AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Domestic Transmission Capacity Service

Final Access Determination Inquiry

Consultation Paper

June 2019

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

List of abbreviations

ACCC	Australian Competition and Consumer Commission
BROC	Binding rules of conduct
CCA	*Competition and Consumer Act 2010*
CSP	Carriage service provider
DTCS	Domestic transmission capacity service (as defined in the current service description)
ESA	Exchange service area
FAD	Final access determination
Gbps	Gigabits per second
LTIE	Long-term interests of end-users
Mbps	Megabits per second
MNO	Mobile Network Operator
NBN	National broadband network
NPTCs	Non-price terms and conditions
POI	Point of interconnection
RAF	Regulatory Accounting Framework
SAOs	Standard access obligations
SDH	Synchronous digital hierarchy
SIO	Services in operation
SLCs	Special linkage charges
Telco Act	*Telecommunications Act 1997*

Contents

1. Introduction

On 1 April 2019 the Australian Competition and Consumer Commission (ACCC) released its final report on the domestic transmission capacity service (DTCS) declaration inquiry (2019 DTCS declaration review). The ACCC decided to extend the DTCS declaration for five years until 31 March 2024, deregulate a further 137 metropolitan and 27 regional Exchange Service Areas (ESAs) and to vary the service description to address changes in the transmission services market since the previous declaration inquiry.

The varied DTCS service description will come into effect from 1 January 2020 to give providers sufficient time to make any necessary adjustments to their commercial arrangements.

On 19 December 2018 the ACCC made Binding Rules of Conduct (BROC) setting temporary terms of access for DTCS services to Christmas Island and commenced a public inquiry under Part 25 of the *Telecommunications Act 1997* into varying the DTCS FAD to determine permanent terms of access for those services.

With the release of this Consultation Paper, the ACCC is commencing a public inquiry into making a final access determination (FAD) for the DTCS.

The ACCC intends to run both inquiries jointly, with separate final reports. This Consultation Paper seeks stakeholders' views on both an approach to setting price and non-price terms and conditions for the DTCS and separately determining appropriate price terms for regulated services to Christmas Island.

The current DTCS FAD was made on 21 April 2016 and will expire on 31 December 2019.

Current pricing approach

In the last two DTCS FADs, the ACCC has used a domestic benchmarking approach to determine regulated price terms. Domestic benchmarking uses prices of transmission services on competitive routes (and in competitive areas) to derive prices that would apply on uncompetitive, declared routes (or areas) if they were competitive. The benchmarking approach reduces the opportunity for monopoly profits to be charged on uncompetitive routes and reflects the cost efficiencies achieved on competitive routes.

The ACCC, working with statistical experts and stakeholders, developed a regression model to estimate competitive benchmark-based prices on regulated routes using commercial pricing data supplied by transmission providers. The regression model was significantly upgraded during the 2016 FAD inquiry. Analysis of the pricing data in that inquiry found route type, capacity and distance to be the primary determinants of transmission prices in the DTCS market. The ACCC also introduced a mechanism into the model to specifically account for low capacity, short distance services.

Structural change

The 2019 DTCS declaration review found the market for transmission services has undergone significant structural change over the last five years. There are now four vertically-integrated transmission providers (Telstra, Optus, TPG and Vocus), of which Telstra remains the dominant supplier, particularly in regional and remote areas. There remain a number of smaller providers servicing particular market segments and areas.

Further, the NBN rollout has progressed substantially since the last declaration review. There are now 5.2 million residential broadband services and 16,300 business services

being sold over the NBN. However, the rollout of the NBN is not complete. In particular, the rollout of NBN residential services has only recently passed its half-way point. NBN business services are still developing and are only expected to be fully migrated beyond the target date for residential services, that is, towards the end of the next regulatory period.

In addition to changes in the structure of the market, the way in which transmission services are sold has also evolved over time. Services have become increasingly segmented into well differentiated bandwidth categories. Mobile backhaul has gained importance as Mobile Network Operators (MNOs) extend their network coverage and increase the capacity of their networks, and consumers continue to increase their demand for mobile data. In addition, transmission services are now more likely to be acquired with additional service features.

The revised DTCS service description has recognised these changes by introducing separate categories for distinct bandwidth segments and mobile backhaul. To reflect common commercial practice, the DTCS service description has also been updated to include online ordering and service monitoring as basic features of the DTCS.

Pricing methodology

The domestic benchmarking model developed during the course of the 2016 DTCS FAD inquiry involved considerable and lengthy stakeholder engagement, the input of statistical experts engaged by both the ACCC and key stakeholders and the analysis of significant amounts of pricing data. The model that was adopted in the FAD was broadly accepted by industry stakeholders. While some issues have emerged, such as the price of mobile transmission in some areas, we consider that the current regression model can be adjusted or varied to recognise declines in pricing that have occurred in the market since 2016, or to address specific issues. This approach will also reflect the industry's ongoing transition towards NBN POI-centred services.

This Consultation Paper seeks stakeholders' views on the parameters and inputs for determining DTCS prices for the next regulatory period based on the current domestic benchmarking approach. However, if stakeholders consider that a more holistic review of the regression model is required, or disagree with the ACCC's views on the impact of the 2016 FAD in the market, we ask that submissions include examples of where the model has not worked well and detailed views on what approach should be adopted.

2. About this review

2.1. Purpose

The ACCC commenced a public inquiry to vary the current DTCS FAD to account for the binding rules of conduct imposed for the Vocus service to Christmas Island. It is now commencing a public inquiry into making a FAD to apply following the expiry of the current FAD.

