



Australian
Competition &
Consumer
Commission

Interim access determination for the declared domestic transmission capacity service

Statement of Reasons

April 2011



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List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
AD	access determination
CBD	central business district
CCA	<i>Competition and Consumer Act 2010</i>
CACS Act	<i>Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010</i>
DTCS	domestic transmission capacity service as defined in the current service description
FAD	final access determination
IAD	interim access determination
Model Terms	<i>Model Non-Price Terms & Conditions Determination 2008</i>
RAF	regulatory accounting framework
SAOs	standard access obligations
TSLRIC+	total service long-run incremental cost

1 Summary

The *Competition and Consumer Act 2010* (CCA) was recently amended to change the operation of Part XIC from an ex-post negotiate/arbitrate access regime to an ex-ante price and non-price terms and conditions access regime.¹ These changes took effect on 1 January 2011.

Under the new access regime, the Australian Competition and Consumer Commission (ACCC) must make final access determinations (FADs) for declared services. The ACCC can also make interim access determinations (IADs) to operate before FADs are made. The ACCC is no longer required to make pricing principle determinations.

The ACCC has decided to issue an IAD under sections 152BC and 152BCG of the CCA for the declared domestic transmission capacity services (DTCS).

The DTCS is ‘a service for the carriage of certain communications from one transmission point to another transmission point via symmetric network interfaces on a permanent uncontended basis by means of guided and/or unguided electromagnetic energy’, subject to a number of exceptions. The full service description is provided in the Appendix.

While the DTCS is often referred to as ‘backhaul’ it is limited by the scope (both in terms of technology and geography) of the service description and only represents one of a number of backhaul options commonly used in communications networks.

This IAD is made at a time when Telstra provides more than 80 per cent of transmission services measured either by revenue or number of services.

The IAD applies from 1 January 2011 to 31 December 2011. The IAD will be automatically revoked when the ACCC issues a FAD in relation to this service. The ACCC considers that making an IAD to commence from 1 January 2011 will provide the industry with certainty in the transition to the new access regime.

The IAD contains both price and non-price terms. The IAD also incorporates the effect of the exemption determinations made under the previous access regime.

The price terms in the IAD are based on the domestic benchmarking of prices on competitive transmission routes supplemented by pricing information from service providers and other sources.

The ACCC has the power to amend the IAD at any time before it issues the FAD.

As required under the CCA, the ACCC will commence a public inquiry before making a FAD in relation to the declared DTCS. The ACCC proposes to issue a discussion paper when the public inquiry commences which will set out relevant issues and seek further comment from stakeholders.

2 Legislative framework

Part XIC of the CCA was amended with effect from 1 January 2011 by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* (CACS Act). This section briefly outlines the changes to the Part XIC access regime.

¹ The amendments were made by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*. From 1 January 2011 the *Trade Practices Act 1974* was renamed the *Competition and Consumer Act 2010*.

2.1 Previous access regime: negotiate/arbitrate

Prior to the commencement of the CACS Act, the now repealed Division 8 of Part XIC set out a negotiate/arbitrate access regime. If parties could not agree on the terms of access to a declared service, either party could notify the ACCC of a dispute. The ACCC would then arbitrate the dispute and determine the terms and conditions of access between those two parties.

The ACCC was required to make pricing principle determinations and price related terms and conditions for declared services under the now repealed section 152AQA. The ACCC was also required to make a written determination setting out model terms and conditions relating to access for certain declared services.² The ACCC was required to have regard to the pricing principle determinations and model terms when arbitrating access disputes.

The ACCC's 1997 document *Access Pricing Principles – Telecommunications: a guide* (1997 Access Pricing Principles) has generally guided the ACCC when determining pricing principles and indicative prices for declared fixed line services.

Following the repeal of sections 152AQA and 152AQB, the ACCC is no longer required to issue pricing principle determinations and model terms and conditions for declared services.

Under the previous access regime, the ACCC had the power to make exemption determinations which had the effect of exempting access providers from the standard access obligations (SAOs) in relation to the supply of declared services. The exemption determinations could be unconditional or could apply subject to conditions and limitations. Following the repeal of sections 152AS and 152AT of the CCA, the ACCC no longer has the power to make exemption determinations.

