



DOMESTIC TRANSMISSION CAPACITY SERVICE

2012 Final Access Determination
variation inquiry

Discussion paper

November 2014

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List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
CCA	<i>Competition and Consumer Act 2010</i>
CSP	Carriage Service Provider
DTCS	Domestic Transmission Capacity Service
ESA	Exchange Serving Area
FAD	Final Access Determination
LTIE	Long-Term Interests of End-users
Mbps	Megabit per second
SDH	Synchronous Digital Hierarchy
Telco Act	<i>Telecommunications Act 1997</i>

1 Introduction

This paper explains the Australian Competition and Consumer Commission's (**ACCC's**) decision to extend the existing final access determination (**FAD**) for the declared domestic transmission capacity service (**DTCS**) made in 2012 under the *Competition and Consumer Act 2010* (Cth) (**CCA**).

The 2012 DTCS FAD was made on 21 June 2012. Prior to the ACCC's decision to extend the 2012 DTCS FAD, it was expected to expire on 31 December 2014. Even though it has been extended, the 2012 DTCS FAD currently does not apply to the re-regulated routes and exchange serving areas (**ESAs**) as they did not form part of the scope of the 2012 DTCS FAD when it was made.

The ACCC commenced a substantive public inquiry into making a new 2015 DTCS FAD under Part 25 of the *Telecommunications Act 1997* (**Telco Act**) on 23 May 2014. However, the ACCC has extended the period for this FAD inquiry as it will not be completed before 1 January 2015. Therefore, there will be no DTCS FAD applying to the re-regulated routes and ESAs as at 1 January 2015 unless the 2012 DTCS FAD is varied to apply to those routes and ESAs.

This paper commences an inquiry into whether to vary the 2012 DTCS FAD so that the price and non-price terms in the FAD apply to the provision of the DTCS on the three regional routes which were re-regulated under the 2014 DTCS declaration from 1 January 2015. It also clarifies that seven ESAs that defined the boundaries of some deregulated regional centres for pricing purposes only (under the 2012 DTCS FAD) and which are now regulated specifically by the 2014 DTCS declaration will also be covered under the 2012 DTCS FAD as extended.

The ACCC considers that the proposed variation to the 2012 DTCS FAD should be considered now in order to provide certainty about the regulated price and non-price terms for the re-regulated routes and ESAs after 1 January 2015.

The ACCC is commencing a public consultation process in relation to the proposed variation. Submissions are due at 5:00pm on **8 December 2014**. Information about how to make a submission is at section 3 of this paper.

2 Background

The ACCC currently regulates the DTCS under Part XIC of the CCA. The DTCS is an essential wholesale communications service and was first deemed a declared service in June 1997.¹

The DTCS is a service which carries large volumes of voice and data communications from one point to another point via symmetric network interfaces on a permanent and

¹ ACCC, *Deeming of Telecommunications Services: a statement pursuant to section 39 of the Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*, June 1997. The declaration was varied and extended in November 1998, May 2001, April 2004, April 2009 and September 2010.

uncontended basis, subject to a range of exceptions. For the purposes of the FAD, the DTCS does not include communications between:

- one customer transmission point directly to another customer transmission point
- one access seeker network location directly to another access seeker network location
- selected inter-capital routes
- selected regional routes, and
- selected metropolitan routes.

In March 2014, the ACCC varied and extended the [DTCS declaration until 31 March 2019](#). During the declaration inquiry the ACCC undertook a comprehensive assessment of the state of competition in the DTCS market and related downstream markets in order to determine the scope of regulation for the DTCS. The ACCC assessed the level of competition for DTCS services on all DTCS routes (including both deregulated and regulated routes) using a revised competition methodology.

As a result of the assessment, the ACCC deregulated an additional 112 metropolitan ESAs and eight regional routes. The ACCC also re-regulated three regional routes² which did not meet the revised competition methodology. The ACCC also 'notionally' re-regulated seven regional ESAs based on definitional changes³ to the regional centres of Townsville, Toowoomba and Rockhampton and application of the competition criteria in the 2014 DTCS Declaration. These are referred to in this discussion paper as the re-regulated routes and ESAs.