The purpose of this Consultation Paper is to seek submissions in relation to:

- the approach the ACCC should adopt in pricing the DTCS for the next regulatory period, and
- determining the appropriate price for the Vocus service to Christmas Island.

The ACCC will consult with stakeholders at various stages during this inquiry. This Consultation Paper seeks industry views on a number of specific questions, but submitters are encouraged to raise other issues within the scope of this inquiry.

2.2. Structure of this paper

This Consultation Paper is structured as follows:

- Section 3 provides a background to the 2016 DTCS final access determination and previous FAD inquiries.
- Section 4 discusses key industry changes since the last FAD inquiry and seeks stakeholders' views on the most appropriate pricing methodology for the DTCS, non-price terms and conditions and any issues the ACCC should consider in making a new FAD.
- Section 5 discusses the pricing of DTCS services to Christmas Island and seeks views from interested parties.

Appendix 1 sets out a consolidated list of questions.

Appendix 2 sets out the regulatory framework relating to access determinations under Part XIC of the Act and the approach the ACCC will take in applying the legislative provisions.

2.3. Timetable for the inquiry

The ACCC requests written submissions by 5 July 2019.

After considering submissions, the ACCC will set out its preliminary findings in a draft report. The ACCC will provide interested parties with the opportunity to comment on its preliminary views before publishing its final report.

The ACCC plans to make a final determination before the current DTCS FAD expires on 31 December 2019.

2.4. Making submissions

The ACCC encourages industry participants, other stakeholders and the public more generally to consider and make submissions on the issues set out in this discussion paper. Submissions are preferred in electronic form, either in PDF or Microsoft Word format. A full list of questions is set out at Appendix 1.

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 has published a guideline[1] with the process that parties should follow when submitting confidential information to communications inquiries by the ACCC. The ACCC-AER information policy: the collection, use and disclosure of information also sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. Both policies are available on the ACCC website.

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[1] ACCC, *Confidentiality Guideline for submitting confidential material to ACCC communications inquiries*, April 2014.

Submissions should be emailed to:

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3. Background

3.1. Transmission services

Transmission services are supplied by telecommunications network owners to other service providers seeking to carry traffic between two locations. The term 'transmission' is generally associated with high capacity, dedicated data links that are used to carry large volumes of communications traffic, including voice, data, video and other content.

Transmission services are a wholesale input into many retail telecommunications services, including mobile services, residential broadband services and business services. There are both regulated and commercial (unregulated) domestic transmission services.

Wholesale transmission services allow other providers (access seekers) to connect their customers in places where they do not own their own transmission infrastructure. Transmission services therefore enable carriers and carriage service providers (CSPs) to connect their core networks with points of service delivery (such as exchange buildings or customer premises) around Australia.

The type of wholesale transmission services required by an access seeker will depend on the geographic reach of their own network and the location to which they need to connect to in order to provide communications services to their customers. There are competitive transmission services available along most inter-capital routes, routes to major regional centres and in the more densely populated metropolitan and regional areas. However, in more sparsely populated areas or where a link is required to reach an individual end-user, the options for access seekers are limited and competition is generally less effective or non-existent. Regulation of transmission services in these areas ensures access seekers are able to acquire services under reasonable terms.

3.2. The declared DTCS

The DTCS was first deemed to be a declared service under subsection 152AL(3) of the CCA in June 1997. The current DTCS declaration applies from 1 April 2019 and expires on 31 March 2024.

Only specific types of transmission services are classified as a DTCS. As set out in its service description, the DTCS is a service that carries large volumes of voice and data communications from one point to another point via symmetric network interfaces on a permanent and uncontended basis. The DTCS does not include communications between:

- one customer transmission point directly to another customer transmission point
- one access seeker network location directly to another access seeker network location, and
- certain transmission routes that have been deregulated, including specified
    - inter-capital routes
    - regional routes
    - metropolitan routes.

In the 2018-19 DTCS Declaration Inquiry the ACCC assessed the level of competition on DTCS routes using an updated competition assessment methodology, which reflected recent changes in the transmission market. As a result of the assessment, an additional 137

metropolitan ESAs and 27 regional ESAs were found to be sufficiently competitive and will be deregulated from 1 January 2020.

The DTCS service description, including the list of routes that are not subject to regulation, is available on the ACCC website.

3.3. Previous DTCS FAD inquiries

Prior to the 2012 DTCS FAD, there was no regulated price for the DTCS and no agreed methodology for setting prices.

In 2009 the ACCC commissioned Frontier Economics (Frontier) to prepare a report on the economics of transmission capacity services.[2] Frontier was required to conduct a 'first principles' review of the regulatory approach that would best promote efficiency and competition. Frontier's recommendation was that domestic price benchmarking may be more appropriate than a cost-based approach, given that there had been competitive entry in to the transmission market. It advised that a benchmarking approach would reduce the reliance on cost modelling and would likely encourage facilities-based competition.

3.3.1. 2012 FAD Inquiry

In the 2012 FAD Inquiry, the ACCC examined a number of approaches to pricing. It concluded that the traditional approaches of a top-down fully-allocated cost model or a bottom-up total service long run incremental cost (TSLRIC) model were not the best options to price the DTCS for the following reasons:

- it would be costly and impractical to model an entire transmission network and would require a large number of subjective judgements that would provoke lengthy and contentious discussion with stakeholders
- modelling and implementation would be time consuming, and
- the Regulatory Accounting Framework (RAF) would need to be substantially amended to provide sufficient information on asset allocation. (The RAF Record Keeping Rule was subsequently revoked in October 2017).

