

**Inquiry to vary the fixed line services final  
access determinations  
– where WLR, LCS and PSTN OA services are  
supplied over the NBN**

**Final Report**

**June 2012**



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## List of abbreviations and acronyms

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

## Executive summary

In April 2012 the Australian Competition and Consumer Commission (ACCC) commenced a public inquiry into varying the final access determinations (FADs) for the declared fixed line services. The ACCC considered whether the category A standard access obligations (category A SAOs) should apply where certain fixed line services are supplied over National Broadband Network (NBN) greenfield estates until 31 March 2013. These services are the wholesale line rental (WLR), local carriage service (LCS) and a subset of the public switched telephone network originating access service, called preselect and override services (PSTN OA). The inquiry was initiated in response to Telstra's temporary inability to supply a wholesale voice service over the NBN.

This final report sets out ACCC and stakeholders views on the inquiry. The ACCC has concluded its inquiry and decided to vary the FADs. The ACCC decided the category A SAOs will not apply where WLR, LCS and PSTN OA are supplied over the NBN. This variation will expire on the earlier of:

- 31 March 2013, or
- the date on which Telstra can supply a wholesale NBN voice service.

For the avoidance of doubt, Telstra must continue to comply with the category A SAOs and supply these services over its copper network in both NBN and non-NBN estates. The ACCC's decision is outlined in **Section 3** and a copy of the variation instrument is in **Appendix A**.

# 1 Background

Early in 2012 Telstra requested that the ACCC urgently vary the final access determinations (FADs) for the declared wholesale line rental (WLR), local carriage service (LCS) and a subset of the public switched telephone network originating access service called preselect and override services (PSTN OA). Telstra requested the category A standard access obligations (category A SAOs) not apply where these services are required to be supplied over the National Broadband Network (NBN) until March 2013.<sup>1</sup>

Subject to certain conditions, the SAOs require carriers and carriage service providers (CSPs) to give access to declared services on request. As the retail provider of last resort, Telstra must supply retail voice services in NBN estates if there are no other retail providers. By supplying retail voice services in these circumstances, Telstra may be required to comply with the category A SAOs.<sup>2</sup>

Telstra is currently providing an interim retail voice service in NBN greenfield estates. However technical and regulatory barriers prevent Telstra from supplying an interim wholesale voice service over NBN fibre infrastructure before September 2012, when it then intends to supply its mass market wholesale and retail NBN services. A request for access to such a wholesale service by another retail provider may put Telstra in breach of the category A SAOs. Technical capability does not relieve compliance with the category A SAOs, which are enforceable in the Federal Court.<sup>3</sup> While Telstra anticipates releasing its wholesale NBN services in September 2012, it requested relief until March 2013 to accommodate any unforeseen delays in launching these services.

Telstra expects this issue will mostly impact NBN greenfield estates, where Telstra's customer access network (CAN) will not operate as an alternative to NBN fibre during the rollout. NBN Co estimates there will be less than 4,000 active services in NBN greenfield estates by September 2012. Telstra will continue to provide wholesale voice services to end-users in areas where its copper lines are still available. Telstra also expects end-users will have access to services provided by other retail service providers (RSPs).

In April 2012 the ACCC commenced this public inquiry and published a discussion paper on varying the FADs (this variation).<sup>4</sup> The discussion paper outlined the ACCC's preliminary view, which was to vary the FADs so the category A SAOs do not apply to WLR, LCS and PSTN OA services supplied over the NBN in greenfield estates until 31 March 2013.<sup>5</sup>

The ACCC initiated this limited inquiry to address Telstra's temporary technical inability to provide a wholesale voice service over the NBN. The ACCC considered the proposed variation satisfied the mandatory assessment criteria outlined in subsection 152BCA(1) of the *Competition and Consumer Act 2010* (CCA).

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<sup>1</sup> The category A SAOs are set out in section 152AR of the *Competition and Consumer Act 2010* (CCA).

<sup>2</sup> Telstra does not necessarily consider that its interim voice service (or other voice services supplied over the NBN UNI-D port) is caught by the existing wholesale line rental service description. However, Telstra considered it important the ACCC grant relief to provide greater regulatory certainty (Telstra, *Interim relief from the SAOs in relation to WLR, LCS and PSTN OA – Letter to the ACCC*, 8 March 2012).

