



Australian
Competition &
Consumer
Commission

Telecommunications Final Access Determination inquiries—non-price terms and conditions and supplementary prices

Position paper

May 2014



Australian Competition and Consumer Commission

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Contents

List of abbreviations and acronyms	i
Glossary.....	ii
1 Introduction	1
1.1 Background.....	1
1.2 Related inquiries	2
2 Process and timeframes.....	4
2.1 Proposed FAD process.....	4
2.2 Consultation process for non-price terms and supplementary prices	4
2.3 Making a submission	4
3 Non-price terms and conditions.....	6
3.1 Background.....	6
3.2 The ACCC's approach to non-price terms and conditions of access	9
4 Supplementary prices.....	13
4.1 Connection and disconnection charges.....	13
4.2 Internal interconnect cable.....	16
4.3 Special linkage charges	17
4.4 Facilities access services.....	17
4.5 Other supplementary prices.....	20
Appendix A: Legislative framework for final access determinations	21

List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	Asymmetric Digital Subscriber line
BBM	Building Block Model
BBM RKR	Building Block Model Record Keeping Rule
BROC	Binding Rule of Conduct
CCA	<i>Competition and Consumer Act 2010</i>
c-i-c	commercial in confidence
CRA	Customer Relationship Agreement
CSP	carriage service provider
DTCS	domestic transmission capacity service
FAD	final access determination
FLSM	fixed line services model
FOAS	fixed originating access service
FTAS	fixed terminating access service
IIC	internal interconnect cable
LCS	local carriage service
LSS	line sharing service
LTIE	Long term interests of end-users
MDF	Main Distribution Frame
MTAS	Mobile Terminating Access Service
NBN	National Broadband Network
PSTN OA	public switched telephone network originating access service
PSTN TA	public switched telephone network terminating access service
RSPs	retail service providers
SSU	Structural Separation Undertaking
TEBA	Telstra Equipment Building Access
TWA	Telstra Wholesale Agreement
ULLS	unconditioned local loop service
WLR	wholesale line rental

Glossary

Access agreement	A commercial contract between the access provider and an access seeker which sets out negotiated terms and conditions of supply for an agreed period of time.
Access determination	Written determinations made by the ACCC relating to access to a declared service after conducting a public inquiry, specifying any or all of the terms and conditions for compliance with any or all of the standard access obligations.
access seeker	Telecommunications companies that seek access to the declared service (that is, the right to use the declared service).
access provider	Telecommunications companies that provide access to a declared service.
ADSL	Asymmetric Digital Subscriber Line. A technology for transmitting digital information at high data rates on existing copper phone lines. It is called asymmetric because the download and upload speeds are not symmetrical (that is, download is faster than upload).
Building Block Model Record Keeping Rule	The Building Block Model Record Keeping Rule (BBM RKR) requests information on forecast and actual data from Telstra relating to operating expenditure, capital expenditure, depreciation and demand that is required to effectively implement the Fixed Line Services Model (FLSM). The FLSM is used as part of the ACCC's building block model-approach to determine prices for the declared fixed line services and wholesale ADSL.
Binding Rules of Conduct	Written rules made by the ACCC where there is an urgent need to make such rules, specifying any or all of the terms and conditions for compliance with any or all of the standard access agreements, or requiring compliance with any or all of the standard access agreements in a manner specified in the rules.
Customer Relationship Agreement	A commercial agreement which sets out the terms and conditions between Telstra and its wholesale customers.
declaration inquiry	The process by which the ACCC holds a public inquiry to determine whether a service should be declared.
declared service	A service that the ACCC regulates under Part XIC of the CCA. Once declared, a service provider must supply the service to other parties in accordance with the standard access obligations and the terms and conditions set in the final access determination.
DSLAM	Digital Subscriber Line Access Multiplexer. A device which makes use of the copper access lines to provide high data rate services, enabling broadband services to be provided over copper lines. It is located in a telephone exchange that links many customer DSL connections (copper wires) to a core IP network via a backhaul system.
DTCS	Domestic Transmission Capacity Service. The regulated transmission service.
end-user	Retail consumers of telecommunication services.

External Interconnection Cable	This commonly refers to space designated for access seeker use in Telstra's exchanges. It encompasses access to floor space, equipment racks or rack space and services such as power, security and air-conditioning. TEBA also includes access to cable trays and the internal interconnection cables contained in them.
exchange	Place where various numbers and types of communication lines are switched so as to establish a connection between two telephones. The exchange also houses DSLAMs, allowing end-users to connect to the internet.
FAD	Final Access Determination. The FAD is made by the ACCC and sets the terms and conditions (including prices) on which a service provider must supply a declared service.
FOAS	Fixed Originating Access Service. The new name of the currently declared PSTN OA service.
FTAS	Fixed Terminating Access Service. The new name for the currently declared PSTN TA service.
fixed line services	Telecommunications services provided over fixed networks, such as Telstra's copper network and HFC networks. The 'declared fixed line services' are the six fixed line services declared in 2009 – the ULLS, LSS, WLR, LCS, PSTN OA and PSTN TA.
IIC	The internal interconnect cable is a twisted copper pair cable connecting an access seeker's intermediate distribution frame to Telstra's main distribution frame. The IIC is essential to access seekers in being able to obtain ULLS/LSS from Telstra.
LCS	The declared Local Carriage Service. Enables access seekers to resell local calls to end-users without having to invest in their own network and switching equipment. The LCS is purchased in conjunction with the WLR service.
LSS	The declared Line Sharing Service. Enables access seekers to share the use of the copper line connecting consumers to the telephone exchange, allowing them to provide fixed internet services using their own equipment.
Main Distribution Frame	Main distribution frame - a set of terminal points providing a means of interconnection between pairs. An MDF is used in many multi-dwelling residential and large commercial premises as a means of interconnection between Telstra's copper wire customer access network and the internal telephone wiring of the premises. There is also an MDF at the local telephone exchange which provides a point of interconnection between the main feeder network cables and the equipment inside the exchange.
MTAS	The declared Mobile Terminating Access Service. A wholesale service provided by a mobile network operator (MNO) to fixed line operators and other MNOs to connect – or 'terminate' – a call on its mobile network. It enables calls to be made to consumers on mobile phone networks.
PSTN	Public Switched Telephone Network. The telephone network that allows the public to make and receive telephone calls via switching and transmission facilities and utilising analogue and digital technologies.
PSTN OA	The declared PSTN Originating Access service. Enables a telephone call

	to be connected from the caller to a point of interconnection with another network.
PSTN TA	The declared PSTN terminating access service. Enables a telephone call to be carried from the point of interconnection to the party being called on another network.
retail service provider	Companies that offer telecommunications services to end-users.
Special access undertaking	A document given by the access provider proposing the terms and conditions on which it will offer access to its services (if approved by the ACCC, access seekers can obtain supply on these terms).
Telstra Wholesale Agreement	Introduced by Telstra on 31 March 2014 and is designed to replace the existing Customer Relationship Agreement on which most access agreements between Telstra and its wholesale customers are based.
transmission	The carriage of voice, data or other communications.
ULLS	The declared Unconditioned Local Loop Service. Allows access seekers to use the copper line connecting end-users to the local telephone exchange, allowing them provide both fixed internet (broadband) and voice services using their own DSLAMs and other exchange equipment.
Wholesale ADSL	The declared Wholesale ADSL service. Allows access seekers to purchase a Wholesale ADSL product from Telstra and resell internet services to end-users.
WLR	The declared Wholesale Line Rental service. For a monthly 'per-user' charge, it allows access seekers to purchase a line rental service from Telstra, which includes access to the copper line and associated services (including a dial tone and telephone number) supplied using Telstra's equipment.