The ACCC's review also observed that where there was competition, most prices were generally linked to the costs associated with providing a given quantity of a service. On the other hand, it also noted that, where the cost-base was difficult to define and/or determine, the potential for regulatory error was high.

The ACCC decided on a domestic benchmarking model as its preferred option at the time. This was because there were a large number of routes or areas within Australia regarded as being competitive. Prices for services on these routes and areas could be used as a benchmark for the prices that would prevail in the non-competitive or regulated routes and areas, as if they were competitive.

In using the pricing information on those routes with effective competition to determine the prices on uncompetitive routes, the benchmarking approach was designed to reduce the possibility of monopoly profits being earned on uncompetitive routes and to reflect the cost efficiency achieved on competitive routes.

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[2] Frontier Economics, Economics of transmission capacity services, June 2009 https://www.accc.gov.au/system/files/Frontier%20Report.pdf

In making the 2012 DTCS FAD, the ACCC obtained confidential contract price data from the major transmission providers, which it incorporated into a regression model that set prices for non-competitive routes.

3.3.2. 2014 FAD Inquiry and 2016 FAD

In March 2014 the ACCC extended the DTCS declaration for a further five years. In May 2014 it commenced a public inquiry into making a new FAD. It released a discussion paper on primary price terms including options as to the most appropriate pricing methodology. The responses to the discussion paper supported continuing the domestic benchmarking approach.

In November 2014 the ACCC released a position statement[3] outlining its approach of using domestic benchmarking to set regulated prices for the DTCS.

To refine and improve the regression analysis upon which the domestic benchmarking had been based for the 2012 FAD, the ACCC sought additional pricing information from transmission service providers and undertook extensive consultation with industry and statistical experts in developing the benchmarking model.

In January 2015 the ACCC engaged an external consultant, Economic Insights, to develop an econometric benchmarking model based on competitive transmission routes. The model was based on industry feedback and commercial contract data supplied by transmission providers. Economic Insights found that the underlying variables that had strongest relationship with price were:

- *Capacity (Mbps)* - the data rate of the connection measured in Megabits per second
- *Distance (km)* - the radial distance between the A-end ESA and B-end ESA
- *Route type* - whether the route is inter-capital, metropolitan, regional or tail-end based in the DTCS service description
- *Interface type* - whether the service is either Ethernet or SDH, and
- *Service provider* - the provider of each service.

In addition to the underlying variables and higher order terms, Economic Insights included a dummy variable to account for a structural break in the pricing of services less than 2.5Mbps and less than 5km.

On 21 April 2016, the ACCC released its final report on the 2014 FAD inquiry to make the 2016 FAD. The 2016 FAD has effect from 21 April 2016 to 31 December 2019.

Under the 2016 FAD, the prices for DTCS services up to 1Gbps are calculated in accordance with the following equation:

[3] ACCC, *DTCS FAD pricing methodology position statement*, November 2014.

$$\begin{aligned} \textbf{Monthly charge} \;=\; & 1.1425.exp\{a + 0.4195lnC - 0.0031lnD \\ & - 0.0260(lnC)^2/2 + 0.0359(lnD)^2/2 \\ & - 0.0010(lnClnD) - 0.2350S + 0.3097I\} \end{aligned}$$

Where:

- **C is capacity**
- **D is distance**
- **If inter-capital route** $a = 5.2021$
- **If metropolitan route** $a = 5.3292$
- **If regional route** $a = 5.4514$
- **If metropolitan tail-end** $a = 5.3292$
- **If regional tail-end** $a = 5.4514$
- **If the services is less than 2.5Mbps and less than 5km** $S = 1$
- **Interface is set at the proportion of contracts on declared routes with SDH as the interface type in the 2016 benchmarking dataset** $I = 0.75$

Prices for services above 1Gbps are determined by commercial negotiation.

As part of the 2016 FAD, the ACCC made a number of other pricing decisions relating to the Bass Strait link, tail-end services and connection charges. These decisions related to matters not included in the regression analysis:

- the ACCC applied an uplift factor on the undersea component of the pricing models output for services across the Bass Strait of 140 per cent to account for the higher costs (including risk) in provisioning and maintaining the undersea cable link
- the ACCC also applied a connection charge depending on data rate and interface type, based on the charges observed in the 2016 FAD benchmarking dataset, and
- for standalone tail-end services, the ACCC set the charge based on a notional 2km distance for both regional and metropolitan tail-end routes.

The 2016 FAD resulted in regulated prices declining substantially in relation to those set in the 2012 FAD, particularly on regional routes:

- average prices for short distance, low capacity services (2Mbps) declined by 13 percent in metro areas and 22 percent in regional areas, and
- average prices for long distance, high capacity services (100Mbps) declined by 76 per cent in metro areas and 78 percent in regional areas.

This fall reflected a general decline in prices for transmission services on competitive routes due to a number of factors including increased investment in infrastructure by major transmission providers and increased competition.

The ACCC is seeking comments from interested stakeholders on whether the benchmarking methodology should be retained, and if so, what changes have occurred in the key variables and determinants of price since the last FAD inquiry and the extent of any price changes since data for the last FAD inquiry was obtained.

3.3.3. Non-Price Terms and Conditions and supplementary prices

In May 2014, in the context of several concurrent inquiries into making new FADs, the ACCC consulted on non-price terms and conditions (NPTCs) and supplementary prices for a number of declared services, including the DTCS. Following consultation, the ACCC decided

to make a targeted set of NPTCs which focussed only on those aspects of access where commercial agreement was less likely to result and where specific competition concerns were likely to arise. It decided not to make a comprehensive set of NPTCs for all aspects of access as it did not consider there to be sufficient evidence to warrant a more interventionist regulatory response.

