



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Christmas Island Binding Rules of Conduct (Vocus)

Explanatory statement

19 December 2018

Australian Competition and Consumer Commission

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1. Introduction

1.1. Purpose

This explanatory statement accompanies the *Christmas Island Binding Rules of Conduct (Vocus)* (the rules).

2. The ACCC binding rules of conduct

2.1. Regulatory framework

The Australian Competition and Consumer Commission (ACCC) has the power to make binding rules of conduct (BROC) specifying terms and conditions in relation to the supply of a specified declared service.

Section 152BD of the *Competition and Consumer Act 2010* (CCA) provides that the Commission may make written rules: specifying terms and conditions of access a carrier or carriage service provider is to comply with in relation to a specified declared service; if the Commission considers that there is an urgent need to do so. This is referred to as binding rules of conduct.

The binding rules of conduct may be limited to:

- a particular carrier or service provider or class of carrier or provider, or
- a particular access seeker or class of access seeker.

Under section 152BD(6) of the CCA the Commission is not required to observe any requirements of procedural fairness in relation to the making of the binding rules of conduct.

Section 152BDAA provides that in making the rules, the Commission must take into account:

- whether the rules will promote the long term interests of end-users (LTIE)
- the legitimate business interests of the access provider and its investments in the facilities used to supply the declared service
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

Under section 152BDAA(4) the Commission is not required to take a matter into account if it is not reasonably practicable to do so, having regard to the urgent need to make the BROOC.

Further, section 152BDAA(5) provides that for the purposes of taking a particular matter into account, the Commission is not required to obtain information, or further information, that is not already in the possession of the Commission if it is not reasonably practicable for the Commission to do so, having regard to the urgent need to make the BROOC.

ACCC binding rules of conduct can commence at any date after they are made, but they can only be in force for a limited time. Under section 152BDC the rules come into force on the day specified in the rules and must expire within 12 months of the date the rules were made.

3. Background

3.1. The DTCS

The Domestic Transmission Capacity Service (DTCS) is a type of high capacity transmission service used to carry data between telecommunications network nodes. Transmission services are an input essential for the supply of most of the telecommunications services that are acquired by consumers, businesses and government (end-users).

The ACCC regulates (declares) the DTCS pursuant to section 152AL(3) of the CCA, being satisfied that declaration will promote the long term interests of end-users.

Declaration of the DTCS implies that a carrier is subject to Standard Access Obligations (SAOs) and must therefore provide access to the DTCS under terms set by the ACCC.

Terms of access to a declared service are set out in a final access determination (FAD). The current DTCS declaration expires on 31 March 2019 and the DTCS FAD expires on 31 December 2019.

3.2. Vocus' request for ACCC binding rules of conduct

On 18 October 2018 Vocus Communications (Vocus) sent a letter to the ACCC requesting that the ACCC make binding rules of conduct setting terms of access to a transmission service it intends to provide between Perth (WA) and the external territory of Christmas Island (the Vocus service). Vocus advised the service would be provided over a high capacity subsea cable Vocus has built between Australia and Singapore with a branch connecting with Christmas Island.

In its letter Vocus considered that the service may fall under the scope of the DTCS declaration and therefore could be subject to access obligations under terms set in the DTCS FAD. Further, Vocus anticipated that the regulated price for access to DTCS services from Perth to Christmas Island (as set out in the current FAD) would be significantly below the cost of providing the service. Vocus considered that if it was required to provide regulated access at the current DTCS rates it would not recover the cost of providing the service to Christmas Island. Vocus provided evidence to support its claim.

Vocus submitted that it was planning to commence services to Christmas Island in early 2019 and, as such, the need for regulated prices to Christmas Island that

account for the higher costs or providing services was urgent. It requested that, given the urgency of the matter, the ACCC address the disparity between costs and regulated prices by way of a BROCC.

4. ACCC decision

4.1. Whether a BROCC is warranted

The ACCC has concluded that the Vocus service to Christmas Island falls within the scope of the DTCS service description and it is therefore subject to Standard Access Obligations under the terms of the DTCS FAD.

The ACCC has also reached the conclusion that the prices set by the DTCS FAD would not allow Vocus to recover the cost of providing the service plus a normal return on its investment. The ACCC has acknowledged that in those circumstances compliance with access obligations would affect Vocus' legitimate business interests.

The ACCC would normally address a problem identified in relation to the terms of access to a regulated service by way of a public inquiry to vary the relevant access determination (FAD).

In this case the ACCC has concluded that it would not be possible to complete a public inquiry into the variation of the DTCS FAD before the Vocus service commences operation.

To provide a temporary remedy to address the FAD pricing, the ACCC has decided to make a BROCC setting interim terms of access that will apply to the Vocus service, until new prices are determined in the course of a public inquiry.