<sup>3</sup> The SAOs are enforceable by the Commission or any person whose interests are affected by a breach of the SAOs, section 152BB of the CCA.

<sup>4</sup> ACCC, *Inquiry into varying the final access determinations for the WLR, LCS and PSTN OA – where these services are supplied over the NBN: Discussion paper*, April 2012: <http://www.accc.gov.au/content/item.phtml?itemId=1044335&nodeId=c879916c306bca72a3b8a4400d92f216&fn=Discussion%20Paper.pdf>.

<sup>5</sup> *ibid*, p. 10.

## 2 Consultation process

On 5 April 2012 the ACCC commenced the public inquiry and published a [discussion paper](#) on varying the FADs. Submissions closed on 11 May 2012. The ACCC received submissions from:

- AAPT Limited (AAPT);
- Competitive Carriers Coalition (CCC);
- SingTel Optus Pty Limited (Optus); and
- Telstra Corporation Limited (Telstra).

Further, Telstra provided a public reply submission on 5 June 2012. Public versions of the submissions are available on the [ACCC website](#). Optus also provided a confidential version of its submission. The ACCC has had regard to all relevant submissions in forming its views on this matter.

## 3 ACCC decision

Based on the reasons outlined in **Section 4**, the ACCC decided to vary the FADs so the category A SAOs do not apply where WLR, LCS and PSTN OA services are supplied over the NBN. However, Telstra must continue to comply with the SAOs and supply these services over its copper network in both NBN and non-NBN estates.

This variation will expire on the earlier of:

- 31 March 2013, or
- the date on which Telstra can supply a wholesale NBN voice service.

A copy of the variation instrument is in **Appendix A**.

The ACCC's decision to vary the FADs only varies slightly from its preliminary views expressed in the discussion paper released on 5 April 2012. The adjustments concern the expiry date of this variation and the scope of this variation. The reasons for these adjustments are outlined below. The sole purpose of this variation is to provide regulatory relief for the limited period Telstra cannot technically comply with the category A SAOs and provide a wholesale voice service over the NBN.

This decision has not considered the appropriateness or otherwise of future regulation of wholesale aggregation services provided over the NBN. As outlined in the discussion paper to this inquiry, the ACCC will monitor the development of these services over the longer term and will consider the need for regulation of such services at a future time.<sup>6</sup>

### Expiry of this variation

The ACCC initially considered this variation should expire on 31 March 2013.<sup>7</sup> This was intended to accommodate any unforeseen delays affecting Telstra's release of its mass market NBN services which was expected to commence in September 2012.

AAPT submitted this variation should expire no later than the end of September 2012, when Telstra expects to release its mass market NBN wholesale products. AAPT considered that, at

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<sup>6</sup> *ibid*, p. 17.

<sup>7</sup> *ibid*, p. 10.

the latest, this variation should expire by the end of 2012.<sup>8</sup> Optus submitted that this variation should expire in September 2012, or when Telstra's NBN voice services become available to wholesale customers, whichever is earlier.<sup>9</sup>

Telstra submitted that 31 March 2013 is an appropriate expiry date as it allows for any unforeseen delays in its deployment of NBN based voice services. Telstra also submitted that an earlier expiry date would increase regulatory risk.<sup>10</sup>

The ACCC decided that this variation will expire on the earlier of:

- 31 March 2013, or
- the date on which Telstra can supply a wholesale NBN voice service.

This adjustment is consistent with the original purpose of this variation. The ACCC intends that the temporary variation only applies for the period required. As requested by Telstra, this period also allows for any unforeseen delays in its release of these services until 31 March 2013. However, it addresses stakeholder concerns and ensures this variation only applies for as long as necessary. That is, Telstra must comply with the SAOs and supply a wholesale voice service over the NBN as soon as technically possible.

Telstra still anticipates making both its mass market retail and wholesale NBN voice services available (including resale services to wholesale customers) by the end of September 2012.<sup>11</sup> The revised expiry date reflects the ACCC's expectation that the release of Telstra's mass market retail NBN voice service products will occur at a point in time no later than when Telstra releases its wholesale NBN voice service (whenever that event occurs). The ACCC would not expect that Telstra relies on this variation of the FADs after the point in time in which it launches its mass market retail NBN voice services. The ACCC, in reserving its rights, may consider its regulatory options should any contingencies arise.