The ACCC also consulted separately on NPTCs and supplementary prices which were specific to the DTCS, principally the Special Linkage Charge (SLC).

In the 2016 FAD, the ACCC decided to include a non-price term for SLCs to require access providers to provide cost itemisation for SLC quotes. The ACCC considered that it was important for access seekers to have this level of transparency to understand how an access provider calculated its SLC costs.

The ACCC is seeking comments on retention of the current NPTCs for use in the next FAD and the effectiveness of the cost itemisation of the SLC.

3.3.4. Legislative framework for 2019 FAD inquiry

The telecommunications access regime in Part XIC of the CCA requires the ACCC to commence a public inquiry into making a replacement FAD at least six months before the expiry of an existing FAD.[4]

The ACCC must consider specific criteria when making a FAD[5] and may also take into account any other matters that it thinks are relevant.[6] Information about the requirements and how the ACCC will apply the specific criteria is at Appendix 2.

[4] Section 152BCI(3) of the CCA

[5] Section 152BCA(1) of the CCA

[6] Section 152BCA(3) of the CCA

4. Pricing of the DTCS for the next regulatory period

4.1. Domestic benchmarking approach

As set out above, the ACCC has adopted a domestic benchmarking approach to pricing the DTCS over the last two regulatory periods, as it considers this approach:

- satisfies the criteria specified in subsection 152BCA(1) of the CCA
- enables the ACCC to set prices across a wide range of transmission routes, and
- requires fewer resources and imposes a lesser regulatory burden on industry than cost-based methodologies while achieving a comparable regulatory outcome.

For the current inquiry, the ACCC's initial view is that the key factors influencing its past decisions to adopt a benchmarking model are still relevant.

However, as highlighted in the recent DTCS declaration inquiry, a number of changes have occurred and are still taking place in the market for transmission services. In particular, the rollout of the NBN has direct implications on the way transmission services are acquired, as an increasing number of services around the country are being aggregated around the 121 NBN points of interconnection (POIs).

The ACCC has observed that:

- competition has increased such that a number of previously regulated routes and areas have been deregulated
- while there are still many legacy 2Mbps services in operation, there is a general shift toward higher capacity services, which we expect to continue
- capacities required for transmission purposes have increased substantially
- many transmission services previously provided over regulated routes are progressively being aggregated into routes connecting the largely deregulated NBN POIs (112 of the 121 NBN POIs are deregulated) to capital city transmission hubs
- business services using low capacity transmission services are transitioning to and being replaced by NBN access links
- pricing of transmission services is less determined by distance and location and more by capacity.

4.2. Options for pricing the DTCS in the next regulatory period

The ACCC recognises that domestic benchmarking models have some limitations, including that they assume cost and demand drivers are the same (or sufficiently similar) on competitive and non-competitive routes. They can also be affected by differences in quality of service between regulated and deregulated areas and across providers operating in deregulated areas. Further, the prices in deregulated areas may incorporate cross-subsidisation of regulated routes and therefore be higher than purely competitive prices would be.

Cost-based pricing methodologies, such as a fully allocated cost model or a building block model, are at times used for setting efficient prices in markets with limited competition and high prices and, as such, could be appropriate for pricing the DTCS.

If a cost-based modelling approach was to be considered at this time, it would involve calculating the actual costs incurred in providing transmission services and allocating those costs to particular service categories. This includes costs that can be directly identified or assigned to the services in question as well as costs that are shared with other services and that therefore require allocation between services.

This exercise would be challenging for the DTCS, given there are thousands of different transmission services, which vary according to capacity, distance, quality of service and levels of demand across various route categories.

As set out in section 3.3.1 above, the ACCC has previously considered arguments in favour of cost-based models in DTCS FAD inquiries and found that the development of an appropriate model would be costly and time consuming. At the time, the ACCC did not consider that the overall benefits of developing cost allocation or building block models would outweigh these difficulties. Given the detailed review of the regression model undertaken in 2016, we consider that the alternative options to pricing outlined below would deliver similar benefits to a cost-based pricing methodology but at a lower cost.

However, the ACCC invites comments on whether there is merit in considering the adoption of a cost-based model or a pricing approach other than the benchmarking approach that has been used to date.

There are a range of options for pricing the DTCS for the next regulatory period if the ACCC were to continue with the benchmarking approach. These include:

1. developing a new regression model from a new dataset
2. adjusting the current regression model with an updated dataset, while retaining the previously identified key drivers of price, including capacity and distance. This would allow for the analysis of any changes in the relative weights of those drivers, or
3. applying an adjustment factor (discount) to the current regression model to account for changes in the price level for DTCS services since the last FAD. For example, a discount to account for the average percentage decline in commercial prices since the last inquiry.

1. Developing a new regression model from a new dataset

As outlined above, the ACCC significantly refined and improved the regression model it had used as the basis for pricing in the 2012 FAD to produce the 2016 FAD pricing methodology. In the same way, the ACCC could seek a new set of pricing information from transmission service providers and develop an entirely new benchmarking model.

Obtaining a new set of prices could provide a more robust estimate of any changes in prices and the factors that determine or underlie those prices. However, collection of data from transmission providers is not a costless exercise and requires substantial time and resources from transmission providers in terms of identifying, collating and providing the data in a format suitable for use by the ACCC in a regression analysis. As such, it will require significant assistance from industry to provide new pricing information.

The ACCC invites views on whether a new regression model is warranted and what the regulatory impact on providers of supplying a new pricing dataset would be. In particular, submissions that highlight how a new model would address issues with the current model would be useful in our consideration.

