

Appendix B: Legislative framework for final access determinations

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

Content of a final access determination

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

A final access determination may, amongst other things, make different provisions with respect to different access providers or access seekers.¹

Matters to consider when making a final access determination

The ACCC must have regard to the matters specified in subsection 152BCA(1) of the CCA when making a final access determination. These matters are:

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

The subsection 152BCA(1) matters mirrors the repealed subsection 152CR(1) matters that the ACCC was required to take into account in making a final determination in an access

¹ Subsection 152BC(5) of the CCA.

dispute. The ACCC interprets the subsection 152BCA(1) matters in a similar manner to the approach taken in access disputes.

Subsection 152BCA(2) provides that where an access provider of a declared service also supplies one or more other eligible services,² the ACCC may take into account the characteristics of, costs and revenues associated with, and demand for, the other eligible service(s) when making a final access determination.

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

The ACCC's views on how the matters in section 152BCA should be interpreted for the purposes of carrying out the final access determination processes are set out below.

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

The first matter for the ACCC to consider when making a final access determination 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.³ This approach to the long-term interests of end-users has also been used by the ACCC in making determinations in telecommunication access disputes.

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.⁴

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

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

End-users: "end-users" include actual and potential [users of the service]...

Interests: the interests of the end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings. ...[T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case ...

Long-term: the long-term will be the period over which the full effect of the ... decision will be felt. This means some years, being sufficient time for all players (being

² As defined in section 152AL of the CCA.

³ ACCC, [Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act](#), August 2016, in particular pp 28–31

⁴ ACCC, [Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act](#), August 2016, p 28,

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.⁵

To consider the likely impact of particular terms and conditions on the long-term interests of end-users, the CCA requires the ACCC to have regard to whether the terms and conditions are likely to result in the achievement of the following objectives:

- promoting competition in markets for carriage services and services supplied by means of carriage services (listed services)
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in:
 - the infrastructure by which listed services are supplied, and
 - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.⁶

Promoting competition

In assessing whether particular terms and conditions will promote competition, the ACCC analyses the relevant market in which the declared services are supplied (retail and wholesale) and considers whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.⁷ 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

Any-to-any connectivity is achieved if, and only if, each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service, whether or not the end-users are connected to the same telecommunications network.⁸

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

Economically efficient use of and economically efficient

⁵ *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

⁶ Subsection 152AB(2) of the CCA.

⁷ 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 Comp T 3 at [92]; *Telstra Corporation Limited* [2006] A Comp T4 at [97], [149].

⁸ Subsection 152AB(8) of the CCA. Pursuant to subsection 152AB(4) of the CCA, in determining the extent to which a particular thing (in this case a final access determination) is likely to result in the achievement of the objective of promoting competition in markets for listed services, regard must be had to the extent to which the thing will remove obstacles to end-users of listed services gaining access to listed services

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 the following matters:⁹

- 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 that would be 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
- In determining incentives for investment, regard must be had to the risks involved in making the investment.¹⁰
- The objective of encouraging the ‘economically efficient use of and economically efficient investment in ... infrastructure’ requires an understanding of the concept of economic efficiency. Economic efficiency consists of three components:
- productive efficiency – this is achieved where individual firms produce the goods and services that they offer at efficient cost
 - allocative efficiency – this is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs), and
 - dynamic efficiency – this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

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

... An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.¹¹

... 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

⁹ Subsection 152AB(6) of the CCA.

¹⁰ Subsection 152AB(7A) of the CCA.

¹¹ *Telstra Corporation Ltd (No. 3)* [2007] AComp T 3 at [159].

investment) by the access provider in the infrastructure necessary to provide the declared service.¹²

... 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.¹³

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

The second matter requires the ACCC to consider ‘the legitimate business interests’ of the carrier or carrier service provider when making a final access determination.

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.¹⁴ The ACCC is of the view that the concept of ‘legitimate business interests’ in relation to final access determinations 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.¹⁵

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.¹⁶

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

The third matter requires the ACCC to consider ‘the interests of all persons who have the right to use the service’ when making a final access determination.

The ACCC considers that this matter requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.¹⁷ 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.¹⁸

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.¹⁹

¹² *Telstra Corporation Ltd (No. 3)* [2007] AComp T 3 at [164].

¹³ *Telstra Corporation Ltd (No. 3)* [2007] AComp T 3 at [176].

¹⁴ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p 56.

¹⁵ ACCC, *Access pricing principles – telecommunications*, July 1997 (1997 Access Pricing Principles), p 9.

