



Australian  
Competition &  
Consumer  
Commission

# **Public inquiry to make an access determination for the local bitstream access service**

**Discussion paper**

**February 2012**



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## Contents

Executive Summary .....	1
1 Introduction.....	2
2 Consultation process .....	4
3 Nature of services provided .....	5
4 Methodology for pricing LBAS.....	6
5 Duration of access determination.....	7
6 Non-price terms and conditions .....	8
7 Summary of questions on which the ACCC seeks views .....	9
Appendix A: LBAS service description .....	11
Appendix B: Legislative framework for access determinations .....	12

## Executive Summary

This discussion paper commences the Australian Competition and Consumer Commission's (ACCC) public inquiry into making a final access determination (FAD) for the local bitstream access service (LBAS). Because the LBAS is a newly declared service, the ACCC does not currently have detailed information regarding the services being offered. This discussion paper is therefore preliminary in nature, focusing on the issues to be covered in the FAD and to seek information from industry regarding the services offered and the terms on which they are offered.

The ACCC is required to declare a Layer 2 bitstream service (hereafter referred to as LBAS) by new provisions in the *Competition and Consumer Act 2010* (CCA).<sup>1</sup> The decision to declare the LBAS was made on 22 February 2012. The CCA also requires that the ACCC commence a public inquiry into making an FAD within 30 days after the decision to declare a service.<sup>2</sup>

An FAD sets base terms and conditions of access to a declared service. If an access seeker cannot agree with an access provider on terms and conditions of access, the access seeker can rely on the FAD. However, if the parties come to a commercial agreement, that agreement prevails over the FAD to the extent of any inconsistency.

The ACCC is seeking submissions on the content of the FAD for the LBAS. Submissions will be accepted until 23 March 2012.

The ACCC is seeking information on the following issues:

- the nature of the current services that may be captured by the LBAS declaration, particularly the location and extent of these services and the commercial terms and conditions under which they are supplied,
- the appropriate methodology for pricing the LBAS or suggested pricing for the LBAS,
- the appropriate regulatory period for the LBAS FAD, and
- the non-price terms and conditions that should be included in the LBAS FAD.

Once the ACCC has considered any submissions that it receives, the ACCC will issue a draft FAD for further consultation with industry. At the end of this process, the ACCC will issue the final FAD.

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<sup>1</sup> Subsection 152AL(3C) of the CCA. Note that references to the CCA are references to those acts as amended by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*.

<sup>2</sup> Subsection 152BCI(1) of the CCA.

# 1 Introduction

This discussion paper commences a public inquiry under Part 25 of the *Telecommunications Act 1997* (Telco Act) into making a final access determination (FAD) under section 152BC of the *Competition and Consumer Act* (CCA) for the declared local bitstream access service (LBAS). The FAD will provide a base set of terms and conditions that access seekers can rely on if they are unable to come to a commercial agreement with an access provider for access to the LBAS.

The paper seeks submissions on the content of the LBAS FAD, particularly on:

- price terms for access to the LBAS, and
- non-price terms for access to the LBAS.

After considering submissions on the discussion paper, the Australian Competition and Consumer Commission (ACCC) will publish a draft FAD for public comment before making an FAD.

This discussion paper marks the beginning of the ACCC's inquiry into the terms and conditions on which the LBAS service is offered. As such, it is a preliminary document whose main purpose is to seek further information from industry.

## 1.1 Legislative framework for final access determinations

Under section 152BCI(1) the ACCC is required to commence a public inquiry into a proposal to make an access determination for any newly declared service. The public inquiry must commence within 30 days after the decision to declare the service is made.

Pursuant to this requirement, this discussion paper commences a public inquiry under Part 25 of the Telco Act into making an FAD for the declared LBAS under section 152BC of the CCA.