2. Adjusting the current regression model with a new or updated dataset

For the reasons set out above, the ACCC considers the benchmarking model developed for the 2016 FAD to be sophisticated in its approach to weighting of the input factors and still fit-for-purpose for the next regulatory period. However, the ACCC also recognises that developments in the transmission capacity market since the model was developed mean that the prices it generates may no longer reflect prices currently offered commercially and would be more reflective if updated.

Under this option the ACCC would seek a new data set from providers of transmission services to determine prices, and to assist in assessing whether the relative weights of the cost drivers and variables in the current regression model need to be adjusted.

This would likely incur significant time and resources in both the collection of pricing data and econometric analysis and consultation to update the regression model.

3. Applying an adjustment factor (discount) to prices generated by the current model

An alternative considered by the ACCC is to preserve the relationships identified in the current regression model by applying an adjustment factor to the current model's output in line with the overall change in transmission prices.

The ACCC has observed two trends that are consistent with the market transformation described at the beginning of this section. First, there has been an increase in the demand for higher capacity services (including for services above 1Gbps). Second, transmission services are characterised by a general decline in prices since the last DTCS FAD was made.

Under this option, the ACCC would consider whether applying an adjustment factor to the current regression model's output would be practicable and whether it would align with the criteria specified in subsection 152BCA(1) of the CCA. This adjustment factor could be as simple as adjusting the current regression equation with an estimate for the overall change in prices (a regression equation minus x approach) or derived from a more complex analysis and modelling of price changes across key variables. This may involve the collection of additional or new data.

In determining an adjustment factor the ACCC could:

- take into account the changes in transmission prices since the ACCC last collected pricing information, and
- estimate the likely change in prices over the remaining term of the DTCS declaration.

The ACCC is seeking stakeholders' views on the above approaches.

4.2.1. Developments in pricing since the 2016 FAD

The ACCC recognises that investment in infrastructure to interconnect NBN POIs has resulted in increased competition for backhaul transmission services from NBN POIs. This can be observed in:

- prices per Gbps for services to POIs being much lower than those reported at the time of the previous FAD

- a perceived erosion of distance as a significant driver of the service price, with acquirers of multiple transmission services reportedly demanding a single price regardless of distance and location, and
- substantial discounts for transmission capacity acquired to interconnect with all the 121 NBN POIs.

The ACCC seeks views on the extent of price decreases since the dataset for the last FAD inquiry was acquired (in November 2014).

4.2.2. Relevance of other factors driving prices for transmission services

The 2016 regression analysis identified the relative weight of other factors in the determination of commercial prices. These include the duration of contracts, the level of protection, quality of service levels, demand for the service in particular regions/areas and negotiated discounts. However, the ACCC appreciates that the way these factors influence prices may have changed since the last FAD inquiry.

Questions

1. What approach should the ACCC adopt for setting regulated prices for the DTCS over the next regulatory period? If domestic benchmarking is not appropriate, please specify what approach would promote the long-term interests of end users and how that approach would provide a better outcome.
2. Are the current drivers (particularly distance and capacity) and their relative weightings still appropriate in setting the regulated DTCS price? Are there other factors that need to be considered?
3. To what extent have prices for transmission services on competitive routes changed since the last FAD inquiry? How have prices for transmission services connecting NBN POIs changed by comparison?
4. Are prices for transmission services to NBN POIs a valid proxy to price access to services in areas that remain regulated?

4.3. Other issues for consideration in the making of the new FAD

The ACCC seeks stakeholders' views on a number of issues that the ACCC considers relevant to discuss in light of the changes that are taking place in the market and the amendments made to the DTCS service description in the recent 2018-19 DTCS declaration inquiry.

4.3.1. Separate pricing for key bandwidth categories

In the recent DTCS Declaration Inquiry Final Report, the ACCC acknowledged that the supply of the DTCS is increasingly being aggregated into key bandwidth segments, which constitute sub-markets of the DTCS. The report noted that each of these segments generally provides an input to different wholesale and downstream services. The ACCC concluded that amending the service description to identify DTCS services by distinct bandwidth categories would promote the long-term interests of end-users.

The current declaration introduces a service classification by commonly acquired speed tiers. The new service description identifies three categories:

- Low capacity: services between 2 Mbps and 10Mbps
- Mid-range: services between, but not including, 10Mbps and 1Gbps

- High capacity: services of 1Gbps and above

The ACCC priced services below 2.5Mbps separately in the 2016 DTCS FAD by way of a dummy variable added to the regression model. In applying the dummy variable, the ACCC recognised that low capacity short distance services were identifiable as a separate 'category' of DTCS that was distinguishable from other (higher) capacity services. The 2019 DTCS declaration extends the classification of low-capacity to all those services under 10 Mbps.

The ACCC also recognised that services above 1Gbps are used for different purposes than the lower capacities, in particular, for high volume data transmission between main transmission hubs, and that they comprise a distinct type/category of service.

The 2016 FAD did not price 1Gbps services due to insufficient data points in this segment to make the sample statistically significant. The ACCC notes that the number of services above 1Gbps has increased considerably since the last declaration inquiry and it is therefore likely that enough contract data points are now available to support the determination of regulated prices for services with capacities of 1Gbps and above.

Questions

5. Should the differentiated pricing for low-capacity short-distance services be extended to the range of low-capacity services identified in the 2019 DTCS declaration (i.e. involving services up to 10Mbps)?
6. Are there any issues with the prices for high capacity transmission services acquired in regulated areas? If so, should the next FAD set price for services of 1Gbps and above?

