



Australian
Competition &
Consumer
Commission

Mobile Terminating Access Service

Final access determination
Draft decision

May 2015



Australian Competition and Consumer Commission

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List of abbreviations and acronyms

2G	2 nd generation networks
3G	3 rd generation networks
4G	4 th generation networks
A2P	application-to-person
ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
AER	Australian Energy Regulator
BAK	bill and keep
BBM	building block model
capex	capital expenditure
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
CCC	Competitive Carriers' Coalition
c-i-c	commercial in confidence
cpm	cents per minute
CSP	carriage service provider
EC	European Commission
EU	European Union
FAD	final access determination
FLBU	forward-looking bottom-up
FNO	fixed network operator
FTAS	fixed terminating access service
FTM	fixed-to-mobile
LRIC	long run incremental cost
LTE	long term evolution
LTIE	long-term interests of end-users
MNO	mobile network operator
MTAS	mobile terminating access service

MTM	mobile-to-mobile
MVNO	mobile virtual network operator
OECD	Organization for Economic Co-operation and Development
opex	operational expenditure
PPP	purchasing power parity
SAO	standard access obligation
SIOs	services in operation
SMS	short message service
SMSC	SMS centre
TSLRIC	total service long run incremental cost
TSLRIC+	total service long run incremental cost plus (organisational-level costs)
VHA	Vodafone Hutchison Australia
VoLTE	Voice over LTE
WACC	weighted average cost of capital

Executive Summary

The Australian Competition and Consumer Commission (ACCC) is currently undertaking a public inquiry into making a new final access determination (FAD) for the declared mobile terminating access service (MTAS).¹ The ACCC has reached a draft decision on the primary price terms for the new MTAS FAD. The primary price terms include the regulated prices for the mobile voice termination service and the short messaging service (SMS) termination service. The latter was declared for the first time in June 2014.

In reaching this draft decision, the ACCC has consulted with stakeholders at various stages of the inquiry.

After considering stakeholders' views and advice from an external consultant on the most appropriate pricing approaches for the MTAS, the ACCC decided that:

- the mobile voice termination rate would be determined using an international benchmarking approach
- the SMS termination rate would be determined as the sum of two parts:
 - the conveyance cost of SMS termination would be determined relative to the mobile voice termination rate based on the relative capacity use by the two services
 - SMS-specific cost would be determined based on the investment costs for SMS centres (SMSCs).

The ACCC engaged the external consultant to undertake the benchmarking study for mobile voice termination and provide advice on implementing the pricing approach for SMS termination.

After reviewing the outcome of the consultant's benchmarking study and advice, the ACCC has reached a draft decision on the following regulated termination rates:

	Time period	Rate
Voice termination	1 January 2016 – 30 June 2019	1.61 cents per minute
SMS termination	1 January 2016 – 30 June 2019	0.03 cents per SMS

The proposed rate for mobile voice termination represents a reasonable estimate of the costs of providing voice termination on Australia's predominantly 3G mobile networks based on benchmarks of the costs of voice termination on 2G and 3G networks in International markets.

The ACCC considers there is insufficient information at this stage to assess the impact of the forthcoming launch of voice-over-LTE (VoLTE) services in Australia on the cost of termination services. The ACCC will monitor the deployment of VoLTE services in Australia and will seek information from MNOs to inform itself on whether to review the regulated termination rates during the term of this FAD.

The ACCC's draft decision is that the regulated mobile voice termination rate and SMS termination rate will come into force from 1 January 2016. This provides a short period of transition after the conclusion of the FAD inquiry which allows industry to adjust their current commercial arrangements to reflect the changes in the regulated MTAS prices.

¹ This new MTAS FAD will replace the current MTAS FAD when it comes into force at the conclusion of the inquiry.

The ACCC does not consider that the FAD should include a mechanism requiring the integrated MNOs to pass on savings from reductions in the mobile voice termination rate to retail fixed-to-mobile (FTM) prices. The ACCC found there is evidence that without such intervention, a substantial portion of the reductions in the mobile voice termination rate appeared to have been passed onto lower retail FTM prices in the past. The ACCC considers that a mandated pass-through mechanism may be inconsistent with the promotion the long-term interests of end-users (LTIE).

The ACCC considers that the expiry date of the FAD should align with that of the associated declaration, i.e. 30 June 2019. However, as indicated above, the ACCC may review the MTAS prices before this date should there be circumstances that warrant a variation to the FAD.

1 Introduction

1.1 Background

The MTAS is a wholesale service provided by MNOs to other MNOs and to fixed-line network operators to terminate calls or SMS messages on their networks. It enables calls and SMS to be received by people using a mobile phone.

In June 2014, the ACCC decided to extend and vary the declaration of the MTAS such that mobile voice termination services and SMS termination services are declared for five years, until 30 June 2019. The MTAS declaration service description is reproduced below.

Domestic Mobile Terminating Access Service

The domestic mobile terminating access service is an access service for the carriage of voice calls and short message service (SMS) messages from a point of interconnection, or potential point of interconnection, to a B-Party directly connected to the access provider's digital mobile network.

Definitions

B-Party is the end-user to whom a telephone call is made or an SMS message is sent.

Digital mobile network is a telecommunications network that is used to provide digital mobile telephony services.

Point of interconnection is a location which:

(a) is a physical point of demarcation between the access seeker's network and the access provider's digital mobile network, and

(b) is associated with (but not necessarily co-located with) one or more gateway exchanges of the access seeker's network and the access provider's digital mobile network.

Short message service (SMS) is the provision of messages up to 160 characters of text using capacity in the voice signalling channel of a mobile network.

Under the *Competition and Consumer Act 2010* (the CCA), the ACCC may make an access determination relating to access to a declared service.² An access determination provides a set of terms and conditions that access seekers can rely on if they cannot agree on terms of access with an access provider. If the parties agree on terms of access, an access determination has no effect to the extent that it is inconsistent with an access agreement.³ The ACCC must hold a public inquiry before it makes an access determination.⁴ Further information about the legislative requirements for making an FAD and the ACCC's approach to applying these legislative requirements is set out in **Chapter 2**.

On 23 May 2014, the ACCC commenced the public inquiry into making a FAD for the MTAS and released a position paper on non-price terms and conditions, and supplementary prices for all declared telecommunications services (the Position Paper).⁵

2 Section 152BC of the *Competition and Consumer Act 2010* (Cth) (the CCA).

3 Section 152BCC of the CCA.

4 Section 152BCH of the CCA.

5 The declared telecommunication services are the six fixed line services (the unconditioned local loop service, line sharing service, public switched telephone network originating access, public switched telephone network terminating access, the wholesale line rental service, and the local carriage service) the domestic transmission capacity service, and the MTAS. Supplementary prices refer to additional charges incurred for using a declared service.

The current MTAS FAD was made in 2011 (2011 MTAS FAD) and was due to expire on 30 June 2014. On 6 June 2014, the ACCC extended the existing MTAS FAD until the day before a new MTAS FAD comes into force.

1.2 Consultation on price terms to date

The ACCC consulted with and provided information to stakeholders on primary MTAS pricing at the following stages in the MTAS FAD inquiry:

- Discussion paper on pricing approaches (August 2014)

The ACCC commenced consultation on the MTAS primary price terms by releasing a discussion paper on the primary pricing approaches on 1 August 2014. The discussion paper sought stakeholders' views on a number of pricing options for the mobile voice and SMS termination services. It also sought views on other relevant pricing issues such as FTM pass-through and the implementation of transitional arrangements.

The ACCC received eight submissions from stakeholders in response to this discussion paper. The ACCC considered these submissions in reaching its position on the most appropriate pricing approaches for mobile voice and SMS terminations.

- ACCC's position on pricing methodology (November 2014)

On 18 November 2014, the ACCC informed stakeholders that it had decided to adopt an international benchmarking approach to determine the mobile voice termination rate. The ACCC also decided that it would set the SMS termination rate as a fraction of the mobile voice termination rate based on the network capacity used to provide each service. The ACCC noted that it would seek external assistance from a consultant to implement the benchmarking approach and seek stakeholders input into this process before the release of the draft FAD. The ACCC also noted that the reasons for the ACCC's preferred pricing approaches would be detailed in the draft decision.

- Development on the benchmarking study (February 2015)

On 13 February 2015, the ACCC informed stakeholders that an external consultant had been engaged to undertake the benchmarking study and sought stakeholders' views on the proposed benchmark countries to be included in the study. The ACCC also provided some preliminary information on the consultant's approach to making adjustments to the benchmarks to take into account Australian conditions. The consultant considered stakeholders' submissions on these preliminary aspects of the benchmarking study in preparing its report to the ACCC.

- MTAS FAD draft decision (April 2015)

The purpose of the draft decision is to set out the findings of the benchmarking study and draft prices for the MTAS for stakeholders' comment. The consultant's report is also released with the draft decision to provide stakeholders with the information that the ACCC has taken into account in reaching its draft decision.

1.3 Engagement of WIK-Consult

In January 2015, the ACCC engaged WIK-Consult to assist in:

- providing a cost estimate of providing mobile voice termination in Australia by benchmarking against the cost of this service in international markets; and

- providing advice on setting SMS termination rates relative to mobile voice termination rates.

The draft regulated prices in this report are informed by WIK-Consult's report and advice. WIK-Consult's benchmarking methodology and advice in relation to SMS termination rate are discussed in Chapters 3 and 4 of this report respectively.

1.4 Making submission to the draft decision

The ACCC encourages all interested parties to make submissions on this draft decision.

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 confidential version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC expects that claims for commercial-in-confidence status of information by parties will be limited in order to promote transparency and broad participation in the public inquiry.

The ACCC has published a Confidentiality Guideline which sets out the process parties should follow when submitting confidential information to communications inquiries commenced by the ACCC. The Guideline describes the ACCC's legal obligations with respect to confidential information, the process for submitting confidential information and how the ACCC will treat confidential information provided in submissions. A copy of the Guideline can be downloaded from the ACCC's website.⁶

The ACCC-AER information policy: the collection, use and disclosure of information sets out the general policy of the ACCC and the Australian Energy Regulator on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC's website.⁷

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

Please send submission to MTASFADInquiry@acc.gov.au by COB **5 June 2015**.

Submissions received after this date may not be considered.

Please contact Kate Reader (kate.reader@acc.gov.au / 02 9230 3822) regarding any questions on the MTAS FAD inquiry.

⁶ <http://acc.gov.au/publications/communications-inquiries-submitting-confidential-material>.

⁷ <http://www.aer.gov.au/node/6280>.

2 ACCC approach to pricing the MTAS

This chapter sets out the legislative framework under which the ACCC may make a FAD. It also provides a general explanation of the ACCC's approach in considering the matters listed in section 152BCA of the CCA and sets out the overarching assessment framework under which specific pricing issues are discussed and determined in chapters 3, 4 and 5 of this report.

2.1 Legislative requirements

Under the CCA, the ACCC may make an FAD that specifies terms and conditions of access to a declared service, which must include terms and conditions relating to price or a method of ascertaining price.⁸ This enables the ACCC to determine pricing for a declared service which access seekers can rely on if they are unable to commercially agree on prices with the access provider.

The CCA requires the ACCC to have regard to a number of matters when making a FAD, which are:

- whether the FAD will promote the long-term interests of end-users (LTIE), which involves considering the extent to which it will result in the achievement of the following objectives:
 - Promoting competition in markets for listed services
 - Achieving any-to-any connectivity
 - Encouraging the economically efficient use of, and the investment in, the infrastructure by which the listed services are supplied, any other infrastructure by which listed services are, or are likely to become, capable of being supplied
- the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- the economically efficient operation of a carriage service, a telecommunications network or a facility.⁹

In considering whether the FAD is likely to encourage the economically efficient use of and investment in infrastructure by which listed services are supplied, or are capable of being supplied, 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

⁸ Sections 152BC(3) and (8) of the CCA.

⁹ Section 152BCA(1) of the CCA.

- 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
- the incentives for investment in the infrastructure by which the services are supplied, or are capable of being supplied, which must involve consideration of the risks involved in making the investment.¹⁰

The ACCC may also take into account any other matters that it considers relevant.¹¹

More details on the relevant legislative frameworks for making an FAD are provided in **Appendix A**.

2.2 Application of the legislative requirements to pricing the MTAS

The ACCC considers that a cost-based approach to setting regulated prices for the MTAS is appropriate taking into account the relevant factors listed in section 152BCA of the CCA. When the price of the declared service reflects the cost of providing the service, it promotes competition and allocative efficiency in downstream markets for services in which the declared service is an essential input. The promotion of competition in these markets is likely to encourage carriers to invest, innovate and improve the range and quality of services and promote dynamic efficiency over time. A cost-based approach that takes into account a reasonable return on investment also protects the legitimate business interests of the carriers and encourages efficient investment in the infrastructure used to provide the declared service in the long term.