The ACCC also decided that a transitional period of 9 months would apply before the changes to the scope of regulation would take effect. To implement this transitional period, the existing DTCS declaration service description remains in place until 31 December 2014. The new service description will apply from 1 January 2015. From this date, the three regional routes which failed to meet the revised competition assessment methodology will be re-declared. The ACCC considered that this transition would allow stakeholders sufficient time to make any necessary adjustments to their commercial arrangements.⁴

The full DTCS service description including the list of routes and ESAs that are not subject to regulation is available on the [Regulated Infrastructure area of the ACCC website](#).

2.1 The 2012 DTCS FAD

Prior to the 2012 DTCS FAD, there was no regulated price for the DTCS and no agreed methodology for setting prices. As part of its inquiry to set regulated prices the ACCC undertook a wide ranging consultation which examined a number of approaches to pricing

² The re-regulated regional routes go to Maryborough, Bundaberg and Rockhampton.

³ See ACCC, *FAD for the DTCS – Explanatory Statement*, June 2012, pp.19-21 for further details.

⁴ ACCC, *Final Report on the review of the declaration for the DTCS*, March 2014, pp.12-13.

including bottom-up long-run incremental cost, top-down long-run incremental cost, fully allocated cost, international and/or domestic benchmarking and a combined approach.⁵

Following consideration of submissions and independent analysis of the best approach for setting transmission prices the ACCC adopted a domestic benchmarking approach. This approach considered that prices in competitive areas and on competitive routes were reflective of the costs of supplying efficient services. It therefore relied on pricing information obtained from transmission providers for services provided in the market to form the basis for prices and price structures on non-competitive routes.

The ACCC obtained information and data from seven transmission providers about transmission prices and services being provided in the market. This information was used as the basis for developing a regression model that informed the benchmarking approach for the 2012 DTCS FAD.⁶ The regression model benchmarked transmission prices observed in competitive (deregulated) areas as the basis for regulated prices to apply in uncompetitive (regulated) areas.

Further detail about the 2012 DTCS FAD prices is at section 5.1 of this paper. Telstra subsequently incorporated the FAD prices into its Rate Card as required under its structural separation undertaking, and is [published on the Telstra Wholesale website](#).

3 Consultation

The ACCC has the power to vary a FAD. In doing so, the ACCC must follow the same procedures as making a FAD, unless the variation is of a minor nature or the parties affected by the variation have consented to the variation. As the proposed variations are not minor nor has the consent of the affected parties been sought, the ACCC must hold a public inquiry under Part 25 of the Telco Act.

This discussion paper constitutes notice that the ACCC is holding an inquiry to vary the 2012 DTCS FAD as outlined in section 4. This inquiry is separate to the substantive inquiry in relation to the 2015 DTCS FAD, but will be run in parallel to that inquiry.

3.1 Making a submission

The ACCC welcomes submissions from industry participants, other stakeholders and the public more generally on the ACCC's proposed approach as set out in this discussion paper. In particular, the ACCC is seeking submissions from industry participants about its preliminary view to vary the 2012 DTCS FAD, pending the making of a new DTCS FAD in 2015.

Submission of commercial-in-confidence material

To foster an informed and consultative process, all submissions will be considered by the ACCC as public submissions and will be posted on the ACCC website. If interested parties

⁵ ACCC, *Domestic Transmission Capacity Service, an ACCC Discussion Paper reviewing pricing of the domestic transmission capacity service*, April 2010.

⁶ ACCC, *Final Access Determination No. 1 of 2012 (DTCS)*, June 2012.

wish to submit commercial-in-confidence material to the ACCC they should submit both a public version and commercial-in-confidence version of their submission.

The ACCC expects that claims for commercial in confidence status of information by parties will be limited in nature in order to allow widest possible participation in the public inquiry.

The ACCC has issued a guideline setting out the process parties should follow when submitting confidential information to communications inquiries commenced by the ACCC. The guideline is available on the ACCC website at: <http://www.accc.gov.au/publications>.

The *ACCC-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC website: <http://www.accc.gov.au>.

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format which allows the submission text to be searched. Please contact Katherine Eddy regarding any questions you have concerning this consultation on (03) 9290 1984.

Submissions about this discussion paper will be accepted until **5:00 pm on 8 December 2014**. Any submissions received after this time may not be considered.

Please forward submissions and enquiries by email to:

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3.2 Other related inquiries

As noted above, the ACCC has also commenced a public inquiry into making the 2015 DTCS FAD which will replace the 2012 DTCS FAD. The ACCC will consider substantive issues regarding the price and non-price terms for the next DTCS FAD in the context of that inquiry.