4.3.2. Separate pricing for mobile backhaul services

In the DTCS Declaration Inquiry Final Report, the ACCC introduced a separate route category for mobile backhaul in the DTCS service description. This recognised the specific characteristics of supply and demand for mobile backhaul and the challenges involved in providing interconnection to base stations built in regional and remote and/or difficult to access locations.

Mobile backhaul is an essential input for the provision of mobile services. Creating a separate route category for mobile backhaul allows, but does not require, the ACCC to set specific service prices in the FAD. The ACCC noted in the DTCS Declaration Inquiry Final Report that current DTCS prices may not appropriately reflect the cost drivers of providing transmission to some mobile sites located in regional and remote areas.[7]

The ACCC also recognises that the availability of appropriately priced mobile backhaul has been identified as an issue for the deployment of mobile towers in regional areas. While each remote and difficult to access site will have its own unique challenges and costs, the ACCC is keen to identify what underlying variables may be taken into consideration in setting prices for these routes. However, whether the ACCC decides to establish prices will depend on whether it is satisfied that this would promote the long-term interests of end-users.

[7] ACCC, DTCS Declaration Inquiry – Final Report, March 2019, p.23

Questions

7. Do current DTCS prices appropriately reflect the cost of providing backhaul to mobile sites located in remote areas or in difficult to access locations?
8. Should mobile backhaul be priced separately from other types of routes? If so, what are the relevant cost drivers?

4.3.3. Additional service features

In the DTCS Declaration Final Report, the ACCC updated the DTCS service description to include additional service features commonly acquired in transmission markets, in particular, an online ordering capability and enhanced service monitoring of faults.

In making this decision, the ACCC considered that the availability of these additional service features would bring the regulated DTCS product closer into line with the basic service provided under commercial negotiations.

Questions

9. Should online ordering and enhanced service monitoring of faults be included in the price of the DTCS or priced separately?
10. If priced separately, should the price be a percentage of the price for the basic DTCS? What should that additional percentage be?
11. Should access providers be required to itemise charges for service features provided in addition to the DTCS service description?

4.3.4. Pricing over the next regulatory period

The ACCC seeks views on whether to implement a pricing approach that incorporates staged reductions in the price for DTCS over the period of the next access determination. This could be in the form of a reduction to the output price of the current regression model. For example, the regulated transmission price would be the price derived from the current regression model minus a price change factor (e.g. minus xx per cent) to account for a downward shift in the overall price level for transmission services.

Questions

12. How are prices expected to change over the next five years?
13. Should the ACCC implement a staged reduction in DTCS prices over the term of the regulatory period? If so, how should it determine those staged adjustments? Would the change in prices since the last FAD be a relevant guide?
14. Alternatively, would it be more appropriate to monitor price movements at specified points in time over the regulatory period and introduce a correction in the price of DTCS if required?

4.3.5. Supplementary prices – Non-recurring charges

The 2016 FAD set supplementary prices for non-recurring connection charges for DTCS services according to capacity and network interface. These services are ancillary to the supply of transmission services.

Connection charges are non-recurring charges sometimes imposed by transmission providers to recover the cost of provisioning the service and setting up new interface ports, internal cabling and back-end support services. Connection charges do not include the SLCs

or network extensions. The DTCS FAD instrument lists non-recurring connection charges by the most commonly acquired service capacities and for each type of interface (i.e. SDH or Ethernet and Ethernet over SDH).

The ACCC is seeking views on whether a new set of non-recurring charges for the next regulatory period should be sourced from the same sample or dataset that will inform the method to determine recurring price terms for the DTCS.

Questions

15. How have non-recurring charges evolved since the last inquiry?
16. Should a set of non-recurring charges be sourced from the sample or dataset to support the determination of recurring charges?
17. Should the capacity bands and technologies set out in the current FAD be maintained?
18. Should connection charges remain only applicable to one-year contracts?

4.3.6. Non-price terms and conditions

The 2016 FAD set non-price terms for SLCs. The ACCC decided to include a term that sets out an access providers' responsibility to provide cost itemisation for SLC quotes.

The ACCC's initial position is that the NPTCs set in the 2016 FAD remain relevant and should be rolled over in the new regulatory period. However, we would be interested in views suggesting a variation of, or additional, NPTCs.

Questions

19. Should the NPTCs set out in the current DTCS FAD be rolled over into a new regulatory period? Should the current NPTCs be varied or should the ACCC consider making additional NPTCs?
20. Has the requirement to itemise costs in SLC quotes been effective in providing greater transparency? Should it be retained for the next regulatory period?

4.3.7. Other issues

Questions

21. Should the new DTCS FAD maintain an uplift on pricing to Tasmania to reflect the higher costs associated with the route? If so, does a level of 40 per cent remain appropriate?
22. Are there any additional issues or views that are relevant to price and non-price terms for access to the DTCS?

5. DTCS to Christmas Island - Variation of the current FAD

In its submission to the March 2018 DTCS Declaration Discussion Paper, Vocus Communications (Vocus) sought the ACCC's agreement to exclude from the DTCS a service it intended to provide between mainland Australia and the external territory of Christmas Island (the Vocus Service).

Additionally, Vocus claimed that the current FAD did not account for the costs it would incur in providing transmission services to Christmas Island and therefore, that compliance with SAOs under FAD terms would be detrimental to its legitimate business interests.

The ACCC concluded that the Vocus Service was captured under the scope of the DTCS declaration and as such, subject to the SAOs under the terms of the DTCS FAD.