The ACCC has considered the following key issues for implementing a cost-based approach for the MTAS:

- What are the relevant costs of providing the MTAS that should be used to determine the regulated prices?
- What methodology should be used to derive or estimate these costs?

2.2.1 What are the relevant costs of providing the MTAS that should be used to determine the regulated prices?

The ACCC has considered the types of costs that an MNO incurs to provide the MTAS. As an MNO provides the MTAS along with other services using the same network elements, the ACCC must determine how the costs should be allocated across different services and what types of costs should be recovered through the regulated price of the MTAS.

In considering what the relevant costs that an MNO should be entitled to recover for the provision of the MTAS, the ACCC considers that the pricing framework adopted should ensure that MNOs are not exposed to the risk of cost under-recovery in providing the service. This supports the legitimate business interests of the MNOs and provides incentives for the MNOs to continue making investment in infrastructure used to provide that service. On the other hand, the pricing framework should also ensure that the MNOs do not over-recover their cost of providing the service and this is in the interests of access seekers who have a right to use the declared service.

Similarly, the objective of promoting competition in downstream markets must also be viewed in light of these principles. While lower MTAS prices tend to better promote competition, they can only be sustained in the short term if the MTAS prices are not so low as to discourage the

¹⁰ Sections 152AB(6) and (7A) of the CCA.

¹¹ Section 152BCA(3) of the CCA.

MNOs from making efficient investment in or maintaining the infrastructure in the long run. The ACCC considers that in assessing whether an FAD will promote the LTIE it is necessary to consider the long term impact that it will have on competition.

The ACCC also considers that when having regard to the promotion of the LTIE, it should consider the effect that an access determination will have on allocative efficiency in the long term. The attainment of allocative efficiency requires that the price for the provision of a service reflects the long run cost of its provision. This ensures that the infrastructure used to provide the service is efficiently used in the long run.

In addition, the ACCC has taken into account the particular technology used to provide the MTAS and its development in determining the most appropriate cost.

2.2.2 What methodology should be used to derive or estimate these costs?

The second question involves the more practical issue of how to derive or estimate the relevant costs of providing the MTAS.

The ACCC has considered the advantages and disadvantages of different methodologies for estimating costs. In doing so, the ACCC took into account the matters set out in section 152BCA as well as a number of practical matters which it considered relevant. The ACCC considered, for instance, the time and costs involved in developing a methodology, the feasibility of implementing different methodologies and the relative accuracy with which different methodologies can produce an estimate of the cost of providing the MTAS.

As discussed in the next two chapters, the ACCC considers that the international benchmarking approach is the most appropriate for determining the cost of mobile voice termination in Australia in this FAD process. The ACCC also considers that the cost of SMS termination should be determined as the sum of two parts: the conveyance cost of SMS termination should be set relative to the mobile voice termination cost based on the relative capacity used by the two services and SMS-specific cost should then be added onto this conveyance cost to derive the total cost of SMS termination.

3 Price terms for mobile voice termination

Key Points

- The ACCC has decided to adopt an international benchmarking approach to determine the efficient cost of mobile voice termination in Australia.
- The benchmarks that are used are TSLRIC+ estimates produced from the cost models of the benchmark countries. Appropriate adjustments have been made to these benchmarks to take into account Australia-specific factors.
- Based on the results of the benchmarking study, the ACCC's draft decision is to adopt a rate of 1.61 cents per minute for mobile voice termination, which will apply from 1 January 2016 to 30 June 2019.

3.1 Pricing approach

3.1.1 Discussion paper

In the Discussion Paper released in August 2014, the ACCC sought stakeholders' views on the appropriate pricing approach for mobile voice termination services. The ACCC discussed a number of pricing approaches, including long run incremental cost methodologies implemented using a cost model, international benchmarking and bill and keep (BAK). The ACCC also invited suggestions on other options for pricing the mobile voice termination service not raised in the discussion paper. The ACCC noted it was important to balance the need to develop a sufficiently robust pricing methodology with the regulatory burden that may be imposed on stakeholders.¹²

The ACCC also expressed its preliminary view that a uniform pricing approach to FTM and mobile-to-mobile (MTM) termination is likely to be appropriate. However, the ACCC sought stakeholders' views on whether different factors should be taken into account in determining the pricing approaches for FTM termination and MTM termination.¹³

A summary of the submissions in response to the discussion paper is provided in **Appendix B**.

3.1.2 ACCC's position on the pricing approach

Having considered the submissions received in response to the Discussion Paper, the ACCC decided that an international benchmarking approach is preferred to determine the efficient cost of mobile voice termination in Australia for the duration of the new FAD. The reasons for adopting its preferred approach are discussed below.

Mobile-to-mobile and fixed-to-mobile termination

The ACCC considers that both MTM and FTM voice termination rates should be set at the same price using the same methodology. This is because from an MNO's perspective, MTM and FTM termination services are essentially the same, using the same infrastructure and

¹² ACCC, *Mobile terminating access service: Final access determination discussion paper*, August 2014, pp. 11–21. (Discussion Paper)

¹³ Discussion Paper, pp. 5–6.

costing the same amount to provide. Further, stakeholders are concerned that differential pricing of FTM and MTM services may raise the risk of arbitrage.¹⁴

For these reasons, the ACCC intends to set one voice termination rate which will apply to both MTM and FTM voice termination services consistent with its preliminary view expressed in the Discussion Paper.

TSLRIC+ remains the most appropriate pricing framework

The ACCC has traditionally preferred TSLRIC+ as the underlining pricing framework for the MTAS.¹⁵ As noted in the Discussion Paper, there has been a shift away from TSLRIC+ type approaches in Europe in favour of the pure LRIC approach.¹⁶ This trend occurred as a result of the European Commission (EC) recommending the use of pure LRIC for pricing both mobile and fixed termination in 2009.¹⁷

After considering stakeholders' views on this issue and taking the 152BCA matters into account, the ACCC has come to the conclusion that TSLRIC+ remains the most appropriate pricing framework for the MTAS for reasons explained below.

MNOs provide a range of services, including MTAS, using their network infrastructure and the provision of most of these services share common network elements, such as base stations. The key conceptual difference between TSLRIC+ and pure LRIC is the treatment of these common network costs.

Under TSLRIC+, the common network costs are allocated to all services that share the same network elements and are utilised based on traffic minutes. This means that all traffic (on-net terminating, off-net terminating, originating) is treated in the same way and each type of traffic contributes to the recovery of the common network costs.

Under pure LRIC for the calculation of the cost of providing mobile voice termination service, the common network costs are allocated to all services other than off-net terminating traffic in the first instance, with only the residual network costs then allocated to the provision of off-net termination. In other words, pure LRIC discriminates between off-net terminating traffic and other traffic.

In addition, TSLRIC+ also includes a contribution to organisational-level costs whereas there is no such contribution under pure LRIC.

The ACCC considers that the above differences have a number of implications with respect to the application of TSLRIC+ and pure LRIC framework to the MTAS.

Firstly, pricing off-net mobile termination at pure LRIC could only be sustained in the long run if other services bear the common network costs. Because common network costs are not allocated to the off-net terminating traffic, the per-unit cost of on-net terminating service must be higher than the unit cost of the off-net terminating service. This means that under a pure

¹⁴ That is, there is a risk that access seekers could route FTM calls through mobile gateways to avoid FTM voice termination charges if these charges were higher than MTM voice termination charges. See Telstra, *Response to the Commission's Mobile Terminating Access Service – Final Access Determination Discussion Paper*, 5 September 2014 (Telstra Submission), p. 30; Vodafone Hutchison Australia, *Final access determination: the domestic mobile terminating access service, primary prices: Response to the ACCC's Discussion Paper*, September 2014 (VHA Submission), p. 20; Macquarie Telecom, *Mobile terminating access service: Final access determination discussion paper*, 3 September 2014 (Macquarie Submission), p. 13; iiNet, *Mobile terminating access service Final access determination discussion paper: Submission by Thomson Geer Lawyers on behalf of iiNet Limited*, August 2014 (iiNet Submission), p. 8.

¹⁵ ACCC, *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, March 2009, p. 12.

¹⁶ Discussion Paper, p. 14.

¹⁷ EC, Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile termination Rates in the EU (2009/396/EC), *Official Journal of the European Union*, L 124/67.

LRIC approach, an MNO will be required to supply termination services to access seekers at a unit price that is below the unit cost of supplying the same service to itself. This is not consistent with the attainment of allocative efficiency as off-net termination would be priced below its long run cost to the economy while on-net termination would be priced above its long run cost.

Secondly, as pure LRIC does not include a contribution to organisational-level costs either, the use of this approach would require a further increase in the prices of other services to make up for this contribution.

Both of these create the risk that an MNO may not be able to fully recover its cost of providing services if pure LRIC is applied. While MNOs may attempt to recover costs by increasing their retail prices, the ACCC considers the retail market for mobile services is sufficiently competitive such that MNOs may be constrained from increasing their retail prices.

As such, the ACCC is of the view that pure LRIC creates a risk of cost under-recovery for MNOs. This undermines the legitimate business interests of the MNOs and is likely to discourage the efficient investment in mobile infrastructure.

Overall, the ACCC considers that the TSLRIC+ framework remains the most appropriate pricing approach taking into account the relevant factors required under the CCA. This is consistent with the position of the ACCC in previous MTAS pricing principles and FAD decision and promotes regulatory certainty for stakeholders. While pure LRIC would produce a lower termination rate than TSLRIC+ and may promote competition in the short term, any competition promoted is likely to be inefficient and unsustainable due to the risk of cost under-recovery.

The ACCC considers that by ensuring that MNOs are adequately compensated for the provision of the MTAS, TSLRIC+ promotes allocative efficiency, protects the legitimate business interests of the MNOs and provides sufficient incentives for MNOs to maintain and invest in the infrastructure necessary to provide the MTAS.

International benchmarking is the most appropriate pricing methodology

The ACCC recognises that the most direct way to implement a TSLRIC+ pricing framework is to develop a cost model, such as the WIK model developed in 2006 which was used to determine the MTAS rates in past pricing determinations.¹⁸

However, the ACCC considers that an international benchmarking approach, which makes use of the estimated termination costs in countries which have developed TSLRIC+ or equivalent cost models, is the most appropriate approach to be adopted in the current FAD for the reasons set out below.

The ACCC acknowledges that generally an appropriate cost model would produce more accurate estimates of the efficient costs of providing mobile voice termination services in Australia than an international benchmarking study. As noted in the Discussion Paper and reflected in stakeholders' submissions, the WIK model used to set prices in the 2011 MTAS FAD is no longer appropriate for setting MTAS prices, because it no longer reflects the current network technology or consumer usage patterns.¹⁹ The ACCC would therefore need to develop a new cost model to set prices in the new MTAS FAD.

However, taking into account stakeholders' submissions, the ACCC estimates that a TSLRIC+ cost model, with proper stakeholder consultation, may take between 1 to 2 years to be developed. The MTAS rate determined in 2011 to apply after 1 July 2013 will continue to apply

¹⁸ ACCC, *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, March 2009; ACCC, *MTAS Pricing Principles Determination 1 July 2007 to 31 December 2008: Report*, November 2007.

¹⁹ See, ACCC, *Mobile Terminating Access Service: Final access determination discussion paper*, August 2014, p. 12.

until the new FAD comes into force. Developing a new cost model is likely to lead to an MTAS rate that is no longer efficient applying for a significantly longer period than if international benchmarking were used, which would not promote the LTIE.

Therefore the ACCC considers that the benefits of obtaining a more accurate estimate using such cost model are outweighed by the detriment that will result from the delay in setting new MTAS prices. Developing a cost model is also likely to be a more resource-intensive process than benchmarking, requiring greater contributions and consideration from and imposing greater regulatory burden on industry than an international benchmarking process.

In contrast, the ACCC considers that an international benchmarking study could be conducted relatively quickly and with minimal impost on industry stakeholders.

The ACCC considers that an international benchmarking study is capable of producing an estimate of the cost of voice termination in Australia if:

- the benchmark set is restricted to appropriate jurisdictions that have used TSLRIC+ (or equivalent) pricing framework, and
- appropriate adjustments are made to benchmarked data to take into account differences between Australia and the benchmarked jurisdictions.

As the mobile voice termination rate is significantly lower now than a decade ago and the cost of mobile voice termination is likely to have declined since the last FAD inquiry, the ACCC considers that the impact of regulatory error inherent in a benchmarking analysis is likely to be small. This also means that the improvement in accuracy in the estimated cost from using a cost model rather than international benchmarking may not be significant.

Taking all of the above considerations into account, the ACCC formed the view that the benefits of developing a cost model do not justify the prolonged application of an inefficient MTAS price or the significant regulatory burden associated with it. In comparison, benchmarking against TSLRIC+ estimates of mobile voice termination in international markets represents a pragmatic and balanced approach to pricing the mobile voice termination service in Australia.