4 Extension of the 2012 DTCS FAD

The ACCC has made the decision to extend the expiry date for the 2012 DTCS FAD to the day before the day on which the 2015 DTCS FAD comes into force under section 152BCF of

the CCA. To provide transparency to industry, this section outlines the ACCC's decision and the reasons behind it. The requisite declaration is published on the ACCC's website.⁷

Under Part XIC of the CCA the ACCC can extend an existing FAD in certain circumstances. Subsection 152BCF(10) of the CCA provides that:

"If:

- (a) an access determination (the original access determination) relating to access to a declared service is in force; and*
- (b) the Commission has commenced to hold a public inquiry under Part 25 of the Telecommunications Act 1997 about a proposal to make another access determination in relation to access to the service; and*
- (c) the Commission considers that it will make the other access determination, but will not be in a position to do so before the expiry date for the original access determination;*

the Commission may, by writing, declare that the expiry date for the original access determination is taken to be the day immediately before the day on which the other access determination comes into force."

The circumstances referred to in subsection 152BCF(10) of the CCA are satisfied in relation to the 2012 DTCS FAD. The 2012 DTCS FAD is currently in force and in May 2014 the ACCC commenced a substantive FAD inquiry about making a new FAD for the DTCS. The ACCC will make a new FAD for the DTCS, but will not be in a position to do so before the expiry date of the 2012 DTCS FAD.

The ACCC has commenced an inquiry in relation to the 2015 DTCS FAD and is currently in the information collection stage. To date, the ACCC has conducted two public consultation processes in relation to the DTCS FAD inquiry – the first, a joint consultation on non-price terms and conditions and supplementary pricing terms and the second a consultation on the key price terms for the DTCS. The ACCC has carefully considered submissions received in response to both consultation processes, particularly in relation to the timing of a new FAD. The ACCC's preliminary view, as set out in a position paper also published on 7 November 2014, is that a domestic benchmarking methodology remains appropriate approach to determine prices for the DTCS. The ACCC intends to request information from DTCS providers to inform the regression analysis.

Only once the relevant information has been received and the modelling completed will the ACCC be in a position to issue a draft determination on the substantive DTCS FAD inquiry. Accordingly, the ACCC considers that it will not be in a position to make a new FAD for the DTCS by 31 December 2014 when the 2012 DTCS FAD expires.

In view of the above, the ACCC has made the decision to extend the expiry date for the 2012 DTCS FAD to the day before the day on which the 2015 DTCS FAD comes into force. Extending the expiry date of the 2012 DTCS FAD will also provide regulatory certainty and

⁷ The relevant extension declaration can be found on the ACCC's Telecommunications Public register – <http://registers.accc.gov.au/content/index.phtml/itemId/1061126>.

consistency for access providers and access seekers until a new FAD is made and comes into force.

5 Inquiry to vary the 2012 DTCS FAD

The ACCC is conducting an inquiry to vary the 2012 DTCS FAD so that the price and non-price terms in the FAD apply to the provision of the DTCS in the three regional routes and seven ESAs that will be regulated under the DTCS declaration from 1 January 2015.

As noted in section 2 of this paper, the previous declaration for the DTCS did not apply to a number of routes and ESAs. This means that the 2012 DTCS FAD, which was made in relation to the services declared by the previous declaration, does not apply to these routes and ESAs.

In its final decision on the 2014 declaration inquiry for the DTCS, the ACCC decided to re-regulate three regional routes which failed to meet the revised competition methodology, and 'notionally' re-regulate seven ESAs based on definitional changes. Accordingly, the following regional routes and ESAs will be re-regulated from 1 January 2015:

- routes to Maryborough, Bundaberg and Rockhampton, and
- the ESAs of Kirwan, Gulliver, Withcott, Middle Ridge, Newtown, Drayton and Frenchville ESAs (based on definitional changes which differentiate these ESAs from the Townsville, Toowoomba and Rockhampton ESAs).

The ACCC considers that the 2012 DTCS FAD even as extended (see section 4) may not apply to services supplied on these re-regulated routes and ESAs.