The ACCC also imposed conditions on Telstra to ensure stakeholders can identify when this variation expires. Telstra must advise access seekers, in writing, 14 days prior to making a wholesale NBN voice service available for supply. Telstra must do this by publishing a notice on its website, advising access seekers of the date from which a wholesale NBN voice service is available for supply.

Telstra must also advise the ACCC, in writing, 14 days prior to making a wholesale NBN voice service available for supply. Following notification from Telstra, the ACCC will update its website and publish the date on which Telstra made a wholesale NBN voice service available for supply. This will be the date this variation expires. If Telstra does not supply a wholesale voice service over the NBN before 31 March 2013, this variation will expire on this date.

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<sup>8</sup> AAPT, *Submission to the ACCC's Inquiry into varying the final access determinations for the WLR, LCS and PSTN OA where these services are supplied over the NBN: Discussion paper April 2012*, 11 May 2012, p. 4.

<sup>9</sup> Optus, *Submission to the ACCC's Inquiry into varying the final access determinations for the WLR, LCS and PSTN OA where these services are supplied over the NBN: Discussion paper April 2012*, 14 May 2012, p. 5.

<sup>10</sup> Telstra, *Submission to the ACCC's Inquiry into varying the final access determinations for the WLR, LCS and PSTN OA where these services are supplied over the NBN: Discussion paper April 2012*, 11 May 2012, pp. 3, 7.

<sup>11</sup> Telstra, *Reply submission to the ACCC's Inquiry into varying the final access determinations for the WLR, LCS and PSTN OA where these services are supplied over the NBN: Discussion paper April 2012*, 5 June 2012, p. 1.

## Scope of this variation

The ACCC originally proposed to limit the scope of this variation to NBN greenfield estates. AAPT opposed the proposed variation, however, supported a variation restricted to NBN greenfield estates should the ACCC be inclined to vary the FADs.<sup>12</sup> AAPT considered the definition of NBN greenfield estates should exclude estates where there are copper services available within the estate or surrounding area.<sup>13</sup> AAPT submitted any variation should clarify that Telstra is still obliged to provide WLR, LCS and PSTN OA services over its copper lines.<sup>14</sup> CCC objected to the proposed variation but did not comment specifically on the scope of this variation.<sup>15</sup>

Optus submitted that the proposed variation should only apply to NBN greenfield estates.<sup>16</sup> Optus did not object to this variation in principle, but considered it premature to remove regulation of wholesale voice services over all NBN estates.<sup>17</sup> Optus also thought this variation should exclude areas where Telstra will retain responsibility for installing copper infrastructure and delivering services in NBN greenfield estates (i.e. estates of less than 100 premises).<sup>18</sup>

Telstra submitted this variation should apply to services supplied over the NBN in all NBN enabled areas to avoid unintended regulatory gaps.<sup>19</sup> Telstra submitted it cannot supply wholesale voice services over the NBN, regardless of whether an end-user is situated in an NBN greenfield or brownfield estate.<sup>20</sup>

Telstra also submitted it is not seeking to avoid its obligations to supply wholesale voice services over its own copper network. Telstra considered this variation “*would not affect the ongoing standard access obligations with respect to WLR, LCS and PSTN OA for the supply of those services over Telstra’s own network (whether copper or fibre).*”<sup>21</sup>

The ACCC accepts Telstra is temporarily incapable of complying with the category A SAOs and supplying a wholesale voice service over NBN fibre infrastructure, in both NBN greenfield and NBN brownfield estates. On this basis, the ACCC decided this variation should apply to WLR, LCS and PSTN OA services supplied over the NBN. This approach is consistent with the original intention of the proposed variation and does not significantly increase the scope. Rather, this approach clarifies that compliance with the category A SAOs is only removed in NBN estates where Telstra cannot technically provide a wholesale voice service over fibre infrastructure.

For the avoidance of doubt, the ACCC’s decision is to clarify this variation does not remove Telstra’s obligation to supply these services over its copper network, including in NBN enabled estates. Telstra is expected to comply with the category A SAOs and continue to

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<sup>12</sup> AAPT, *Submission*, 11 May 2012, pp. 3, 5.

