



**Australian
Competition &
Consumer
Commission**

**Telecommunications Final Access
Determination inquiries—non-price terms
and conditions
Discussion paper**

October 2014



Australian Competition and Consumer Commission

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List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	Asymmetric Digital Subscriber line
CCA	Competition and Consumer Act 2010
c-i-c	commercial in confidence
CSP	carriage service provider
DTCS	domestic transmission capacity service
FAD	final access determination
FOAS	fixed originating access service
FTAS	fixed terminating access service
LCS	local carriage service
LSS	line sharing service
LTIE	Long term interests of end-users
MNO	mobile network operator
MTAS	Mobile Terminating Access Service
NBN	National Broadband Network
NPTCs	Non-price terms and conditions
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
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).
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 upon request 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.
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 previously declared PSTN OA service.
FTAS	Fixed Terminating Access Service. The new name for the previously 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 2014 – the ULLS, LSS,

	WLR, LCS, FOAS and FTAS. The ACCC also declared the wholesale ADSL service in February 2012.
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.
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 accepted 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.
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1. Introduction

The Australian Competition and Consumer Commission (ACCC) is responsible for the economic regulation of the telecommunications sector. Part XIC of the *Competition and Consumer Act 2010* (the CCA) sets out an access regime for the telecommunications sector. A number of telecommunications services are declared.

The 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 Mobile Terminating Access Service (MTAS) in June 2014 until 30 June 2019²
- six fixed line services in April 2014 until 31 July 2019.³

Additionally, the ACCC declared the wholesale ADSL service in February 2012 until 13 February 2017.⁴

Once a service is declared, the ACCC has the ability to make a determination relating to access to the declared service, including to specify how the access provider is to comply with the standard access obligations and any other terms and conditions of an access seeker's access to the declared service.⁵ The legislative framework that applies to the making of Final Access Determinations (FADs) and the approach the ACCC takes in applying these criteria are set out in chapter 2 and in Appendix A.

The abovementioned declared services are currently regulated through FADs. The current FADs for these services specify certain price and non-price terms and conditions (NPTCs) that apply when commercial negotiations do not result in agreement between the access provider and access seeker. The existing FADs for the fixed line services, the wholesale ADSL and the MTAS were due to expire on 30 June 2014. In April 2014, the ACCC extended the expiry date of the current fixed line services and the wholesale ADSL FADs until the day before new FADs come into force. In June 2014, the ACCC extended the current MTAS FADs until the day before the new FADs come into force. The DTCS FAD will expire on 31 December 2014.

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 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.

³ 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 Fixed Originating Access Service (FOAS) and the Fixed Terminating Access Service (FTAS).

⁴ ADSL (asymmetric) services are the dominant fixed-line broadband technology in Australia, accounting for around 83 per cent of fixed-line broadband services in operation as at June 2011. It is supplied over Telstra's near-ubiquitous customer access network (CAN) which runs from the exchange building to premises. As the operator of the CAN, Telstra is the dominant access provider of ADSL services at the wholesale level.

⁵ Section 152BC(3) of the CCA.

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. On 22 May 2014, the ACCC commenced inquiries into making new FADs for the DTCS and the MTAS.

In May 2014, the ACCC decided to consult separately on the primary prices for all the fixed line services, the DTCS and the MTAS FADs and on NPTCs and supplementary prices. The ACCC considered there is benefit in conducting a combined consultation process for NPTCs 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.

On 23 May 2014, the ACCC released a position paper, seeking submissions on the NPTCs and supplementary prices. The ACCC received 10 submissions to the position paper plus a further submission from Telstra on 23 September 2014.

The ACCC is now considering supplementary prices alongside the primary prices in the FAD inquiries. Industry views on NPTCs, received in response to the position paper, are considered in chapters 4, 5, 6, and 7 of this paper. NPTCs cover a broad range of issues on which an access provider and access seeker may require agreement. These range from commercial terms, such as billing and general dispute resolution processes, to the operational processes by which the declared services are to be accessed.

Consultation to date indicates that industry generally considers that there should be regulatory fall-back for NPTCs, through FAD terms and conditions. In light of this, the ACCC is considering whether it will be necessary to develop a comprehensive FAD in order to provide an effective regulatory fall-back. The ACCC seeks access seeker views on whether its previous approach in making non-comprehensive or targeted NPTCs in FADs (which do not cover all non-price terms of access) has allowed access seekers to rely solely on regulated terms to obtain viable commercial supply of declared services from access providers.

Whether regulated non-price terms provide a viable commercial alternative is particularly important in the current context. Long standing customer relationship agreements for legacy copper-based services are being renegotiated ahead of the NBN (for example, through the introduction of the Telstra Wholesale Agreement).

The ACCC requires specific examples from access seekers which establish that a non-comprehensive or targeted set of regulated terms will be an effective alternative to supply under an access agreement.

The ACCC's ability to determine the most appropriate regulatory mechanism is heavily influenced by the extent of active industry engagement on these issues.

This discussion paper outlines the legislative framework governing the regulation of NPTCs under Part XIC, summarises the history of NPTCs regulation outlined in the May 2014 Position Paper, sets out some further detail about the regulatory options the ACCC is considering in respect of NPTCs in the current FAD inquiries and seeks further views from industry on these matters.

Following consideration of submissions received in response to this discussion paper, the ACCC intends to publish a draft report in early 2015, with a view to finalising NPTCs in the relevant FADs by June 2015.

1.1 Making a submission

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

Importantly, parties should provide specific examples of their concerns regarding non-price terms rather than general claims of problems or general unsupported allegations. The ACCC understands in-principle arguments that access providers with market power can engage in 'take it or leave it' negotiations – a concern recognised by the Vertigan committee in relation to NBN Co. Whether that concern arises in relation to legacy services and requires regulatory intervention, potentially through a comprehensive FAD (which could be more resource intensive) or a targeted set of NPTCs depends on evidence that there are current issues in commercial negotiations that warrant such intervention.

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 the 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 discussion paper are due by **Friday 28 November 2014**.

Please email submissions to:

fixedservices@acc.gov.au

Cc: Nicole.Ross@acc.gov.au

Cc: Robert.Wright@acc.gov.au

2. Relevant considerations

The ACCC must have regard to the matters specified in subsection 152BCA(1) of the CCA when making a FAD. These matters 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 (CSP) who supplies, or is capable of supplying, the declared service, and the carrier's or CSP'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.

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

The ACCC may also take into account any other matters that it thinks are relevant when making an access determination.⁶

The ACCC's approach to these matters and other matters which the ACCC may take into account when making an access determination is described in Appendix A.

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 decisions. The ACCC considers that the FADs will most likely affect retail markets (that is, end-users of the products) and wholesale markets (suppliers of the products) for the supply of fixed line services, transmission services and mobile services.

Questions:

1. Please set out the relevant considerations that you think the ACCC should have regard to when considering each of the mandatory criteria in determining the appropriate NPTCs to include in any FAD.
2. Are there any 'other matters' that should be considered when making NPTCs in FADs?

⁶ Section 152BCA(3) of the CCA.