The ACCC's preliminary view is that it should vary the 2012 DTCS FAD so that it applies to the re-regulated routes and ESAs. The variation would commence on 1 January 2015 when the transitional period ends and the relevant routes and ESAs will be declared.

Once the proposed variation is made, carriers and carriage service providers (**CSPs**) will be required to supply the DTCS in relation to the re-regulated routes and ESAs at the price and on the non-price terms and conditions specified in the 2012 DTCS FAD.⁸

The draft variation instrument is attached at [Appendix B](#).

5.1 Price terms

The ACCC is proposing that the price terms currently specified in the 2012 DTCS FAD should be available to access seekers for services provided via the re-regulated routes and ESAs.

These prices are set out at Schedule 1 of the 2012 DTCS FAD and include:

- an annual charge, which is calculated according to a formula and varies depending on a number of factors including speed (megabit per second (**Mbps**)), distance (kilometres), and whether the service is protected (table 1), and

⁸ Section 152BCO of the CCA.

Table 1: Annual charges in accordance for DTCS services

$$\text{Price} = \exp[\log_e(\text{Annual Charge})] \times 1.102$$

The term $\log_e(\text{Annual Charge})$ is defined as:

$$\log_e(\text{Annual Charge}) = 7.682 + 0.623 \times \log_e(\text{Speed}) + 0.199 \times \log_e(\text{Distance}) + c + t$$

$$\text{where: } c = \begin{cases} 0.078 & \text{Protected Service} \\ 0.000 & \text{Unprotected Service} \end{cases}$$

$$t = \begin{cases} 0.000, & \text{Intercapital Routes} \\ -0.081, & \text{Metro Routes} \\ 0.052, & \text{Regional Routes} \end{cases}$$

- a non-recurring connection charge which varies depending on the speed and technology (Synchronous Digital Hierarchy (**SDH**) or Ethernet) of the service (table 2).

Table 2: Non-recurring (connection) charges for DTCS services

	SDH	Ethernet
2Mbps	\$3,100	\$2,500
10Mbps	\$6,500	\$2,500
34/45Mbps	\$19,000	-
100Mbps	-	\$5,000
155Mbps	\$36,000	-
622 Mbps	\$40,000	
1000Mbps		\$5,000

The 2012 DTCS FAD provides that these charges are based on a particular quality of service and a contract period of 12 months. Charges for periods longer or shorter than 12 months are to be determined on a pro rata basis with reference to the price determined by the formula at Schedule 1. The charges set out in the 2012 DTCS FAD do not include GST or any other tax.

A DTCS Pricing Calculator that can be used to ascertain the annual charge for a particular service in accordance with the 2012 DTCS FAD formula at table 1 can be found [on the ACCC website](#).

These charges were determined using a domestic benchmarking approach during the previous FAD inquiry in 2011-12. The ACCC used commercially negotiated prices, charged on unregulated routes that had been determined to be competitive, to set prices for the DTCS using a regression model. The model is discussed in detail in the ACCC's explanatory statement to the 2012 DTCS FAD.⁹

⁹ ACCC, FAD for the DTCS – Explanatory Statement, June 2012, pp. 14-15.

5.2 Non price terms

The ACCC is proposing that the non-price terms and conditions specified at Schedules 2-8 of the 2012 DTCS FAD should apply to services supplied via the re-regulated routes and ESAs. These terms relate to a number of commercial matters including:

- billing and notifications
- creditworthiness and security
- general dispute resolution procedures
- confidentiality provisions
- suspension and termination of services
- liability and indemnity, and
- network modernisation and upgrade provisions.

5.3 Legislative framework for variations to FADs

The telecommunications access regime in Part XIC of the CCA requires, among other things, the ACCC to make FADs for all declared services. A FAD provides a base set of terms and conditions that access seekers can rely on if they are unable to come to an agreement with an access provider on the terms and conditions of access to a declared service. If parties come to an agreement on terms and conditions of access, their access agreement will prevail over the FAD to the extent of any inconsistency.¹⁰

The ACCC must take the matters set out in subsection 152BCA(1) of the CCA into account in deciding whether to vary a FAD. These matters are:

- a) whether the determination will promote the long term interests of end-users (**LTIE**) of carriage services or services supplied by means of carriage services
- b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- c) the interests of all persons who have rights to use the declared service
- d) the direct costs of providing access to the declared service
- e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and
- g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

¹⁰ Section 152BCC of the CCA.