As noted in **Chapter 1**, the ACCC engaged WIK-Consult to undertake the benchmarking study to estimate the cost of voice termination in Australia. WIK-Consult's benchmarking study and its outcomes are discussed in **section 3.2** below.

Other proposed approaches

Stakeholders expressed views on other pricing approaches which the ACCC could use to determine the mobile voice termination rate. The ACCC has considered the alternative methodologies set out below and for the reasons discussed, concluded that they are not appropriate for pricing the mobile voice termination service.

Building block model

VHA and Mr John de Ridder submitted that the ACCC should use a building block model (BBM) to set mobile voice termination prices.²⁰ VHA submitted that BBM is the most appropriate cost methodology because it is used by the ACCC to price other declared services such as fixed line services.²¹ The ACCC does not consider that a building block model (BBM), similar to that used for the fixed line services, should be used to price the MTAS. While the BBM is also a cost-based approach, it is different from the concept of TSLRIC+ in a number of aspects which make it unsuitable for pricing the MTAS.

²⁰ John de Ridder, *How long will MTAS be necessary*, August 2014; VHA Submission.

²¹ VHA Submission, pp. 15-16.

One of the important reasons the ACCC adopted the BBM to price fixed line services, is that the BBM locks in the value of the regulated asset base, and therefore provides greater certainty for access providers and access seekers than a TSLRIC+ methodology.²² This is appropriate where the infrastructure and technology used to provide the services do not fundamentally change for extended periods of time. However, where technology develops rapidly the BBM does not provide such certainty, as it makes it difficult to forecast the regulated asset base in the long term. Such is the case in the mobiles industry, where the pace of technological change is more rapid than in the fixed line services markets, and this difference undermines the key advantage of using a BBM.

The ACCC also notes that the use of a BBM approach requires the use of historical costs of actual carriers. This means that to properly implement a BBM approach, the ACCC would need to develop three BBMs, one for each of the three MNOs. This would require a large amount of data collection and would likely delay significantly the completion of the MTAS FAD inquiry. This, as noted earlier, would result in the prolonged application of the MTAS price determined in 2011 which is likely to be no longer efficient.

Setting mobile voice termination rate relative to fixed termination rate

A number of parties submitted that mobile voice termination rates should be set with reference to the fixed terminating access service (FTAS) rate set out in the fixed-line services FAD.

Optus' preferred method for pricing mobile voice termination rates is to set them at three times the FTAS rate.²³ The ACCC does not consider that the MTAS rate should be set at three times the FTAS rate, or that this is necessary to avoid competitive distortions as Optus has submitted, for a number of reasons.

First, the ACCC considers it appropriate to use different pricing methodologies for fixed and mobile termination services. The ACCC is of the view that BBM and an international benchmarking approach will result in prices which reflect the efficient cost of providing the fixed and mobile voice termination services respectively. As explained above, the use of BBM is appropriate for the fixed line services but not for the MTAS due to differences in the pace of changes in the technologies used to provide the two services.

Secondly, even if the use of different pricing methodologies for fixed and mobile voice termination services means there are slight differences in the type of costs that can be recovered, the ACCC considers that it will result in prices that are more closely aligned with the relative costs of providing the two services than adopting the 3:1 ratio proposed by Optus. Considering the matters under 152BCA, and in particular the promotion of the LTIE, the ACCC does not think that setting the mobile voice termination rate at three times the FTAS rate is appropriate, as it will not be based on the cost of providing the mobile voice termination service.

Similarly, the ACCC does not consider that the mobile voice termination rate should be simply aligned with the FTAS rate as proposed by a number of stakeholders because it is not based on the cost of providing the service.

Bill and keep

The ACCC does not consider that a BAK regime is appropriate for mobile voice termination. The ACCC raised a number of concerns with adopting BAK for MTM termination in the discussion paper including the potential risk of arbitrage which still remain. Further, submissions from stakeholders do not support the use of BAK for MTM termination.

²² See ACCC, *Review of the 1997 telecommunications access pricing principles for fixed line services: Draft report*, September 2010, pp. 15–17.

²³ Optus, *Submission in response to ACCC Discussion Paper: Mobile Terminating Access Service: Final Access Determination*, August 2014 (Optus Submission), pp. 6–10.

3.2 WIK-Consult's benchmarking study

WIK-Consult's benchmarking study involves two stages:

- Selection of benchmark countries based on the selection criteria specified by the ACCC
- Adjustments to the benchmarks to take into account Australian conditions.

The section below discusses some key aspects of this two-stage process. Full details on each step of WIK-Consult's benchmarking study and the outcomes of the study are contained in the consultant's report published with this draft decision.²⁴

As noted in **Chapter 1**, the ACCC sought stakeholders' comments on some preliminary aspects of the benchmarking study in February 2015 and the comments received were considered by WIK-Consult in preparing its report.

3.2.1 Selection criteria for benchmark countries

The ACCC instructed WIK-Consult that the benchmarks should be selected based on the following criteria:

- The benchmark countries should be restricted to those that developed and published cost models based on TSLRIC+ (or equivalent) framework. This could include countries which adopted a pure LRIC framework to set regulated prices but whose cost models are capable of producing TSLRIC+ estimates which can be used as benchmarks.
- The benchmarks to be included must be the outputs of cost models, which are not necessarily the regulated mobile termination rates adopted by the regulators, i.e. benchmarking against costs not regulated rates.

Based on these criteria, WIK-Consult selected nine benchmark countries which have published their cost models which are amenable to be used for the purposes of the benchmarking study. These countries are:

- Denmark
- Portugal
- Romania
- Mexico
- Spain
- Netherlands
- Sweden
- Norway
- UK.²⁵

The ACCC is satisfied that the countries identified by WIK-Consult meet the selection criteria and provide an appropriate pool for the benchmarking study. The ACCC recognises that these countries differ in characteristics compared to Australia which may impact on the cost of providing services. However, the ACCC considers that the adjustment process used by WIK-Consult in its benchmark study takes those differences into account when determining the cost of voice termination in Australia.

²⁴ This report is available on the ACCC website at: <http://acc.gov.au/regulated-infrastructure/communications/mobile-services/mobile-terminating-access-service-fad-inquiry-2014>.

²⁵ For a detailed explanation of WIK-Consult's process of selecting benchmark countries and the reasons for excluding certain countries, see WIK-Consult, *Benchmarks for the cost of mobile terminating access service in Australia*, 15 April 2015, pp. 19–21. (WIK Report)

3.2.2 Adjustment factors

As instructed by the ACCC, WIK-Consult has applied adjustments to the benchmarks to take into account certain country specific factors that impact the cost of termination services in Australia. These factors are:

- Currency conversion
- Network technology: share of 2G/3G voice traffic
- WACC
- Network usage
- Geographic terrain
- Spectrum fees.

WIK-Consult also discussed its reasons for not adjusting for a number of other factors.²⁶ These include the availability of VoLTE,²⁷ spectrum allocation and population density.

The ACCC understands that it is impossible to adjust for every country-specific factor that affects termination costs. The ACCC considered WIK-Consult's reasons for including the adjustment factors listed above as well the reasons for excluding other factors. The ACCC is of the view that the adjustment factors selected by WIK-Consult are appropriate as they represent the factors that have the greatest impact on the cost of providing voice termination services.

To make appropriate adjustments for the selected factors, information about the Australian MNOs is necessary. To assist WIK-Consult in undertaking the adjustment process, the ACCC has obtained the following information from the MNOs:

- Shares of voice traffic carried on 2G and 3G networks
- Number of subscribers for years 2012–2014
- Voice and data traffic for years 2012–2014.

The ACCC has also obtained from other public sources information on spectrum fees and the number of mobile sites which have also been used as Australia-specific inputs in the adjustment process.

The ACCC considers that a single voice termination rate should apply to all MNOs and the benchmarking study estimates the cost of voice termination for a hypothetical efficient MNO in Australia having a market share of 33.3%.²⁸ To this end, where MNO-specific information is used in the adjustment process, an average has been taken from the information provided by the three MNOs.²⁹

The details of the adjustment process are explained in the WIK Report. The ACCC discusses its views in relation to some key elements of the adjustment process below.

Currency conversion

In WIK-Consult's study, the benchmarks from overseas cost models in local currencies have been converted into Australian dollar based on an average of market exchange rate (10 year average) and exchange rate adjusted for purchasing power parity (PPP).³⁰ This reflects the fact that some costs of providing mobile termination services are for internationally tradable goods

²⁶ WIK Report, pp. 13–18.

²⁷ While this is not an adjustment factor, it is a relevant factor WIK-Consult has taken into account in estimating future mobile voice termination costs. See discussion on VoLTE in **Section 3.2.2**.

²⁸ This is based on a market with three MNOs and is close to the current actual market share of the second largest MNO in Australia.

²⁹ This also means that the relevant input values for each of the adjustment factors are presented in the WIK-Consult's draft report without disclosing any confidential information of the MNOs.

³⁰ WIK Report, pp. 24–26.

(such as radio equipment) and other costs are for goods and services acquired locally (such as mobile towers, installation costs, etc.).

Telstra submitted in response to the Discussion Paper that PPP rates should be used for currency conversion if a benchmarking approach is taken. Telstra argued that PPP rates take into account differences in wage levels, equipment prices and varying capital charges, all of which are relevant to the provision of the MTAS.³¹

As the costs of providing mobile voice termination services by an MNO involves costs for both tradable and non-tradable goods and services, the ACCC considers that it is appropriate to apply an average of market exchange rate and PPP-adjusted exchange rate reflecting the proportions of these two categories of costs.³²

WACC

The ACCC understands that adjusting for WACC is important to ensure that the difference in the cost of financing capital expenditure in Australia is taken into account. For the purpose of WIK-Consult's adjustment process, the ACCC provided a nominal WACC of 5.43%,³³ which is the WACC used in the fixed line services FADs draft decision.³⁴ Although this WACC was calculated for the purpose of determining Telstra's cost of providing fixed line services, the ACCC considers that the parameters used for this WACC are generally applicable to an Australian telecommunications service provider.

Of particular relevance is the value of the equity beta, which measures the systematic risk faced by a firm. It is represented by the standardised correlation between the returns of a firm and the returns of the overall market. The equity beta of 0.7 adopted in the fixed line services FAD draft decision is consistent with the outcome of benchmarking equity betas for comparable telecommunications service providers across OECD countries.³⁵ These comparable telecommunications service providers provide a range of telecommunications services, such as fixed line and mobile services. Therefore, the ACCC expressed the view in the fixed-line services FADs draft decision that the equity beta of 0.7 is likely to be higher than that of an operator who provides fixed-line services alone.³⁶ The ACCC considers that this equity beta is appropriate for a hypothetical efficient MNO in Australia as two out of the three MNOs are integrated operators.

The ACCC is also aware that the gearing ratio of 40:60 (debt/equity) used in the calculation of this WACC reflects that of Telstra alone.³⁷ Given WIK-Consult's conservative approach to determining the effect of WACC on the cost of termination,³⁸ the ACCC is satisfied that the WACC adopted by the fixed line services FAD draft decision can be used for the purpose of the benchmarking study. However, the ACCC welcomes submissions from MNOs on this issue if their gearing ratios are sufficiently different from this value so as to result in a significant change in the benchmarking outcome.

³¹ Telstra Submission, p. 27.

³² As noted by WIK-Consult, the use of a simple average reflects empirical observations of the share of an MNO's costs for tradable and non-tradable goods and services. This approach also corresponds to the use of a blended exchange rate by the New Zealand Commerce Commission in its benchmarking study for mobile voice termination in 2011. See Commerce Commission, *Standard terms determination for the designated services of the mobile termination access services (MTAS) fixed-to-mobile voice (FTM), mobile-to-mobile voice (MTM) and short messaging services (SMS)*, 5 May 2011, p. 67.

³³ WIK Report, p. 32.

³⁴ See ACCC, *Public inquiry into final access determinations for fixed line services – primary price terms: Draft decision*, March 2015, p. 79.

³⁵ *ibid.*, p. 91.

³⁶ *ibid.*, p. 93.

³⁷ *ibid.*, p. 102.

³⁸ See WIK Report, pp. 32–33.

Population density and network usage

The ACCC understands that low population density has been considered by some stakeholders to be a significant factor which affects the cost of termination services in Australia. For instance, Telstra submitted that despite Australia's high urbanisation rate, low population density and low urban population density means that there will be higher MTAS costs in Australia than in other jurisdictions.³⁹

As instructed by the ACCC, WIK-Consult gave extensive consideration to the effect of low population density in Australia. It examined information from Australian sources, including the three MNOs, about the volumes of traffic carried over the networks and the number of cell sites in the networks. Since the intensity of network usage is an indicator of the level of average cost per unit of traffic, this provides information on how far population density would affect cost. WIK-Consult noted Australia has a very high usage per cell site compared with the network usage evident in the benchmark countries. It concluded that given the high network usage per cell site in Australia, low population density does not actually mean that the average cost of traffic in Australia is higher than in other countries. WIK-Consult therefore did not consider population density to be a separate adjustment factor in addition to network usage, for which it adjusted in its benchmarking study.⁴⁰ This adjustment in fact led to a *decrease* in the per-unit cost of voice termination services as network usage per site in Australia is significantly higher than those in the benchmark countries (almost double than that of the second highest).