The ACCC acknowledged that pricing in the current FAD would not allow Vocus to recover its cost of providing the Christmas Island service and, considering that the service would soon be entering operations, made Binding Rules of Conduct (BROC) in December 2018 setting temporary terms of access for the service.[8]

Subsequent to making the BROC, section 152BCN(9) of the CCA requires the ACCC to commence a FAD variation inquiry within 30 days to determine permanent prices for the service within 12 months. The ACCC commenced an inquiry into varying the 2016 DTCS FAD on 19 December 2018.

Interim prices for the Vocus Service under the BROC

The ACCC has set interim prices under the BROC for access to the Vocus Service that provide a temporary remedy to address the disparity between Vocus' costs in providing the service and current pricing under the 2016 DTCS FAD. The ACCC considered that below-cost regulated prices would:

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

The ACCC's BROC priced services to Christmas Island by way of an uplift of 360 per cent on current FAD prices to be applied to the 2600km subsea component of the service. The ACCC reached the decision set out in the BROC after considering:

- cost information provided by Vocus, including details of capital and operating expenditure incurred and other assumptions encompassed in a cost model provided by Vocus to support its case (the Vocus model)
- its own cost information on undersea cable links, and
- benchmarking of costs for comparable international undersea cables.

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

[8] ACCC, Christmas Island Binding Rules of Conduct (Vocus), 19 December 2018

The ACCC considered costing information and other inputs and assumptions in the Vocus model in light of generally accepted standards on the construction and operations of undersea cables. From the information available and considering the time constraints described above, the ACCC determined interim regulated prices under a BROC that would allow Vocus to recover the costs incurred in providing the services plus a normal return on the investment.

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

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

The direct costs of providing access to the declared service

The costs incurred in providing the service have been a primary consideration in setting the terms for access in the BROC.

Cost-recovery charges determined the lower boundary in the range of regulated prices considered by the ACCC in making the BROC. The upper boundary was determined by the expected return on investment taking into account factors such as risk.

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

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

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

Where:

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

To assist in the determination of long term prices for the Vocus Service, the ACCC seeks stakeholders' views on the price set in the BROC. It also seeks any other information stakeholders consider relevant to the pricing of transmission services provided by way of a subsea cable to Christmas Island.

On completion of this consultation the ACCC proposes to vary the 2016 DTCS FAD to incorporate pricing for the Vocus Service to Christmas Island. This price will also be used over the term of the next DTCS FAD.

Questions

23. Should the price for services to Christmas Island be set as an uplift on DTCS prices for equivalent services in the mainland? If not, by what method should prices to Christmas Island be set?

24. If the Commission adopted an uplift approach to pricing the Vocus service, what should be the appropriate level of that uplift to reflect the additional costs incurred in the construction and operation of a long-distance subsea cable, as well as the associated risks? Are there any other factors that the ACCC should take into account?
25. What is the normal operating life for an undersea cable system?
26. What are the expected maintenance and system costs for an undersea cable?
27. What is an acceptable normal rate of return for undersea cable investments and how should 'risk' be taken into account?

Please provide evidence to support your claim.

Appendix 1 – Consolidated list of questions

1. What approach should the ACCC adopt for setting regulated prices for the DTCS over the next regulatory period? If domestic benchmarking is not appropriate, please specify what approach would promote the long-term interests of end users and how that approach would provide a superior outcome.
2. Are the current drivers (particularly distance and capacity) and their relative weightings still appropriate in setting the regulated DTCS price? Are there other factors that need to be considered?
3. To what extent have prices for transmission services on competitive routes changed since the last FAD inquiry? How have prices for transmission services connecting NBN POIs changed by comparison?
4. Are prices for transmission services to NBN POIs a valid proxy to price access to services in areas that remain regulated?
5. Should the differentiated pricing for low-capacity short-distance services be extended to the range of low-capacity services identified in the 2019 DTCS declaration (i.e. involving services up to 10Mbps)?
6. Are there any issues with the prices for high capacity transmission services acquired in regulated areas? If so, should the next FAD set price for services of 1Gbps and above?
7. Do current DTCS prices appropriately reflect the cost of providing backhaul to mobile sites located in remote areas or in difficult to access locations?
8. Should mobile backhaul be priced separately from other types of routes? If so, what are the relevant cost drivers?
9. Should online ordering and enhanced service monitoring of faults be included in the price of the DTCS or priced separately?
10. If priced separately, should the price be a percentage of the price for the basic DTCS? What should that additional percentage be?
11. Should access providers be required to itemise charges for service features provided in addition to the DTCS service description?
12. How are prices expected to change over the next five years?
13. Should the ACCC implement a staged reduction in DTCS prices over the term of the regulatory period? If so, how should it determine those staged adjustments? Would the change in prices since the last FAD be a relevant guide?
14. Alternatively, would it be more appropriate to monitor price movements at specified points in time over the regulatory period and introduce a correction in the price of DTCS if required?
15. How have non-recurring charges evolved since the last inquiry?
16. Should a set of non-recurring charges be sourced from the sample or dataset to support the determination of recurring charges?
17. Should the capacity bands and technologies set out in the current FAD be maintained?
18. Should connection charges remain only applicable to one-year contracts?
19. Should the NPTCs set out in the current DTCS FAD be rolled over into a new regulatory period? Should the current NPTCs be varied or should the ACCC consider making additional NPTCs?