The ACCC may also take into account any other matters that it thinks are relevant.¹¹ Information about the above requirements and how the ACCC will take these matters into account is available at [Appendix A](#).

Compliance with a FAD is both a carrier licence condition and a service provider rule,¹² the breach of which may lead to a pecuniary penalty of up to \$10 million for each contravention.¹³ Private enforcement of a FAD is available in the Federal Court.¹⁴

5.4 Preliminary ACCC view

Based on the information currently available and having taken into account the matters specified in section 152BCA of the CCA and other relevant matters, including matters raised in submissions to the substantive FAD inquiry, the ACCC has formed the preliminary view that the 2012 DTCS FAD should be varied to ensure it applies to the re-regulated routes and ESAs from 1 January 2015.

In the absence of regulated prices for the DTCS, a monopoly service provider may be expected to charge prices that are above efficient costs. In making the 2012 DTCS FAD, the ACCC considered that:

...the domestic benchmarking approach is the most appropriate method of determining prices for the DTCS FAD. The ACCC considers that prices on competitive routes are broadly reflective of costs (inclusive of a normal return on investment) and provide an appropriate estimate of efficient prices that would prevail in competitive markets. The ACCC has therefore used pricing information from competitive routes as a basis for determining prices and price structures on non-competitive routes, through a domestic benchmarking approach.¹⁵

At the time, the ACCC determined that the price and non-price terms in the 2012 DTCS FAD were consistent with the matters set out at subsection 152BCA(1) of the CCA.¹⁶

The ACCC notes that the methodology and charges for the DTCS are likely to be revised as part of the current substantive FAD inquiry. In applying the regression model to determine the final prices, regulated prices set in the 2012 DTCS FAD reflected the diverse range of transmission prices for services at different capacities, different distances and across different geographies.¹⁷ On some regional transmission routes which had historically high prices the FAD prices were considerably lower. On the other hand, some access seekers found that some regulated prices were higher than they had expected the market rate to be. Should the ACCC retain a domestic benchmarking approach in the 2015 DTCS FAD, the ACCC intends to carefully consider the regression model to ensure that it is effective to determine efficient prices.

¹¹ Subsection 152BCA(3) of the CCA.

¹² Sections 152BCO and 152BCP of the CCA.

¹³ Section 570 of the *Telecommunications Act 1997*.

¹⁴ Section 152BCQ of the CCA.

¹⁵ ACCC, *FAD for the DTCS – Explanatory Statement*, June 2012, p. 13.

¹⁶ *Ibid.*, sections 7 and 8.

¹⁷ The final FAD prices reflected the mid-range of 80 per cent of prices in the data set.

While the ACCC is likely to receive updated information during the current substantive DTCS FAD inquiry, the ACCC has not yet received that information. To the extent that changes in the market mean that the 2012 DTCS FAD prices are no longer reflective of efficiently incurred costs, the ACCC considers that this will be addressed via the 2015 DTCS FAD. The ACCC acknowledges submissions received in the substantive FAD inquiry that seek an urgent review of the 2012 DTCS FAD prices. However, the ACCC considers that applying the 2012 DTCS FAD prices in the interim is unlikely to have a significantly detrimental effect, particularly compared to the absence of any regulated prices, given that:

- the 2012 DTCS FAD will only apply to the re-regulated routes and ESAs for a relatively short period, between 1 January 2015 and the making of the 2015 DTCS FAD (expected mid-2015)
- the re-regulated routes and ESAs are in regional areas and there are currently only a limited number of services supplied on those routes, meaning the total financial impact is likely to be quite small, and
- industry has been aware since the ACCC's DTCS declaration decision in March 2014 that these routes and ESAs will be re-regulated. It is possible that access seekers have already signed access agreements which would override the terms of the 2012 DTCS FAD.

Given that the 2015 DTCS FAD will not be finalised by 31 December 2014, the ACCC is of the preliminary view that it is reasonable to apply the prices in the 2012 DTCS FAD to the re-regulated routes and ESAs. The ACCC considers this is an appropriate interim measure which will apply only until the 2015 DTCS FAD is finalised.