The ACCC recognises that population density affects the relative proportion of coverage-driven cells and traffic-driven cells in a mobile network. A country with lower population density tends to have proportionately more coverage-driven cells with cost per unit of traffic that is higher than in traffic-driven cells. Therefore, everything else being equal, lower population density would ordinarily increase the average cost per unit of traffic for a mobile network.

However, the ACCC considers that the effect of low population density in Australia cannot be determined independently of other factors that are specific to Australia. It must also be examined in light of how per unit cost of traffic is determined in TSLRIC+ cost modelling.

As explained by WIK-Consult in its report, the per unit cost of traffic serviced by the radio access network is determined by taking the total cost of the radio access network and dividing that cost by the total volume of traffic serviced by that network – this is inclusive of the cost and traffic for both coverage-driven and traffic-driven cells.⁴¹ This means that even though the low population density means that the proportion of coverage-driven cells in Australia is likely to be higher than in the benchmark countries, the extremely high network usage per site in Australia, in particular in traffic-driven cells, means that despite this, the average cost of traffic is in fact lower in Australia.

The ACCC therefore considers that it is appropriate to adjust for network usage (per mobile cell site), rather than population density, as it is the factor that has a more significant impact on the cost of termination services.

Geographic terrain

As the geographic features of Australia are likely to be different from those of the benchmark countries, the ACCC considers it appropriate to make adjustments to the extent that such features impact on the cost of voice termination services in Australia.

The ACCC understands that the adjustment for geographic terrain in WIK-Consult's study captures the effect of mountainous and hilly regions in a country which obstructs the propagation of radio waves. This has the effect of making coverage-driven cell sizes smaller and therefore increasing the number of cells in these areas, resulting in an increase in total

³⁹ Telstra Submission, p. 26.

⁴⁰ WIK Report, pp. 13–15.

⁴¹ *ibid*, p. 14.

cost as well as cost per unit of service. The outcome of this adjustment suggests that the cost of termination in Australia is higher than the average of the benchmark countries due to the particular geographic terrains in Australia, although the increase is small.⁴²

Spectrum fees

The ACCC considers it is appropriate to adjust for the differences in the cost of spectrum that MNOs have to incur to provide mobile services in Australia. For the purpose of making this adjustment, the cost components for spectrum were first set equal to zero in the benchmark models. The ACCC provided WIK-Consult with information obtained from the Australian Communications and Media Authority (ACMA) on the amount paid by the MNOs for obtaining spectrum used to provide mobile services (via auction or administrative allocation) and the term of spectrum licences in Australia. The process of deriving a per unit mark-up to account for spectrum fees from this information, which was then added to the benchmarks for voice termination with local spectrum fees removed, is explained fully in WIK-Consult's report.⁴³

In this process, WIK-Consult added a 2% opex over the annualised spectrum cost to account for costs incurred by MNOs in using the spectrum. While the cost models of the benchmark countries and the WIK model developed for the ACCC in 2006 do not apply opex for the use of spectrum, WIK-Consult considers that the proper use of spectrum will require some expenses, such as administrative expenses, which warrant the inclusion of a mark-up for opex. Given the significant amount of investment the MNOs made in acquiring spectrum and renewing spectrum licences, the ACCC considers that it is appropriate to apply a mark-up to cover any opex that the MNOs may incur in using the spectrum.

3.2.3 ACCC views on WIK-Consult's recommendation

Overall, the ACCC is satisfied that WIK-Consult's benchmarking study has produced a reasonable estimate of the cost of voice termination in Australia, and, taking into account the section 152BCA matters, is an appropriate method to set voice termination prices in the MTAS FAD. The benchmarking countries included satisfy the selection criteria set by the ACCC, which reflect pricing principles that the ACCC considers promote the LTIE. The ACCC also considers that the adjustments made to the benchmarks reflect the most significant cost drivers for the provision of the MTAS; have been informed by current information from Australian sources; and have been applied in a conservative manner.

WIK-Consult recommends that the mean of the adjusted benchmarks with extreme values removed be used as the central value and have provided a cost range that reflects its view on the cost of voice termination in Australia based on this value.⁴⁴ The estimated cost range is from 1.37 (cpm) to 1.85 (cpm) with a central value of 1.61 (cpm).⁴⁵

Having considered this cost range, the ACCC is of the view the central value is the most appropriate to adopt for the draft decision. The ACCC considers that this is a reasonable estimate of the cost of providing voice termination in Australia and would ensure that MNOs recover the efficient costs of providing the service. In reaching this view, the ACCC has taken into account that WIK-Consult took a conservative approach at each step of the benchmarking study.

The ACCC does not consider that there are any significant factors which warrant selecting a price point above or below this central value. In cases where a significant cost driver has been identified but not adjusted for because of the lack of relevant information or feasibility, it would be open for the ACCC to make a qualitative conclusion that this omission means the benchmarking outcome is likely to be either over-estimated or under-estimated. The ACCC is

⁴² WIK Report, pp. 35–37.

⁴³ WIK Report, pp. 38–39.

⁴⁴ WIK Report, pp. 43–44.

⁴⁵ *ibid*, p. 51.

seeking views from stakeholders as to whether all of the significant cost drivers have been identified.

Voice-over-LTE (VoLTE)

While all three MNOs have deployed 4G networks in Australia, the 4G networks are not currently used to provide voice and SMS services. However, the commercial launch of VoLTE appears to be imminent given announcements by two of the MNOs that VoLTE will be launched in late 2015.⁴⁶ The ACCC considers it highly likely that all three MNOs will launch VoLTE services during the next FAD. This development is likely to have an impact on the cost of termination services given the efficiency gains associated with the use of this technology.

WIK-Consult did not adjust the benchmarks for the differences in the use of VoLTE, but did consider the likely impact that the deployment of VoLTE will have on the cost of voice termination in future years. WIK-Consult has provided a preliminary estimate of this impact based on the forecast VoLTE traffic shares used in the UK cost model, as this is the only benchmark cost model which considered VoLTE services.

Based on the UK cost model, WIK's report suggests that the cost of termination on 4G networks averages 30% of the cost of termination on 3G networks. This estimation is based on forecasted VoLTE traffic shares growing from 1% to 24% in a 4-year period.⁴⁷ The larger the share of VoLTE traffic on a mobile network, the lower the average cost of termination.

Therefore, the share of VoLTE of the total MNOs' traffic is the key information the ACCC needs in order to properly assess the impact of the deployment of VoLTE on the cost of voice termination. The ACCC has considered whether to adjust the regulated mobile voice termination rate to reflect the deployment of VoLTE for later years of the FAD period. However, the ACCC consider that it does not currently have reliable information on the potential take-up of VoLTE services to be able to do so.

Due to these considerations, the ACCC's draft decision is to adopt a regulated mobile voice termination rate of 1.61 cents per minute for the entire FAD period. This reflects the estimated cost of providing voice termination on Australia's predominantly 3G networks, as benchmarked against the costs of providing voice termination on 2G and 3G technologies estimated using cost models developed in countries that are capable of producing TSLRIC+ estimates.

Having adopted this position, the ACCC may review this rate during the term of the FAD if there is sufficient evidence that it no longer reflects the efficient cost of mobile voice termination service in Australia.

For this purpose, the ACCC will monitor the deployment of VoLTE services in Australia and may seek information from MNOs, such as the actual shares of VoLTE traffic and forecast demand for VoLTE services, during the term of the FAD.

At this stage, the ACCC welcomes stakeholders' submissions on the likely extent of the deployment of VoLTE over the FAD period, including any early forecasts of VoLTE traffic that may be available.

3.3 Draft mobile voice termination rates for 2015–2019

For the reasons set out in the preceding sections, the ACCC's draft decision is to adopt a MTAS price of 1.61 (cpm) for voice termination for the FAD period until 30 June 2019. This

⁴⁶ VHA media release, *Vodafone 4G calling: successful start to VoLTE trials*, 6 February 2015, at: http://www.vodafone.com.au/doc/Vodafone_VoLTE_Trial.pdf; Telstra media release, *Telstra's network evolution to lay new world leading foundations*, 2 March 2015, at: <http://www.telstra.com.au/aboutus/media/media-library/telstras-network-evolution-to-lay-new-world-leading-foundations.xml>.

⁴⁷ WIK Report, p. 45.

compares to the current MTAS price of 3.6 (cpm). This means that since the declaration of the MTAS in 2004, the regulated mobile voice termination rate has consistently declined over the years. This is consistent with the trend observed in the regulation of mobile termination service globally. The ACCC considers that in general, this reflects the consistent decline in the cost of providing termination services, mainly due to the adoption of more efficient technology (as more and more traffic are carried on 3G rather than 2G networks), and increasing network usage, in particular the exponential growth in data traffic.

The ACCC considers that the decreasing mobile voice termination rate will continue to benefit end-users of mobile services and fixed-line voice services in the form of lower retail prices and more generous inclusions of calls in included-value plans.

The ACCC's draft decision is that the new mobile voice termination should apply from 1 January 2016 to provide industry with a short period of transition to adjust commercial arrangements to reflect this change.

Table 3.1 Draft mobile termination rate for 2015

Time period	Rate (cpm)
1 January 2016 – 30 June 2019	1.61

4 Price terms for SMS termination

Key Points

- The ACCC has decided to determine the efficient cost SMS termination in two ways:
 - A conversion factor is used to determine the part of the cost incurred by using the same network elements used for voice termination (conveyance cost)
 - SMS-specific cost is determined based on benchmarks of investment costs for SMS centres in the cost models used by the benchmark countries.
- Based on the derivation of the SMS termination costs, the ACCC's draft decision is to adopt an SMS termination rate of 0.03 cents per SMS to apply from 1 January 2016 to 30 June 2019.

4.1 Pricing approach

4.1.1 Discussion paper

In its August 2014 MTAS FAD Discussion Paper, the ACCC sought stakeholders' views on the most appropriate approach to pricing SMS termination services.

As noted in section 3, the ACCC discussed a number of potential pricing approaches in the discussion paper including LRIC cost models, international benchmarking and BAK. The ACCC also expressed the preliminary view that a consistent pricing approach for voice and SMS termination services was likely to be appropriate. However, the ACCC indicated that it was open to views as to whether different pricing approaches for voice and SMS termination should be adopted for this FAD.

A summary of the submissions in response to the discussion paper is provided in **Appendix B**.

4.1.2 ACCC's position on the pricing approach

Having considered the submissions received in response to the Discussion Paper and WIK-Consult's advice, the ACCC has decided the SMS termination rate should be set in two parts:

- The conveyance cost for SMS termination should be set relative to mobile voice termination rate based on the relative capacity used by the two services, i.e. a conversion factor
- SMS-specific costs will be determined based on investment cost for SMS-specific network elements, i.e. SMS centres.

The reasons for adopting this approach are discussed below.

The ACCC should set a regulated price for SMS termination

The ACCC has reached a draft decision to set a regulated price for SMS termination in this FAD. The ACCC found in the 2013 MTAS declaration inquiry that the commercial SMS termination rates have been well above cost for many years and this may have constrained the ability of some MNOs to offer more competitive retail SMS packages. The ACCC noted that based on the WIK model used by the ACCC in previous MTAS pricing decisions, it was

assumed that 432 SMS can be sent per minute of voice calls but the commercial SMS termination rate was significantly higher than the MTAS voice termination rate.⁴⁸

The ACCC notes VHA's request in response to the Discussion Paper that the MNOs be given nine months to negotiate lower SMS termination rates commercially. The ACCC understands that commercial negotiations have failed to reduce SMS termination rates for many years. Having concluded that the declaration of SMS termination is necessary to promote the LTIE and facilitate cost-based pricing for SMS termination, the ACCC does not consider it is appropriate to make the MTAS FAD without including a regulated price for SMS termination in anticipation of commercial negotiations which may or may not happen in the future.

Setting the SMS termination rate

The ACCC understands that the infrastructure used to provide mobile voice termination services is also used to provide SMS termination services. The ACCC is also aware that cost models for mobile voice termination often estimate the network capacity used to provide SMS relative to the network capacity used to provide voice services. This enables the calculation of a conversion factor which reflects the number of SMS that can be carried in the network capacity used to provide one minute of voice call.