3. Regulation of non-price terms and conditions

3.1 Background to regulation

From 1997-2010, access to declared services was regulated under a ‘negotiate-arbitrate’ model. Under this regime, if parties could not agree on the terms of access to a declared service, then either party (the carrier or carriage service provider that provides access to the service, or the access seeker) could notify an access dispute to the ACCC. The ACCC would then arbitrate the dispute. The terms and conditions of access were then those determined by the ACCC in its arbitration determination for those two parties only. The ACCC arbitrated disputes over terms and conditions of access where attempts by carriers and access seekers to negotiate mutually agreed arrangements were unsuccessful.

Under that regime, from 2003, the ACCC provided indicative guidance on the terms and conditions that it would specify in an arbitration determination. This guidance addressed a limited number of contentious non-price aspects of access to the declared service and took the form of model term determinations.⁷ 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. Although these determinations were not binding of themselves, the ACCC was required to have regard to them when arbitrating an access dispute.⁸ The ACCC undertook fundamental reviews in 2002 and 2008 in developing model term determinations.

Between 1997 and 2010, the ACCC made 19 final access dispute determinations and eleven of these determinations dealt with non-price matters in dispute and set NPTCs in relation to some of those matters.

The current regime replaced the previous telecommunications access regime from 1 January 2011.⁹ The current regulatory regime replaced the ACCC’s power to make arbitration decisions under the CCA with the power to make FADs relating to access to a declared service.¹⁰ As noted in the explanatory memorandum that accompanied the 2010 Bill, the purpose of this reform was:

⁷ Limiting the areas that model terms and conditions addressed was seen as an effective and timely strategy given the limited timeframes in which to make the model terms. See, ACCC, *Final Determination – Model Non-price Terms and Conditions*, October 2003, p 13.

⁸ Section 152AQB(9) of the *Trade Practices Act 1974* (repealed).

⁹ 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.

¹⁰ 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.

... 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.¹¹

3.2 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 agreement¹²
2. a special access undertaking given by the access provider and accepted by the ACCC¹³
3. binding rules of conduct¹⁴
4. access determinations.¹⁵

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.¹⁶

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 a particular matter will apply where the access agreement does not deal with that matter. This is discussed in further detail in Chapter 4.

3.3 Currently regulated NPTCs

In the 2011¹⁷, 2012¹⁸ and 2013¹⁹ FADs, the ACCC addressed the following NPTCs:

¹¹ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p.4.

¹² Section 152AY(2)(a) of the CCA.

¹³ Section 152AY(2)(b) of the CCA.

¹⁴ Section 152AY(2)(c) of the CCA.

¹⁵ Section 152AY(2)(d) of the CCA.

¹⁶ Sections 152AY, 152BCC, 152BDB of the CCA.

¹⁷ ACCC, *Inquiry to make final access determinations for the declared fixed line services*, July 2011, <http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fixed-line-services-final-access-determination-fad-2011>

ACCC, *Inquiry to make a final access determination for the domestic mobile terminating access service*, December 2011, <http://www.accc.gov.au/regulated->

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

In the previous FADs, a number of issues were raised and either deferred or partially addressed and deferred for future consideration. These issues are discussed below.

3.3.1 Liability (risk allocation) and iVULLS (intact Vacant ULLS) process

In the fixed line services FAD inquiry in 2011, Hebert Geer and Macquarie Telecom supported the inclusion of clauses dealing with liability (risk allocation) and iVULLS process. However, the ACCC decided not to include liability (risk allocation) and iVULLS process in the FADs at that stage. The ACCC considered that further consultation was required on these matters prior to them being included in the FADs.²⁰

3.3.2 Ordering and provisioning

In response to the DTCS FAD inquiry in 2012, Optus submitted that the DTCS FAD should include terms relating to ordering and provisioning. The DTCS FAD does not include terms in relation to ordering and provisioning. The ACCC recognised that there were some concerns about access providers' processes for ordering and provisioning, however, the ACCC did not have sufficient information at that time to determine an appropriate response in the DTCS FAD. The ACCC noted it would consider an appropriate regulatory response if more information became available.²¹

3.3.3 Disclosure of confidential information to regulatory bodies

In response to the wholesale ADSL FAD inquiry in 2013, Telstra submitted that a new subclause should be inserted under the confidentiality provisions. This is so that the access provider could disclose an access seeker's confidential information in accordance with a

[infrastructure/communications/mobile-services/final-access-determination-for-the-mobile-terminating-access-service-2011](http://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/final-access-determination-for-the-mobile-terminating-access-service-2011)

¹⁸ ACCC, *DTCS final access determination*, June 2012, <http://www.accc.gov.au/regulated-infrastructure/communications/transmission-services-facilities-access/domestic-transmission-capacity-service-access-determination-2011-12/final-access-decision>

¹⁹ ACCC, *Wholesale ADSL final access determination*, May 2013, <http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/wholesale-adsl-final-access-determination-fad-2013>

²⁰ ACCC, *Inquiry to make final access determinations for the declared fixed line services*, July 2011, <http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fixed-line-services-final-access-determination-fad-2011>, pp. 156-157.

²¹ ACCC, *DTCS final access determination*, June 2012, <http://www.accc.gov.au/regulated-infrastructure/communications/transmission-services-facilities-access/domestic-transmission-capacity-service-access-determination-2011-12/final-access-decision>, p. 48.

reporting obligation or a request from a regulatory authority or any other government body in connection with Telstra's Structural Separation Undertaking (SSU). Telstra submitted that it is likely to be administratively costly and cause unnecessary delay if the access provider is required to obtain consent from the access seekers on each occasion when such a request is made. The ACCC decided not to adopt Telstra's proposed new clause in the FADs as the protection of confidential information prevents this information from being used inappropriately. However, the ACCC stated that this issue could be considered in future FAD inquiries which would allow further consultation.²²

3.3.4 Facilities access

The declaration of facilities access has been raised by stakeholders a number of times in previous FADs.²³ Most submissions to the Position Paper addressed issues around the regulation of facilities access and a number supported the declaration of some facilities access services. The issue of pricing facilities access services and the issue of whether further facilities access services should be regulated are being considered by the ACCC and will be addressed in other separate regulatory processes later in 2014/15.

²² ACCC, *Wholesale ADSL final access determination*, May 2013, <http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/wholesale-adsl-final-access-determination-fad-2013>, p. 87.

²³ ACCC, *Inquiry to make final access determinations for the declared fixed line services*, July 2011, <http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fixed-line-services-final-access-determination-fad-2011>, p. 156.

ACCC, *DTCS final access determination*, June 2012, <http://www.accc.gov.au/regulated-infrastructure/communications/transmission-services-facilities-access/domestic-transmission-capacity-service-access-determination-2011-12/final-access-decision>, pp. 61-62.

4. Non-price terms and conditions – principles for regulation

4.1 The position paper

The position paper stated that the ACCC intends to approach its consideration of NPTCs with a view to ensuring that there would be an effective fall-back set of terms and conditions of access available to parties.²⁴

The position paper stated that an effective fall-back set of terms and conditions would:

- fill any gaps in an access agreement where parties do 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 FADs
- 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 minimal disruption. That is, any FAD terms should, where possible, be expressed in a manner that will ‘fit’ with contractual arrangements.²⁵

In circumstances where parties do not have a commercial agreement, the position paper noted that an effective fall-back position should:

- provide the access provider and access seeker with sufficient certainty over the terms and conditions of access
- ensure that an access seeker relying solely 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 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.²⁶

Further, the ACCC considers that an effective fall-back position must, as a standalone mechanism, be capable of ensuring supply of services to an access seeker even if all commercial negotiations fail, unless there are arrangements in place that allow for regulatory

²⁴ ACCC, *Non Price Terms and Conditions and Supplementary Pricing Issues – Position Paper*, May 2014, <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/position-paper>, p. 9.