The transitional provisions in the CACS Act state that once an access determination (AD) (including an IAD) in relation to a service commences, a determination made under the repealed sections 152AS and 152AT ceases to have effect.³

2.2 New access regime: up-front price and non-price terms

The CACS Act replaced the previous negotiate/arbitrate model with a model which enables the ACCC to set default price and non-price terms in ADs. An AD will only apply where there is no commercial agreement between the access seekers and access provider. They create a benchmark which access seekers can fall back on while still allowing parties to negotiate different terms.

ADs can be interim (IADs) or final (FADs). Where ADs specify terms and conditions of access they must include terms and conditions relating to price (or a method of ascertaining a price) and may also contain non-price terms, although this is not compulsory.⁴ Compliance with IADs and FADs is a carrier licence condition⁵ and a service provider rule.⁶ The IADs and FADs do not apply to the extent they are

² Repealed section 152AQB of the CCA. These services were PSTN OA, PSTN TA, ULLS and LCS.

³ Items 202 (class exemptions) and 203 (individual exemptions) of the CACS Act.

⁴ See section 152BC of the CCA.

⁵ Section 152BCO of the CCA.

⁶ Section 152BCP of the CCA.

inconsistent with various other instruments and agreements, including access agreements between parties.⁷

Under the new access regime, the ACCC is able to incorporate provisions in ADs which provide that the SAOs are not applicable (either unconditionally or subject to conditions or limitation). Similarly, it may include provisions that restrict or limit the application of any or all of the SAOs.⁸

Interim access determinations

The CCA allows the ACCC to make IADs in various circumstances, including where a service is declared and no FAD has previously been made in relation to that service.⁹

The CCA does not require the ACCC to undertake a public inquiry before making an IAD¹⁰ and does not specify any matters that the ACCC must take into account when making an IAD.¹¹ While the legislation does not require the ACCC to provide its reasoning, the ACCC considers it appropriate to provide this Statement of Reasons as a guide to its decision to issue an IAD for the DTCS.

An IAD for a declared service is automatically revoked when an FAD is made by the ACCC for that declared service.¹²

The ACCC has the ability, if necessary, to amend an IAD at any time before an FAD is made.¹³

3 Background on DTCS pricing

The DTCS was deemed a declared service in 1997. Since Declaration, the ACCC has not released indicative prices or set a price in any access dispute for the DTCS.

The ACCC has been generally guided by its 1997 Access Pricing Principles when determining pricing principles and indicative prices for declared fixed line services. The 1997 Access Pricing Principles used a forward looking TSLRIC+ approach to determining prices for access to the relevant declared services.¹⁴

In 2004 the ACCC released its pricing principles for the DTCS: Pricing Principles for Declared Transmission Capacity Services - Final Report (2004 DTCS Pricing Principles Determination). The 2004 DTCS Pricing Principles Determination outlined TSLRIC+ as the relevant pricing principle.¹⁵

In March 2009, the ACCC completed a review of the DTCS Declaration. The review found that the rationale for efficient build-buy signals using TSLRIC pricing were less relevant where competition is changing and/or there are low prospects for efficient by-pass of access provider networks.

⁷ Section 152BCC of the CCA.

⁸ Paragraphs 152BC(3)(h) and (i) of the CCA.

⁹ Subsection 152BCG(2) of the CCA.

¹⁰ Subsection 152BCG(4) of the CCA.

¹¹ Subsection 152BCA(4) of the CCA.

¹² Subsection 152BCF(9A) of the CCA.

¹³ Subsection 152BCN(1) of the CCA.

¹⁴ TSLRIC+ is the incremental or additional costs the firm incurs in providing the service, assuming all of its other production activities remain unchanged. It includes a mark up for common costs.

¹⁵ ACCC, Pricing Principles for Declared Transmission Capacity Services - Final Report, September 2004, pp. 23-24.

Following the review, ACCC commissioned a report from Frontier Economics on the economics of transmission capacity services pricing in July 2009. The Frontier Economics report noted the complexities of DTCS pricing and the limits of TSLRIC route-based pricing, suggesting an approach based on multiple sources of information would provide greater certainty for industry.

The ACCC subsequently released the Frontier Report and a discussion paper in April 2010 inviting submissions on a range of approaches to pricing the DTCS. These included bottom-up long-run incremental cost, top-down long-run incremental cost, Fully Allocated Cost (FAC), international and/or domestic benchmarking and a combined approach.