After considering stakeholders' views and taking into account the 152BCA matters, the ACCC reached the position that setting SMS termination rate relative to mobile voice termination rate is an appropriate approach to pricing SMS termination. The approach uses a conversion factor based in the number of SMS that can be sent using the amount of network capacity required to carry one minute of voice call. This conversion factor is then applied to the cost of mobile voice termination resulting from the benchmarking exercise, in order to estimate the cost of SMS termination.

The advantages of using an international benchmarking approach compared to the development of a cost model for mobile voice termination apply equally to SMS termination. However, the ACCC considers that, in this instance, an international benchmarking approach for SMS termination may not be appropriate. The ACCC is of the view that the limited number of comparable jurisdictions that currently regulate SMS prices would lead to a very small benchmark set. The ACCC also considers that the significant differences in the pricing approaches taken by those jurisdictions that regulate SMS termination further reduces the possibility of developing an appropriate benchmark set.

For these reasons, the ACCC has decided not to use an international benchmarking approach for SMS termination.

Given the unit cost of providing SMS termination services is likely to be very low, the ACCC considered that setting SMS termination rate relative to mobile voice termination rate is a pragmatic and proportionate approach which makes use of the estimated cost of providing mobile voice termination once derived from the benchmarking study.

The ACCC sought advice from WIK-Consult in relation to the use of a conversion factor to estimate the costs of providing SMS termination services. In particular, the ACCC sought advice on the feasibility of this approach, the appropriate means of determining the conversion factor and whether any refinement should be made to this approach.

WIK-Consult's advice suggests that the use of a conversion factor is appropriate. However, the ACCC should also take into account SMS specific costs that are not incurred to provide voice termination and that are not captured by the estimated costs of providing SMS termination derived from the cost of providing mobile voice service, namely those of the SMS centres (SMSCs).

⁴⁸ ACCC, *Domestic Mobile Terminating Access Service Declaration Inquiry: ACCC's Final Decision*, June 2014, p. 42.

After considering WIK-Consult's advice, the ACCC considers that the use of a conversion factor alone means that not all relevant costs of providing SMS termination services would be included in determining the regulated SMS termination rate. The ACCC therefore decided to refine its approach to pricing the SMS termination service based on WIK-Consult's advice. This means that the cost of SMS termination service is estimated as the sum of two parts: a conveyance cost which is determined using a conversion factors, and SMS-specific cost to reflect investment in SMSCs.

The ACCC considers that this refined approach should ensure that MNOs are able to recover the relevant costs of providing SMS termination services.

WIK-Consult's advice is discussed in **section 4.2.1**.

Application-to-person SMS

The ACCC considers that the regulated SMS termination rate should apply to the termination of both person-to-person (P2P) SMS and A2P SMS. This is consistent with the ACCC's decision to declare SMS termination services which includes the termination of both P2P and A2P SMS.

At the time of making the final decision in the MTAS declaration inquiry in June 2014, the ACCC concluded from stakeholders' submissions that only MNOs and some fixed-line network operators purchased the MTAS.

Based on submissions to the MTAS declaration inquiry, the ACCC understood that SMS aggregators and A2P SMS providers purchase end-to-end wholesale SMS services from MNOs which are different to the SMS termination services that MNOs supply to each other and to fixed-line network operators.

As such, while the ACCC recognises that the regulated pricing for SMS termination does not directly apply to the end-to-end wholesale SMS services that SMS aggregators or A2P SMS providers acquire from the MNOs, the lower SMS termination rate that MNOs pay to each other is likely to benefit SMS aggregators and A2P SMS providers.

As indicated in the 2013 MTAS declaration inquiry, high commercial SMS termination rates as a consequence of the bottleneck nature of SMS termination, appeared to have forced MNOs to offer off-net SMS services to A2P SMS providers at high prices, resulting in most A2P SMS providers seeking to acquire only on-net services from each individual MNO to ensure connectivity with all networks.

The reduction in the SMS termination rate to a level that more closely aligns with the cost of the service will potentially allow MNOs to offer competitive prices for off-net A2P SMS, making it commercially feasible for A2P SMS providers to acquire both on-net and off-net A2P SMS from their preferred MNO.

The ACCC considers that this is likely to promote competition among MNOs for the provision of end-to-end SMS services to SMS aggregators or A2P SMS providers, with the consequent reduction in the wholesale price for A2P SMS. The ACCC expects these lower wholesale prices to flow into the highly competitive retail market for A2P SMS for the benefit of end-users.

4.2 WIK-Consult's advice and derivation of SMS termination cost

As noted in **section 4.1.2** above, the ACCC sought WIK-Consult's expert advice on the following:

- the feasibility of deriving the cost of SMS termination relative to the cost of voice termination using the relative capacity used by the two services, i.e. a conversion factor

- how this conversion factor should be determined
- whether adjustments should be made to this conversion factor that is based only on the relative capacity requirements of voice and SMS services.

4.2.1 WIK-Consult's advice

As discussed in 4.1.2 above, WIK-Consult concurred with the ACCC's views that a conversion factor is a feasible way to derive that part of the cost of SMS that relates to network elements utilised to carry both SMS and voice, i.e. the conveyance cost.

However, WIK-Consult noted that there are costs incurred in the provision of SMS termination that are SMS-specific and cannot be derived from the application of the conversion factor to the cost of voice termination. These costs relate to the acquisition and operation of SMSCs which are dedicated network elements that control the traffic of SMS through the network.⁴⁹

The ACCC considers that the refined approach recommended by WIK-Consult is more appropriate than using the conversion factor alone. This approach will ensure that all of the relevant costs of providing SMS termination can be taken into account.

4.2.2 WIK-Consult's derivation of SMS termination cost

For the calculation of the conversion factor, WIK-Consult took into consideration the technical bitrate capacity of SMS carriage using both 2G and 3G technologies. Using the 2G and 3G traffic shares on Australian networks as weights, WIK-Consult calculated the average capacity required to carry an SMS. WIK-Consult calculated that on average, 825 SMS could be sent utilising the capacity necessary to carry a minute of voice (i.e. a conversion factor of 1/825 or 0.00121). Based on this conversion factor and the mobile voice termination cost of 1.61 cents per minute, the conveyance cost of SMS is estimated to be 0.002 cents per SMS.⁵⁰

For the purpose of calculating SMS-specific costs, the ACCC requested from the MNOs information on the number of SMSCs in operation and the investment cost of each SMSC. However, there was a large disparity in the information provided by MNOs in terms of both the investment cost and the number of SMSCs. WIK-Consult decided to utilise information on investment for SMSCs from the cost models used for benchmarking of voice termination.⁵¹ SMSCs' investment costs in the benchmark models ranged from \$330,000 to \$5.3m with 1 to 4 SMSCs per network. WIK-Consult took a conservative approach and chose figures from the upper range of these values for its calculations to ensure that it did not underestimate the SMS-specific cost of a hypothetical efficient MNO.⁵²

To derive a per unit cost for SMS-specific costs, the annualised amount of total investment in SMSCs, including mark-ups to account for operating expenditure and common costs, was divided by SMS traffic volume to provide an estimate of the cost of an SMS due to the acquisition and operation of SMS-specific elements of the network. The SMS-specific cost amounts to 0.026 cents per SMS.

The total cost of SMS termination therefore is around 0.028 cents per SMS.

⁴⁹ WIK Report, p. 48.

⁵⁰ WIK Report, p. 47.

⁵¹ The ACCC understands that while these investment figures for SMSCs are used in the cost models, they do not form part of the costs of voice termination since they are cost of SMS-specific network elements which are not used to provide voice termination services.

⁵² WIK Report, p. 49.

The outcome of the derivation shows, as noted by WIK-Consult in its report, that the SMS-specific costs account for the majority of the cost of SMS termination while the conveyance costs only account for a small proportion.⁵³

The ACCC acknowledges that the estimated cost of SMS termination obtained represents a considerable reduction in relation to current commercial rates. The ACCC is however satisfied that a conservative approach has been adopted at each stage to ensure that the regulated SMS termination rate will allow a hypothetical efficient MNO to recover the costs incurred in providing the service.

4.3 Draft SMS termination rates for 2015–2019

The ACCC's draft decision is to adopt a regulated SMS termination rate of 0.03 cents per SMS which will be a flat rate to apply for the entire FAD period.⁵⁴ As noted above, the ACCC is aware that this is significantly lower than the current commercial rates.

As with the implementation of the new regulated voice termination rate, the ACCC considers it is appropriate to provide a short period of transition for industry to adjust their commercial arrangements to reflect this change. Therefore, the ACCC's draft decision is that the SMS termination rate will come into force from 1 January 2016.

Time period	Rate (cents/SMS)
1 January 2016 – 30 June 2019	0.03

⁵³ WIK Report, p. 49.

⁵⁴ Rounded off from the estimated cost of 0.028 cents per SMS.

5 Fixed-to-mobile pass through

Key Points

- The ACCC's analysis shows that there is evidence that Telstra has passed on a significant portion of savings from reductions in the mobile voice termination rate in the past.
- The ACCC's draft decision is to not include a mechanism mandating integrated operators to pass through reductions in the mobile voice termination rate.

5.1 Discussion paper

In the Discussion Paper, the ACCC noted that over the period from 2005 to 2013, the reductions in Telstra's average FTM call rates have been less than the reductions in MTAS rates. However, taking into account the fact that Telstra only incurs MTAS charges for calls made to other mobile networks, the ACCC examined changes in Telstra's FTM revenues and compared them to its cumulative savings from reductions in the mobile voice termination rate over the same period. The ACCC found that the reductions in Telstra's FTM revenues have been greater than its cumulative savings from the reductions in the MTAS rate.⁵⁵

The ACCC invited stakeholders to provide their views and supporting evidence on the extent to which FTM pass-through has occurred. The ACCC also sought stakeholders' views on whether integrated operators should be subject to a mandated pass-through requirement and how this would be implemented.

A summary of the submissions in response to the discussion paper is provided in **Appendix B**.

5.2 ACCC's draft decision

After considering stakeholders' submissions and having taken the s 152BCA matters into account, the ACCC's draft decision is not to include a mandated FTM pass-through mechanism in the FAD. The ACCC's position is premised on two views:

- The ACCC remains of the view that there is evidence of FTM pass-through of past MTAS reductions and that further reductions in the mobile voice termination rate are expected to be passed onto end-users in the form of lower retail prices. The ACCC does not consider that the evidence provided to the contrary is convincing.
- The ACCC does not consider that additional intervention, in the form of a mandated FTM pass-through mechanism, is likely to be in the LTIE.

The reasons for the ACCC's draft decision are discussed in this section.

5.2.1 Evidence submitted on the level of pass-through

The ACCC notes that a number of stakeholders provided views with supporting evidence that past reductions in the MTAS rate have not been passed through to benefit end-users of FTM calls. The ACCC's views in relation to this evidence are discussed below.

⁵⁵ Discussion Paper, pp. 22–23.

Comparison of Telstra retail plans

VHA submitted that Telstra has not passed through past reductions of MTAS and instead these reductions have provided an inappropriate windfall gain to Telstra. To support its claims, VHA selected three Telstra fixed line retail plans and compared the pricing for these plans in 2003 and 2014 respectively. VHA noted that end-users have not adequately benefited from past MTAS price reductions in the form of lower off-net FTM pricing and any price reductions that have occurred have been outweighed by substantial line rental price increases.⁵⁶

The ACCC does not agree with VHA's analysis of these plans.

First, VHA pointed out that there have been some price reductions in off-net FTM call rates and substantial increases in line rental prices. The ACCC does not consider that the rise in line rental prices detract from any benefit that end-users of FTM calls receive from having lower FTM call rates.

Secondly, the ACCC also does not consider that the information presented by VHA provides a complete picture of what end-users pay and receive in these retail plans. For instance, the plans listed in VHA's submission do not refer to the prices for local calls, which are now unlimited in most of Telstra's plans advertised on its website, or other features which may not have been included in the plans in 2003.

Thirdly, while the ACCC considers that a comparison of prices in comparable retail plans at different time points can be a useful indication of the movements in retail prices, the ACCC does not consider that, in this instance, it is a decisive measure of whether end-users have benefited from past MTAS reductions. End-users value various services differently and, as a result, retail service providers offer different retail plans to target different consumer preferences. For instance, the Telstra Home Phone Local and Telstra Home Phone National plans in 2014 both cap FTM calls at \$2 for the first 20 minutes of each call so the per minute FTM call rate each end-user pays would depend on the length of the call. The ACCC considers that an assessment of the average per minute price for FTM calls and their changes over time is a more useful measure to examine whether end-users have benefited from past MTAS reductions.