²⁵ ACCC, *Non Price Terms and Conditions and Supplementary Pricing Issues – Position Paper*, May 2014, <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/position-paper>, p. 9.

²⁶ ACCC, *Non Price Terms and Conditions and Supplementary Pricing Issues – Position Paper*, May 2014, <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/position-paper>, p. 10.

terms to be incorporated into access agreements. It is only in that form that a FAD becomes a commercially viable alternative to supply under an access agreement, and thus would be able to balance unequal bargaining positions.

4.2 Submissions to the position paper

The majority of submitters support NPTCs being regulated in FADs.²⁷ In its first response, Telstra submitted that it does not consider that NPTCs need to be regulated but stated that, if they are included, they do not need to be expanded beyond the NPTCs currently regulated in the FADs.²⁸

In relation to the DTCS service, DTCS provider Basslink stated that commercial agreements are readily reached, relatively expeditious and reasonable for all parties.²⁹

A key premise underlying a number of submissions is that it is important for FADs to provide a regulated fall-back. Access seekers generally agree that this is the purpose of regulated terms and conditions in a FAD. Optus³⁰, Nextgen³¹, iiNet³², TPG³³ and Macquarie³⁴ all stated that this is particularly important due to the imbalance in negotiating power between access seekers and access providers. Macquarie submitted that fall-back terms and conditions are conducive to promoting competition given the significant imbalance in competitive market power between access seekers like Macquarie and access providers.³⁵

Vodafone Hutchison Australia (VHA) stated that '[i]t is essential that the ACCC make FADs that present a viable alternative to an access agreement in circumstances where the parties cannot agree.'³⁶ The ACCC considers VHA's submission suggests that the current non-comprehensive or targeted FADs are ineffective and do not provide for a viable commercial alternative to supply under an access agreement. The ACCC seeks specific examples of this issue occurring. For example, access providers adopting a 'take it or leave it' position in negotiations. Effective regulatory fall-back may need to ensure that access seekers can obtain commercially viable supply on regulated terms alone.

²⁷ Basslink, submission to NPTC position paper, 15 July 2014, p. 2; Optus, submission to NPTC position paper, 18 July 2014, p. 6; Nextgen, submission to NPTC position paper, 15 July 2014, p. 4; iiNet, submission to NPTC position paper, 15 July 2014; pp. 2-3, TPG, submission to NPTC position paper, 17 July 2014, pp. 2-3; Macquarie Telecom, submission to NPTC position paper, 23 July 2014; p. 2, VHA, submission to NPTC position paper, 15 July 2014, p. 10; Optus, submission to NPTC position paper, 15 July 2014, p. 2.

²⁸ Telstra, submission to NPTC position paper, 15 July 2014, p. 6.

²⁹ Basslink, submission to NPTC position paper, 15 July 2014, p. 2.

³⁰ Optus, submission to NPTC position paper, 18 July 2014, p. 6.

³¹ Nextgen, submission to NPTC position paper, 15 July 2014, p. 4.

³² iiNet, submission to NPTC position paper, 15 July 2014, pp. 2-3.

³³ TPG, submission to NPTC position paper, 17 July 2014, pp. 2-3.

³⁴ Macquarie Telecom, submission to NPTC position paper, 23 July 2014, p. 2.

³⁵ Macquarie Telecom, submission to NPTC position paper, 23 July 2014, p. 2.

³⁶ VHA, submission to NPTC position paper, 15 July 2014, p. 10.

Optus noted that access providers with significant market power have increasingly used NPTCs in a manner which may limit the growth of competition.³⁷ The ACCC is seeking specific examples of instances where this has occurred.

4.3 Key issues

The ACCC considers that, based on submissions to the position paper, there is a broad preference for regulation of NPTCs in a manner that provides an effective fall-back. The ACCC notes that, under Part XIC of the CCA, the ACCC is required to set terms relating to price or a method of ascertaining price in certain circumstances.

While Part XIC requires the ACCC to regulate price in certain circumstances, the ACCC is also able to regulate NPTCs if it makes a decision under the legislative criteria. The ACCC will make an assessment regarding what type of NPTCs will provide an effective fall-back (if any are needed), according to the criteria specified in Part XIC.

As noted in the position paper, 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 in a FAD through to a targeted FAD which sets NPTCs dealing only with those areas where specific competition concerns arise or commercial agreement is unlikely, through to making a comprehensive FAD that specifies all NPTCs relating to the supply of a declared service.

The ACCC notes that a number of submissions referred to an inequality in bargaining power between parties and most submissions supported a targeted approach which provided an effective regulatory fall-back for access seekers. Submissions did not support a principles-based FAD approach and the ACCC considers this is unlikely to be a suitable solution. This is due to the inequality in bargaining power between parties referred to in a number of submissions, the need for parties to still negotiate all specific terms and conditions of access, and that a principles-based FAD would be less effective in 'fitting' into commercial contracts.

While the ACCC would prefer not to engage in a lengthy exercise of developing commercial terms of access that do not relate to competition concerns or which are typically not matters of significant dispute between parties, it will consider whether it is necessary to develop a comprehensive FAD in order to provide an effective regulatory fall-back.

This discussion paper discusses both the specific targeted FAD and comprehensive FAD options in more detail in chapters 5 and 6. When considering effective fall-back and how to regulate NPTCs, the ACCC will take into account the broader industry environment, including the transition to the NBN which will progressively take place over the next few years, and any new forms of access agreements such as the Telstra Wholesale Agreement (TWA) and potential concerns around the terms of those agreements. The ACCC notes that, during the transition period to an industry structure where retail competition is vertically separated, there is likely to be enhanced incentives for vertically integrated parties to take advantage of their integration in competing for customers during that transition period.

³⁷ Optus, submission to NPTC position paper, 15 July 2014, p. 2.

The ACCC will take into account the incentives and ability for access providers to take advantage of their position and restrict access on reasonable non-price terms which in turn, hinders the ability of access seekers to compete on their merits in downstream markets. In practice, the issue arises where there is no effective fall-back and access seekers therefore have limited leverage for when monopoly service providers include unreasonable non-price terms of access in access agreements.

The ACCC considers that understanding any concerns regarding the specific non-price terms in current access agreements or the subject of negotiations for future access agreements (such as the TWA), is fundamental to determining the form effective regulatory fall back should take. The ACCC's ability to develop and implement an effective regulatory fall-back mechanism is heavily influenced by the extent of active industry engagement on the issue. It is seeking submissions detailing the effects of relative bargaining positions in commercial negotiations and on finalised terms. To this end, the ACCC is specifically seeking information from access seekers about the effectiveness of commercial negotiation in achieving competitive market outcomes and issues in dispute.