<sup>13</sup> *ibid.*, p. 5.

<sup>14</sup> *ibid.*, p. 3.

<sup>15</sup> CCC, *Submission to the ACCC’s Inquiry into varying the final access determinations for the WLR, LCS and PSTN OA where these services are supplied over the NBN: Discussion paper April 2012*, 11 May 2012, pp. 1–2.

<sup>16</sup> Optus, *Submission*, 14 May 2012, p. 3.

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*, p. 4.

<sup>19</sup> Telstra, *Reply Submission*, 5 June 2012, pp.1–2 and Telstra, *Submission*, 11 May 2012, pp. 4–5.

<sup>20</sup> Telstra, *Reply Submission*, 5 June 2012, p. 2.

<sup>21</sup> *ibid.*

provide wholesale voice services over available copper infrastructure during the period of this variation. This will minimise the impact on access seekers and end-users in those estates, who may continue to obtain access to these services. Telstra agrees that this variation will not affect its ongoing obligations to supply WLR, LCS and PSTN OA services over Telstra's own network.<sup>22</sup>

## **4 Legislative framework for varying the final access determinations**

This section sets out the legislative framework to vary an FAD and the ACCC's assessment of the relevant legislative criteria.

### **4.1 Relevant markets**

The ACCC is of the view that Part XIC of the CCA does not require it to precisely define the scope of the relevant markets for the purpose of assessing this variation of the FADs. Further, the ACCC considers that a precise definition of the relevant markets is not critical when this particular issue is common across relevant markets. Consistent with its preliminary views expressed in the discussion paper released on 5 April 2012, the ACCC considers the relevant markets are:

- the market for the retail and wholesale supply of voice services over the NBN,
- the market for the retail and wholesale supply of broadband services over the NBN, and
- the market for the retail and wholesale supply of a bundle of voice and broadband services over the NBN.<sup>23</sup>

### **4.2 Paragraph 152BCA(1)(a) – whether the variation will promote the long-term interests of end-users**

The limited scope and duration of this variation is unlikely to affect the long-term interests of end-users (LTIE) for the following reasons:

- this variation will only apply for the limited period that Telstra is technically incapable of supplying wholesale voice services over the NBN. Telstra still plans to make its wholesale NBN voice services available from September 2012.<sup>24</sup> If this occurs, this variation will only apply for approximately three months. At most this variation will apply for a total of nine months, until 31 March 2013;
- Telstra expects this issue will mostly affect NBN greenfield estates serviced by NBN fibre infrastructure, where Telstra's copper network will not operate as an alternative during the rollout;
- the number of affected end-users in NBN greenfield estates is likely to be minimal. NBN Co estimates there will be less than 4,000 active services in NBN greenfield estates by September 2012;
- Telstra must continue to comply with the category A SAOs and provide wholesale voice services in NBN enabled areas where its copper lines are still available; and

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<sup>22</sup> *ibid.*

<sup>23</sup> ACCC, *Discussion Paper*, April 2012, p. 13.

<sup>24</sup> Telstra, *Reply submission*, 5 June 2012, p. 1.

- access seekers may obtain wholesale services by contracting directly with NBN Co. Therefore, end-users may have access to services provided by other RSPs.

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

This variation is unlikely to affect the legitimate business interests of carriers or CSPs. This variation supports the legitimate business interests of access providers, including Telstra, by clarifying the application of the category A SAOs to services supplied over the NBN. It will enable Telstra to provide its interim retail voice service over the NBN, without risk of breaching conditions of its carrier licence (as a consequence of failing to comply with the category A SAOs for technical reasons).

This variation may affect the legitimate business interests of carriers and CSPs who wish to gain access to a Telstra wholesale voice service over the NBN before September 2012. However, this variation is likely to affect a small number of NBN access seekers for a limited period of time. Further, this variation reflects Telstra's temporary technical inability to provide a wholesale voice service over the NBN and is intended to apply only for the period until Telstra can provide such a service.