20. Has the requirement to itemise costs in SLC quotes been effective in providing greater transparency? Should it be retained for the next regulatory period?
21. Should the new DTCS FAD maintain an uplift on pricing to Tasmania to reflect the higher costs associated with the route? If so, does a level of 40 per cent remain appropriate?
22. Are there any additional issues or views that are relevant to price and non-price terms for access to the DTCS?
23. Should the price for services to Christmas Island be set as an uplift on DTCS prices for equivalent services in the mainland? If not, by what method should prices to Christmas Island be set?
24. If the Commission adopted an uplift approach to pricing the Vocus service, what should be the appropriate level of that uplift to reflect the additional costs incurred in the construction and operation of a long-distance subsea cable, as well as the associated risks? Are there any other factors that the ACCC should take into account?
25. What is the normal operating life for an undersea cable system?
26. What are the expected maintenance and system costs for an undersea cable?
27. What is an acceptable normal rate of return for undersea cable investments and how should ‘risk’ be taken into account?

Appendix 2 – 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.[9]

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.[10] 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.[11]

Commencement and expiry provisions

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

A FAD may be backdated up to 1 January 2011.[12]

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.[13]

Criteria to consider when making a FAD

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

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[9] Subsection 152BC(5) of the CCA.

[10] Section 152BCD of the CCA.

[11] Subsection 152BCN(4) of the CCA.

[12] Subsections 152BCF(2) and (2A) of the CCA.

[13] Subsection 152BCF(6) of the CCA.

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.

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

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

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

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

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

The first criterion for the ACCC to consider when making 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.[14] This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for making FADs for the declared fixed line services.

In the ACCC's view, particular terms and conditions promote the interests of end-users if they are likely to contribute towards the provision of:

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.[15]

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):

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

[15] ibid., p. 33.

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.*[16]

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.[17]

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.[18]

Obstacles to accessing these services include the price, quality and availability of the services and the ability of competing providers to provide telephony and broadband services.

The ACCC is not required to precisely define the scope of the relevant markets in which the declared services are supplied. The ACCC considers that it is sufficient to broadly identify the scope of the relevant markets likely to be affected by the ACCC's regulatory decision.

Any-to-any connectivity

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service. This must be

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

[17] Subsection 152AB(2) of the CCA.

[18] Subsection 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] A CompT 3 at [92]; *Telstra Corporation Limited* [2006] A CompT at [97], [149].

the case whether or not the end-users are connected to the same telecommunications network.[19]

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
- the risks involved in making the investment.[20]

The objective of encouraging the 'economically efficient use of, and economically efficient investment in ... infrastructure' requires an understanding of the concept of economic efficiency. Economic efficiency consists of three components:

- productive efficiency – this is achieved where individual firms produce the goods and services that they offer at least cost
- allocative efficiency – this is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs)
- dynamic efficiency – this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

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

> *…An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.*[21]

[19] Subsection 152AB(8) of the CCA.

[20] Subsections 152AB(6) and (7A) of the CCA.

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

> *…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.*[22]
>
> *…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.*[23]

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

The second criterion requires the ACCC to consider '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.[24] 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.[25]

The Tribunal has taken a similar view of the expression 'legitimate business interests'.[26]

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

The third criterion requires the ACCC to consider '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 Tribunal has also taken this approach.[27] The access seekers' interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete with the access provider in the provision of retail services.[28]

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

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[22] ibid. at [164].

[23] ibid.

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

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

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

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

[28] ibid.

occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.[29]

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

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

The fourth criterion requires that the ACCC consider '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 criterion, and the use of the term 'direct costs', as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal's approach in an undertaking decision.[30] 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.[31]

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs criterion 'is concerned with ensuring that the costs of providing the service are recovered.'[32] The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.[33]

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

The fifth criterion requires that the ACCC consider 'the value to a party of extensions, or enhancements of capability, whose cost is borne by someone else' when making 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.[34]

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

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[29] ibid.

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

[31] 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.

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

[33] ibid. at [139].

[34] 1997 Access Pricing Principles, p. 11.

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

The sixth criterion requires the ACCC to consider 'the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility' when making a FAD.

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

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

> *…this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.*[35]

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

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

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

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase 'economically efficient operation' embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.[36]

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

- retail services provided by access seekers using the access provider's services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.[37]

Subsection 152BCA(2) – other eligible services

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,[38] take into account:

- the characteristics of those other eligible services
- the costs associated with those other eligible services

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

[36] Access Dispute Guidelines, p. 57.

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

[38] Eligible service' has the same meaning as in section 152AL of the CCA.

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

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in making an AD, does not consider the declared service in isolation, but also considers other relevant services.[39] 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.*[40]

The ACCC proposes to consider the costs and revenues associated with other services—whether declared or not declared—that are provided over transmission networks when making, extending or revising the FAD for the DTCS.

Subsection 152BCA(3) – any other relevant matters

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

The ACCC is of the view that considerations of regulatory certainty and consistency will be important when setting the terms and conditions of the FADs.

The ACCC also considers that it should have regard to:

- Frontier Economics, Economics of transmission capacity services: A report prepared for the Australian Competition and Consumer Commission (June 2009)
- Gibson Quai AAS, Transmission Network Cost Model – Supply of Data and Application to Representative Transmission Rings (August 2009)
- Analysys Mason, Report for the Australian Competition and Consumer Commission - International benchmarking of leased-line and Ethernet regulation and pricing (July 2010)
- wholesale transmission pricing information provided by transmission service providers following a request for information by the ACCC in December 2010
- ACCC Model Non-Price Terms & Conditions Determination 2008 (2008 Model Terms)
- exemption determinations made under the repealed sections 152AS and 152AT
- information received under the infrastructure record keeping rule (RKR).

These considerations and documents do not limit the matters that the ACCC may have regard to when making the FAD for the DTCS.

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

[40] ibid.