The ACCC considers that applying the 2012 DTCS FAD to the re-regulated routes and ESAs will provide certainty and transparency for access providers and access seekers about what regulated terms and conditions apply to the re-regulated routes and ESAs from 1 January 2015. Further, applying the 2012 DTCS FAD price and non-price terms to the re-regulated routes and ESAs will provide regulatory consistency across the DTCS. The ACCC considers this is a matter relevant to its assessment, in accordance with subsection 152BCA(3) of the CCA.

Given the above considerations, the ACCC's preliminary view is that it should vary the 2012 DTCS FAD so that it applies to services supplied in the re-regulated routes and ESAs.

Appendix A – Legislative framework for final access determinations

The ACCC has the power to vary a FAD.¹⁸ The ACCC must take into account the matters specified in subsection 152BCA(1) of the CCA when varying an access determination.

This section sets out the relevant legislative framework in relation to FADs and the approach the ACCC will take in applying the legislative provisions. The ACCC must take into account the same matters (and follow the same procedures) as though it was making an access determination.

The ACCC's initial views on how the matters in section 152BCA of the CCA should be interpreted for the access determination variation process are set out below.

Content of a FAD

Section 152BC of the CCA specifies what a FAD may contain. It includes, among other things, terms and conditions on which a carrier or CSP is to comply with the standard access obligations provided for in the CCA and terms and conditions of access to a declared service.

A FAD may make different provisions with respect to different access providers or access seekers.¹⁹

Fixed principles provisions

A FAD may contain a fixed principles provision, which allows a provision in a FAD to have an expiry date after the expiry date of the FAD.²⁰ Such a provision would allow the ACCC to 'lock-in' a term so that it would be consistent across multiple FADs.

Varying a FAD

Section 152BCN of the CCA allows the ACCC to vary or revoke a FAD, provided that certain procedures are followed.

A fixed principles provision cannot be varied or removed unless the FAD sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.²¹

Commencement and expiry provisions

Section 152BCF of the CCA sets out the commencement and expiry rules for FADs.

A FAD may be backdated up to 1 January 2011.²²

¹⁸ Under subsection 33(3) of the *Acts Interpretation Act 1901* (Cth) subject to the changes specified in section 152BCN of the CCA.

¹⁹ Subsection 152BC(5) of the CCA.

²⁰ Section 152BCD of the CCA.

²¹ Subsection 152BCN(4) of the CCA.

²² Subsections 152BCF(2) and (2A) of the CCA.

A FAD must have an expiry date, which should align with the expiry of the declaration for that service unless there are circumstances that warrant a different expiry date.²³

Matters to consider when making a FAD

The ACCC must take into account the matters specified in subsection 152BCA(1) of the CCA when making a FAD. These matters are:

- a) whether the determination will promote the LTIE of carriage services or services supplied by means of carriage services
- b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- c) the interests of all persons who have rights to use the declared service
- d) the direct costs of providing access to the declared service
- e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

Subsection 152BCA(1) matters mirror the repealed subsection 152CR(1) matters that the ACCC was required to take into account in making a final determination in an access dispute. The ACCC intends to interpret the subsection 152BCA(1) matters in a similar manner to that used in access disputes.

Subsection 152BCA(2) of the CCA sets out other matters that the ACCC may take into account in making FADs.

Subsection 152BCA(3) of the CCA allows the ACCC to take into account any other matters that it thinks are relevant.

The ACCC's initial views on how the matters in section 152BCA of the CCA should be interpreted for the FAD process are set out below.

Paragraph 152BCA(1)(a) – long-term interests of end-users

The first matter for the ACCC to consider when making a FAD is 'whether the determination will promote the LTIE of carriage services or of services supplied by means of carriage services'.

The ACCC has published a guideline explaining what it understands by the phrase 'long-term interests of end-users' in the context of its declaration responsibilities.²⁴ This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The

²³ Subsection 152BCF(6) of the CCA.

²⁴ ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act*, July 1999, in particular pp. 31-38.

ACCC considers that the same interpretation is appropriate for making FADs for the declared DTCS.

In the ACCC's view, particular terms and conditions promote the interests of end-users if they are likely to contribute towards the provision of:

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.²⁵

The ACCC also notes that the Australian Competition Tribunal (Tribunal) has offered guidance in its interpretation of the phrase 'long-term interests of end-users' (in the context of access to subscription television services):

Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary to take the following matters into account when applying the touchstone – the long-term interests of end-users:

- End-users: "end-users" include actual and potential [users of the service]...
- Interests: the interests of the end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings. ...[T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case ...
- Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.²⁶

To consider the likely impact of particular terms and conditions on the LTIE, the CCA requires the ACCC to have regard to whether the terms and conditions are likely to result in:

- promoting competition in markets for carriage services and services supplied by means of carriage services
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in:
 - the infrastructure by which listed carriage services are supplied, and
 - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.²⁷

²⁵ *ibid.*, p. 33.