On 23 November 2010 the ACCC issued a Position Paper announcing its proposed domestic benchmarking approach to transmission pricing.

4 IAD for the DTCS

The ACCC has decided to issue an IAD for the declared DTCS to commence from 1 January 2011. The ACCC considers it appropriate to provide this Statement of Reasons as a guide to its decision to issue an IAD for the DTCS.

The ACCC considers it desirable for industry to have interim price and non-price terms for the DTCS. These terms will provide a default position for access seekers, while still allowing parties to negotiate different terms. The ACCC considers that this will provide an important level of certainty for industry until the ACCC makes a FAD for the declared DTCS.

The IAD for the DTCS includes price and non-price terms. The IAD also incorporates the effect of the exemption determinations which were originally made under the exemption provisions in the CCA which have since been repealed.

4.1 Material the ACCC has taken into account

The ACCC has taken the following material into account when making the IAD for the declared DTCS.

Price terms

- 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)
- Analysis 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.

Non-price terms

- *ACCC Model Non-Price Terms & Conditions Determination 2008* (2008 Model Terms)

Exemptions

- exemption determinations made under the repealed sections 152AS and 152AT.

The ACCC's approach to setting the price and non-price terms and conditions in the IAD is set out below.

5 Price terms for the DTCS

For the purpose of the IAD, the ACCC has decided to adopt price terms which are based on a domestic benchmarking of prices of competitive transmission services.

The ACCC regards transmission services that are not subject to regulation to be provided in relatively mature markets served by a number of service providers. Services between the mainland state capitals and national capital are not subject to the DTCS Declaration, 14 regional services were removed from regulation in 2004, and a further nine capital-regional services and services between almost all CBD ESAs and half the metropolitan ESAs were exempted from regulation in 2008. The exemptions were granted in recognition of the level of competition in the relevant markets.

The ACCC considers prices in competitive areas and on competitive services provide a reasonable indication of prices that would prevail in a competitive market. This information provides a useful basis for prices and price structures in non-competitive routes.

The ACCC therefore considers it appropriate to base regulated transmission prices on a benchmarking approach using the prices charged for competitive domestic transmission services. This approach has involved the following stages:

1. obtaining pricing information from transmission service providers
2. analysing pricing information to establish a range of prices for declared and non-declared services
3. determine a range of recurring and non-recurring prices for declared transmission services.

Benchmarking current prices reflects existing market conditions and different price structures across regions. This produces a range of IAD prices across both capacity and distance. In some instances the prices are counter intuitive to the general, well recognised observation that transmission prices increase with both capacity and distance. For example:

- in regards to regional pricing for a 10Mbps Ethernet DTCS service (see Table 3 on p.12 of the IAD) the interim prices show a decline in the 501-750km and 751-1000km distance bands. This is a result of the low number of observations, the significant variation in prices observed in the market for these distance bands and, to some extent, the discretionary nature of the distance bands chosen. It may also be as a result of regional transmission paths being routed directly between regional centres or via major capital cities.

- the relatively low price for a 155Mbps inter-capital SDH service across all distance increments (see Table 1 on p.11 of the IAD) compared to a similar 34-45Mbps service is likely to be a result of differing technology standards, the price of standardised equipment and the demand for this capacity on inter-capital routes.

The ACCC will seek comment on these observations during the public inquiry into the FAD for DTCS.

The ACCC also expects that prices will change as the market develops and will seek further input from stakeholders on this during the public inquiry. However, the ACCC considers that the IAD provides the required level of regulatory certainty until the FAD is made.

6 Non-price terms and conditions

The ACCC has decided to include non-price terms and conditions in the IAD for the declared DTCS. The ACCC considers that the most appropriate non-price terms and conditions for the purposes of this IAD are based on the 2008 Model Terms. This will provide industry with default terms and conditions in the interim period before the FAD is made. The inclusion of these terms in the IAD may reduce the number of access disputes between parties in the transitional period for areas covered by the non-price terms and conditions.

The non-price terms and conditions in this IAD cover the following areas:

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

The terms and conditions covering the areas above incorporate the wording of the 2008 Model Terms except for (f) which has been amended to the extent it does not apply to the DTCS. Similarly, the ACCC has not included the following clauses from the 2008 Model Terms because they are not relevant or do not apply to the DTCS:

- the liability (risk allocation) provisions which are contained in clause C of the 2008 Model Terms
- the changes to operating manual provisions which are contained in clause I of the 2008 Model Terms, and
- the ordering and provisioning terms which are contained in clause J of the 2008 Model Terms.