4.2. Matters the ACCC has considered in making the BROCC

In making the rules, the ACCC must take into account a number of matters. However, the ACCC is not required to take a matter into account if it is not reasonably practicable to do so, having regard to the urgent need to make the BROCC. The ACCC has set the interim price terms under the BROCC in a way that will allow access to the service but also allow Vocus to recover the costs of the service (to the extent that can be determined with the limited information available to the ACCC). The ACCC has considered:

Whether the rules will promote the long term interests of end-users

The ACCC has set interim prices for access to the Vocus service that provide a temporary remedy to address the disparity between Vocus' costs in providing the service and current pricing under the DTCS FAD. The ACCC considered that below-cost regulated prices would:

- distort competition in related downstream markets
- prevent the efficient allocation of capacity on the subsea cable, and
- remove incentives for the access provider to make further investment in the operation, maintenance and upgrade of the submarine cable.

The ACCC considers that prices that allow the access provider to recover the costs of providing the service will promote competition in related downstream markets and will encourage the economically efficient use of, and investment in, infrastructure.

The ACCC has set the price terms in the BROC in a way that will enable access seekers to compete in downstream markets, in this case the provision of data services to larger business and government providers (and potentially retail voice and data services) on Christmas Island.

Prices that reflect the cost of providing the service will also encourage the economically efficient use of the Vocus infrastructure, by allocating the transmission capacity in the cable to its highest-value use.

The ACCC also notes that by having access to wholesale transmission services at efficient prices, retail service providers may find incentives to further invest in the expansion and/or upgrade of other network infrastructure in the island.

The legitimate business interests of the access provider and its investments in the facilities used to supply the declared service

In setting regulated prices for the Vocus service the ACCC has taken into account that the access provider must be able to recover the costs incurred in providing the service plus a normal commercial return on its investment. The ACCC concluded that the terms in the BROC will allow Vocus to recover the costs and to obtain a reasonable return on its investment, until permanent terms are determined in a public inquiry.

The interests of all persons who have rights to use the declared service

In determining the terms in the BROC the ACCC has aimed to strike a balance between the preservation of the access seeker's legitimate business interests and the need of access seekers to acquire the wholesale input at a rate that allows them to compete in related retail and wholesale markets.

The Vocus service has monopoly characteristics. As noted, the Vocus service falls within the DTCS service description which has been declared by the ACCC. The purpose of the declaration is to facilitate access to the monopoly infrastructure in order to promote competition in downstream markets.

The direct costs of providing access to the declared service

The costs incurred in providing the service have been a primary consideration in setting the terms for access in the BROC. In determining the interim pricing under this BROC the ACCC relied on:

- cost information provided by Vocus
- publicly available information on prices for services on similar undersea cables, and
- the costs of similar undersea cable systems.

Cost-recovery charges determined the lower boundary in the range of regulated prices considered by the ACCC.

The economically efficient operation of a carriage service, a telecommunications network or a facility

The ACCC concluded that regulated charges in the current DTCS FAD would likely lead to an inefficient allocation of the capacity of the subsea cable connecting Christmas Island. This is because inefficiently low prices would provide and

advantage for the access seeker, which in turn would impair the access provider's ability to compete in the related downstream market.

The ACCC has set interim regulated prices that encourages efficient use of the new infrastructure and associated facilities.

Conclusion

In making a BROC in relation to the Vocus service the ACCC has determined it is appropriate to take into account the direct costs incurred in providing the service as the primary consideration. This is to address the inconsistency between current DTCS FAD prices and the costs incurred in providing the Vocus service to Christmas Island.

By setting interim access terms that align with the costs of providing the service, the ACCC considers the BROC will:

- promote the long term interests of end-users
- recognise the legitimate business interests of the access provider and its investments in the facilities used to supply the declared service
- acknowledge the interests of all persons who have rights to use the declared service
- account for the direct costs of providing access to the declared service ,and
- encourage the economically efficient operation of the service.

The ACCC will conduct a public inquiry to vary the DTCS FAD following the making of the BROC as required under s152BCN(9) of the CCA to account for DTCS services to Christmas Island.

5. Formula to determine the price of the Vocus Service

The *Christmas Island Binding Rules of Conduct (Vocus)* set out a method to ascertain the regulated price for a DTCS between any point in Australia (A-end of the service) and the Christmas Island ESA (B-end of the service).

As the Vocus service is provided via Perth, (Shenton Park) WA, the ACCC has decided that the total price for the service should be determined as the sum of two parts, as per the following formula:

$$\textit{The price for the Vocus service} = \textit{DTCS FAD price}_{A-S} + 4.6 \times \textit{DTCS FAD price}_{2600}$$

Where:

- **DTCS FAD price**_{A-S} is the price that will result from the application of the *2016 DTCS Pricing model* to a service of the required data rate, provided over a route of distance equal to the radial distance between the A-end of the service and the location of the Vocus datacentre in Shenton Park, Western Australia.
- **DTCS FAD price**₂₆₀₀ is the price that will result from the application of the *2016 DTCS Pricing model* to a service of the required data rate, provided over a regional route for a notional distance of 2600km.