As indicated above, an FAD provides a base set of terms and conditions. If parties come to an agreement on terms and conditions of access, their access agreement will prevail over the FAD to the extent of any inconsistency.<sup>3</sup>

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

- whether the determination will promote the long-term interests of end users (LTIE) of carriage services or services supplied by means of carriage services
- 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
- 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

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<sup>3</sup> Section 152BCC of the CCA.

- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

The ACCC may also take into account any other matters that it thinks are relevant when making an FAD.<sup>4</sup> Further detail on the new access regime and criteria for making FADs can be found in Appendix B of this discussion paper.

Compliance with an FAD is both a carrier licence condition and a service provider rule.<sup>5</sup> 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.<sup>6</sup> Private action to enforce an FAD may also be taken in the Federal Court.<sup>7</sup>

## 1.2 Background of the local bitstream access service

The ACCC made the decision to declare the LBAS on 22 February 2012. The LBAS is a Layer 2 bitstream service and is declared under subsection 152AL(3) of the CCA. By declaring a service, the ACCC is able to regulate access to that service. A declared service is subject to the standard access obligations, which require that an access provider must:

- supply the service to an access seeker on request,
- ensure that the quality and fault handling of the service provided to the access seeker is equivalent to that which it provides itself, and
- allow interconnection.<sup>8</sup>

As part of the ‘level playing field arrangements’ introduced into the CCA and the Telco Act by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011* (NBN Access Arrangements Act), the ACCC is required to declare a Layer 2 bitstream service.<sup>9</sup> The LBAS declaration will take effect when the relevant provisions of the NBN Access Arrangements Act commence. The latest date that these provisions may commence is 13 April 2012.

The service description for the LBAS can be found in Appendix A. Further information regarding this service can be found in the ACCC’s *Layer 2 bitstream service description: Final Report* (February 2012) on the ACCC’s website.<sup>10</sup>

<sup>4</sup> Subsection 152BCA(3) of the CCA.

<sup>5</sup> Sections 152BCO and 152BCP of the CCA.

<sup>6</sup> Section 570 of the Telco Act.

<sup>7</sup> Section 152BCQ of the CCA.

<sup>8</sup> Section 152AR of the CCA.

<sup>9</sup> Subsection 152AL(3C) of the CCA. Note that references to the Telco Act and the CCA are references to those acts as amended by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*.

<sup>10</sup> See: <http://www.accc.gov.au/content/index.phtml/itemId/1002378>.

## 2 Consultation process

The ACCC is required to commence a public inquiry into making an FAD within 30 days after declaring a service.<sup>11</sup> Once a public inquiry has commenced, the ACCC must make a decision on making an FAD within six months. This period may be extended by a further six months if the ACCC explains the reasons for the extension.<sup>12</sup>

The ACCC requests written submissions to this discussion paper from interested parties before 5.00 pm on **23 March 2012**.

The ACCC encourages industry participants, other stakeholders and the general public to make submissions to the ACCC to assist it in determining an FAD for the LBAS. The ACCC invites submissions on the specific issues identified in this discussion paper, the statutory criteria the ACCC must apply under subsection 152BCA(1) of the CCA, and any other matters that respondents consider relevant.

After considering submissions on the discussion paper, the ACCC will publish a draft FAD for public comment before making an FAD for the LBAS.

To foster an open, informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. If interested parties wish to submit commercial-in-confidence material as part of their submission to the ACCC, parties should submit both a public and 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-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC website:

<http://www.accc.gov.au/content/index.phtml/itemId/846791>.

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format, which allows the submission text to be searched.

Please forward submissions to [accessdeterminations@acc.gov.au](mailto:accessdeterminations@acc.gov.au) by **23 March 2012**.

For further information, please contact:

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<sup>11</sup> Subsection 152BCI(1) of the CCA.

<sup>12</sup> Section 152BCK of the CCA.