This issue has also recently been considered in the NBN context by the committee undertaking an independent cost benefit analysis of broadband and review of regulation (the Vertigan Committee). In submissions to the Vertigan Committee's regulatory framing paper, access seekers raised concerns that NBN Co's market power may encourage it to offer a standard form of agreement (SFAA) on a 'take it or leave it' basis.³⁸ In its *Statutory review under section 152EOA of the Competition and Consumer Act* report, the Vertigan Committee stated that:

...[it] is concerned that NBN Co will increasingly be in a position to exercise monopoly power with respect to the negotiation of access agreements based on its SFAA.³⁹

While noting that access agreements take precedence in the access hierarchy, once settled, the Vertigan Committee further stated:

...there is a significant degree of inequality in bargaining power between NBN Co and access seekers; there should therefore be a mechanism for access seekers to approach the ACCC before an access agreement is settled, where third-party intervention is required.⁴⁰

The ACCC considers that this issue applies equally in respect to parties negotiating access to legacy services under the regulatory hierarchy set out in Part XIC. This current process offers an opportunity to consider any issues around current commercial negotiations and relative

³⁸ Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM, *Statutory review under section 152EOA of the Competition and Consumer Act*, June 2014, http://www.communications.gov.au/data/assets/pdf_file/0008/240767/3.Section_152EOA_Report.pdf, p. 34.

³⁹ Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM, *Statutory review under section 152EOA of the Competition and Consumer Act*, June 2014, http://www.communications.gov.au/data/assets/pdf_file/0008/240767/3.Section_152EOA_Report.pdf, p. 35.

⁴⁰ Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM, *Statutory review under section 152EOA of the Competition and Consumer Act*, June 2014, http://www.communications.gov.au/data/assets/pdf_file/0008/240767/3.Section_152EOA_Report.pdf, p. 35.

bargaining positions at a time when access providers are introducing new forms of access agreements (such as the TWA).

When considering effective fall-back the ACCC will also consider factors such as the respective bargaining power of parties in making access agreements and the terms of any proposed or current access agreements. The ACCC welcomes views on such terms to inform the level of fall-back that may be necessary.

The ACCC is interested in views regarding how relative bargaining position affects the outcome with respect to NPTCs and whether interested parties consider that a particular regulatory approach is needed to equalise or more evenly distribute bargaining power between the relevant parties.

Questions:

3. Are non-comprehensive or targeted FADs a commercially viable alternative to supply of declared services pursuant to access agreements?
4. Have commercial negotiations on NPTCs in access agreements been effective in obtaining competitive outcomes in relevant markets. Please explain why or why not.
5. How have parties used previous regulated terms and conditions in negotiating access agreements? How have these regulated terms and conditions affected the bargaining power of parties?
6. How should the ACCC take account of the relative bargaining power of parties in its assessment of the mandatory criteria in s.152CBA of the CCA, when considering the approach to take in regulating NPTCs?

5. Options for making targeted non-price terms and conditions

5.1 The position paper

The position paper provided an overview of the targeted NPTCs FAD approach and raised questions in relation to how effectively such an approach could be implemented in industry arrangements.

A targeted FAD focuses only on those aspects of access where commercial agreement is less likely to result and where specific competition concerns are likely to arise. The ACCC made targeted NPTCs in FADs in 2011 for fixed line services and MTAS⁴¹, in 2012 for the DTCS⁴² and in 2013 for the wholesale ADSL service.⁴³ In its position paper, the ACCC indicated that for a targeted approach to be effective 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 the future.

The position paper noted that it would be less time consuming for the ACCC and industry to develop and comment on targeted NPTCs. However, the position paper noted that making targeted NPTCs 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 achieve genuine agreement on matters that were not covered by the limited set of terms and conditions included in the FADs.

5.2 Submissions to the position paper

Submissions to the position paper on making targeted NPTCs were divergent. VHA stated that 'it is essential that the ACCC make FADs that present a viable alternative to an access agreement in circumstances where the parties cannot agree.'⁴⁴

A number of parties, NBN Co⁴⁵, NextGen⁴⁶, Optus⁴⁷, Basslink and Macquarie⁴⁸ would prefer that the ACCC adopt a targeted approach. They submitted that a FAD should address issues

⁴¹ ACCC, *Inquiry to make final access determinations for the declared fixed line services*, July 2011, <http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fixed-line-services-final-access-determination-fad-2011>

ACCC, *Inquiry to make a final access determination for the domestic mobile terminating access service*, December 2011, <http://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/final-access-determination-for-the-mobile-terminating-access-service-2011>

⁴² ACCC, *Domestic Transmission Capacity Service final access determination*, June 2012, <http://www.accc.gov.au/regulated-infrastructure/communications/transmission-services-facilities-access/domestic-transmission-capacity-service-access-determination-2011-12/final-access-decision>

⁴³ ACCC, *Wholesale ADSL final access determination*, May 2013, <http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/wholesale-adsl-final-access-determination-fad-2013>

⁴⁴ VHA, submission to NPTC position paper, 16 July 2014, p. 10.

on which commercial agreement is less likely, or which are likely to harm the LTIE if access providers are able to exploit a stronger bargaining position. Most stakeholders who favoured a targeted approach submitted that the ACCC should continue to regulate the NPTCs that the ACCC addressed in the 2011, 2012 and 2013 FADs. Nextgen⁴⁹ submitted that the ACCC should include 'liability and risk allocation' in the NPTCs as this would be consistent with current commercial practice whereas iiNet⁵⁰ submitted that they should be included for consistency purposes (as these terms have been included in the wholesale ADSL FAD and DTCS but not for the fixed line services and MTAS).

Macquarie indicated that a pass through provision should be included in the NPTCs as it would ensure that regulatory decisions are reflected immediately in commercial arrangements.⁵¹ In its supplementary response to the position paper, Telstra opposed this arguing that a pass through would lead to uncertain and inefficient outcomes.⁵²

NextGen⁵³ and Telstra⁵⁴ submitted that NPTCs are not an area of significant concern and are typically non-contentious. VHA submitted that NPTCs for MTAS and the fixed line services are well established and generally, have not been a source of contention between carriers.⁵⁵ Basslink indicated that access seekers readily reach commercial agreements, negotiations are not 'hard fought' and are relatively expeditious.⁵⁶

5.3 Key issues

As discussed in the position paper, if the ACCC were to make targeted NPTCs, the ACCC would need to make a decision as to what terms and conditions it should regulate. The ACCC notes that submitters generally indicated that the issues in section 3.3 should be addressed in FADs. The ACCC seeks to confirm this, and that there are no further matters which should be addressed in targeted NPTCs.

In particular, the ACCC notes that, while access providers - Telstra⁵⁷, Basslink⁵⁸, and Nextgen⁵⁹, and VHA⁶⁰ stated that NPTCs are well understood and generally not contentious, a number of

⁴⁵ NBN Co, submission to NPTC position paper, 15 July 2014, p. 2.

⁴⁶ Nextgen, submission to NPTC position paper, 15 July 2014, p. 4.

⁴⁷ Optus, submission to NPTC position paper, 18 July 2014, p. 4.

⁴⁸ Macquarie Telecom, submission to NPTC position paper, 23 July 2014, p. 2.

⁴⁹ Nextgen, submission to NPTC position paper, 15 July 2014, p. 6.

⁵⁰ iiNet, submission to NPTC position paper, 15 July 2014, p. 9.