The ACCC consulted with industry before making the 2008 Model Terms and the 2008 Model Terms continue to apply in the absence of different terms and conditions that have been agreed between the relevant parties.

In determining the non-price terms of the IAD, the ACCC has decided to take a conservative approach and limit the scope of some of the 2008 Model Terms. This is because there is no requirement to undertake a public inquiry before making an IAD and breach of an IAD is a breach of a carrier licence condition¹⁶ and a service provider rule.¹⁷ Both breaches may involve substantial pecuniary penalties of up to \$10 million.¹⁸

The ACCC will consult with industry on the content of non-price terms and conditions in its public inquiry into a FAD for the DTCS.

7 Incorporating the DTCS exemptions

As noted above, the transitional provisions in the CACS Act state that once an AD (including an IAD) in relation to a service commences, a determination made under the exemption provisions ceases to have effect.¹⁹

Before the commencement of the IAD, there were four exemption determinations which affected the DTCS:

- ACCC Class Exemption Determination No. 4 of 2008 made on 25 November 2008 ACCC
- ACCC Individual Exemption Determination No.7 of 2008 made on 25 November 2008 (in respect of capital-regional routes)
- ACCC Individual Exemption Determination No.8 of 2008 made on 25 November 2008 (in respect of inter-exchange transmission capacity in metropolitan areas)
- ACCC Individual Exemption Determination No.9 of 2008 made on 25 November 2008 (in respect of inter-exchange transmission capacity in CBD areas)

The ACCC considers it appropriate to incorporate the effect of these exemption determinations in the DTCS IAD in order to provide certainty to industry. The issue of exemptions from the SAOs will be considered further in the public inquiry into a FAD for the DTCS.

8 Commencement and expiry

The IAD is backdated to commence on 1 January 2011. The ACCC considers it desirable that the IAD apply from this date to give industry certainty by setting default (or benchmark) terms relating to price from the commencement of the new access regime as amended by the CACS Act.

The CCA requires IAD to specify an expiry date. As such, the ACCC has specified that the IAD will expire on 31 December 2011. As noted above when an FAD commences, the IAD for that service will automatically be revoked.²⁰

¹⁶ Section 152BCO of the CCA.

¹⁷ Section 152BCP of the CCA.

¹⁸ Sections 68 and 101 and Part 31 of the *Telecommunications Act 1997*.

¹⁹ Items 202 (class exemptions) and 203 (individual exemptions) of the CACS Act.

²⁰ Section 152BCF(9A) of the CCA.

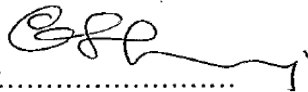
Appendix – DTCS Service Description

TRADE PRACTICES ACT 1974

Variation of declaration under sections 152AL and 152AO

1. Pursuant to sections 152AL and 152AO of the *Trade Practices Act 1974* (Act), and with effect from 29th September 2010, the Australian Competition and Consumer Commission (Commission) varies the domestic transmission capacity service (DTCS) declaration which took effect from 1 April 2009 under section 152AL of the Act (the DTCS declaration) by deleting Annexure 1 to the DTCS declaration and replacing it with Annexure 1 to this instrument.
2. Pursuant to subsection 152ALA(1) of the Act, the expiry date of the DTCS declaration is 31 March 2014.

Note: this expiry date is unchanged.



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Graeme Julian Samuel
Chairman
Australian Competition and Consumer Commission

Dated: 29th September 2010

Annexure 1 – Service description

The domestic transmission capacity service is a service for the carriage of certain communications from one transmission point to another transmission point via symmetric network interfaces on a permanent uncontended basis by means of guided and/or unguided electromagnetic energy, except communications between:

- (a) one customer transmission point directly to another customer transmission point
- (b) one access seeker network location directly to another access seeker network location

Inter-capital routes

- (c) a transmission point in an exempt capital city and a transmission point in another exempt capital city. Exempt capital cities include: Adelaide, Brisbane, Canberra, Melbourne, Perth or Sydney

