise those costs.

## **8.3. The legitimate commercial interests of the access provider**

The ACCC must also consider the legitimate interests of the access provider, including their ability to exploit economies of scale and scope.<sup>181</sup>

The concept 'legitimate commercial interests' of the access provider has a number of dimensions. For example, the need to recover the costs of providing services and to earn a normal commercial return on the investment in infrastructure. Allowing for a normal commercial return on investment provides an appropriate incentive for the access provider to maintain, improve and invest in the efficient provision of the service.

The ACCC will assess the effects on access provider's ability to exploit economies of scale and scope on a case-by-case basis.

To an extent, the access provider's legitimate commercial interests is protected by subsection 152AR(4)(b) of the Act, which provides that the access provider is not required to supply a declared service if to do so would prevent the access provider from obtaining a sufficient amount of the service to meet its reasonably anticipated needs.

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<sup>179</sup> Subsection 152AB(6)(a)(ii) of the Act.

<sup>180</sup> Subsection 152AB(6)(a)(iii) of the Act.

<sup>181</sup> Subsection 152AB(6)(b) of the Act.

## 8.4. Incentives for investment in infrastructure

In determining the extent to which declaration is likely to encourage the economically efficient investment in infrastructure, the ACCC must have regard to the incentives for investment in:

- the infrastructure by which services are supplied
- any other infrastructure by which the services are, or are likely to become capable of being supplied.<sup>182</sup>

It must also have regard to the risks involved in making the investment.<sup>183</sup>

### 8.4.1. Infrastructure used to supply the service

Incentives for investment in *existing* infrastructure may be impacted by declaration, particularly decisions about future maintenance, improvement and expansion given the initial investment decision will have been made. Incentives for investment in *new* infrastructure will also be an important consideration.

Efficient outcomes mean that optimal buy/build decisions are being made, assessed from the perspective of end-users.<sup>184</sup> Optimal means providing the best outcome in terms of prices, quality, diversity and innovation.<sup>185</sup>

In some instances, economic efficiency may be best served by increasing the use of existing infrastructure to supply the service, with duplication of infrastructure being inefficient and leading to higher costs for end-users. Declaration is likely to lead to prices that align with the economically efficient costs of providing the service and could avoid inefficient investment incentives, reduce the barriers to entry for competing providers and promote their efficient investments in related equipment required to provide services to end-users.

In other situations, however, declaration could deter efficient investment, stifle the development of a more diverse and differentiated range of goods and services, delay the deployment of new technology and prolong inefficient production processes. In a dynamic environment such as telecommunications, this is likely to cause significant harm to end-users.

To assist in determining the impact on investment incentives insight may be gained from examining the cost structure associated with the service and the innovation benefits likely to flow from additional investment. For example, if the supply of the service is characterised by increasing returns to scale then, in the absence of dynamic benefits, duplication may be inefficient (since it would cost less for the market to be served by a single supplier than by multiple suppliers). However, if scale economies are relatively small and the market demand can accommodate a number of suppliers of the service, then investment by new entrants could be considered efficient.

In considering the likely impacts of declaration on investment the ACCC is mindful that impacts may differ depending on the type of investment in question.

While declaration can encourage efficient investment in infrastructure used to supply services, the threat of declaration may in some circumstances have a negative impact on this investment where there is uncertainty about whether the ACCC will declare services. Transparency in the declaration process through consultation and the publication of reasons

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<sup>182</sup> Subsection 152AB(6) of the Act.

<sup>183</sup> Subsection 152AB(7A) of the Act; see also subsection 152AB(7B) of the Act.

<sup>184</sup> *Re Seven Network (No 4)* ACompT 11 at [130].

<sup>185</sup> *Re Seven Network (No 4)* ACompT 11 at [130]; *Re Chime Communications Pty Ltd (No 2)* AComp T 2 at [18].

for decisions should help to minimise this by enabling investors to appreciate the situations in which declaration is likely to be appropriate.