### 3 Nature of services provided

The ACCC has recently made the decision to declare the LBAS and published a service description for the service. The ACCC is required to declare a Layer 2 bitstream service, which it described as the local bitstream access service, by the new subsection 152AL(3C) of the CCA.<sup>13</sup> Within 30 days after making the decision to declare the LBAS, the ACCC must commence a public inquiry into making an FAD. This section outlines the services that may be captured by the LBAS declaration and seeks submissions on the nature of services currently being provided.

The declaration captures all Layer 2 bitstream services that will be offered in fulfilment of the new Parts 7 and 8 of the Telco Act, known as the level playing field provisions. Those parts require that providers of ‘new’ fixed line networks that are capable of a transmission rate of 25 Megabits per second (Mbs) must supply a Layer 2 bitstream service and must only supply services at a wholesale level.<sup>14</sup> These networks are known as designated superfast telecommunications networks.<sup>15</sup>

The level playing field legislation envisages that a network owner will sell access to its fixed line network (at Layer 2 of the OSI model) to retail service providers (RSPs) who will then sell products to end-users. The Explanatory Memorandum states that the level playing field provisions are designed:

to ensure that other providers of superfast broadband networks in Australia can provide to consumers outcomes similar to those available on the NBN and ensure that NBN Co operates on a more level regulatory playing field to assist it to achieve the range of objectives for which it has been established.<sup>16</sup>

Because this is a newly declared service and the networks under consideration will have been built or upgraded after 1 January 2011, the ACCC seeks information from industry regarding the nature of the market for this service.

*Questions on which the ACCC seeks views:*

- 1) Which currently operational networks are designated superfast telecommunications networks under section 152AGA of the CCA? Who operates these networks?
- 2) What types of access technologies are used in these networks? Fibre, hybrid fibre-coaxial (HFC), copper?
- 3) How many customers do these designated superfast telecommunications networks serve? How many customers can they potentially serve?
- 4) What geographic area do these designated superfast telecommunications networks serve?
- 5) Do these networks currently (as at February 2012) offer wholesale access? If so, at what network layer and under what terms?

<sup>13</sup> Subsection 152AL(3C) of the CCA was inserted by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*. Subsection 152AL(3C) will commence on 13 April 2012 at the latest.

<sup>14</sup> ‘New’ refers to networks that are built or upgraded after 1 January 2011 so that they are capable of a transmission rate of 25 Mbs, see sections 141 and 143 of the Telco Act.

<sup>15</sup> See section 152AGA of the CCA.

<sup>16</sup> Revised Explanatory Memorandum, *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011*, p. 166.



6) On what terms do/did these networks offer retail services to end-users?

## 4 Methodology for pricing LBAS

This section outlines issues relating to the pricing of the LBAS. The CCA requires that an access determination contain terms and conditions relating to price or a method of ascertaining price.<sup>17</sup> Because the LBAS is a new service, the ACCC has little information as to the current pricing of these types of services. The ACCC seeks submissions from interested parties on what is an appropriate pricing methodology for the LBAS.

A possible price or a pricing methodology of the LBAS will need to be assessed against the criteria in subsection 152BCA(1) of the CCA. The criteria include, most relevantly for the consideration of pricing, whether the determination will promote the long-term interests of end-users, the legitimate business interests of the provider, and the direct costs of providing access. The criteria are described in further detail in Appendix B of this paper.

*Questions on which the ACCC seeks views:*

- 7) What are the access provider's costs in providing the LBAS?
- 8) Do costs vary depending on access medium, e.g. fibre vis a vis HFC? If so, should regulated prices vary between different access mediums?
- 9) Do costs vary depending on the size and/or location of the designated superfast telecommunications network? If so should regulated prices vary depending on those factors?

### Current industry pricing structure

As the LBAS is a new service, the ACCC does not have detailed information on the pricing structure that is used in the industry for this service or for any services such as wholesale fibre services. The ACCC is interested in the commercial arrangements of industry and the applicability of these arrangements to regulated pricing.