1 Introduction

1.1 Background

The Australian Competition and Consumer Commission (ACCC) recently extended and varied the declarations for the following services:

- the Domestic Transmission Capacity Service (DTCS) in March 2014 until 31 March 2019¹
- the six fixed line services in April 2014 until 31 July 2019.²

The ACCC intends to complete the declaration inquiry for the Mobile Terminating Access Service (MTAS) shortly.³

Under Part XIC of the *Competition and Consumer Act 2010* (CCA), the ACCC is required to conduct a public inquiry under Part 25 of the *Telecommunications Act 1997* before it makes an access determination relating to access to declared services.⁴ In an access determination, the ACCC has the ability to specify any or all of the terms and conditions of an access seeker's access to the declared service, including how the access provider is to comply with the standard access obligations.⁵ The legislative framework that applies to the making of Final Access Determinations (FADs) and the approach the ACCC will take in applying these criteria are set out in Appendix A.

On 11 July 2013 the ACCC commenced a public inquiry into making new FADs for the six fixed line services and the Wholesale ADSL service.⁶ On 22 May 2014, the ACCC commenced inquiries into making new DTCS and MTAS FADs.

The current FADs for these services specify certain price and non-price terms and conditions that apply when commercial negotiations do not result in agreement between the access provider and access seeker. The ACCC considers that the price terms fall into two categories:

- The **primary prices** for the declared services are charges for direct use of the services, that is: the monthly access prices for the ULLS, LSS, WLR and wholesale ADSL port service; the usage charges for the LCS, MTAS, FOAS and FTAS (previously PSTN OA and TA), and wholesale ADSL AGVC service; and the annual charges for the DTCS.
- The **supplementary prices** for these services refer to additional charges incurred in using the services, for example, connection and disconnection charges.

¹ The regulated DTCS is a subset of all transmission services and refers to high capacity data links that are used by carriers and carriage service providers to carry large volumes of voice, data, video or other communications over long distances.

² The fixed line services are made up of the unconditioned local loop service (ULLS), line sharing service (LSS), local carriage service (LCS), wholesale line rental (WLR) service, the as Public Switched Telephone Network Originating Access (PSTN OA) and the Public Switched Telephone Network Terminating Access (PSTN TA). From 1 August 2014 the PSTN OA and PSTN TA will be known as the Fixed Originating Access Service (FOAS) and the Fixed Terminating Access Service (FTAS).

³ The MTAS is a wholesale service provided by a mobile network operator to fixed line operators and other MNOs to receive and then terminate voice call on its mobile network. The MTAS is essential for calls to be made between subscribers connected to different mobile networks, and for calls to be made from fixed networks to mobile networks.

⁴ Section 152BCH of the CCA.

⁵ Section 152BC(3) of the CCA.

⁶ The ACCC declared the Wholesale ADSL service for a period of five years on 14 February 2012. The declaration expires on 13 February 2017.

The current FADs expire on the following dates:

- The current DTCS FAD expires on 31 December 2014. More information on the DTCS declaration and FAD inquiries can be found on [the ACCC's website](#).
- The current MTAS FAD expires on 30 June 2014. More information on the MTAS declaration and FAD inquiries can be found on [the ACCC's website](#).
- The current fixed line FADs were originally due to expire on 30 June 2014. The ACCC will not be in a position to complete the current FAD inquiry prior to the expiry of the FADs on 30 June 2014 due to the complexity of the pricing issues and the extensive consultation required. On 16 April 2014 the ACCC extended the current FADs for the fixed line services until the day before the new FADs come into force. The ACCC anticipates releasing a discussion paper on issues regarding primary prices for the declared services in July 2014. More information about the FAD inquiry can be found on [the ACCC's website](#).

Due to the complexity and number of the issues involved in determining the primary prices for the declared services, the ACCC has decided to consult separately on the primary prices for the fixed line services, the DTCS and the MTAS FADs and on non-price terms and supplementary prices for the FADs. Furthermore, the ACCC considers there is benefit in conducting a combined consultation process for non-price terms and conditions and supplementary prices given that a number of these terms are similar (or the same) across the declared services and there may be benefits in maintaining consistency in certain terms across the FADs.

Consequently, this position paper seeks submissions on the supplementary price issues for the fixed line, DTCS and MTAS FADs, as well as submissions on non-price terms and conditions for these FADs. The ACCC expects to release separate discussion papers on the primary prices for the fixed line services, the DTCS and the MTAS FADs in mid-2014.

1.2 Related inquiries

FAD variation inquiry

On 17 April 2014, the ACCC commenced an inquiry into varying the existing FADs for the ULLS, the LSS, the WLR service and the LCS to:

- ensure the current regulated charges for the WLR and LCS services will apply in CBD areas (after the CBD exemptions in the declarations are removed from 1 August 2014) and
- set a regulated price term for the Internal Interconnection Cable (IIC) service in the FADs for the ULLS and LSS (after the current arbitration determinations expire on 30 June 2014).

More information on the FAD variation inquiry can be found on [the ACCC's website](#).

Building Block Model Record Keeping Rule – disclosure notice

On 13 September 2013 the ACCC requested Telstra to provide information under Rule 15 of the Building Block Model Record Keeping Rule (BBM RKR).⁷ The information requested is required for the ACCC's FAD pricing review. On 25 November 2013, Telstra provided its response to the ACCC's information request under the BBM RKR. On 17 January 2014, the ACCC requested further information to be provided by Telstra under the BBM RKR.

The ACCC may, if it is satisfied of certain matters, issue a notice to a carrier or carriage service provider stating that it will disclose a report or particular extracts a report lodged by that carrier or carriage service provider.⁸ On 19 March 2014 the ACCC gave Telstra a draft disclosure

⁷ To facilitate the operation of Part XIC of the CCA, the ACCC has the power to make Record Keeping Rules that require carriers or carriage service providers to keep or retain relevant records.

⁸ Section 151BUA(2) of the CCA.

notice and released a consultation paper inviting submissions on the proposed approach to disclosure of information provided under the BBM RKR. The ACCC expects to finalise the disclosure notice in June 2014 and will then proceed to finalise the discussion paper on the fixed line services primary pricing issues. More information on information the BBM RKR information collection and disclosure notice can be found [on the ACCC's website](#).

2 Process and timeframes

The ACCC invites interested parties to submit their views on the issues discussed in this paper by **15 July 2014**. The ACCC will consider these submissions in determining non-price terms and conditions and supplementary prices in FADs for the declared services.

2.1 Proposed FAD process

As noted in chapter 1, the ACCC is conducting a combined consultation process for non-price terms and conditions and supplementary prices across the three FAD inquiries for the declared fixed line services, DTCS and MTAS. The ACCC intends to release separate issues papers in relation to setting primary prices for the declared fixed line services, the DTCS and the MTAS in mid-2014.

Depending on the nature and magnitude of the price and non-price issues, submissions and other information provided during the ACCC's consultation processes, the ACCC will consider how best to make final FAD terms and conditions in a timely and effective manner.

Given the large number of issues for the current FAD inquiries, and the ACCC's expectation that completion of the consultations on the primary price issues is likely to take most of the coming financial year, the ACCC may consider a staged approach to finalising its consideration of different aspects of the FADs. For example, this could mean that the ACCC would finalise its decisions on the non-price terms and conditions, supplementary prices and primary prices at different times.

If this transpires, the ACCC could consider varying the current FADs to include terms dealing with the matters on which it has finalised its consideration rather than waiting for the conclusion of the current FAD inquiry to make terms dealing with those matters.

2.2 Consultation process for non-price terms and supplementary prices

The ACCC considers that conducting separate consultations on non-price and supplementary price issues and on primary price issues is likely to assist industry and other stakeholders in preparing submissions on these various aspects of the FADs.

To further facilitate effective engagement with stakeholders on non-price terms and conditions and supplementary pricing issues, the ACCC is considering whether to conduct an industry forum as part of its consultation process on these issues. In this regard, the ACCC notes that it has previously held a number of open industry forums for discussion of targeted issues and that these forums were positively received by industry. The ACCC welcomes views on the benefits of conducting an industry forum on non-price and supplementary price issues and any suggestions for the topics that could be discussed in any such forum.