⁵¹ Macquarie Telecom, submission to NPTC position paper, 23 July 2014, p. 4.

⁵² Telstra, *Supplementary response to the ACCC position paper*, 23 September 2014, <https://www.accc.gov.au/system/files/Supplementary%20response%20to%20ACCC%20position%20paper%20Sept%202014%20Public%20version%202014....pdf>, p. 5.

⁵³ Nextgen, submission to NPTC position paper, 15 July 2014, p. 4.

⁵⁴ Telstra, submission to NPTC position paper, 15 July 2014, p. 8.

⁵⁵ VHA, submission to NPTC position paper, 15 July 2014, p. 5.

⁵⁶ Basslink, submission to NPTC position paper, 15 July 2014, p. 2.

⁵⁷ Telstra, submission to NPTC position paper, 15 July 2014, p. 8; Telstra, *Supplementary response to the ACCC position paper*, 23 September 2014, <https://www.accc.gov.au/system/files/Supplementary%20response%20to%20ACCC%20position%20paper%20Sept%202014%20Public%20version%202014....pdf>, p. 2.

submissions called for the ACCC to regulate on contentious issues or issues on which agreement was not likely to be reached.

As mentioned above, for targeted FAD terms and conditions to provide an effective fall-back, they would need to operate alongside or within access agreements. The ACCC is keen to understand whether stakeholders consider that the current agreement framework and process is likely to enable recourse to more targeted FAD clauses. This could be done in a number of ways including:

- the ability to adopt regulated (FAD) terms in to an existing or new agreement
- the ability to vary or renegotiate, or request a variation or renegotiation of an agreement
- direct incorporation of regulated terms into an agreement.

The ACCC notes that access agreements could specifically include clauses that allow for one or more of these ways to include, adopt or incorporate regulatory terms. Alternatively, and as suggested by Telstra, there may be 'practical, commercial opportunities' that arise during the course of normal commercial access arrangements that in effect allow for parties to request regulated terms and conditions even after an access agreement has entered into.⁶¹

Access seeker views are critical to informing the ACCC's understanding of whether parties have adequate recourse to regulated terms (given the structural features of the industry). In this regard, the ACCC seeks access seeker views on whether effective recourse to regulated terms currently exists or is likely to be negotiated for inclusion in future access agreements (including any new forms of agreement such as the TWA). The ACCC considers that if there is no effective recourse to regulated terms in current or future access agreements there may be a need for a regulatory mechanism that ensures such recourse.

Questions:

7. Do your current access agreements or terms currently being negotiated for future access agreements allow for recourse to regulated terms during the life of the agreement? If so, please provide examples of the specific clauses and describe how they operate.
8. When and how have you incorporated or requested regulated NPTCs for access agreements in the past? In your response, describe at what stage this occurred (E.g. at the expiry of a contract, during the term of the contract pursuant to variation clauses) and whether you consider the end result was consistent with competitive outcomes and the LTIE.

⁵⁸ Basslink, submission to NPTC position paper, 15 July 2014, p. 2.

⁵⁹ Nextgen, submission to NPTC position paper, 15 July 2014, p. 4.

⁶⁰ VHA, submission to NPTC position paper, 15 July 2014, p. 5.

⁶¹ Telstra, *Supplementary response to FAD inquiry on NPTCs*, 23 September 2014, https://www.accc.gov.au/system/files/Supplementary%20response%20to%20ACCC%20position%20paper_Sept%202014_Public%20version%20....pdf, p. 6.

9. What do you consider are the issues on which agreement is less likely to be reached and should, therefore, be the subject of NPTCs?
10. Do you consider that the currently regulated NPTCs (discussed in Chapter 3) should be included in the new FADs? Please provide reasons for your views, by reference to the statutory criteria outlined in Chapter 2.
11. Please provide reasons justifying the inclusion in a FAD of the clauses identified in section 3.3 of this paper or in response to Question 3 above, by reference to the statutory criteria outlined in Chapter 2.
12. Are there any additional NPTC matters you consider the ACCC should address in FADs, beyond those already identified in Chapter 3? Please provide reasons for your views, by reference to the statutory criteria outlined in Chapter 2.

6. Ensuring regulatory fall-back

Given that the FADs should be providing effective regulatory fall-back, the ACCC is considering options for other scenarios raised in submissions to the position paper. In particular, the ACCC is considering how an effective fall-back might be provided in the following circumstances:

- where commercial agreement cannot be reached (particularly for new access seekers or where an access seeker terminates their existing agreement but wants to acquire or continue to acquire declared services)
- where the negotiation process is significantly affected by unequal bargaining positions
- where new regulatory issues arise that may need to be included in a FAD by way of variation.

6.1 The position paper

The position paper noted that 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.⁶²

The position paper stated that the 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 including:

- where 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
- where an access provider seeks to exclude future recourse to a FAD (beyond the usual application of the access hierarchy where specific terms and conditions are the subject of genuine agreement) as a part of offering an access agreement or otherwise supplying the declared service.

The position paper also noted that an effective fall-back in this situation could potentially be achieved by a targeted FAD and 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. The ACCC notes that Telstra, for example, has used a standard form of agreement during negotiations in the past (customer relationship agreement) and will continue to do so in the future (TWA).

The position paper noted that this approach may provide greater certainty but may also be less flexible and less able to adapt to a changing commercial environment. It may also involve lengthier consideration of issues by both the ACCC and industry.

⁶² ACCC, *Non Price Terms and Conditions and Supplementary Pricing Issues – Position Paper*, May 2014, <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/position-paper>, p. 9.

6.2 Submissions to the position paper

VHA and iiNet submitted in favour of providing more comprehensive terms and conditions in a FAD. VHA's submission focused on NPTCs for the DTCS and it commented that a comprehensive FAD is the only way to address the imbalance in negotiating power between access seekers and the access provider.⁶³

iiNet proposed a novel approach to implementing more comprehensive terms through:

- the ACCC making a more limited targeted FAD which includes an obligation for the access provider to publish a reference offer
- the reference offer, including the FAD terms, being made available to access seekers on request
- the incorporation of the reference offer terms into the FAD.

TPG stated that '(W)hilst the notion of a comprehensive set of FAD non-price terms and conditions that can operate as a fall back is attractive...' it considered it unrealistic for a regulator to be able to maintain such terms in a manner that would be useful on an ongoing basis. TPG appears to suggest that a possible option would be to include in model terms (now FAD terms) a requirement that where an access provider offers a commercial agreement for services that include declared services, the systems and operational aspects of that commercial agreement will apply in all respects for declared services.⁶⁴

Optus also identifies a number of different commercial constructs adopted by access providers which could be used as a basis in determining clauses that should be included in a FAD. (However, the ACCC notes that Optus, in its submission, supports a targeted FAD approach). Optus specifically refers to the Telstra TWA, NBN Co's Wholesale Broadband Agreement (WBA) and Optus's own wholesale and interconnect agreements with other carriers and service providers.⁶⁵

In its supplementary response to the position paper, Telstra opposed a comprehensive FAD stating that to avoid over-regulation and resulting inefficiencies FADs should only include NPTCs that address a particularly contentious issue.⁶⁶

In relation to recourse to regulatory terms, Telstra submitted that regulated terms can and do serve as a reference point for the parties on certain matters in negotiations but, once an access agreement is entered into, a FAD has no effect to the extent to which it is inconsistent with the relevant access agreement.⁶⁷

⁶³ VHA, submission to NPTC position paper, 15 July 2014, p. 10.