*Questions on which the ACCC seeks views:*

- 10) How are commercial prices for the LBAS or like services structured?
- 11) Are these prices differentiated by port speed? By download quota? If so, how?
- 12) Do these prices include any backhaul component?
- 13) Do retail service providers need to purchase anything besides access to the customer access line to provide a customer with services? If so, what products need to be purchased and how are the commercial prices for these products structured?
- 14) What are the charges that are meaningfully needed to use a service such as the LBAS? For example is it necessary to set: a connection charge, a monthly charge, a disconnection charge, or a churn charge?
- 15) Which of the above charges needs to be regulated to ensure access to the LBAS? Which charges can be set by market forces?

<sup>17</sup> Subsection 152BC(8) of the CCA.

## Pricing methodologies

The ACCC considers that any pricing methodology of the LBAS needs to ensure that:

- the service provider is adequately compensated (neither over- nor under-compensated)
- the service is provided efficiently, and
- any regulated price is set efficiently.

A key consideration in choosing a pricing methodology is what pricing methodology will create incentives for efficient investment in and use of infrastructure and at the same time promote competition. Historically this has involved choosing a pricing methodology that is cost based.

In previous pricing processes, the ACCC has considered various different pricing methodologies, including:<sup>18</sup>

- bottom-up forward-looking long-run incremental cost, such as a total service long-run incremental cost approach
- top-down forward-looking long-run incremental cost using historical accounting values for assets and making optimisation and efficiency adjustments where necessary
- fully allocated cost, where actual costs are allocated to particular services,
- benchmarking of prices – international and domestic, and
- a building block cost model, where each cost category for the regulated business is added together to determine the business's total revenue requirement.

Because of the lack of detailed information regarding the LBAS at this stage and the fact that the service is newly declared, the ACCC seeks information regarding the most appropriate approach or methodology for determining prices for the LBAS.

*Questions on which the ACCC seeks views:*

- 16) Are any of the above pricing approaches appropriate for pricing the LBAS? What information would be required to implement such an approach?
- 17) Is there a different pricing approach, not mentioned above, that would be more appropriate? What information would be required to implement such an approach?

## 5 Duration of access determination

Subsection 152BCF(5) of the CCA specifies that an access determination must have an expiry date. Because the LBAS declaration does not expire, it is not possible to align the expiry date of the access determination with the expiry of the declaration as envisaged by subsection 152BCF(6) of the CCA.

The ACCC seeks submissions on the appropriate duration of the LBAS FAD. Factors that may influence the duration include: the need for regulatory certainty and the need for flexibility to adapt to a changing environment.

<sup>18</sup> See: ACCC, *Domestic Transmission Capacity Service: An ACCC Discussion Paper reviewing pricing of the domestic transmission capacity service*, April 2010; ACCC, *Review of the 1997 telecommunications access pricing principles for fixed line services: Draft report*, September 2010; ACCC, *Domestic Mobile Terminating Access Service (MTAS): Public Inquiry to make an Access Determination: Discussion Paper*, June 2011.

*Questions on which the ACCC seeks views:*

18) What is an appropriate duration for the LBAS FAD?

## **6 Non-price terms and conditions**

In access determinations for other declared services the ACCC has included non-price terms and conditions.<sup>19</sup> Those terms are based on the ACCC's *Model Non-Price Terms & Conditions Determination 2008* (2008 Model Terms).<sup>20</sup>

The 2008 Model Terms that could be considered for inclusion in an LBAS FAD cover the following areas:

- (a) billing and notifications
- (b) creditworthiness and security
- (c) liability (risk allocation)
- (d) general dispute resolution procedures
- (e) confidentiality
- (f) communication with end users
- (g) network modernisation and upgrade
- (h) suspension and termination
- (i) facilities access

The above list does not include all clauses from the 2008 Model Terms because some will not apply to the LBAS.