Telstra's retail margin

Both VHA and Macquarie Telecom submitted that Telstra's substantial retail margins indicated the lack of FTM pass-through over the years. In particular, VHA noted that Telstra's retail FTM margins have increased from 37% in 2004 to 64% in 2013 according to the ACCC's Imputation Testing Reports.⁵⁷

The ACCC acknowledges that retail margins may reflect the degree of competitive tension in the retail market for fixed-line services. However, the ACCC considers that the level of retail margins is not a useful indicator of the extent of FTM pass-through. The ACCC notes that a complete pass-through of MTAS reductions, other things being equal, can lead to increasing retail margins. To illustrate, consider a simple example of the provision of a service with a unit cost of \$100, a unit price of \$200 and therefore a retail margin of 50%. If there is a decrease in the unit cost of \$10 and this is fully passed through to the unit price, this results in a new unit price of \$190. However, even with 100% pass-through in this case, the retail margin has increased from 50% to 53%.

This simple example shows that, if other things are unchanged, retail margins will increase when the totality of a cost reduction is passed through to prices. In other words, significant pass-through levels can be consistent with an increasing retail margin.

⁵⁶ VHA Submission, pp. 3–4.

⁵⁷ *ibid.*, p. 5.

5.2.2 ACCC's analysis on the extent of pass-through

The ACCC recognises that the extent of the FTM pass-through depends on the structure of the fixed line voice services market, including the state of competition as well as how sensitive consumer demand is in response to price changes. Generally, the extent of the pass-through should increase with the intensity of competition in the relevant market.

The ACCC has relied on empirical evidence to estimate the extent of FTM pass-through that has occurred to date. It is difficult, if not impossible, to ascertain precisely how the reductions in the mobile voice termination rate are reflected in the changes in retail prices of fixed line voice service. However, the ACCC considers that a comparison between the changes in average FTM call rates and changes in the MTAS rate provide a reasonable indication of the extent of the pass-through that may have occurred.

The ACCC conducted a preliminary analysis in the final decision of the 2013 MTAS declaration which showed that the cumulative reductions in Telstra's average per minute FTM call rate from 2005 to 2013 have been lower than the cumulative reductions in the MTAS rate over the same period. However, taking into account that only a portion of Telstra's FTM calls incurs MTAS payments as some calls will be made to Telstra's own mobile network, the ACCC compared the estimated savings Telstra had made from the MTAS reductions and the changes in its FTM call revenue, adjusted for the changes in volumes, over same period. The ACCC found that Telstra appeared to have passed on more than the savings it made from the MTAS reductions.⁵⁸

The ACCC acknowledges, however, that this comparison is imperfect as it did not take into account any changes that might have occurred in other costs of providing retail FTM calls, such as transmission and retail costs, which would have affected the retail FTM call prices.⁵⁹

The ACCC has since considered other information from the Imputation Testing reports which assisted in conducting a more accurate comparison for the purposes of assessing the extent of pass-through.

Table 5.2 below shows the level of average per minute retail FTM call rates and total unit cost of providing residential FTM calls in the December quarter 2004 and the December quarter 2013.⁶⁰ This gives a good indication of the changes in retail FTM call rates since the declaration of the MTAS and application of cost-based pricing principles in 2004.⁶¹ The total unit cost of providing the FTM calls must include, by its very nature, the MTAS and other non-MTAS costs. For the purposes of the analysis, the effective MTAS rates for those years are also provided. Using the effective MTAS rates and the total unit cost figures, the non-MTAS unit costs for the two years have been calculated.

The key comparison in table 5.2 is between the average per minute retail FTM call rates and the total unit cost of FTM calls. The table shows that between 2004 and 2013 total FTM cost per minute decreased by 18.6 cents while the retail FTM price per minute declined by 17.5 cents, i.e. approximately 94% of the cost reduction.

This means that, according to the price and cost information in the Imputation Testing reports, approximately 94% of any cost reduction, either from MTAS or other source, were passed through to retail prices for FTM calls.

⁵⁸ ACCC, *Domestic Mobile Terminating Access Service Declaration Inquiry: ACCC's Final Decision*, June 2014, p. 29.

⁵⁹ *ibid*, p. 30.

⁶⁰ See ACCC, *Imputation and non-price terms and conditions reports relating to accounting separation of Telstra for the December Quarter 2003*, April 2004; ACCC, *Accounting Separation of Telstra: Imputation testing and non-price terms and conditions report for the December Quarter 2013*, March 2014. Available at: <http://www.accc.gov.au/publications/imputation-testing-and-non-price-terms-and-conditions-report>.

⁶¹ See ACCC, *Mobile services review – Mobile terminating access service: final decision on whether or not the Commission should extend, vary or revoke its existing declaration of mobile terminating access service*, June 2014.

For reference, table 5.2 also shows the retail margins of Telstra for each minute of FTM call, in absolute and percentage terms for 2004 and 2013. As evident from the table as well as the example from the previous section, near full pass-through of MTAS reductions and other cost savings to retail FTM prices is statistically consistent with an increasing retail margin.

Table 5.2 Comparison of retail prices and costs for FTM calls in 2004 and 2013

	Dec 2004	Dec 2013	Variation
FTM retail price (cents/min)	43.7	26.2	-17.4
FTM Total Unit cost⁶² (cents/min)	27.8	9.2	-18.6
Telstra's effective MTAS rate ⁶³ (cents/min)	11.5	2.3	-9.2
Non-MTAS unit costs (cents/min)	16.3	6.9	-9.4
Retail margin (cents/min)	15.9	17.0	+1.2
Retail margin (%)	36%	65%	+29 pp

Source: ACCC imputation testing reports for December quarters 2004 and 2013; ACMA Telecommunications Performance Report 2004–05; ACMA Communications Report 2013–14; ACCC analysis

For reasons discussed above, the ACCC considers that there is evidence that Telstra has substantially passed through reductions in the regulated MTAS rates reductions in the past to retail prices for FTM calls. The ACCC does not consider that it has received persuasive evidence to the contrary.

5.2.3 ACCC's draft decision on a mandated pass-through mechanism

The ACCC does not consider that including a mandated pass-through mechanism in the MTAS FAD is likely to promote the LTIE.

The ACCC notes VHA's submission that the 2009 Analysys Mason report supports the regulation of FTM pass-through. The ACCC has considered the report and acknowledges its conclusion that given any amount of cost reduction, an increase in the pass-through of this cost reduction into lower retail prices could improve total welfare. However, the ACCC considers that a number of practical considerations are important in assessing the merit of a mandated FTM pass-through mechanism for the MTAS.

The ACCC considers that the conclusion in the 2009 Analysys Mason report rests on two assumptions:

- First, in the absence of intervention to increase pass-through, substantial pass-through would not be expected to occur.

⁶² The total unit cost of a FTM call is calculated as the sum of the Unit Cost and Access Price in the imputation testing reports. It has been assumed that the Access Price reflects the cost to Telstra in providing core services and the Unit Cost reflects Telstra's costs in transforming the core services into retail FTM services.

⁶³ Telstra's effective MTAS rate takes into account that only a portion of Telstra's FTM calls are off-net and therefore incurs MTAS payments. It is calculated as the product of the regulated MTAS rate and the percentage proportion of all FTM calls that are terminated off-net. For the purpose of this calculation, the combined market shares of non-Telstra mobile network operators have been used as proxies for the percentage proportions of off-net FTM calls (54.9% for 2004 and 48% for 2013).

- Second, regulators are able to estimate and enforce a pass-through mechanism that results in lower FTM retail prices and improves economic efficiency.

The ACCC does not consider that either of these assumptions holds in this instance.

As discussed in the previous section, the ACCC considers that there is empirical evidence that substantial FTM pass-through has in fact occurred without a mandated pass-through mechanism. In addition, the ACCC is not convinced that a mandated pass-through mechanism is able to effectively improve economic efficiency and further promote the LTIE beyond what the declaration and regulated pricing of the MTAS is able to. The ACCC considers that any benefit from the additional contribution of a mandated safeguard to increasing the current level of pass-through would be marginal in comparison to the associated regulatory risks, which are discussed below.

The ACCC is concerned about the effectiveness of a pass-through mechanism which would link the MTAS reduction to lower retail FTM prices in some ways. Such a mechanism, regardless of its exact form, would effectively impose a specified amount of reduction in an integrated operator's retail FTM prices. The ability of the ACCC to monitor such reductions and enforce a specified amount of pass-through is limited by the fact that an integrated operator's voice services are normally offered in bundles, and that any mandated reductions over and above what it is willing to pass through in the retail FTM prices could be offset by increased prices for other services in the bundle.⁶⁴

Further, as discussed in the final decision report of the 2011 MTAS FAD inquiry, the ACCC is concerned that an MTAS FAD containing a mandated FTM pass-through mechanism could be avoided by access agreements containing inconsistent terms and conditions. This may lead to access prices that are above the MTAS prices set in the FAD, which reflect the efficient costs of providing the MTAS.

The ACCC also considers that imposing restrictions on an integrated operator in its retail pricing may have unintended consequences that do not promote the LTIE. The ACCC recognises that the promotion of competition not only entails a reduction of prices, but also greater availability and improvement in the range and quality of products and services in the market. A pass-through mechanism that only focuses on the reduction in prices may restrict a service provider's ability to flexibly determine how it chooses to pass on its cost savings and limit (or even negate) potential improvements in the quality and range of retail services.⁶⁵

In light of the potential consequences outlined above, the ACCC agrees with ACCAN's concern about using the MTAS to solve competitive issues in the retail fixed line voice services market. The ACCC considers that the primary means by which the regulation of MTAS contributes to the LTIE is through efficient cost-based pricing of the services which helps create an environment that promotes competition in the downstream markets.

In summary, the ACCC's draft decision is not to include a FTM pass-through mechanism in the MTAS FAD. The ACCC considers that the imposition of such a pass-through mechanism may in fact damage economic efficiency and undermine the promotion of competition and therefore not promote the LTIE.

⁶⁴ See ACCC, *Domestic Mobile Terminating Access Service Declaration Inquiry: ACCC's Final Decision*, June 2014, p. 35; ACCC, *Submission to DBCDE's review of the retail price control arrangements*, December 2011, pp. 11–12.

⁶⁵ See, *Application by Vodafone Network Pty Ltd and Vodafone Australia Limited* [2007], ACompT 1, [289]–[290].

6 Duration of regulated terms and conditions

The ACCC has reached the view in this draft decision that the regulated price terms and non-price terms in the MTAS FAD should expire at the same time as the current MTAS declaration on 30 June 2019.

However, the ACCC may review the price terms of the FAD before the expiry date should there be significant changes in circumstances which warrant an inquiry to vary the terms of the FAD.

6.1 Discussion paper

The ACCC noted in the Discussion Paper that under the CCA, the expiry date for an FAD should align with the expiry of the associated declaration unless there are circumstances that warrant a different expiry date.⁶⁶ The ACCC also indicated that the technological development in the industry, namely the launch of VoLTE is relevant in considering the appropriate expiry date for the FAD.⁶⁷

A summary of the submissions in response to the discussion paper is provided in **Appendix B**.

6.2 ACCC's draft decision

The ACCC recognises that determining the duration of a regulatory period requires a balance between promoting regulatory certainty and flexibility. The ACCC's draft decision is that the price and non-price terms of the MTAS FAD should expire at the same time as the current MTAS declaration on 30 June 2019. This is the default position under the CCA and the ACCC considers that at this point in time, there are no circumstances which warrant the setting of a different expiry date.⁶⁸

As discussed in **Section 3.2**, the ACCC is aware that the MNOs have announced plans to commercially launch VoLTE on their 4G networks as early as late 2015. The ACCC is able to review the primary price terms of the FAD before its expiry should there be evidence that the regulated termination rates no longer reflects the efficient costs of providing the services in Australia.

⁶⁶ Discussion Paper, p. 25. See section 152BCF(6) of the CCA.

⁶⁷ *ibid.*

⁶⁸ Section 152BCF(6) of the CCA.

7 Non-price terms and conditions

The ACCC is consulting separately on the non-price terms and conditions for the MTAS via a joint consultation with the other declared services.

On 25 March 2015, the ACCC released a draft decision for the non-price terms and conditions that will apply to the declared services.⁶⁹ Submissions in response to this draft decision close on 8 May 2015, following an extension to the original submission date in response to industry requests for more time to consider the various issues. The ACCC is currently considering these submissions before reaching a final decision on the non-price terms and conditions. The non-price terms and conditions applicable to the MTAS as determined in this final decision will be incorporated into the new MTAS FAD at the conclusion of this inquiry.

For the purpose of this draft decision for primary price terms, the ACCC includes a draft FAD instrument in **Appendix C**. This draft instrument contains the non-price terms and conditions for the MTAS as determined in the draft decision for the non-price terms and conditions released in March 2015.

⁶⁹ See ACCC website at: <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/draft-decision>.

Appendices

A Relevant legislative framework for final access determinations

This section sets out the relevant legislative framework in relation to final access determinations (FADs).