Capital-regional routes

- (d) a transmission point in Sydney and a transmission point in any of the following regional centres: Albury, Lismore, Newcastle, Grafton, Wollongong, Taree, Dubbo, Campbelltown, Gosford, Coffs Harbour and Goulburn
- (e) a transmission point in Melbourne and a transmission point in any of the following regional centres: Ballarat, Bendigo, Geelong and Shepparton
- (f) a transmission point in Brisbane and a transmission point in any of the following regional centres: Toowoomba, Gold Coast, Townsville, Rockhampton, Bundaberg and Maryborough
- (g) a transmission point in Adelaide and a transmission point in Murray Bridge and, Port Augusta

Inter-exchange transmission (metropolitan areas)

- (h) inter-exchange transmission for the following metropolitan ESAs:
 - (1) in Sydney between transmission points located at an exchange in any of the following ESAs: Ashfield, Balgowlah, Bankstown, Blacktown, Burwood, Campsie, Carramar, Castle Hill, Chatswood, Coogee, Cremorne, East, Eastwood, Edgecliff, Epping, Glebe, Granville, Harbord, Homebush, Hornsby, Hurstville, Kensington, Kingsgrove, Kogarah, Lakemba, Lane Cove, Lidcombe, Liverpool, Mascot, Mosman, Newtown, North Parramatta, North Ryde, North Sydney, Parramatta, Pendle Hill, Pennant Hills, Petersham, Randwick, Redfern, Revesby, Rockdale Rydalmere, Ryde, Seven Hills, Silverwater, St Leonards, Undercliffe, Waverley

- (2) in Brisbane between transmission points located at an Exchange in any of the following ESAs: Paddington, South Brisbane, Toowong, Valley, Woolloongabba
- (3) in Melbourne between transmission points located at an Exchange in any of the following ESAs: Ascot, Brunswick, Caulfield, Coburg, Elsternwick, Footscray, Heidelberg, Malvern, Moreland, North Melbourne, Port Melbourne, Preston, Richmond, South Melbourne, St Kilda, Toorak
- (4) in Perth between transmission points located at an Exchange in any of the following ESAs: South Perth and Subiaco

Inter-exchange transmission (CBD areas)

- (i) inter-exchange transmission for the following CBD ESAs:
 - (1) in Sydney between transmission points located at an Exchange in any of the following ESAs: City South, Dalley, Haymarket, Kent, Pitt and exempted Sydney Metropolitan ESAs as set out in item (h)(1) of this service description
 - (2) in Brisbane between transmission points located at an Exchange in any of the following ESAs: Charlotte, Edison, Spring Hill and exempted Brisbane Metropolitan ESAs as set out in item (h)(2) of this service description
 - (3) in Adelaide between transmission points located at an Exchange in any of the following ESAs: Flinders and Waymouth.
 - (4) in Melbourne between transmission points located at an Exchange in any of the following ESAs: Batman, Exhibition, Lonsdale and exempted Melbourne Metropolitan ESAs as set out in item (h)(3) of this service description
 - (5) in Perth between transmission points located at an Exchange in any of the following ESAs: Bulwer, Pier, Wellington and exempted Perth Metropolitan ESAs as set out in item (h)(4) of this service description

Definitions

Where words or phrases used in this Annexure are defined in the *Trade Practices Act 1974* or the *Telecommunications Act 1997*, they have the meaning given in that Act.

an **access seeker network location** is a point in a network operated by a service provider that is not a point of interconnection or a customer transmission point

a **customer transmission point** is a point located at customer equipment at a service provider's customer's premises in Australia (for the avoidance of doubt, a customer in this context may be another service provider)

network interfaces include Ethernet, Plesiochronous Digital Hierarchy (PDH) and Synchronous Digital Hierarchy (SDH) interface protocols used to provide a transmission rate of 2.048 Megabits per second or above which an access provider provides to itself or others

exchange means a telecommunications exchange and includes the land, buildings and facilities (within the meaning of section 7 of the *Telecommunications Act 1997* (Cth)) that comprise or form part of the exchange

exchange service area or **ESA** has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1

a **point of interconnection** is a physical point of interconnection in Australia between a network operated by a carrier or a carriage service provider and another network operated by a service provider

a **transmission point** is any of the following:

- a) a point of interconnection
- b) a customer transmission point
- c) an access seeker network location

uncontended means dedicated and not shared