The ACCC seeks submissions on which of the above non-price terms and conditions should be included in the LBAS FAD. It also seeks submissions on any other terms and conditions that should be included.

*Questions on which the ACCC seeks views:*

19) Which non-price terms and conditions from the 2008 Model Terms should be included in the LBAS FAD?

20) Are there any modification to the 2008 Model Terms necessary to make them appropriate for inclusion in the LBAS FAD? If so, please include details.

21) Are there any other non-price terms and conditions should be included in the LBAS FAD? If so, please include details.

<sup>19</sup> These access determinations can be found on the Register of Access Determinations on the ACCC website: <http://www.accc.gov.au/content/index.phtml/itemId/971651>.

<sup>20</sup> The 2008 Model Terms can be found on the ACCC's website at: <http://www.accc.gov.au/content/index.phtml?itemId=849788>.

## **7 Summary of questions on which the ACCC seeks views**

Submissions should address the following matters:

- 1) Which currently operational networks are designated superfast telecommunications networks under section 152AGA of the CCA? Who operates these networks?
- 2) What types of access technologies are used in these networks? Fibre, hybrid fibre-coaxial, copper?
- 3) How many customers do these designated superfast telecommunications networks serve? How many customers can they potentially serve?
- 4) What geographic area do these designated superfast telecommunications networks serve?
- 5) Do these networks currently (as at February 2012) offer wholesale access? If so, at what network layer and under what terms?
- 6) On what terms do/did these networks offer retail services to end-users?
- 7) What are the access provider's costs in providing the LBAS?
- 8) Do costs vary depending on access medium, e.g. fibre vs HFC? If so should regulated prices vary between different access mediums?
- 9) Do costs vary depending on the size and/or location of the designated superfast telecommunications network? If so should regulated prices vary depending on those factors?
- 10) How are commercial prices for the LBAS or like services structured?
- 11) Are these prices differentiated by port speed? By download quota? If so, how?
- 12) Do these prices include any backhaul component?
- 13) Do retail service providers need to purchase anything besides access to the customer access line to provide a customer with services? If so, what products need to be purchased and how are the commercial prices for these products structured?
- 14) What are the charges that are meaningfully needed to use a service such as the LBAS? For example is it necessary to set: a connection charge, a monthly charge, a disconnection charge, or a churn charge?
- 15) Which of the above charges needs to be regulated to ensure access to the LBAS? Which charges can be set by market forces?
- 16) Are any of the pricing approaches listed on pages 6 to 7 appropriate for pricing the LBAS? What information would be required to implement such an approach?
- 17) Is there a different pricing approach, not mentioned above, that would be more appropriate? What information would be required to implement such an approach?
- 18) What is an appropriate length for the regulatory period for the LBAS FAD?
- 19) Which non-price terms and conditions from the 2008 Model Terms should be included in the LBAS FAD?

- 20) Are there any modifications to the 2008 Model Terms necessary to make them appropriate for inclusion in the LBAS FAD? If so, please include details.
- 21) Are there any other non-price terms and conditions should be included in the LBAS FAD? If so, please include details.

## Appendix A: LBAS service description

The local bitstream access service is a point to point service for the carriage of communications in digital form between a **network-network interface** and a **user-network interface** supplied using a **designated superfast telecommunications network** that is:

- (a) a **Layer 2 bitstream service**; and
- (b) a **superfast carriage service**.

This declaration does not apply to services supplied, or capable of being supplied:

- (a) using a specified network; or
- (b) using a specified local access line; or
- (c) by a specified owner of a local access line;

where that network, local access line or owner is the subject of a Ministerial exemption under section 141A or statutory exemption under subsection 141B(3) or 141B(4) of the *Telecommunications Act* and any conditions that apply to the exemption are satisfied.

### Definitions

Where words or phrases used in this declaration are defined in the *Competition and Consumer Act 2010* or the *Telecommunications Act 1997*, they have the meaning given in the relevant Act.