A.1 Content of final access determinations

Section 152BC of the *Competition and Consumer Act 2010* (CCA) specifies what an 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 (SAOs) and terms and conditions of access to a declared service.

An FAD may make different provisions with respect to different access providers or access seekers.

A.2 Fixed principles provisions

An FAD may contain a fixed principles provision, which allows a provision in an FAD to have an expiry date after the expiry date of the FAD.⁷⁰ Such a provision allows the ACCC to 'lock-in' a term so that it would be consistent across consecutive FADs.

A.3 Varying final access determinations

Section 152BCN allows the ACCC to vary or revoke an 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.⁷¹

A.4 Commencement and expiry provisions

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

An 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.⁷²

A.5 Matters to consider when making FADs

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

- (a) whether the determination will promote the LTIE of carriage services or services supplied by means of carriage services
- (b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- (c) the interests of all persons who have rights to use the declared service
- (d) the direct costs of providing access to the declared service

⁷⁰ Section 152BCD of the CCA.

⁷¹ Subsection 152BCN(4) of the CCA.

⁷² Subsection 152BCF(6) of the CCA.

- (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, and
- (g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

The subsection 152BCA(1) matters reflect the repealed subsection 152CR(1) matters that the ACCC was required to take into account in making a final determination (FD) in an access dispute. The ACCC interprets the subsection 152BCA(1) matters in a similar manner to the approach taken in access disputes.

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

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

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

A.5.1 Paragraph 152BCA(1)(a)

The first matter for the ACCC to consider when making an 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.⁷³ 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 mobile terminating access service (MTAS).

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.⁷⁴

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

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

* End-users: "end-users" include actual and potential [users of the service]...

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

⁷³ 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.

⁷⁴ *ibid.*, p. 33.

* 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.⁷⁵

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.⁷⁶

Promoting competition

In assessing whether particular terms and conditions will promote competition, the ACCC analyses the relevant markets in which the declared services are supplied (retail and wholesale) and considers whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.⁷⁷

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 decisions.

The ACCC's view is that the relevant markets for the purpose of making FADs for the declared fixed line services are:

- the markets for wholesale mobile voice terminations services on each MNO's networks
- the downstream market for retail mobile services
- the downstream market for retail fixed voice services
- the wholesale markets for SMS termination services on each MNO's mobile network
- the wholesale application-to-person SMS services market, and
- the downstream application-to-person SMS services market.

⁷⁵ *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

⁷⁶ Subsection 152AB(2) of the CCA.

⁷⁷ 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].

Any-to-any connectivity

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service. This must be the case whether or not the end-users are connected to the same telecommunications network.⁷⁸

The ACCC considers that this matter 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.⁷⁹

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), and
- 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:

⁷⁸ Subsection 152AB(8) of the CCA.

⁷⁹ Subsections 152AB(6) and (7A) of the CCA.

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.⁸⁰

...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.⁸¹

...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.⁸²

A.5.2 Paragraph 152BCA(1)(b)

The second matter requires the ACCC to consider ‘the legitimate business interests’ of the carrier or CSP when making an FAD.

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment.⁸³ 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.⁸⁴

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.⁸⁵

A.5.3 Paragraph 152BCA(1)(c)

The third matter requires the ACCC to consider ‘the interests of all persons who have the right to use the service’ when making an FAD.

The ACCC considers that this matter requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.⁸⁶ 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.⁸⁷

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

⁸⁰ Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [159].

⁸¹ *ibid.* at [164].

⁸² *ibid.*

⁸³ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

⁸⁴ ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

⁸⁵ Telstra Corporation Limited [2006] ACompT 4 at [89].

⁸⁶ Telstra Corporation Limited [2006] ACompT 4 at [91].

⁸⁷ *ibid.*

occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.⁸⁸

However, the ACCC does not consider that this matter 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 matters.

A.5.4 Paragraph 152BCA(1)(d)

The fourth matter requires the ACCC to consider 'the direct costs of providing access to the declared service' when making an FAD.

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

The ACCC interprets this matter, and the use of the term 'direct costs', as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal's approach in an undertaking decision.⁸⁹ A contribution to indirect costs can also be supported by other matters.

However, the matter does not extend to compensation for loss of any 'monopoly profit' that occurs as a result of increased competition.⁹⁰

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs matter 'is concerned with ensuring that the costs of providing the service are recovered.'⁹¹ 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 matter.⁹²

A.5.5 Paragraph 152BCA(1)(e)

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

In the 1997 Access Pricing Principles, the ACCC stated that this matter:

...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.⁹³

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

A.5.6 Paragraph 152BCA(1)(f)

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

⁸⁸ *ibid.*

⁸⁹ Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

⁹⁰ 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.

⁹¹ Telstra Corporation Limited [2006] ACompT 4 at [92].

⁹² *ibid.* at [139].

⁹³ ACCC, 1997 Access Pricing Principles, p. 11.

The ACCC considers that this matter 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.⁹⁴

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

A.5.7 Paragraph 152BCA(1)(g)

The final matter 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 an FAD.

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of 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.⁹⁵

Consistent with the approach adopted by the Tribunal, the ACCC considers that in applying this matter, it is relevant to consider the economically efficient operation of:

- retail services provided by access seekers using the access provider’s services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.⁹⁶

A.5.8 Subsection 152BCA(2)

Subsection 152BCA(2) provides that, in making an AD that applies to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,⁹⁷ take into account:

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

⁹⁴ ACCC, Final Determination – Model Non-price Terms and Conditions, November 2008, p. 8.

⁹⁵ ACCC, Access Dispute Guidelines, p. 57.

⁹⁶ *Telstra Corporation Limited* [2006] ACompT at [94]–[95].

⁹⁷ ‘Eligible service’ has the same meaning as in section 152AL of the CCA.

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.⁹⁸ 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.⁹⁹

The ACCC proposes to consider the costs and revenues associated with other services—whether declared or not declared—that are provided over Telstra's network when making FADs for the declared fixed line services.

A.5.9 Subsection 152BCA(3)

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

- its previous decisions in relation to the MTAS
- consultation documents and submissions in response to those documents
- information provided to the ACCC by stakeholders.

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

⁹⁸ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

⁹⁹ *ibid.*

B Submissions to the Discussion Paper

1- Pricing approach for voice Termination	Submitter/s	Submission
<i>Mobile-to-mobile and fixed-to-mobile termination</i>	Telstra, iiNet, Macquarie Telecom and TPG	<ul style="list-style-type: none"> The ACCC should not distinguish between MTM and FTM termination services when setting mobile voice termination prices, the rates for both services should be the same. The MTM and FTM termination services are identical. Asymmetric pricing for MTM and FTM termination services provides opportunity for arbitrage.¹⁰⁰
	VHA	<ul style="list-style-type: none"> Lower MTM voice termination rates may be appropriate considering that traffic is balanced among MNOs. FTM voice termination rates should not change since the reduction will not pass through to end-users. Different MTM and FTM rates should only be set if arbitrage opportunities can be avoided.¹⁰¹
<i>Setting mobile voice termination rate relative to fixed termination rate</i>	Optus	<ul style="list-style-type: none"> Mobile voice termination rates should be set at three times the FTAS rate to maintain the current ratio.¹⁰²

¹⁰⁰ Telstra, *Response to the Commission's Mobile Terminating Access Service – Final Access Determination Discussion Paper*, 5 September 2014, p. 8 (Telstra Submission); iiNet, *Mobile terminating access service Final access determination discussion paper: Submission by Thomson Geer Lawyers on behalf of iiNet Limited*, August 2014, p. 4 (iiNet Submission); Macquarie Telecom, *Mobile terminating access service: Final access determination discussion paper*, 3 September 2014, p. 2 (Macquarie Submission).

¹⁰¹ Vodafone Hutchison Australia, *Final access determination: the domestic mobile terminating access service primary prices, response to the Australian Competition and Consumer Commission's discussion paper*, September 2014, p. 5 (VHA Submission).

¹⁰² Optus, *Submission in response to ACCC Discussion Paper: Mobile Terminating Access Service: Final Access Determination*, August 2014 (Optus Submission), pp. 6–10.

	TPG ¹⁰³ , iiNet ¹⁰⁴ and Macquarie Telecom ¹⁰⁵	<ul style="list-style-type: none"> Mobile voice termination rates should be aligned to the FTAS rate.
<i>Building Block model (BBM)</i>	VHA, Mr John de Ridder ¹⁰⁶	<ul style="list-style-type: none"> Mobile voice termination rates should be set using a BBM. VHA considers TSLRIC+ to be the 2nd best option.¹⁰⁷
<i>Pure LRIC or TSLRIC+ cost model</i>	Optus, ¹⁰⁸	<ul style="list-style-type: none"> A pure LRIC methodology would better promote the LTIE as it reflects the true marginal cost of terminating calls on-net and off-net.¹⁰⁹
	Macquarie Telecom and iiNet	<ul style="list-style-type: none"> Pure LRIC methodology would better promote the LTIE than a TSLRIC+ methodology, as pure LRIC does not allow for over-recovery of costs and would not cause wholesale and retail distortions.¹¹⁰
	ACCAN	<ul style="list-style-type: none"> Pure LRIC is more appropriate where there are asymmetric traffic flows and market shares.¹¹¹
	Telstra	<ul style="list-style-type: none"> TSLRIC+ promotes the LTIE as it allows a return on efficiently invested capital and the recovery of efficient common costs.¹¹²

¹⁰³ TPG Telecom Limited, *Submission by TPG to the ACCC Mobile terminating access service final access determination discussion paper* (TPG Submission), August 2014, pp. 1–2.

¹⁰⁴ iiNet Submission, pp. 2–3.

¹⁰⁵ Macquarie Submission, p. 13.

¹⁰⁶ See, John de Ridder, *How long will MTAS be necessary*, August 2014.

¹⁰⁷ VHA Submission, pp. 18–19.

¹⁰⁸ See, Optus Submission, pp. 12–17.

¹⁰⁹ Note that Optus refers to LRIC+ instead of TSLRIC+.

¹¹⁰ Macquarie Submission, pp. 7–9; iiNet Submission, pp. 5–6.

¹¹¹ Australian Communications Consumer Action Network (ACCAN), *MTAS FAD Inquiry*, 8 September 2014 (ACCAN Submission).

<i>International benchmarking</i>	Optus	<ul style="list-style-type: none"> • International benchmarking may be more pragmatic than developing a cost model since it is less resource- intensive and can be implemented in a shorter time frame. • The impact of regulatory errors resulting from benchmarking does not warrant the delay and costs associated with using a cost model.¹¹³
	Telstra	<ul style="list-style-type: none"> • TSLRIC+ cost model is the best approach but, international benchmarking may be a more pragmatic approach given existing limitations.¹¹⁴
	TPG	<ul style="list-style-type: none"> • International benchmarking should be used as a secondary pricing tool, to ensure that the MTAS rate is efficient relative to the rates used in the rest of the world.¹¹⁵
	iiNet	<ul style="list-style-type: none"> • A benchmarking approach would be more appropriate than developing a new cost model, but FTAS rates should be set immediately as a 1st stage.¹¹⁶
	Macquarie Telecom	<ul style="list-style-type: none"> • The ACCC should conduct a benchmark study and give sufficient weight to the findings in the final price determination.¹¹⁷

¹¹² Telstra Submission, pp. 5, 16–24.

¹¹³ Optus Submission pp. 22–24

¹¹⁴ Telstra Submission, p. 24.

¹¹⁵ TPG Submission, p. 4.

¹¹⁶ iiNet Submission, p. 7.

¹¹⁷ Macquarie Submission, pp. 11–12.

	VHA	<ul style="list-style-type: none"> International benchmarking is not appropriate given the differences between Australia and potential benchmark countries and lack of independence of European benchmarks among them.¹¹⁸
<i>Bill and keep (BAK)</i>	Telstra	<ul style="list-style-type: none"> BAK is only appropriate where calling externalities are significant and there are low costs associated with supplying the service, but these do not apply to MTAS.¹¹⁹
	VHA	<ul style="list-style-type: none"> BAK does not allow for recovery of efficient costs and creates arbitrage risks.¹²⁰
	Macquarie Telecom, iiNet	<ul style="list-style-type: none"> BAK would not promote the LTIE.¹²¹
2- Pricing of SMS Termination	Submitter/s	Submission
<i>Regulation of SMS and the use of a conversion factor</i>	VHA	<ul style="list-style-type: none"> The ACCC should not set a regulated price for SMS termination. If the ACCC is to price SMS termination, the price should be based on the outcome of at least one cost-based model.¹²² The ACCC should allow industry nine months to commercially negotiate a reduction of SMS termination rates to international levels.¹²³

¹¹⁸ VHA Submission, pp. 19–20.

¹¹⁹ Telstra Submission, pp. 27–30

¹²⁰ VHA Submission, p. 20.

¹²¹ Macquarie Submission, p.13; iiNet Submission, p. 8.