⁶⁴ TPG, submission to NPTC position paper, 17 July 2014, p. 3.

⁶⁵ Optus, submission to NPTC position paper, 18 July 2014, pp.7-8.

⁶⁶ Telstra, *Supplementary response to the ACCC position paper*, 23 September 2014, <https://www.accc.gov.au/system/files/Supplementary%20response%20to%20ACCC%20position%20paper%20Sept%202014%20Public%20version%20....pdf>, p. 4.

⁶⁷ Telstra, *Supplementary response to the ACCC position paper*, 23 September 2014, <https://www.accc.gov.au/system/files/Supplementary%20response%20to%20ACCC%20position%20paper%20Sept%202014%20Public%20version%20....pdf>, p. 2.

6.3 Key issues

The ACCC considers that, should there be a risk that:

- commercial agreement might not be reached, leaving access seekers to rely solely on regulated terms and conditions
- the relative bargaining positions of the parties are so imbalanced as to potentially lead to uncompetitive outcomes
- targeted terms and conditions in FADs will not be able to be integrated into access agreements throughout the life of the agreement (either automatically or by request or negotiation)

then it may be necessary to make a FAD that provides comprehensive NPTCs or that provides for a complete set of standard terms and conditions to apply upon an access seeker's request for supply of (or order for) a declared service.

6.3.1 Comprehensive FAD terms

The ACCC considers that one of the options to ensure a sufficient regulatory fall-back is to develop comprehensive FAD terms that specify terms and conditions for all aspects of access on which the parties could require certainty, in the absence of any form of commercial agreement. However, a number of parties expressed concern about the ACCC's capacity to undertake such an exercise and about the length of time it would take to develop a full set of commercial terms and conditions of access.

The ACCC considers that there are a number of methods by which it could make a comprehensive set of minimum terms that would suffice in circumstances where access seekers and access providers were unable to reach agreement. For example, iiNet proposed an approach whereby the ACCC made a FAD that:

- specified clauses dealing with issues of particular competition concern or where industry agreement is unlikely
- required an access provider formulate a standard offer which includes the specific clauses referred to in the preceding dot point and which is made available to access seekers on request and
- incorporates the standard offer terms and conditions into the FAD through reference to the standard offer.

Another option would be for the ACCC to make a FAD that:

- includes specific clauses dealing with issues of particular competition concern or where industry agreement is unlikely and
- states that all other terms and conditions of access are those set out in another document, for example, an access agreement entered into between Company X and Company Y on 1 January 2011. Under this option, the document would be the relevant access provider's contract for the supply of the declared services.

In each of these examples, the process is unlikely to involve significantly more resources in drafting the FAD terms than would be undertaken in respect of the targeted FAD approach discussed in Chapter 5. This may also address concerns around the ACCC's capacity to deal with more commercial matters and the timeliness of any comprehensive FAD.

The ACCC is interested in views on how it might decide on terms for a comprehensive FAD, beyond the terms that would be included in a targeted FAD. The ACCC is considering:

- utilising terms and conditions from one of a number of existing agreements (and how this might be achieved) or
- where they may be suitable, utilising terms and conditions from standard reference offers in other jurisdictions (with necessary changes for the Australian context). For example, a Standard Term Determination developed by the New Zealand Commerce Commission (discussed in the case study in Box 1) may be a suitable reference offer to use. Further, in Singapore the InfoComm Development Authority has developed a reference offer which applies to a dominant provider of interconnection and access related services.⁶⁸ This reference offer may provide another international example.

⁶⁸ IDA, Access seekers who seek to interconnect with a dominant provider may do so via an approved reference offer, <http://www.ida.gov.sg/Policies-and-Regulations/Industry-and-Licensees/Interconnection-and-Access>

Case Study - New Zealand Standard Terms Determinations

The New Zealand Commerce Commission has issued standard terms determinations on which service providers must provide wholesale services regulated under the *Telecommunications Act 2001* to access seekers. The Commerce Commission has made different determinations for a number of regulated services, including:

- Unbundled Copper Local Loop⁶⁹ and Unbundled Copper Low Frequency services⁷⁰
- Unbundled bitstream access service⁷¹ and UBA backhaul service⁷²
- Mobile terminal access service.⁷³

The determinations must specify sufficient terms to allow, without the need for the access seeker to enter into an agreement, the regulated service to be supplied within the time frames specified in the determination.⁷⁴ In this way, the determinations are comprehensive and specify both price and non-price terms of access. Regarding non-price terms, all the determinations include standard terms which generally include commercial terms and define legal rights (although there are some variations by service). The terms include:

- General rights and obligations including an obligation to supply the regulated service to the access seeker and an access seeker's right to order the service. There is also a term on the effect of the determination's terms on other rights under the Act (other rights are not excluded).
- Access seeker rights and obligations - for example, access seekers must not interfere with reasonable use of the service by the access provider or by other access seekers.
- Invoicing and payment of charges, for example, specifying the due date for invoice payment.
- Liability and risk terms which set limitations on access seeker and access provider liability, exclusions of liability (e.g. for indirect damages for certain acts), a time bar after which there will be no liability, and exceptions to limitations and exclusions.
- Terms about service disruption including notice periods for planned outages and terms on unplanned outages.
- Terms about who is responsible for fixing faults on different parts of the network.

⁶⁹ NZCC, Unbundled Copper Local Loop, <http://www.comcom.govt.nz/regulated-industries/telecommunications/regulated-services/standard-terms-determinations/unbundled-copper-local-loop-and-unbundled-copper-low-frequency-services/>.

⁷⁰ NZCC, Unbundled Copper Low Frequency services, <http://www.comcom.govt.nz/regulated-industries/telecommunications/regulated-services/standard-terms-determinations/unbundled-copper-local-loop-and-unbundled-copper-low-frequency-services/>.

⁷¹ NZCC, Unbundled bitstream access service, <http://www.comcom.govt.nz/regulated-industries/telecommunications/regulated-services/standard-terms-determinations/unbundled-bitstream-access-uba-services/unbundled-bitstream-access-uba/>.

⁷² NZCC, UBA backhaul service, <http://www.comcom.govt.nz/regulated-industries/telecommunications/regulated-services/standard-terms-determinations/unbundled-bitstream-access-uba-services/uba-backhaul/>.

⁷³ NZCC, Mobile terminal access service, <http://www.comcom.govt.nz/regulated-industries/telecommunications/regulated-services/standard-terms-determinations/mobile-termination-access-service/>.

⁷⁴ Section 300(1) *Telecommunications Act 2001* (NZ).

- Terms about access provider's network, equipment and property. For example, obligations on the access provider to safely operate and upgrade its network.
- Obligations around use and disclosure of confidential information including restrictions on using such information for sales and marketing purposes.
- Specifying when services can be suspended and terms about termination of supply, i.e. when an access provider or access seeker can terminate supply.
- Dispute resolution processes.

The Commerce Commission has also made service levels for some regulated services (Unbundled Copper Local Loop and Unbundled Copper Low Frequency services). These set out the quality and performance of Service Level commitments and provide for a penalty mechanism where these service levels are not met.