**Layer 2 bitstream service** has the meaning given in section 152AC of the *Competition and Consumer Act 2010*

**designated superfast telecommunications network** has the meaning given in subsection 152AGA of the *Competition and Consumer Act 2010*

a **network-network interface** means an interface provided by an access provider at a **point of interconnection** where the access seeker's telecommunications network can interface to the access provider's **designated superfast telecommunications network**

a **point of interconnection** is a physical point of interconnection which allows the interconnection of facilities in accordance with subsection 152AR(5) of the *Competition and Consumer Act 2010*

**superfast carriage service** has the meaning given in section 152AC of the *Competition and Consumer Act 2010*

a **user-network interface** means an interface located at a physically defined end-user's premises where the access provider's **designated superfast telecommunications network** is present to an end-user

## Appendix B: Legislative framework for access determinations

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

The new access regime enables the ACCC to set default price and non-price terms in access determinations. An access determination will only apply where there is no commercial agreement between the access seekers and access provider. The access determinations create a benchmark which access seekers can fall back on while still allowing parties to negotiate different terms.

Access determinations can be interim or final. Where access determinations specify terms and conditions of access they must include terms and conditions relating to price (or a method of ascertaining a price) and may also contain non-price terms, although this is not compulsory.<sup>21</sup> Compliance with access determinations is a carrier licence condition and a service provider rule.<sup>22</sup> The access determinations do not apply to the extent they are inconsistent with various other instruments and agreements, including access agreements between parties.<sup>23</sup>

### Public inquiry

The access regime requires the ACCC to consider making access determinations for all declared services. For a newly declared service, the ACCC must commence a public inquiry into making an access determination within 30 days after the declaration is made.<sup>24</sup> The ACCC must make an FAD within 6 months of commencing a public inquiry. The ACCC can extend the time frame for making an FAD by up to 6 months.<sup>25</sup>

### Content of access determinations

Section 152BC of the CCA specifies what an access determination may contain. These include, 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. Access determinations can make different provisions with respect to different access providers or access seekers.<sup>26</sup>

### Fixed principles provisions

An access determination may contain a fixed principles provision, which allows a provision in an access determination to have an expiry date after the expiry date of the

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<sup>21</sup> Subsection 152BC(3) of the CCA.

<sup>22</sup> Sections 152BCO and 152BCP of the CCA.

<sup>23</sup> Section 152BCC of the CCA.

<sup>24</sup> Subsection 152BCI(1) of the CCA.

<sup>25</sup> Subsections 152BCK(2) and (3) of the CCA.

<sup>26</sup> Subsection 152BC(5) of the CCA.

access determination.<sup>27</sup> Such a provision would allow the ACCC to ‘lock in’ a term so that it would be consistent across multiple access determinations.

## **Varying an access determination**

Section 152BCN allows the ACCC to vary or revoke an access determination. A fixed principles provision cannot be varied or removed unless the access determination sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.<sup>28</sup>

## **Commencement and expiry provisions**

Section 152BCF of the CCA sets out the commencement and expiry rules for access determinations. An access determination must have an expiry date.<sup>29</sup>

## **Criteria to consider when making an access determination**

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

- whether the determination will promote the long-term interests of end users (LTIE) of carriage services or services supplied by means of carriage services
- 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
- 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
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

The subsection 152BCA(1) criteria mirror the repealed section 152CR(1) criteria that the ACCC was required to take into account in making a final determination in an access dispute. The ACCC intends to interpret the subsection 152BCA(1) 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 access determinations.

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 access determination process are set out below.

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<sup>27</sup> Subsection 152BCD of the CCA.

<sup>28</sup> Subsection 152BCN(4) of the CCA.

<sup>29</sup> Subsection 152BCF(5) of the CCA.