²⁶ *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

²⁷ Subsection 152AB(2) of the CCA.

Promoting competition

In assessing whether particular terms and conditions will promote competition, the ACCC will analyse the relevant markets in which the declared services are supplied (retail and wholesale) and consider whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.²⁸

Obstacles to accessing these services include the price, quality and availability of the services and the ability of competing providers to provide telephony and broadband services.

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

Any-to-any connectivity

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved 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, with each other end-user who is supplied with the same service or a similar service. This must be the case whether or not the end-users are connected to the same telecommunications network.²⁹

The ACCC considers that this matter is relevant to ensuring that the terms and conditions contained in FADs do not create obstacles for the achievement of any-to-any connectivity.

Efficient use of and investment in infrastructure

In determining the extent to which terms and conditions are likely to encourage the economically efficient use of and investment in infrastructure, the ACCC must have regard to:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
- the technology that is in use, available or likely to become available
- whether the costs 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 services would have on the operation or performance of telecommunications networks
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope

²⁸ Subsection 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] A CompT 3 at [92]; *Telstra Corporation Limited* [2006] A CompT at [97], [149].

²⁹ Subsection 152AB(8) of the CCA.

- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the national broadband network) by which services are, or are likely to become, capable of being supplied, and
- the risks involved in making the investment.³⁰

The objective of encouraging the 'economically efficient use of, and economically efficient investment in ... infrastructure' requires an understanding of the concept of economic efficiency. Economic efficiency consists of three components:

- productive efficiency – this is achieved where individual firms produce the goods and services that they offer at efficient cost
- allocative efficiency – this is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs), and
- dynamic efficiency – this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and productive opportunities.

On the issue of efficient investment, the Tribunal has stated that:

...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.³¹

...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.³²

...access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.³³

Paragraph 152BCA(1)(b) – legitimate business interests

The second matter requires the ACCC to consider 'the legitimate business interests' of the carrier or CSP when making a FAD.

In the context of access disputes, the ACCC considered that it was in the access provider's legitimate business interests to earn a normal commercial return on its investment.³⁴ The ACCC is of the view that the concept of 'legitimate business interests' in relation to FADs

³⁰ Subsections 152AB(6) and (7A) of the CCA.

³¹ *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

³² *ibid.* at [164].

³³ *ibid.*

³⁴ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

should be interpreted in a similar manner, consistent with the phrase 'legitimate commercial interests' used elsewhere in Part XIC of the CCA.

For completeness, the ACCC notes that it would be in the access provider's legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.³⁵

The Tribunal has taken a similar view of the expression 'legitimate business interests'.³⁶

Paragraph 152BCA(1)(c) – persons who have a right to use

The third matter requires the ACCC to consider 'the interests of all persons who have the right to use the service' when making a FAD.

The ACCC considers that this matter requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.³⁷ The access seekers' interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete with the access provider in the provision of retail services.³⁸

People who have rights to currently use a declared service will generally use that service as an input to supply carriage services, or a service supplied by means of carriage service, to end-users.

The ACCC considers that this class of persons has an interest in being able to compete for the customers of end-users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.³⁹

However, the ACCC does not consider that this matter calls for consideration to be given to the interests of the users of these 'downstream' services. The interests of end-users will already be considered under other matters.

Paragraph 152BCA(1)(d) – direct costs of providing access

The fourth matter requires that the ACCC consider 'the direct costs of providing access to the declared service' when making a FAD.

The ACCC considers that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access, and includes the incremental costs of providing access.

³⁵ ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

³⁶ *Telstra Corporation Limited* [2006] ACompT 4 at [89].

³⁷ *Telstra Corporation Limited* [2006] ACompT 4 at [91].

³⁸ *ibid.*

³⁹ *ibid.*

The ACCC interprets this matter, and the use of the term 'direct costs', as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal's approach in an undertaking decision.⁴⁰ A contribution to indirect costs can also be supported by other matters.