After considering submissions received in response to this position paper, the ACCC will release a draft report outlining its preliminary views on non-price terms and conditions and supplementary prices. Depending on the nature and extent of the issues raised in submissions, and any other relevant information, the ACCC expects to release its draft report in late 2014.

The ACCC considers it is unlikely that it would be in a position to finalise its decisions on these aspects of the FADs before early to mid-2015. The ACCC will keep stakeholders informed about its processes during the course of the FAD inquiries.

2.3 Making a submission

The ACCC encourages industry participants, other stakeholders and the public more generally to consider and make submissions on the issues set out in this position paper.

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

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 published a Confidentiality Guideline which sets out the process parties should follow when submitting confidential information to communications inquiries commenced by the ACCC. The Guideline describes the ACCC's legal obligations with respect to confidential information, the process for submitting confidential information and how the ACCC will treat confidential information provided in submissions. A copy of the Guideline can be downloaded from [the ACCC's website](#).

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 on the collection, use and disclosure of information. A copy of the policy document can also be downloaded from [the ACCC's website](#).

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format which enables the submission text to be searched. Please contact Nicole Ross regarding any questions you have concerning this consultation on 03 9290 1957.

Submissions in response to this position paper are due by **15 July 2014**.

Stakeholders are welcome to submit views on any urgent issues prior to this deadline, with an explanation as to why the issues are urgent (including by reference to the LTIE).

Please email submissions to:

Nicole.Ross@acc.gov.au

Cc: fixedservices@acc.gov.au

Cc: Annette.Weier@acc.gov.au

3 Non-price terms and conditions

The ACCC can specify in an access determination some or all of the terms and conditions on which a carrier is to provide an access seeker with access to the declared service. These terms and conditions can take the form of price or non-price terms and conditions.

Non-price terms and conditions cover a broad scope as there can be many aspects of access to the declared service that it is necessary to address in a FAD. These range from commercial terms, such as billing to general dispute resolution processes, to the operational processes by which the declared services are to be accessed.

In this paper, the ACCC sets out its proposed approach to setting non-price terms and conditions in FADS for the declared fixed line services, the DTCS and the MTAS.

The ACCC is also seeking views on whether there are any specific non-price issues that should be dealt with in the FADs, including any issues that are considered urgent.

3.1 Background

Relevance of non-price terms to the LTIE

The non-price terms and conditions on which access is provided to a declared service can play an important role in promoting the LTIE, in that they can directly affect the degree of competition and economic efficiency that develops in the supply of downstream services to end-users. This in turn will dictate the services that will be available to end-users and also the range of prices and quality on which end-users can acquire those services.

For instance, setting security and liability caps too high could represent a barrier to competition if they impeded efficient firms from entering markets or led to the exit of efficient firms. Similarly, slow or cumbersome operational requirements for activating orders or fixing faults could delay an access seeker in supplying services to its end-users or raise its costs above efficient levels.

In the case of a vertically integrated access provider, there is also the potential for non-price terms of access to be set in a way that would give the access provider a competitive advantage in downstream retail markets.

For instance, weak protections against a carrier using the confidential information of an access seeker—which the carrier learns in its capacity as the access provider and operator of the network—to advance its own commercial interests in downstream markets could impede competition because efficient access seekers would face a disadvantage in attracting and retaining its customer base.

Regulation of non-price terms

In recognition that an access provider can potentially use its market power to not agree to reasonable non-price terms and conditions of access, the telecommunications access regime has provided for regulatory oversight over these terms and conditions of access to declared services.

Under that regime, as it applied until 2011, the ACCC arbitrated disputes over terms and conditions of access where attempts by carriers and access seekers to negotiate mutually agreed arrangements were unsuccessful.

Also under that regime, from 2003, the ACCC maintained indicative guidance on the terms and conditions that it would specify in an arbitration determination. This guidance addressed a number of non-price aspects of access to the declared service and took the form of model term determinations. The purpose of the model term determinations was to inform negotiations around the terms of access to the declared service and to overcome uncertainty around the position that the ACCC would likely take should a dispute be notified for arbitration that concerned that matter.

In preparing the model terms determinations, the ACCC consulted on the in-principle position that should be adopted with respect to non-price terms that industry considered to be contentious, as well as how these in-principle positions could be implemented in contractual provisions. Although these determinations were not binding of themselves, the ACCC was required to have regard to them when arbitrating an access dispute.⁹

The ACCC undertook fundamental reviews in 2002 and 2008 in developing model term determinations and since that time the telecommunications access regime has been altered significantly.

The previous telecommunications access regime was replaced by the current regime from 1 January 2011.¹⁰ The current regulatory regime replaced the ACCC's power to make arbitration decisions under the CCA with the power to make FADs that specify any or all of the terms on which a carrier or carriage service provider is to comply with any or all of the standard access obligations.¹¹

Compliance with an access determination is both a carrier licence condition and a service provider rule.¹² A breach of either a carrier licence condition or a service provider rule may lead to a pecuniary penalty of up to \$10 million for each contravention.¹³ Private action to enforce an access determination may also be taken in the Federal Court.¹⁴

As noted in the explanatory memorandum that accompanied the 2010 Bill, the purpose of this reform was:

... to allow the regulator to set up front price and non-price terms for declared services. This will create a benchmark which access seekers can fall back on, while allowing the parties to negotiate different terms.¹⁵

Consequently, access determinations can inform commercial negotiations and facilitate the parties reaching reasonable terms of access by way of commercial agreement, in the same way that published arbitration determinations and model term determinations could do.

However, unlike arbitration determinations or model term determinations, access determinations are intended to provide an up-front set of terms and conditions of access to the declared services that apply in the absence of commercial agreement.

The ACCC flagged the possibility of a holistic review of non-price terms and conditions in its 2013 report on the access determination for the Wholesale ADSL service.¹⁶ The ACCC considers that it is appropriate to revisit these issues at this time.

⁹ Section 152AQB(9) of the *Trade Practices Act 1974* (repealed).

¹⁰ The Telecommunications regime contained in Part XIC of the CCA was amended with effect from 1 January 2011 by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*. The amendments replaced the previous negotiate/arbitrate framework with a range of different access mechanisms, including access determinations.

¹¹ Section 152BC(3) of the CCA. However, Division 4 of the Telecommunications Act sets out a third party access regime for fixed line facilities in which the ACCC is the default arbitrator.

¹² Sections 152BCO and 152BCP of the CCA.

¹³ Section 570 of the Telecommunications Act.

¹⁴ Section 152BCQ of the CCA.

¹⁵ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p.4.

¹⁶ ACCC, *Public inquiry to make a final access determination for the Wholesale ADSL service: Final Report*, May 2013, p. 82.

The access hierarchy

Given that an access provider and access seeker can agree to terms of access that differ to those contained in an access determination, Part XIC of the CCA establishes an access hierarchy. The hierarchy provides that a carrier or carriage service provider must comply with the standard access obligations on terms and conditions specified in:

1. an access agreement¹⁷
2. a special access undertaking given by the access provider and accepted by the ACCC¹⁸
3. binding rules of conduct¹⁹
4. access determinations.²⁰

Instruments higher in the access hierarchy take precedence to the extent of any inconsistency with instruments that are lower in the hierarchy.

The access hierarchy reflects that an access provider and access seeker are always free to negotiate terms and conditions of access that differ to those contained in a regulatory instrument and, where these negotiations are successful, those terms and conditions should be given precedence.

In other words, where the access provider and access seeker agree on a particular matter relating to access to the declared service, then the agreed terms on that matter will apply and the access determination would not apply to the extent of any inconsistency.²¹

However, access terms and conditions can be derived from different sources, with some terms and conditions being sourced from regulatory instruments and others from access agreements. For instance, terms and conditions in an access determination dealing with an aspect of access to the service will apply where the access agreement does not deal with that aspect of access or only does so in a more limited manner.