Questions:

13. Do you consider that the current industry structure or environment justifies the need for a FAD that provides comprehensive NPTCs? Please provide reasons.
14. What do you consider would be an appropriate mechanism for implementing a comprehensive FAD?
15. If you think the ACCC should give further consideration to developing a comprehensive FAD, please nominate and/or provide an appropriate set of terms and conditions of access you consider the ACCC should use as a basis for setting comprehensive NPTCs in a FAD.

7. Other issues

There are a number of other issues that the ACCC may consider in preparing draft FAD NPTCs, including:

- terms which should be consistent and common across a number of declared services (common terms) and terms which should be service-specific
- commencement, expiry and review of NPTCs.

7.1 The position paper

The position paper noted that some NPTCs in the current FADs take different approaches to issues. The ACCC noted that the current inquiry presents an opportunity to consult on non-price terms which would commonly apply across the fixed line services, MTAS and DTCS FADs, except where there are service-specific reasons for why a different approach is appropriate.⁷⁵

In relation to service-specific terms, the position paper asked whether there are NPTCs for which a different approach should be adopted for individual regulated services. The ACCC recognised that some terms might only be relevant for some services or that some services would require a different in-principle position on a particular issue.⁷⁶

The position paper also asked for views on how frequently the ACCC should review the NPTCs.

7.2 Submissions to the position paper

In relation to common terms, there was general support from submitters to standardise certain terms and conditions and apply them across the FADs for fixed line services, MTAS and DTCS. Specifically:

- Nextgen supported common NPTCs where they can be made expeditiously.⁷⁷
- Optus and iiNet supported the development of common NPTCs and submitted that, as a starting point, these could be developed from the current FADs and the wholesale ADSL FAD, respectively.⁷⁸ Similarly, Macquarie and TPG considered that common terms should reflect the matters covered by the current FADs.⁷⁹

⁷⁵ ACCC, *Non Price Terms and Conditions and Supplementary Pricing Issues – Position Paper*, May 2014, <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/position-paper>, p. 11.

⁷⁶ ACCC, *Non Price Terms and Conditions and Supplementary Pricing Issues – Position Paper*, May 2014, <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/position-paper>, p. 11.

⁷⁷ Nextgen, submission to NPTC position paper, 15 July 2014, p. 6.

⁷⁸ iiNet, submission to NPTC position paper, 15 July 2014, p. 9.

Optus, submission to NPTC position paper, 18 July 2014, p. 8.

⁷⁹ TPG, submission to NPTC position paper, 17 July 2014, p 4; Macquarie Telecom, submission to NPTC position paper, 23 July 2014, p 4. Namely, billing and notifications, creditworthiness and security, general dispute resolution, confidentiality, and suspension and termination, communications with end users, network modernisation and upgrade, and liability and indemnity.

- VHA submitted that most of the NPTCs should be common, and encompass terms relevant to “commercial terms, liability, confidentiality and disputes, and legal boilerplate provisions”.⁸⁰
- While Telstra did not support the making of NPTCs generally, it submitted that if they were to be made, then some NPTCs⁸¹ should apply to all of the declared services⁸² and be drafted consistently to promote certainty and decrease compliance costs.⁸³

In relation to service-specific terms, Nextgen and TPG did not consider there to be any terms which would need to be specific to particular declared services.⁸⁴

VHA noted that terms regarding more technical matters such as service descriptions, compliance with relevant standards, testing and service levels should be service-specific.⁸⁵ In particular, VHA considered that comprehensive NPTCs for DTCS should be prioritised by the ACCC to ensure that there is a viable regulatory alternative to access agreements.⁸⁶

Telstra noted that some specific NPTCs should only apply to Wholesale ADSL, ULLS and LSS because they are only relevant to those services.⁸⁷

7.2.1 Commencement, expiry and review

Optus, TPG and iiNet submitted that non-price terms should be set for the duration of the FAD (i.e. there should not be a special term or review process for NPTCs which is different from that which applies to price terms). Submitters also suggested that binding rules of conduct could be used for more urgent matters between review processes.⁸⁸ Similarly, Nextgen and VHA considered that a full review every five years in line with when FADs are generally reviewed would be appropriate.⁸⁹ Nextgen also submitted that a light-handed review should be undertaken annually if there is a material change to circumstances or new circumstances.⁹⁰

In relation to DTCS specifically, VHA submitted that the ACCC should make a FAD before the expiry of the current DTCS FAD (end 2014) because the terms in the current DTCS FAD are ineffective.

⁸⁰ VHA, submission to NPTC position paper, 16 July 2014, p. 13.

⁸¹ Billing and notifications, creditworthiness and security, general dispute resolution, confidentiality, and suspension and termination.

⁸² Telstra, submission to NPTC position paper, 15 July 2014, p. 7. Namely, billing and notifications, creditworthiness and security, general dispute resolution, confidentiality, and suspension and termination.

⁸³ Telstra, submission to NPTC position paper, 15 July 2014, p. 8.

⁸⁴ Nextgen, submission to NPTC position paper, 15 July 2014, p. 6; TPG, submission to NPTC position paper, 17 July 2014, p. 4.

⁸⁵ VHA, submission to NPTC position paper, 16 July 2014, p. 13.

⁸⁶ VHA, submission to NPTC position paper, 16 July 2014, p. 5.

⁸⁷ Telstra, submission to NPTC position paper, 15 July 2014, p. 9.

⁸⁸ iiNet, submission to NPTC position paper, 15 July 2014, p. 19; TPG, submission to NPTC position paper, 17 July 2014, p. 4; Optus, submission to NPTC position paper, 18 July 2014, p. 10; Macquarie Telecom, submission to NPTC position paper, 23 July, p. 5.

⁸⁹ Nextgen, submission to NPTC position paper, 15 July 2014, p. 6; VHA, submission to NPTC position paper, 16 July 2014, p. 15.

⁹⁰ Nextgen, submission to NPTC position paper, 15 July 2014, p. 6.

Telstra submitted that regular reviews of NPTCs are not necessary.⁹¹ It noted that under section 152BCF(6)(a) of the CCA, FADs must expire on the same date as the applicable service declaration.

7.3 Key issues

To facilitate further industry engagement on the issues discussed in this section, the ACCC has set out some indicative approaches to these issues below.

7.3.1 Common terms

The ACCC notes general industry consensus supporting the development of common NPTCs which would be consistent and applied across the fixed line services, MTAS and DTCS FADs. As a starting point, the ACCC is considering some of the issues listed at section 3.3 of this paper for the development of consistent and commonly applied terms. These are:

- Billing and notification
- Creditworthiness and security
- General dispute resolution
- Confidentiality
- Communication with end-users
- Suspension and termination
- Changes to operating manuals.
- Liability (risk allocation) and indemnity
- Resale services
- Disclosure of confidential information to regulatory bodies
- Network modernisation and upgrade notice periods.

The ACCC is seeking further submissions on the above issues and whether there are other matters which should be subject to common terms.

7.3.2 Service specific terms

The ACCC notes that there was less industry support for service-specific terms. The ACCC considers that service-specific terms should be adopted where they are only relevant for a particular service or where there is a reason for a different in-principle position for that service. As a starting point, the ACCC is considering the following matters to be addressed by service-specific terms:

- ordering and provisioning processes for ULLS, DTCS, and LSS only, including intact Vacant ULLS processes.