However, the matter does not extend to compensation for loss of any 'monopoly profit' that occurs as a result of increased competition.⁴¹

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs matter 'is concerned with ensuring that the costs of providing the service are recovered.'⁴² The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this matter.⁴³

Paragraph 152BCA(1)(e) – extensions or enhancements of capability

The fifth matter requires that the ACCC consider 'the value to a party of extensions, or enhancements of capability, whose cost is borne by someone else' when making a FAD.

In the 1997 Access Pricing Principles, the ACCC stated that this matter:

... requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.⁴⁴

The ACCC considers that this application of paragraph 152BCA(1)(e) is relevant to making FADs.

Paragraph 152BCA(1)(f) – safe and reliable operation

The sixth matter requires the ACCC to consider 'the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility' when making a FAD.

The ACCC considers that this matter requires that terms of access should not compromise the safety or reliability of carriage services and associated networks or facilities, and that this has direct relevance when specifying technical requirements or standards to be followed.

The ACCC has previously stated in the context of model non-price terms and conditions that:

⁴⁰ *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

⁴¹ See Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill* 1996, p. 44: [T]he 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

⁴² *Telstra Corporation Limited* [2006] ACompT 4 at [92].

⁴³ *ibid.* at [139].

⁴⁴ 1997 Access Pricing Principles, p. 11.

*...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.*⁴⁵

The ACCC considers that these views will apply in relation to the paragraph 152BCA(1)(f) matter for the making of FADs.

Paragraph 152BCA(1)(g) – economically efficient operation

The final matter of subsection 152BCA(1) requires the ACCC to consider ‘the economically efficient operation of a carriage service, a telecommunications network facility or a facility’ when making a FAD.

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.⁴⁶

Consistent with the approach taken by the Tribunal, the ACCC considers that it is relevant to consider the economically efficient operation of:

- retail services provided by access seekers using the access provider’s services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.⁴⁷

Subsection 152BCA(2) – other eligible services

Subsection 152BCA(2) provides that, in making an FAD that applies to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,⁴⁸ take into account:

- the characteristics of those other eligible services
- the costs associated with those other eligible services
- the revenues associated with those other eligible services, and
- the demand for those other eligible services.

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in making an FAD, does not consider the declared service in isolation, but also considers other relevant services.⁴⁹ As an example, the Explanatory Memorandum states:

⁴⁵ ACCC, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

⁴⁶ Access Dispute Guidelines, p. 57.

⁴⁷ *Telstra Corporation Limited* [2006] ACompT at [94]-[95].

⁴⁸ ‘Eligible service’ has the same meaning as in section 152AL of the CCA.

...when specifying the access price for a declared service which is supplied by an access provider over a particular network or facility, the ACCC can take into account not only the access provider's costs and revenues associated with the declared service, but also the costs and revenues associated with other services supplied over that network or facility.⁵⁰

The ACCC proposes to consider the costs and revenues associated with other services, whether declared or not declared, that are provided over a transmission network when making a FAD for the DTCS.

Subsection 152BCA(3) – any other relevant matters

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

The ACCC is of the view that considerations of regulatory certainty and consistency will be important when setting the terms and conditions of the FADs.

⁴⁹ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

⁵⁰ *ibid.*

Appendix B - Draft variation instrument

Variation instrument

COMPETITION AND CONSUMER ACT 2010

Variation of Final Access Determination No. 1 of 2012 made under section 152BC by the Australian Competition and Consumer Commission

Application of DTCS FAD terms to declared routes and ESAs

1. Title

This Determination may be cited as:

Final Access (Variation) Determination No.3 of 2014 (DTCS)

2. Commencement

This Determination comes into effect on 1 January 2015.

3. Variation

Final Access Determination No. 1 of 2012 (DTCS)

is hereby varied as set out below:

The table in Clause 1.1 is to be removed and replaced with:

Declared service	Expiry of declaration	Title of final access determination	Applicable schedules
Domestic Transmission Capacity Service (DTCS)	31 March 2019	Final Access Determination No. 1 of 2012 (DTCS)	1-9

Clause 1.2 is deleted and replaced with:

The terms and conditions set out in clause 4 apply to all of the domestic transmission capacity service that is covered by the declaration specified in the table in clause 1.1 as of 1 January 2015.

Date of decision: December 2014