New form of Telstra wholesale agreement

There are several providers of wholesale services to access seekers. These providers supply both declared and unregulated services which are used in supplying retail services to end-users.

The ACCC notes that the major access provider, Telstra, has recently introduced a new Telstra Wholesale Agreement (TWA). The TWA is a new form of agreement that Telstra has recently proposed to apply across its wholesale services. The TWA is an 'umbrella' agreement, which is intended to apply to all wholesale services supplied by Telstra, including both regulated and unregulated services.

Telstra launched the new TWA on 31 March 2014. The TWA is intended over time to replace the existing Customer Relationship Agreements (CRA) on which most access agreements between Telstra and its wholesale customers are currently based.

Telstra will be offering to supply its wholesale services, including the declared services, on the terms and conditions contained in the TWA to new access seekers and existing access seekers from July 2014. Telstra has commenced consultation with its wholesale customers, inviting them to transition to the TWA. However, supply of regulated services is not contingent on customers signing up to the TWA.

The ACCC understands, based on advice from Telstra, that as with other commercial agreements, commercial negotiations over the TWA are bilateral and ongoing, and hence it is

¹⁷ Section 152AY(2)(a) of the CCA.

¹⁸ Section 152AY(2)(b) of the CCA.

¹⁹ Section 152AY(2)(c) of the CCA.

²⁰ Section 152AY(2)(d) of the CCA.

²¹ Sections 152AY, 152BCC, 152BDB of the CCA.

possible that TWA terms dealing with non-price issues could evolve in some respects before the next FADs are made.

The TWA provides an insight into the most recent commercial approach to terms and conditions dealing with access to the declared services, and so could assist in preparing the FADs by providing a starting point for drafting relevant terms and conditions that may be included in the FADs.

3.2 The ACCC's approach to non-price terms and conditions of access

In broad terms, the ACCC intends to approach its task in considering the inclusion of non-price terms and conditions in the FADs from the perspective of ensuring that there would be an effective fall-back set of terms and conditions of access available to the parties.

The ACCC considers that a fall-back set of terms and conditions would:

- fill any gaps in an access agreement where parties did not reach a commercial agreement
- provide certainty over terms and conditions of access for access seekers that do not have an access agreement and are solely reliant on the FADs.

Options for providing an effective fall-back position

The ACCC considers that there is a continuum of options for how an effective fall-back position could be established through FADs. These range from establishing overarching principles to guide commercial negotiations on particular issues through to making a FAD that specifies all non-price terms and conditions relating to the supply of a declared service. The ACCC is considering all options in this consultation.

At one end of the continuum, a FAD could focus only on those aspects of access where commercial agreement is less likely to result. This is the approach that was adopted in the FADs made in 2011, 2012 and 2013.

However, for this model to work effectively, there would need to be assurance that certainty over the balance of the access terms would be delivered by way of a commercial agreement and that the agreement would not inappropriately restrict recourse to regulated terms in future. A benefit of this option is that it would take less time for the ACCC and industry to develop and comment on non-price terms and conditions and regulatory activity would be focussed only on those areas where specific competition concerns arise. However, the ACCC notes that options at this end of the continuum would, to the extent that there were substantial gaps in the scope of the FAD terms, be potentially less effective as a fall-back set of terms and conditions. In particular, this could be the case if commercial negotiations failed to reach agreement on matters that were not covered by the limited set of terms and conditions included in the FADs.

At the other end of the spectrum, a FAD could provide a more comprehensive fall-back position by specifying terms and conditions for all aspects of access on which the parties could require certainty, in the absence of any form of commercial agreement.

This approach might be necessary where there is a risk that an access seeker might be relying solely on a FAD to provide terms and conditions of access. For example:

- if an access seeker is only given a binary choice between the FAD and an access agreement, and is not permitted to supplement the acceptable aspects of the access agreement with terms and conditions sourced from the FAD
- should an access provider seek to exclude future recourse to a FAD (beyond the usual application of the access hierarchy where terms and conditions of access were the subject of genuine agreement) as a condition of offering an access agreement. This could mean that an access seeker would be reluctant to enter the agreement at all. This could result directly from express provisions in the contract, or indirectly by

offering only a lengthy or indeterminate contract duration, or not providing for a seamless transition to the FAD should the access agreement come to an end.

This could potentially be achieved by—as well as addressing the aspects of access where commercial agreement was considered less likely—including a binding obligation on the access provider not to withhold its standard terms and conditions dealing with all other aspects of access that were not dealt with specifically.

While a more comprehensive approach may provide greater certainty, it may be less flexible and less able to deal with a changing commercial environment. Further, depending on the approach taken in setting FAD terms and conditions, this approach could potentially require lengthier consideration of issues by both the ACCC and industry.

There will be other options on the continuum and industry is invited to provide views on the appropriate option for the ACCC to adopt in making its decision on FAD non-price terms and conditions.

The ACCC considers that the preferred option may, in part, depend on the approach adopted by access providers, given the role of the FADs in providing an effective fall-back set of terms and conditions when commercial negotiations are not successful. Consequently, the ACCC is interested in understanding the experiences of access seekers and access providers in negotiating commercial agreements. The ACCC invites submitters to provide information about their experiences, on a commercial-in-confidence basis if necessary, to assist the ACCC in assessing the various options within the context of the commercial environment.

Setting specific non-price terms and conditions

Depending on which option on the continuum is adopted for setting non-price terms and conditions in the FADs, the ACCC may need to determine specific non-price terms and conditions. Where the option adopted involves setting out overarching principles to guide commercial negotiations on particular issues, the ACCC will have to determine principles.

The ACCC intends to ensure that the in-principle positions that it reaches, and any specific terms and conditions that it includes in the FADs:

- are consistent with relevant legislation, including the standard access obligations and industry codes—for instance, a number of aspects of access to services are dealt with in codes, such as the local number portability code and the ULLS ordering and provisioning code
- promote the LTIE and are reasonable, as viewed against the reasonableness criteria contained in Part XIC of the CCA
- are of relevance to the prevailing market conditions.

Further, the ACCC considers that, to ensure a FAD will provide an effective fall-back position, the principles and/or specific terms and conditions included in the FAD should result in the following outcomes:

- the access provider and access seeker have sufficient certainty over the terms and conditions on which access is to be granted in the absence of commercial agreement
- an access seeker relying on FAD terms would not be significantly disadvantaged as compared to the standard terms of access that would be available to it if it were 'on contract':
 - that is, the access seeker should have access to business as usual operational processes and systems, and not face commercial terms that are more restrictive than those generally available under standard commercial contracts, leaving aside special arrangements that have been made available via genuine commercial negotiation

- the FAD should be readily applicable in a commercial setting so that where an access seeker 'comes off contract' or 'goes on contract' the transition can occur with a minimum disruption:
 - that is, the intended operation of the terms and conditions of access should be simply explained and where possible the terms and conditions should be expressed in a manner that will 'fit' with the contractual arrangements that have existed, or will likely exist, between the carrier and the access seeker.

For the purposes of making submissions to the ACCC, parties are encouraged to compile a list of the aspects of access to declared services that they consider should be addressed in the FADs.

The ACCC notes that the 2011, 2012 and 2013 FADs addressed:

- billing and notification
- creditworthiness and security
- general dispute resolution
- confidentiality
- communication with end-users
- suspension and termination
- changes to operating manuals.

A number of other non-price terms and conditions of access were not addressed in some of these FADs, such as liability (risk allocation) provisions.

Parties are invited to nominate issues that they have raised in previous consultations, even where they were not ultimately addressed at that time, should they consider that it is important for these issues to be considered in this consultation.