#### **Example: NBN Co Special Access Undertaking<sup>186</sup>**

In December 2013 the ACCC accepted the SAU provided by NBN Co. In accepting the SAU the ACCC considered that various elements in the SAU, together with a range of other factors, would create incentives for NBN Co to invest efficiently in infrastructure. Specifically, the ACCC found that the pricing commitments in the SAU, the anticipated low demand for NBN services initially and uncertain costs during the NBN rollout of the, meant that NBN Co will have an incentive to invest efficiently during the rollout. In addition, the SAU provides for ACCC oversight of NBN Co's actual operating and capital expenditure during the rollout. The ACCC considered this should provide additional protection to ensure NBN Co incurs only efficient costs.

The ACCC also considered that the 'modular' structure of the SAU allows for different regulatory arrangements to apply both during the rollout of the NBN and following completion of the NBN rollout, reflecting the different incentives and circumstances applying to NBN Co in these two periods. Following completion of the NBN rollout, the SAU provides for regulatory periods of between three and five years, in which NBN Co's allowable revenues will be based on forecasts. The ACCC considered that setting allowable revenues based on forecasts of expenditure would provide incentives on NBN Co to minimise expenditure relative to forecast. It also considered that NBN Co's expenditure risk would be greater and the incentive would be stronger for longer regulatory periods. Further, that exposing NBN Co to too much expenditure risk could also impact on NBN Co investment incentives.

The ACCC therefore found that the ability to set different periods for the replacement module allows for different incentives to apply to NBN Co depending on the circumstances at the time.

#### **8.4.2. Infrastructure used to supply other services**

Declaration may also facilitate efficient investment in markets which were previously 'locked up', and thus promote the LTIE.

For example, declaration of FTAS and FOAS has facilitated investment in long distance transmission networks and declaration of the ULLS has facilitated investment in DSLAMs and other ancillary equipment required to supply ADSL broadband services. This analysis is likely to be informed by the ACCC's views about the likely result of declaration on the promotion of competition.

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<sup>186</sup> *NBN Co Special Access Undertaking*, Final Decision, 13 December 2013.

### **Example: Declaration of the ULLS and LSS<sup>187</sup>**

The 2014 fixed line services declaration inquiry included the network access services ULLS and LSS. The ACCC was of the view in its final decision that extending the declarations for these services would encourage the efficient use of, and investment in, infrastructure. In particular, it considered declaration would enable greater competition in retail markets and improve productive and dynamic efficiency. Access providers and access seekers would have incentives to invest and innovate to ensure they produce services of a given quality at the lowest possible cost on an ongoing basis.

The ACCC considered that in the absence of declaration, the ability of access seekers to acquire these services, or to acquire them on reasonable terms and conditions, during the transition to the NBN was likely to be reduced. As a result, access seekers' incentives for efficient investment in infrastructure might be distorted. Specifically, the costs to access seekers of using their existing copper-based Digital Subscriber Line Access Multiplexers equipment could increase and lead to less than efficient use of access seekers' infrastructure investments and disincentives to undertake any further investments that might otherwise be efficient and commercially viable.

### **8.4.3. Risks involved in investments**

The ACCC will also consider the risks involved in investment decisions from the access provider's perspective. In deciding whether declaration will promote the LTIE, the ACCC will give particular consideration to the risks to efficient investment flowing from declaration.

A key risk relates to the access price and the access provider's view as to whether this will enable the recovery of access costs. Where investors perceive there to be a risk that the access price will inappropriately reduce their revenues, or revenues will be lower than costs, declaration may distort investment incentives with investment being discouraged.

The anticipatory exemption process in the Act can be used to reduce these potential risks. This enables the ACCC, upon application, to make an order exempting a person, or a class of carriers or carriage services providers, from any or all of the SAOs in the event that a specified service or proposed service becomes an active declared service. The ACCC must not make such an order unless it is satisfied that doing so will promote the LTIE.<sup>188</sup> The order can be unconditional or subject to conditions and limitations specified in the order (e.g. an expiry date).<sup>189</sup>

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<sup>187</sup> *Public Inquiry into the fixed line service declarations*, Final Report, April 2014.

<sup>188</sup> Subsection 152ASA(4) and 152ATA(6) of the Act.

<sup>189</sup> Subsection 152ASA(2) and 152ATA(4) of the Act.