The ACCC is seeking further views on whether the above approach would be appropriate and whether the ACCC should consider other service-specific terms.

⁹¹ Telstra, submission to NPTC position paper, 15 July 2014, p. 15.

7.3.3 FAD commencement, expiry and review

The ACCC notes that industry submissions generally agreed that NPTCs should not have a different term or review process than that which applies to price terms in the FADs. Further, industry considered that any changes to circumstances or emerging issues which required changes to NPTCs before their expiry in a FAD could be dealt with through a binding rule of conduct.

The ACCC is considering and seeking industry views on the following approach regarding the term and review of NPTCs:

- the ACCC will make NPTCs as soon as practicable and will make or incorporate these terms into new or existing FADs, respectively
- when made, NPTCs will have the same term/expiry as the price terms in the FADs
- if circumstances change or there are new issues which would require a material change to the NPTCs, the ACCC will consider making a binding rule of conduct to address these issues ahead of commencing an inquiry to make or vary a FAD in the longer term.

7.4 Consultation process to develop NPTCs

The ACCC typically releases a draft decision on FAD terms with the proposed draft clauses for comment prior to making a final decision. The ACCC intends to follow this approach when it makes a draft decision in this NPTC FAD inquiry.

However, the ACCC notes that commercial negotiations for terms and conditions of access will often involve iterative exchanges between parties to agree on the detail of such terms and conditions.

Given the commercial negotiation process and the highly detailed nature of NPTCs, the ACCC is seeking views on whether and how it should consult on comprehensive NPTCs in this current process. In particular, the ACCC is considering informal market inquiries on the drafting of NPTCs and also seeks views on whether an additional industry forum or series of forums might be appropriate prior to the release of a draft decision.

Questions:

16. Please identify other issues (not listed at 7.3.1) which should be the subject of common terms for fixed line services, MTAS and DTCS and provide reasons why these should be considered by the ACCC. Please provide drafts of any proposed terms.
17. Please identify other issues (not listed at 7.3.2) which should be the subject of service-specific terms and provide reasons why these should be considered by the ACCC. Please provide drafts of any proposed terms.
18. Do you agree with the ACCC's indicative approach to the commencement, expiry, and review of NPTCs as set out in section 7.3.3? Please provide reasons.
19. How do you think the ACCC should consult on comprehensive NPTCs before the release of a draft decision?

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 a FAD

Section 152BC of the CCA specifies what a FAD may contain. It includes, among other things, terms and conditions on which a carrier or 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. A FAD may make different provisions with respect to different access providers or access seekers.⁹²

Fixed principles provisions

A FAD may contain a fixed principles provision, which allows a provision in a FAD to have an expiry date after the expiry date of the FAD.⁹³ Such a provision would allow the ACCC to 'lock-in' a term so that it would be consistent across multiple FADs.

Varying a FAD

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

A fixed principles provision cannot be varied or removed unless the FAD sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.⁹⁴

Commencement and expiry provisions

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

A FAD must have an expiry date, which should align with the expiry of the declaration for that service unless there are circumstances that warrant a different expiry date.⁹⁵

A FAD may be 'backdated' such that it comes into force on a date prior to the making of the determination.⁹⁶ There are, however, limitations on the extent of backdating that is permitted.⁹⁷

⁹² Section 152BC(5) of the CCA.

⁹³ Section 152BCD of the CCA.

⁹⁴ Section 152BCN(4) of the CCA.

⁹⁵ Section 152BCF(6) of the CCA.

⁹⁶ Section 152BCF(2) of the CCA.

⁹⁷ Sections 152BCF(2A), 152BCF(3), 152BCF(3A), 152BCF(4) and 152BCF(4A) of the CCA.

Criteria to consider when making a FAD

The ACCC must have regard to the matters specified in subsection 152BCA(1) of the CCA when making a 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 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.

The long-term interests of end-users (subsection 152BCA(1)(a))

The first criterion for the ACCC to consider when making a 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.⁹⁸ 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:

⁹⁸ ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act*, July 1999, pp. 31-38.

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.⁹⁹

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.¹⁰⁰

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.¹⁰¹

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.¹⁰²

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.

⁹⁹ ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provision of Part XIC of the Trade Practices Act*, July 1999, p. 33.

¹⁰⁰ Seven Network Limited (No 4) [2004] ACompT 11 at [120].

¹⁰¹ Section 152AB(2) of the CCA.

¹⁰² Section 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].

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.¹⁰³

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
 - 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.¹⁰⁴

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)

¹⁰³ Section 152AB(8) of the CCA.

¹⁰⁴ Sections 152AB(6) and (7A) of the CCA.

- 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.¹⁰⁵

...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.¹⁰⁶

...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.¹⁰⁷

Legitimate business interests (subsection 152BCA(1)(b))

The ACCC must take into account ‘the legitimate business interests’ of the carrier or CSP when making a FAD.

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment.¹⁰⁸ 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.¹⁰⁹

The Australian Competition Tribunal has taken a similar view of the expression ‘legitimate business interests’.¹¹⁰

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

The ACCC must have regard to ‘the interests of all persons who have the right to use the service’ when making a 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.¹¹¹ The access

¹⁰⁵ Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [159].

¹⁰⁶ Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [164].

¹⁰⁷ Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [164].

¹⁰⁸ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

¹⁰⁹ ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

¹¹⁰ Telstra Corporation Limited [2006] ACompT 4 at [89].

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.¹¹²

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.¹¹³

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 (subsection 152BCA(1)(d))

The ACCC must have regard to 'the direct costs of providing access to the declared service' when making a FAD.

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

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 Australian Competition Tribunal's approach.¹¹⁴ 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.¹¹⁵

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.'¹¹⁶ 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.¹¹⁷

Extensions or enhancements of capability (subsection 152BCA(1)(e))

¹¹¹ Telstra Corporation Limited [2006] ACompT 4 at [91].

¹¹² Telstra Corporation Limited [2006] ACompT 4 at [91].

¹¹³ Telstra Corporation Limited [2006] ACompT 4 at [91].

¹¹⁴ Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

¹¹⁵ 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.

¹¹⁶ Telstra Corporation Limited [2006] ACompT 4 at [92].

¹¹⁷ Telstra Corporation Limited [2006] ACompT 4 at [139].

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

In the 1997 Access Pricing Principles, the ACCC stated:

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.¹¹⁸

Safe and reliable operation (subsection 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 a 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.¹¹⁹

Economically efficient operation (subsection 152BCA(1)(g))

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

The ACCC considers that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The 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.¹²⁰

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

¹¹⁸ 1997 Access Pricing Principles, p. 11.

¹¹⁹ ACCC, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

¹²⁰ Access Dispute Guidelines, p. 57.

- the telecommunications networks and infrastructure used to supply these services.¹²¹

Other eligible services (section 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,¹²² 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.¹²³ 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.¹²⁴

Any other relevant matters (section 152BCA(3))

The ACCC may take into account any other matters that it thinks are relevant when making a 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.

¹²¹ *Telstra Corporation Limited* [2006] ACompT at [94]-[95].

¹²² 'Eligible service' has the same meaning as in section 152AL of the CCA.

¹²³ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

¹²⁴ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.