Applicability across declared services

The commercial terms and conditions of access, such as credit worthiness and security terms, are typically dealt with in 'umbrella agreements' that apply across various services. This assists in simplifying the contractual arrangements and allows provisions to operate on a whole of business basis. Telstra has previously suggested that a common set of regulated terms to apply across declared services would also aid efficiency.²²

In making the FADs in 2011, 2012 and 2013, the ACCC considered the non-price terms and conditions in discrete consultation processes at different times and as a consequence some aspects of the current FADs take different approaches to issues.

The current inquiry presents an opportunity to consult on non-price terms to apply across all declared services as part of the current FAD inquiries. In doing so, the ACCC intends to develop a common set of non-price terms and conditions of access to apply across the declared services, except where there are service-specific reasons for why a different approach is appropriate. For instance, some aspects of access might not arise in respect of all the declared services or a different in-principle position might be appropriate for some aspects of access that are common across the services.

The ACCC seeks views on applicability of non-price terms and conditions across declared services.

²² Telstra, *Response to the Commission's Draft Report in the Public inquiry to make a final access determination for the Wholesale ADSL service*, April 2013, <http://www.accc.gov.au/system/files/Telstra%20submission%20April%202013.pdf>, p. 37.

Requests for urgent consideration

The ACCC's current expectation is that access providers and access seekers will have a reasonable degree of certainty over the non-price terms and conditions of supply of the declared services while the current inquiry is undertaken, so that there is unlikely to be a need for the ACCC to specify access terms in a regulatory instrument before the conclusion of the inquiry.

That said, if a party considers that there is an urgent need for the ACCC to prioritise its consideration of particular issues over the course of the inquiry, or specify non-price terms and conditions dealing with particular issues sooner, it should notify its views to the ACCC as soon as practicable.

Questions

1. What approach to regulating non-price terms and conditions of access do you consider would best promote the LTIE?
2. Do you consider the FADs should be made as:
 - a comprehensive set of terms and conditions which can act as a fall back or complete substitute for commercial agreement; or
 - a set of terms and conditions which deal only with a limited number of issues, which can be used when parties are unable to agree on a complete set of terms and conditions for access to a declared service or services; or
 - an alternative option (please describe).

Please provide reasons for your answers. In doing so, please describe any relevant experiences you have had in negotiating commercial agreements and how those experiences explain your preferred approach to addressing non-price terms and conditions in the FADs.

3. What terms and conditions do you consider should be covered in the FAD? Please provide reasons and examples.
4. Are there any terms and conditions that the ACCC should consider as a matter of urgency? Please provide reasons.
5. What terms and conditions do you consider should be 'common' (that is, identical) across all the declared services? Please provide examples and reasons.
6. Are there non-price issues for which a different approach should be adopted for individual regulated services? Please provide examples and reasons.
7. How frequently should the ACCC review the non-price terms and conditions included in the FADs?
8. Please provide your views on what steps the ACCC can take to facilitate active engagement and assistance from industry in the course of its consultation on non-price terms and conditions. For example, would there be benefit from holding an industry forum to discuss specific issues in relation to non-price terms and conditions (as proposed in chapter 2 of this paper)?

4 Supplementary prices

The existing FADs for the declared fixed line, DTCS and MTAS services set primary prices for these services as well as certain supplementary prices. The ACCC defines the primary prices for these services as charges for direct use of the services, that is: the monthly access prices for the ULLS, LSS, WLR and wholesale ADSL port; the usage charges for the LCS, MTAS, FOAS and FTAS (previously PSTN OA and TA), and wholesale ADSL service AGVC; and the annual charges for the DTCS. Supplementary prices for these services refer to additional charges incurred in using the services, for example, connection and disconnection charges.

The ACCC has previously considered it appropriate to set certain supplementary prices in the FADs so as to facilitate competition between access seekers and Telstra. If the ACCC did not regulate these charges, Telstra would be able to set supplementary prices that were above the cost of supply. High supplementary prices would increase the total cost to access seekers of supplying retail services to end-users using the declared services, reducing their ability to compete effectively and creating a barrier to entry to retail markets.

As a vertically-integrated operator of bottleneck network infrastructure, Telstra has the incentive and ability to set supplementary prices at levels higher than the costs of supply to reduce competition in retail markets and boost its profits. In addition, the ACCC considers that, absent regulation of supplementary prices, Telstra would have the incentive and ability to increase supplementary prices to compensate, at least in part, for reductions in the regulated primary prices for the declared services determined by the ACCC.

Due to the complexity and the number of the issues involved in determining the primary prices for the declared services, the ACCC has decided to consult separately on determining the primary prices for the fixed line services, the DTCS and the MTAS FADs and on non-price terms and supplementary prices for the FADs. This position paper seeks submissions on the supplementary price issues for the fixed line, DTCS and MTAS FADs, as well as submissions on non-price terms and conditions for these FADs.

The supplementary prices issues discussed in this chapter relate to connection, the IIC service and facilities access services.

4.1 Connection and disconnection charges

Connection and disconnection charges are one off charges access seekers pay to either connect or disconnect an end-user for example changes incurred in connecting an end-user to an access seeker's own exchange based equipment. These charges are incurred in relation to the provision of retail services using the ULLS, LSS, and/or DTCS services. There are also similar charges levied in respect of Wholesale ADSL. This section considers connection and disconnection services for fixed line services (ULLS, LSS and Wholesale ADSL) and DTCS.

Connection and disconnection changes for ULLS and LSS

Fixed line connection and disconnection charges are imposed by Telstra on access seekers for the costs involved in moving an end-user from Telstra's exchange based equipment to an access seeker's exchange based equipment (connection) and for moving an end-user from an access seeker's equipment to Telstra's exchange based equipment (disconnection).²³ Connection is necessary to enable an access seeker to supply voice and/or broadband services to an end-user via either the ULLS or LSS. The connection and disconnection charges allow Telstra to recover the costs of technicians performing jumpering work inside Telstra exchanges, travel and vehicle for the technicians, back-of-house management or assistance for

²³ As noted on pp. 123-124 in the ACCC Final Report for *Inquiry to make final access determination for the declared fixed line services* July 2011, Telstra also imposes a disconnection charge when an end-user churns from one service provider to another. These charges are imposed in accordance with Telstra churn process, which allows for the removal of the existing jumpers to be combined with installation of new jumpers on the relevant lines.

technicians, material costs and indirect costs. The ACCC has previously considered it appropriate to set connection and disconnection charges so as to facilitate competition between access seekers and Telstra. If the ACCC did not regulate these charges, Telstra would be able to set above-cost connection and disconnection charges, which would create a cost barrier for an access seeker to supply end-users with broadband and/or voice services using the ULLS or LSS.

As part of the 2011 FAD inquiry for the fixed line services, the ACCC set connection and disconnection charges based on the estimated costs of connection and disconnection work determined in 2007 and 2008 as part of a separate process under the previous regulatory regime.

In setting the 2011 connection and disconnection charges, the ACCC indexed the previously determined charges using the Reserve Bank of Australia's consumer price index forecasts.²⁴ The ACCC also set a number of non-price terms and conditions relating to connections and disconnections, for example the circumstances in which Telstra could charge separate disconnection charges.²⁵

The connection and disconnection charges were originally determined as part of the ACCC's pricing principles and indicative prices for the LSS and ULLS made in October 2007 and June 2008 respectively. The pricing principles and indicative prices for these services were informed by the ACCC's assessment of two undertakings submitted by Telstra in December 2004 for the connection and disconnection charges, and its arbitration of an access dispute over these services.²⁶

The connection and disconnection charges set out in the pricing principles and indicative prices for the LSS and ULLS were generally based on third party contractor rates. The ACCC considered at the time that third party contractor rates were an appropriate benchmark for the efficient forward-looking level of costs for the jumpering, travel, vehicle and materials cost categories. The ACCC noted that Telstra tendered out connections and disconnections work to contractors on a competitive basis. The ACCC concluded that quoted prices for this work were likely to represent 'efficient' rates as they were derived from a competitive tendering process that would allow cost recovery, including a commercial return, on the activities undertaken.²⁷

In respect of back-of-house activities and indirect costs, there was no opportunity to use an external tender process to estimate these costs. The estimated cost of back-of-house activities was calculated using relevant employee pay rates and the results of a time and motion study by a consultant on the amount of time involved in these activities. For indirect costs, a mark-up was applied to the total estimated costs of the other cost categories.²⁸

The ACCC notes that it has been some time since the underlying data used to derive the connection and disconnection charges was updated and that the underlying cost estimates may no longer accurately reflect the actual costs of connection and disconnection work now. The ACCC is proposing to update this data by obtaining third party contractor rates from Telstra, where it is available, and to consider whether the method used in estimating the cost of back-of-house activities and indirect costs remains appropriate.