## Paragraph 152BCA(1)(a)

The first criterion for the ACCC to consider when making an 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 previously published a guideline explaining what it understands by the phrase ‘long-term interests of end users’ in the context of its declaration responsibilities.<sup>30</sup> 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 an access determination for the LBAS.

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.<sup>31</sup>

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

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

\*End users: “end users” include actual and potential [users of the service]...

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

\*Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.<sup>32</sup>

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

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<sup>30</sup> 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.

<sup>31</sup> *ibid.*, p. 33.

<sup>32</sup> *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

- any other infrastructure by which listed services are, or are likely to become, capable of being supplied.<sup>33</sup>

### ***Promoting competition***

In assessing whether particular terms and conditions will promote competition, the ACCC will analyse the relevant markets to which the declared service is an input and consider whether the terms set in those markets remove obstacles to end users gaining access to carriage services and services supplied by means of carriage services.<sup>34</sup>

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.

The ACCC's view is that the relevant markets for the purpose of making an access determination for the LBAS are:

- the market for the wholesale supply of Layer 2 bitstream services, and
- the market for the wholesale and retail supply of Layer 3 bitstream services.

### ***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.<sup>35</sup>

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.

### ***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

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<sup>33</sup> Subsection 152AB(2) of the CCA.

<sup>34</sup> 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].

<sup>35</sup> Subsection 152AB(8) of the CCA.

- 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
- the risks involved in making that investment.<sup>36</sup>

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 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.<sup>37</sup>

...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.<sup>38</sup>

...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.<sup>39</sup>

### **Paragraph 152BCA(1)(b)**

The second criterion requires the ACCC to consider ‘the legitimate business interests of the carrier or provider’ 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.<sup>40</sup> 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.

<sup>36</sup> Subsections 152AB(6) and (7A) of the CCA.

<sup>37</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

<sup>38</sup> *ibid.* at [164].

<sup>39</sup> *ibid.*

<sup>40</sup> ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

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.<sup>41</sup>

The Tribunal has taken a similar view of the expression 'legitimate business interests'.<sup>42</sup>

### **Paragraph 152BCA(1)(c)**

The third criterion requires the ACCC to consider '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 Tribunal has also taken this approach.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup>

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.

### **Paragraph 152BCA(1)(d)**

The fourth criterion requires that the ACCC consider '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 criterion, 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.<sup>46</sup> A contribution to such apportioned 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.<sup>47</sup>

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<sup>41</sup> ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

<sup>42</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [89].

<sup>43</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [91].

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

<sup>47</sup> 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

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs criterion ‘is concerned with ensuring that the costs of providing the service are recovered.’<sup>48</sup> The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.<sup>49</sup>

### **Paragraph 152BCA(1)(e)**

The fifth criterion 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 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.<sup>50</sup>

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

### **Paragraph 152BCA(1)(f)**

The sixth criterion 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 an FAD.

The ACCC considers that this criterion 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, 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.<sup>51</sup>

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

### **Paragraph 152BCA(1)(g)**

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

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of

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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.

<sup>48</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [92].

<sup>49</sup> *ibid.* at [139].

<sup>50</sup> 1997 Access Pricing Principles, p. 11.

<sup>51</sup> ACCC, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.<sup>52</sup>

Consistent with the approach adopted by the Tribunal in considering an undertaking, the ACCC considers that in applying this criterion, 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.<sup>53</sup>

### **Subsection 152BCA(2)**

Subsection 152BCA(2) of the CCA provides that, in making an 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,<sup>54</sup> take into account:

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

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in making an access determination, does not consider the declared service in isolation, but also considers other relevant services.<sup>55</sup> 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.<sup>56</sup>

### **Subsection 152BCA(3)**

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

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<sup>52</sup> Access Dispute Guidelines, p. 57.

<sup>53</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [94]-[95].

<sup>54</sup> 'Eligible service' has the same meaning as in section 152AL of the CCA.

<sup>55</sup> Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

<sup>56</sup> *ibid.*