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

The ACCC anticipates that other providers will purchase Layer 2 services from NBN Co to provide wholesale and retail voice services over the NBN. Other than Telstra, various access providers have already indicated a willingness to provide wholesale services over the NBN. The ACCC anticipates that the limited numbers of NBN end-users impacted by the variation are likely to have access to alternate voice services. Further, Telstra still plans to release its mass market wholesale and retail NBN services in September 2012.

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

This criterion is not relevant as this variation temporarily removes the requirement for an access provider to supply regulated WLR, LCS and PSTN OA services over the NBN. Consequently, the direct costs of providing access to these services are unlikely to be affected.

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

This criterion is not relevant as this variation temporarily removes the requirement for an access provider to supply regulated WLR, LCS and PSTN OA services over the NBN. Therefore, access providers and access seekers will not be seeking to recover costs of enhancement or extension capabilities for these services supplied over the NBN during this variation period.

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

This criterion is not relevant as this variation is not expected to impact on the safe and reliable operation of a carriage service.

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

This variation will allow Telstra to continue to supply its interim retail voice service over the NBN, without risk of breaching the conditions of its carrier licence. It may be economically inefficient to require Telstra to make an equivalent interim wholesale voice service available for supply based on the limited number of affected end-users and its intention to release a mass market wholesale NBN voice service in September 2012.

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

The ACCC may, if the carrier or provider supplies one or more other eligible services,<sup>25</sup> take those services into account when making an access determination. This criterion is not relevant as Telstra can only provide the interim fixed voice retail product. Telstra intends to only provide this product until September 2012, at which time it intends to offer its mass market NBN wholesale and retail voice services.

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

Business certainty as to the applicability of the category A SAOs is a factor in deciding whether to vary the FADs as requested by Telstra. This variation will provide certainty to Telstra and other NBN access seekers for the short period in which Telstra is technically unable to provide wholesale voice services over the NBN. It will provide NBN access seekers with certainty as to the regulation of access to wholesale voice services provided over the NBN until 31 March 2013, or when Telstra can supply a wholesale NBN voice service (whichever is earlier).

This variation will provide Telstra with business certainty. It can continue to operate as the retail provider of last resort without the risk of breaching its carrier licence due to a temporary technical inability to comply with the category A SAOs. Based on the limited nature of this variation, it would not be in the LTIE to potentially risk Telstra's carrier licence as a consequence of its failure to comply with the category A SAOs due to conflicting regulatory obligations (that is, its obligation to be the retail provider of last resort and comply with the category A SAOs).

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<sup>25</sup> 'Eligible service' has the same meaning as in section 152AL of the CCA.

## **Appendix A - Variation instrument**

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

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

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

#### **1. Title**

These Determinations may be cited as:

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

#### **2. Commencement**

These Determinations come into effect on 29 June 2012.

#### **3. Variation**

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

are hereby varied as set out below:

After Clause 4.1 insert:

4.1A

- (a) Notwithstanding the obligation in clause 4.1, the category A standard access obligations (SAOs) in section 152AR of the *Competition and Consumer Act 2010* do not apply to WLR or LCS or PSTN OA (preselect and override) services supplied over the National Broadband Network (NBN).

(b) For the avoidance of doubt, this variation does not affect the obligation to supply WLR, LCS and PSTN OA services in accordance with the SAOs over available copper infrastructure, including in NBN estates.

4.1B Clause 4.1A commences on 29 June 2012 and ceases to have effect on the earlier of:

- 31 March 2013, or
- the date on which Telstra can supply a wholesale NBN voice service.

Note: Telstra must not delay the supply of its wholesale NBN voice services. This variation is intended to only apply for the period that regulatory and technical barriers prevent Telstra from supplying wholesale voice services over the NBN. The ACCC expects that Telstra will release its wholesale NBN voice services no later than its retail NBN voice services (whether the services are supplied as a standalone or bundled product).

4.1C Wholesale NBN voice service includes a wholesale voice service that utilises either the UNI-D or UNI-V port of the NBN Co optical network terminal.

4.1D Telstra must advise access seekers 14 days prior to making a wholesale NBN voice service available for supply. Telstra must do this by publishing a notice on its website, advising access seekers of the date from which a wholesale NBN voice service is available for supply.

4.1E Telstra must advise the ACCC, in writing, 14 days prior to making a wholesale NBN voice service available for supply.