²⁴ ACCC, *Inquiry to make final access determination for the declared fixed line services* Final Report June 2011, pp. 119-126. These charges were indexed in previous years using labour rates derived from the ABS Labour Price Index ordinary times rates of pay excluding bonuses for private sector communications service industry.

²⁵ An example of these non-price terms and conditions include the ACCC's consideration of: when disconnection charges are payable; whether LSS Managed Network Migrations (MNM) cancellation charges should be applicable and whether minimum charges for the MNM should be applicable in Band 4. For further discussion on these issues see the ACCC's *Inquiry to make final access determination for the declared fixed line services*, Final Report, July 2011, pp.119-126.

²⁶ ACCC, *Access dispute between Request Broadband and Telstra-LSS- publication of interim determination and associated statement of reasons*, 1 August 2007, published 24 August 2007.

²⁷ ACCC, *Assessment of Telstra's LSS undertaking relating to connection and disconnection charges- final decision*, April 2006, pp. 23-35.

²⁸ ACCC, *Assessment of Telstra's LSS undertaking relating to connection and disconnection charges- final decision*, April 2006, pp. 27-28 and 37-43; Consultel, *Analysis of ULLS and LSS undertaking and subsequent submissions – final report*, February 2006, pp. 56-57.

Connection and supplementary charges for Wholesale ADSL

Telstra has typically levied a range of supplementary charges associated with the supply of its wholesale ADSL services. These have included charges for connection, early termination, order reversals and speed upgrade requests, as well as other charges.

During the 2012-13 Wholesale ADSL FAD inquiry, the ACCC considered, and sought submissions on, which of these charges should be included in the FAD and at what level they should be set. The ACCC decided that a key subset of charges should be included in the FAD, namely the connection charges and early termination charges.

In the 2013 FAD, the ACCC set regulated charges three types of connections for which Telstra imposed charges. The ACCC noting the importance of including regulated charges as they would be faced by all access seekers in connecting new end-users. The ACCC included Telstra's early termination charges in the FAD but noted potential issues regarding the basis for the charges and the potential for competition concerns that may arise from their application (e.g. during migration to the NBN).²⁹

During the inquiry process, limited information was available to the ACCC regarding the work (and costs) associated with these activities and the reasonableness of the charges. In contrast to the ULLS/LSS connection and disconnection charges set in the 2011 FAD, the ACCC did not have information available to independently assess the level of the existing charges. As a result, the ACCC decided to set the charges at their existing levels (that is, those set by Telstra) but to reconsider them during the 2014 FAD inquiry.

Therefore, the ACCC is seeking submissions on the scope of supplementary charges included in the FADs for the Wholesale ADSL service, information regarding the work and costs associated with undertaking these activities, and views regarding the appropriate approach in setting these charges. It may be useful for parties to submit on how these activities compare with activities for other wholesale services (e.g. ULLS and LSS). The ACCC is also proposing to seek information from Telstra on these issues (as described in the previous section).

Connection charges for DTCS

The ACCC also sets the connection charges in relation to the DTCS service. These one off charges relate to the costs of connecting a customer to a service and aim to provide some investment certainty. These charges are set outside the regression model, used to determine the regulated price for the DTCS, because there is no significant relationship between these one off charges and recurring annual charges.

The ACCC considered it appropriate to set out various connection charges to account for the costs associated with different network interfaces and capacity. There are two separate DTCS connection charges one for SDH and Ethernet services. These charges are based on industry averages of connection charges for metropolitan and regional services. Connection charges were set for a single connection and did not account for discounts that may apply for contracts longer than one year. Discounts are left to commercial negotiation.

²⁹ ACCC, *Public inquiry to make a final access determination for the Wholesale ADSL service*, final report, May 2013, pp. 54-55.

Questions

9. Please comment on whether the ACCC's previous approach to setting connection and disconnection charges for the fixed line services, Wholesale ADSL and the DTCS remains appropriate. If not, please propose an alternative approach and explain why it would be more appropriate and how it would be implemented.
10. If you agree with maintaining the ACCC's previous approach to setting connection and disconnection charges, please provide any comments on the ACCC's proposal to update the contractor rates and other costs used in calculating these charges.
11. Please comment on the non-price terms and conditions associated with connection and disconnection charges, such as whether disconnections should still be made pursuant to the Telstra churn process or whether the terms around Telstra Managed Network Migrations policy are still appropriate?

4.2 Internal interconnect cable

The IIC is a twisted copper pair cable connecting an access seeker's equipment to Telstra's customer access network and is essential to an access seeker being able to obtain a ULLS or LSS from Telstra. More specifically, the ULLS and LSS allow an access seeker to use a Telstra copper pair from an end-user premises to a Telstra exchange building. The copper pair then terminates on a main distribution frame (MDF) and is jumpered across to the equipment side of the MDF from where an IIC takes the copper pair to the access seeker's intermediate distribution frame. In the case of the LSS (where an access seeker supplies the broadband component to the end-user and Telstra typically provides the voice component), a second IIC takes the voice component of the service back to Telstra's MDF where it can be jumpered to Telstra or another access seeker's equipment.

The ACCC currently regulates the IIC charge for seven access seekers using the ULLS and LSS through an arbitral determination which was made in November 2012. The final determination was made in response to an access dispute between Telstra and seven access seekers under the previous Part XIC regime. Since the arbitral determination will expire on 30 June 2014 and cannot be extended, the ACCC has proposed in its *Inquiry into varying the WLR, LCS, ULLS and LSS final access determination* to include a price terms for the IIC service in the ULLS and LSS FADs. On the 17 April 2014 the ACCC released a discussion paper for this variation inquiry, which noted its preliminary view that IIC price terms should be included in the ULLS and LSS FADs that are the same as those determined in the final arbitral determinations until the ACCC makes new FADs for these services.

The key area of dispute in the 2012 arbitrations was the appropriate level for the IIC charge. Access seekers submitted that the charge should be zero, citing a number of reasons, including: access seekers had already paid for the IIC and its installation; access seekers pay for its maintenance which has been almost nominal; and Telstra has fully recovered its costs associated with the IIC via costs included in charges for the declared services. Telstra submitted that charges for the IIC service were set at commercially agreed rates and were not set in accordance with any cost model. However, as part of the arbitration process, Telstra submitted an IIC cost model supporting its proposed charge.

In setting the IIC charge in its final determination, the ACCC made a number of adjustments to Telstra's IIC cost model to ensure consistency with the Fixed Line Services Model (FLSM), which is used to estimate the primary prices for the declared fixed line services. These adjustments included removing MDF costs from Telstra's model. As noted in the final determination, these assets are used in providing the declared services such as the ULLS and WLR (as well as other fixed line services, such as Telstra retail lines) and therefore the prices of these declared services should recover an appropriate share of costs associated with the MDF. Therefore, allowing Telstra to recover the MDF housing costs via the IIC charge would be likely to result in over-recovery or double-recovery of costs.