¹⁶ *Telstra Corporation Limited* [2006] ACompT 4 at [89].

¹⁷ *Telstra Corporation Limited* [2006] ACompT 4 at [91].

¹⁸ *Telstra Corporation Limited* [2006] ACompT 4 at [91].

¹⁹ *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [262].

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

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

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

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 Tribunal's approach in an undertaking decision.²⁰ A contribution to indirect costs can also be supported by other matters.

However, the matter does not extend to compensation for loss of any 'monopoly profit' that occurs as a result of increased competition.²¹

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs matter 'is concerned with ensuring that the costs of providing the service are recovered'.²² The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in several ways and that adopting any of those approaches would be consistent with this matter.²³

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

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

In the 1997 access pricing principles, the ACCC stated that this matter:

requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.²⁴

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

²⁰ Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

²¹ 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.

²² *Telstra Corporation Limited* [2006] ACompT 4 at [92].

²³ *Telstra Corporation Limited* [2006] ACompT 4 at [139].

²⁴ ACCC, [Access Pricing Principles - Telecommunications, a guide](#) p 11, July 1997.

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

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

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

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

...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.²⁵

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

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

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

The ACCC noted in the access dispute guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the long-term interests of end-users. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.²⁶

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

- retail services provided by access seekers using the access provider’s services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.²⁷

Subsection 152BCA(2) – other eligible services

Subsection 152BCA(2) provides that, in making a final access determination that applies to a carrier or carriage service provider who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,²⁸ take into account:

²⁵ ACCC, *Final determination – Model Non-price Terms and Conditions*, November 2008, p 8.

²⁶ ACCC, [Resolution of telecommunications access disputes—a guide](#), p 30.

²⁷ Telstra Corporation Limited [2006] ACompT4 at [94]-[95].

²⁸ ‘Eligible service’ has the same meaning as in section 152AL of the CCA.

- 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 stated that this provision is intended to ensure that the ACCC, in making a final access determination, does not consider the declared service in isolation, but also considers other relevant services.²⁹ As an example, the Explanatory Memorandum stated:

... 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.³⁰

Subsection 152BCA(3) – any other relevant matters

This subsection states the ACCC may consider any other matters that it thinks are relevant when making a final access determination.

We consider that providing regulatory pricing certainty in a timely and efficient manner in making the access determination would be a relevant consideration. Section 152BCB - restrictions on access determinations

Section 152BCB imposes certain restrictions on the ACCC's ability to make an access determination.

More specifically, the ACCC must not make an access determination that would have any of the following effects:

- preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements, measured at the time when the access seeker made a request in relation to the service under section 152AR or 152AXB of the CCA,
- preventing a carrier or carriage service provider from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements, measured at the time when the access seeker made a request in relation to the service under section 152AR or 152AXB of the CCA,
- preventing a person from obtaining, by exercise of a pre-determination right, a sufficient level of access to the declared service to be able to meet their actual requirements,

²⁹ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p 178.

³⁰ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p 178.

- depriving any person of a protected contractual right,
- resulting in an access seeker becoming the owner (or one of the owners) of any part of a facility without the consent of the owner of the facility,
- requiring a person (other than an access seeker) to bear an unreasonable amount of costs of:
 - extending or enhancing the capability of a facility, or
 - maintaining extensions to or enhancement of the capability of a facility,
- requiring a carrier or carriage service provider to provide an access seeker with access to a declared service if there are reasonable grounds to believe that:
 - the access seeker would fail, to a material extent, to comply with the terms and conditions on which the carrier or provider provides, or is reasonably likely to provide, that access; or
 - the access seeker would fail, in connection with that access to protect the integrity of a telco network or to protect the safety of individuals working on, or using services supplied by means of, a telco network or a facility.

The ACCC is also unable to make an access determination (under section 152BCB(3)) that is inconsistent with any of the standard access obligations that are, or will be, applicable to a carrier or carriage service provider.

Section 152BCD - fixed principles provisions

Section 152BCD of the CCA specifies that a final access determination may contain a fixed principles provision, which allows a provision in a final access determination to have an expiry date that is after the expiry date of the final access determination itself. Such a provision effectively allows the ACCC to 'lock-in' a term so that it would be consistent across consecutive final access determinations.

Section 152BCF - commencement and expiry provisions

Section 152BCF of the CCA sets out the commencement and expiry rules for final access determinations.

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

Section 152BCN - varying final access determinations

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

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