During the course of the arbitrations, Telstra submitted that the cost allocations for the ULLS and WLR do not allow it to recover MDF and MDF housing costs for the equipment side of the MDF. The ACCC noted in its final determination that the appropriate forum for debating the merits of these costs allocations was in the 2014 review of the fixed line services FADs for the next regulatory period.³⁰ The ACCC seeks comments on the methodology and approach to pricing the IIC service.

Questions

12. Is the ACCC's proposed approach in pricing these services still appropriate? Please provide reasons.
13. Is there an alternative approach to pricing these services that would be more appropriate? Please provide reasons.

4.3 Special linkage charges

Special linkage charges (SLCs) are additional charges levied by Telstra where it is required to build out new transmission infrastructure beyond its existing network boundary point so that an access seeker is able to deliver services to a customer premises.

The ACCC notes that Telstra indicated in its submission to the DTCS declaration inquiry that it is simplifying the SLCs by introducing better quote tools that also improve price certainty. The ACCC understands that Telstra is conducting a trial of the new measures.

Questions

14. Should the DTCS FAD address the issue of special linkage charges in relation to non-price terms and conditions? If so, what specific issues should be addressed?

4.4 Facilities access services

Facilities access services are used by access seekers to facilitate the effective use of declared and non-declared services. For example, facilities access services enable carriers to interconnect their network and equipment with other carriers' networks and equipment in order to provide telecommunication services to end-users. Without access and interconnection carriers, other than Telstra, would face difficulties in supplying competing telecommunication services. Access to facilities access services on reasonable terms and conditions is important to facilitate competition between Telstra and other carriers.

Telstra generally provides these services, which tend to fall into three broad categories:

- Telstra Equipment Building Access service (TEBA)—This commonly refers to space designated for access seeker use in Telstra's exchanges. It encompasses access to floor space and equipment racks or rack space. TEBA also includes access to cable trays and the IIC contained in them (IIC are discussed in section 4.2 above.) Power, security and air-conditioning are also commonly included in the definition of a TEBA service.
- External Interconnect Cable access service (EIC access service)—This commonly refers to access to cables that run from a point in an exchange building to a point outside that exchange building. This service may be required to use ULLS and LSS

³⁰ ACCC, *ULLS and LSS Access Disputes Chime Communications Pty Ltd / Telstra reasons for Final Determinations* November 2012, p. 26.

where access seeker equipment is located outside the exchange, such as in a street cabinet.

- Duct access service—This usually refers to access to Telstra’s network of ducts, tunnels, manholes and pits for the purpose of installing and operating access seeker cables and equipment. This could include ducts in which EICs are held and ducts holding transmission cables between exchanges within a city. This service could also include lead-in conduits which hold the cable connecting the consumer premises to the local exchange or cabinet.

Regulation of facilities access services

Access to telecommunication facilities is regulated under the Telecommunications Act and the CCA, both of which contain an obligation on owners or operators of facilities to provide access. Compliance with the facilities access obligation is a standard carrier licence condition under both Acts.³¹ There are three ways by which access seekers can obtain facilities access services on regulated terms and conditions, including price.

First, under Schedule 1 of the Telecommunications Act, there is a general obligation on owners and operators of facilities to provide access to facilities if requested to do so by another carrier. The obligation to provide access is, except in specific circumstances,³² broad in the sense that it covers most facilities used in the telecommunication industry to provide services.

Where carriers are unable to reach agreement on price and non-price terms, pursuant to the general obligation, or there is an access dispute, the ACCC is the default arbitrator. A determination made by the arbitrator can set terms and conditions for access to facilities, including pricing of access. However, a determination will only apply to the parties to the arbitration and prices cannot be set to apply retrospectively. Recent amendments to the Telecommunications Act mean that an arbitral determination will have no effect to the extent that it is inconsistent with an agreement in force between parties.³³

Under the Telecommunications Act, there is no mechanism by which the ACCC can determine up-front prices that could operate as a fall-back provision in the event that carriers cannot agree on access terms. The ACCC notes that during the declaration inquiries for the fixed line services and the DTCS, a number of access seekers submitted that the existing regulatory regime is not entirely effective, primarily because of the inability of the ACCC to determine up-front charges for facilities access services as a fall-back for access seekers in negotiations with Telstra. The ACCC received submissions that access seekers were paying excessive charges for these services.³⁴

Second, the ACCC has the power to declare facilities access services under Part XIC of the CCA.³⁵ Once a service is declared, a carrier or carriage service provider that provides the service must meet the standard access obligations set out in section 152AR. Declaring such services would allow the ACCC to set price and non-price terms and conditions through a FAD, which would be the terms and conditions by which the access provider would satisfy its standard access obligations in section 152AR(3). To date, the ACCC has not declared any facilities access services.

Third, the ACCC is able to regulate services that are related to the supply of already declared services. Section 152AR(5) provides that access providers of the declared service, that also own or control one or more facilities, must permit interconnection of those facilities for the purpose of enabling the supply of active declared services.³⁶ That is, there is an obligation to supply ancillary facilities access services.

³¹ Schedule 1 to the Telecommunications Act and section 152AZ of the CCA.

³² For example, where access to Part 5 underground facilities is not technically feasible (sub-clause 35(3)).

³³ Section 18(7), Part 3 of Schedule 1 to the Telecommunications Act.

³⁴ ACCC, *Fixed Services Review – Declaration Inquiry: Public inquiry into the fixed line services declarations*, Draft Report, December 2013, pp. 87-88; ACCC, *An ACCC Draft Report on the review of the declaration for the Domestic Transmission Capacity Service*, December 2013, pp. 45-46.

³⁵ Section 152AL(1)(b) of the CCA.

³⁶ Section 152AR(1)(5) of the CCA.

The ACCC can make terms and conditions in a FAD that relate to facilities access services that are ancillary to obtaining access to a declared service.³⁷ Such terms and conditions would set out how the interconnection is to occur, including matters relating to the timing and quality of the interconnection and fault handling. For example, conditions for access to TEBA space may be included in a FAD for a declared service such as the ULLS. TEBA facilities, such as rack space, are used for access to services provided by Telstra over its copper network, such as the declared ULLS. In order to utilise the ULLS, an access seeker would first acquire TEBA space in which to locate its exchange equipment. Telstra's standard access obligations require it to supply the active declared service, including interconnection of facilities—in this scenario, TEBA space. In this circumstance, regulated terms and conditions in a FAD would be related to Telstra's performance of its standard access obligation to provide interconnection of facilities.

The ACCC notes that access seekers have raised a number of issues regarding facilities access services in the recent declaration inquiries for the DTCS and fixed line services. Broadly, access seekers consider that the regulatory framework under the Telecommunications Act does not adequately deal with facilities access issues and have submitted that the ACCC should:

- set terms and conditions for access to facilities that relate to access to a currently declared service (that is, ancillary facilities access services)
- commence an inquiry to declare facilities access services.

The ACCC is also considering three disputes relating to the terms and conditions on which access to TEBA space and ducts is provided. The ACCC is aware that facilities access services will also be important as access seekers access NBN POIs, the majority of which are located in Telstra exchanges.

In the final reports for the fixed services and DTCS declaration inquiries, the ACCC noted access seeker concerns. The ACCC stated that it would consider whether regulation of certain facilities access services under Part XIC would promote the LTIE during the FAD inquiries for the DTCS and fixed line services. In doing so, the ACCC stated that it would take into account the existing regulatory regime established under the Telecommunications Act. The ACCC also indicated that it would consider and consult on regulating facilities access services that are ancillary to declared services through the FADs. Additionally, the ACCC stated that it would seek submissions on whether declaring any facilities access services would promote the LTIE and would take these submissions into account in informing any further decision regarding the commencement of a declaration inquiry for facilities access services.

Although it has not set terms and conditions relating to facilities access services previously, given the issues that have been raised in recent inquiries and processes by access seekers, the ACCC considers that it is appropriate to consider whether it is necessary to do so in order to promote the LTIE.

Questions

15. Which facilities access services are ancillary to currently declared services and should be regulated through the FADs for those services? Please provide:
 - a. a detailed description of each facilities access service that is ancillary to a declared service
 - b. an explanation of the nexus between the declared service and each facilities access service that make these facilities access services ancillary to declared services
 - c. how regulating these facilities access services in the FADs would be likely to promote the long term interests of end-users (LTIE).
16. Are there any other facilities access services (that are not acquired as ancillary to a declared service) that should be the subject of a declaration inquiry into facilities access services? Please provide:

³⁷ Section 152BC(3)(j) of the CCA.

- a. a detailed service description of the each facilities access service sufficient to precisely identify the service
- b. an explanation of how declaring these facilities access services would be likely to promote the LTIE.

4.5 Other supplementary prices

The ACCC notes that there may be other supplementary charges, related to acquiring declared services, other than those outlined above. The ACCC invites submissions on any additional supplementary charges for which stakeholders consider it would be in the LTIE to include regulated charges in the FADs, accompanied by an explanation of how setting regulated charges would promote the LTIE.

Questions

17. Are there any other supplementary charges relating to acquiring declared services that should be regulated through the FADs for those services? Please provide:
 - a. a detailed description of each supplementary charge
 - b. an explanation of how and why the supplementary charge is incurred in relation to the use of a declared service
 - c. how regulating this charge in the FADs would be likely to promote the LTIE
 - d. the materiality of the charge in relation to the supply of services to end-users using the relevant declared service.

Appendix A: Legislative framework for final access determinations

This section sets out the relevant legislative framework in relation to FADs and the approach the ACCC will take in applying the legislative provisions.

Content of an FAD

Section 152BC of the CCA specifies what an FAD may contain. It includes, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the standard access obligations provided for in the CCA and terms and conditions of access to a declared service. An FAD may make different provisions with respect to different access providers or access seekers.³⁸

Fixed principles provisions

An FAD may contain a fixed principles provision, which allows a provision in an FAD to have an expiry date after the expiry date of the FAD.³⁹ Such a provision would allow the ACCC to 'lock-in' a term so that it would be consistent across multiple FADs.

Varying an FAD

Section 152BCN allows the ACCC to vary or revoke an 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.⁴⁰

Commencement and expiry provisions

Section 152BCF of the CCA sets out the commencement and expiry rules for FADs. An 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.⁴¹ An FAD may be 'backdated' such that it comes into force on a date prior to the making of the determination.⁴² There are, however, limitations on the extent of backdating that is permitted.⁴³

Criteria to consider when making an FAD

The ACCC must have regard to the criteria specified in subsection 152BCA(1) of the CCA when making an FAD. These criteria 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

³⁸ Subsection 152BC(5) of the CCA.

³⁹ Section 152BCD of the CCA.

⁴⁰ Subsection 152BCN(4) of the CCA.

⁴¹ Subsection 152BCF(6) of the CCA.

⁴² Subsection 152BCF(2) of the CCA.

⁴³ Subsections 152BCF(2A), 152BCF(3), 152BCF(3A), 152BCF(4) and 152BCF(4A) of the CCA.

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

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

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

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

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

The first criterion for the ACCC to consider when making an FAD is 'whether the determination will promote the long-term interests of end-users 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.⁴⁴ This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for making FADs for the declared fixed line services.

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.⁴⁵

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

⁴⁴ 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.

⁴⁵ ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provision of Part XIC of the Trade Practices Act, July 1999*, p. 33.

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.⁴⁶

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.⁴⁷

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.⁴⁸

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.⁴⁹

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

⁴⁶ Seven Network Limited (No 4) [2004] ACompT 11 at [120].

⁴⁷ Subsection 152AB(2) of the CCA.

⁴⁸ 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].

⁴⁹ Section 152AB(8) of the CCA.

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, and
 - 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
- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the NBN) by which services are, or are likely to become, capable of being supplied, and for the purposes of determining the incentives for investment, regard must be had to the risks involved in making the investment.⁵⁰

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 least 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)
- dynamic efficiency – this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

On the issue of efficient investment, the Australian Competition 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.⁵¹

...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.⁵²

...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.⁵³

⁵⁰ Sections 152AB(6) and (7A) of the CCA.

⁵¹ *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

⁵² *Ibid.* at [164].

⁵³ *Ibid.*

Legitimate business interests (s. 152BCA(1)(b))

The ACCC must take into account ‘the legitimate business interests’ of the carrier or CSP when making an 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.⁵⁴ The ACCC is of the view that the concept of ‘legitimate business interests’ in relation to FADs 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.⁵⁵

The Australian Competition Tribunal has taken a similar view of the expression ‘legitimate business interests’.⁵⁶

Persons who have a right to use (s. 152BCA(1)(c))

The ACCC must have regard to ‘the interests of all persons who have the right to use the service’ when making an FAD.

The ACCC considers that this criterion requires it to have regard to the interests of access seekers. The Australian Competition Tribunal has also taken this approach.⁵⁷ 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.⁵⁸

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 custom 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.⁵⁹

However, the ACCC does not consider that this criterion 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 criteria.

Direct costs of providing access (s. 152BCA(1)(d))

The ACCC must have regard to ‘the direct costs of providing access to the declared service’ when making an 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.

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

⁵⁴ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

⁵⁵ ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

⁵⁶ *Telstra Corporation Limited* [2006] ACompT 4 at [89].

⁵⁷ *Telstra Corporation Limited* [2006] ACompT 4 at [91].

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

Australian Competition Tribunal's approach.⁶⁰ A contribution to indirect costs can also be supported by other criteria.

However, the criterion does not extend to compensation for loss of any 'monopoly profit' that occurs as a result of increased competition.⁶¹

The ACCC also notes that the Australian Competition Tribunal has considered the direct costs criterion 'is concerned with ensuring that the costs of providing the service are recovered.'⁶² The Australian Competition 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 criterion.⁶³

Extensions or enhancements of capability (s. 152BCA(1)(e))

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

In the 1997 Access Pricing Principles, the ACCC stated:

This criterion 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.⁶⁴

Safe and reliable operation (s. 152BCA(1)(f))

The ACCC must 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 an FAD.

The ACCC considers that this matter involves consideration of whether terms of access 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, it is of the view that:

...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.⁶⁵

Economically efficient operation (s.152BCA(1)(g))

The ACCC must consider 'the economically efficient operation of a carriage service, a telecommunications network facility or a facility' when making an FAD.

The ACCC has 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

⁶⁰ Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

⁶¹ 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.

⁶² *Telstra Corporation Limited* [2006] ACompT 4 at [92].

⁶³ *Telstra Corporation Limited* [2006] ACompT 4 at [139].

⁶⁴ 1997 Access Pricing Principles, p. 11.

⁶⁵ ACCC, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

productive, allocative and dynamic efficiency. The ACCC has also noted – in the context of resolving access disputes - that the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.⁶⁶

Consistent with the approach taken by the Australian Competition Tribunal, the ACCC considers that in having regard to this matter, 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.⁶⁷

Other eligible services (s. 152BCA(2))

Subsection 152BCA(2) provides that, in making an AD 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,⁶⁸ 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 to the Bill that introduced this provision states that this provision is intended to ensure that the ACCC, in making an AD, does not consider the declared service in isolation, but also considers other relevant services.⁶⁹ As an example, the Explanatory Memorandum states:

...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.⁷⁰

Any other relevant matters (s. 152BCA(2))

The ACCC may take into account any other matters that it thinks are relevant when making an FAD. For the wholesale ADSL FAD, the ACCC considers that the relevant considerations will likely be captured under the range of matters to which the ACCC must have regard.

⁶⁶ Access Dispute Guidelines, p. 57.

⁶⁷ *Telstra Corporation Limited* [2006] ACompT at [94]-[95].

⁶⁸ 'Eligible service' has the same meaning as in section 152AL of the CCA.

⁶⁹ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

⁷⁰ *Ibid.*