¹²² VHA Submission, p.14.

¹²³ *ibid.*

	Telstra	<ul style="list-style-type: none"> • The ACCC should not set a regulated price of SMS termination. There is a high risk of regulatory error in setting the SMS termination rate at this point in time due to the evolving nature of the market.¹²⁴ • If SMS rates are set, a consistent approach with voice termination should be adopted.¹²⁵ However there are few countries that regulate SMS termination and their approaches are different so a benchmarking of SMS termination rates would not be appropriate.¹²⁶ • The use of a conversion factor poses the risk of under-recovery of costs.¹²⁷
	Optus	<ul style="list-style-type: none"> • The use of a conversion factor is a simple and reasonable approach since cost models usually estimate the network capacity used by SMS relative to voice. • Even a conservative conversion factor will result in an SMS termination considerably lower than the current commercial rates.¹²⁸
	iiNet	<ul style="list-style-type: none"> • The use of a conversion factor is an efficient method and it allows a reliable estimate of the cost of terminating an SMS message.¹²⁹
	Macquarie Telecom	<ul style="list-style-type: none"> • It is possible to set an SMS termination price based on the relative network capacity used by

¹²⁴ Telstra Submission, p. 9.

¹²⁵ *ibid.*

¹²⁶ *ibid.*, pp. 9–10.

¹²⁷ *ibid.*, p. 9.

¹²⁸ Optus Submission, p. 25.

¹²⁹ iiNet Submission, p. 4.

		voice and SMS. ¹³⁰
<i>Application-to-person (A2P) SMS</i>	Telstra	<ul style="list-style-type: none"> • A2P should be excluded from regulation since it is an end-to-end service rather than a termination service. Current commercially negotiated price reflects the cost of the service plus added value. • If the ACCC intends to apply the SMS termination rate only to termination between MNOs, this should be made explicit in the FAD.¹³¹
3- Fixed-to-Mobile Pass-through	Submitter/s	Submission
	VHA	<ul style="list-style-type: none"> • Telstra has not passed through past reductions of MTAS. These reductions have provided an inappropriate windfall gain to Telstra.¹³² • Telstra's retail margin has grown from 37% to 64% between 2003 and 2013 and retail prices for standard 2- minute FTM calls have increased in the period.¹³³ • Further MTAS reductions would benefit Telstra in detriment of other MNOs and end-users and would not be in the LTIE unless a pass-through safeguard is put in place.¹³⁴
	Macquarie Telecom	<ul style="list-style-type: none"> • Reductions in the cost of providing MTAS appear not to be passed through to retail customers in the form of lower prices for FTM.¹³⁵

¹³⁰ Macquarie Submission, p. 15.

¹³¹ Telstra Submission, pp. 12–13.

¹³² VHA Submission, p. 4.

¹³³ *ibid*, p. 5.

¹³⁴ *ibid*, p. 9.

¹³⁵ Macquarie Submission, p. 14.

		<ul style="list-style-type: none"> • The lack of pass-through is due to structural issues in the market for fixed-line services driven by consumers' preferences for bundled services.¹³⁶ • A mandated pass-through should be applied to integrated operators to ensure that reductions in the MTAS for voice and SMS will be passed through to retail and wholesale customers, including MVNOs.¹³⁷
	iiNet	<ul style="list-style-type: none"> • A mandated pass-through mechanism should be applied to retail and wholesale FTM services as a way to promote competition in downstream markets.¹³⁸
	Telstra	<ul style="list-style-type: none"> • MTAS reductions have been more than passed through to consumers.¹³⁹ • Telstra's average yield for FTM calls fell more than MTAS reductions between 2004 and 2013. • Mandating a pass-through mechanism would distort competition by preventing operators from passing through savings from MTAS reductions to other components of the fixed services bundle and this would not be allocatively efficient.¹⁴⁰ • Mandating a pass-through mechanism may be outside the ACCC's jurisdiction.¹⁴¹

¹³⁶ *ibid.*, p. 15.

¹³⁷ *ibid.*, p. 14.

¹³⁸ iiNet Submission, pp. 8–9. The CCC recommended an incentive mechanism whereby an integrated operator is only entitled to reductions in MTAS rate if its average FTM revenue per minute is below a specified threshold for each year of the regulatory period. See CCC, *Submission on MTAS Pass Through*, published 2 August 2011.

¹³⁹ Telstra Submission, pp. 32–33.

¹⁴⁰ *ibid.*, p. 31.

¹⁴¹ *ibid.*

	ACCAN	<ul style="list-style-type: none"> • ACCAN cautioned against using MTAS to solve competition issues in the fixed line market. • A mandated pass-through mechanism would create a level of retail price control that may not serve the LTIE.¹⁴²
	TPG	<ul style="list-style-type: none"> • Past MTAS reductions allowed TPG to improve its offerings in the retail market.¹⁴³
4- Duration of the regulatory terms and conditions	Submitter/s	Submission
	Telstra	<ul style="list-style-type: none"> • A new MTAS FAD should align with the declaration and apply until 30 June 2019. • 4G services for voice and SMS should not be taken into account at this point in time due to the significant amount of uncertainty associated with the deployment of these services.¹⁴⁴
	VHA	<ul style="list-style-type: none"> • A regulatory period of five years for the price terms is appropriate, provides certainty and is consistent with the declaration period for the MTAS.¹⁴⁵
	ACCAN	<ul style="list-style-type: none"> • The uncertainty of VoLTE rollout may warrant an ACCC revision of the MTAS FAD within the current declaration period.¹⁴⁶

¹⁴² ACCAN Submission, p. 2.

¹⁴³ TPG Submission, p. 5.

¹⁴⁴ Telstra Submission, p. 35.

¹⁴⁵ VHA Submission, p. 21.

¹⁴⁶ ACCAN Submission, p. 1.

	Macquarie Telecom, iiNet	<ul style="list-style-type: none">• The ACCC should adopt a two stage approach to account for the deployment of VoLTE over the regulatory period.¹⁴⁷
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¹⁴⁷ Macquarie Submission, p.16; iiNet submission, p. 9.

C Draft instrument



Final Access Determination No. **X of 2015 (MTAS)**

Competition and Consumer Act 2010

The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes this final access determination under section 152BC of the *Competition and Consumer Act 2010*.

Date of decision: **XX** 2015

1. Application

- 1.1 This instrument sets out the final access determination (FAD) in respect of the declared domestic mobile terminating access service (MTAS).
- 1.2 This access determination replaces the previous access determination for MTAS (Final Access Determination No. 7 of 2011).
- 1.3 The prices in this FAD are exclusive of tax payable under *the Utilities (Network Facilities Tax) Act 2006* (ACT).
- 1.4 The prices in this FAD are exclusive of Goods and Services Tax (GST).

2. Definitions and interpretation

- 2.1 Schedule 1 applies to the interpretation of this instrument.
- 2.2 The Schedules form part of this instrument.

3. Commencement and duration

- 3.1 This FAD commences on **1 January 2016.**
- 3.2 This FAD remains in force up until and including **30 June 2019.**

4. Terms and conditions of access

- 4.1 If a carrier or carriage service provider is required to comply with any or all of the standard access obligations as defined in the *Competition and Consumer Act 2010* in respect of the MTAS, the carrier or carriage service provider must comply with those obligations on the terms and conditions set out in this clause 4.

Note: The terms and conditions in a final access determination apply only to those terms and conditions where terms and conditions on that matter in an Access Agreement cannot be reached, no special access undertaking is in operation setting out terms and conditions on that matter and no binding rules of conduct have been made setting out terms and conditions on that matter: section 152AY of the *Competition and Consumer Act 2010*.

- 4.2 If the carrier or carriage service provider is required to supply the MTAS to a service provider, the carrier or carriage service provider must supply the service at the price specified in Schedule 2.

The non-price terms and conditions set out in Schedules 3–12 apply to the access of the MTAS.

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Schedule 1 - Interpretation and definitions

Interpretation

In these FADs, unless the contrary intention appears:

- (a) the singular includes the plural and vice versa;
- (b) the words “including” and “include” mean “including, but not limited to”; and
- (c) terms defined in the CCA or the *Telecommunications Act 1997* have the same meaning.

Definitions

ACCC means the Australian Competition and Consumer Commission

Access Agreement has the same meaning as given to that term in section 152BE of the CCA

Access Provider has the same meaning as given to that term in subsection 152AR(2) of the CCA

Access Seeker has the same meaning as given to that term in section 152AG of the CCA

ACDC means the Australian Commercial Disputes Centre Limited

ACDC Guidelines means the mediation guidelines of the ACDC in force from time to time

ACMA means the Australian Communications and Media Authority

Billing Dispute means a dispute relating to a Charge or an invoice issued by the Access Provider

Billing Dispute Notice means a notice given pursuant to clause 3.10 in Schedule 3

Billing Dispute Procedures means the procedures set out in clauses 3.10 to 3.30 in Schedule 3

Breach Notice has the meaning set out in clause 7.5 of Schedule 7

Business Hours means 8.00 am to 5.00 pm Monday to Friday, excluding a day which is a gazetted public holiday in the place where the relevant transaction or work is to be performed

Business Day means any day other than Saturday or Sunday or a day which is a gazetted public holiday in the place concerned

Calendar Day means a day reckoned from midnight to midnight

Carriage Service has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

CCA means the *Competition and Consumer Act 2010* (Cth)

Charge means a charge for the supply of a Service

Confidential Information means all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form and whether coming into existence before or after the commencement of this FAD) relating to or developed in connection with or in support of the Service supplied under this FAD (the “**first mentioned party**”) but does not include:

- (a) information which is or becomes part of the public domain (other than through any breach of this FAD);

 - (b) information rightfully received by the other party from a third person without a duty of confidentiality being owed by the other party to the third person, except where the other party has knowledge that the third person has obtained that information either directly or indirectly as a result of a breach of any duty of confidence owed to the first mentioned party; or

 - (c) information which has been independently developed or obtained by the other party;
- or
- (d) information about Services supplied by the Access Provider (including where that information is generated by the Access Provider) that has been aggregated with other information of a similar or related nature, such that the Access Seeker cannot be identified by the information or any part of it.

Coordinated Capital Works Program means a planned Major Network Modernisation and Upgrade with respect to the Service that extends across more than one ESA but does not include an Emergency Network Modernisation and Upgrade.

Coordinated Capital Works Program Forecast has the meaning set out in clause 10.10 of

Schedule 10

Coordinated Capital Works Program Schedule has the meaning set out in clause 10.14 of

Schedule 10

Disclosing Party has the meaning set out in clause 6.5 in Schedule 6 of this FAD

Distribution Area has the same meaning as in the Network Deployment Rules

Emergency means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war-like action) which:

- a) endangers or threatens to endanger the safety or health of persons or
- b) destroys or damages, or threatens to destroy or damage property, being an emergency which requires a significant and co-ordinated response

Emergency Network Modernisation and Upgrade means a Major Network Modernisation and Upgrade that is required and is reasonably necessary and a proportionate response to address an Emergency

Equivalent Period of Notice means a period of notice commencing at the time that the Access Provider has approved and allocated the capital expenditure or otherwise approved and made a decision to commit to a Major Network Modernisation and Upgrade

ESA means an exchange service area which is a geographic area generally serviced by a single Exchange

Event means an act, omission or event relating to or arising out of this FAD or part of this FAD;

Exchange means a building in which telephone switching or other equipment of an Access Provider or Access Seeker has been installed for use in connection with a telecommunications network

Expert Committee means a committee established under clause 5.11 in Schedule 5

FAD means Final Access Determination

Fault means:

(a) a failure in the normal operation of a Network or in the delivery of a Service; or

(b) any issue as to the availability or quality of a Service supplied to an end-user via the Access Seeker, notified by the end-user to the Access Seeker's help desk, that has been reasonably assessed by the Access Provider as being the Access Provider's responsibility to repair

General Notification has the meaning set out in clause 10.1

Indemnifying Party means the Party giving an indemnity under this FAD

Individual Notification has the meaning set out in clause 10.1 of Schedule 10

Initiating Notice has the meaning as set out in clause 5.11 of Schedule 5

Innocent Party means the Party receiving the benefit of an indemnity under this FAD;

Liability (of a party) means any liability of that party (whether in contract, in tort, under statute or in any other way and whether due to negligence, wilful or deliberate breach or any other cause) under or in relation to this FAD, or part of this FAD or in relation to any Event or series of related Events;

Limitation Notice has the meaning set out in clause 13.10 of Schedule 13

Listed Carriage Service has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

Loss includes liability, loss, damage, costs, charges or expenses (including legal costs)

Major Network Modernisation and Upgrade means a modernisation or upgrade that:

- (a) involves the installation of the Access Provider's customer access modules closer to end-users than an Exchange;
- (b) requires the removal/relocation of the Service provided from Exchanges and the establishment of a new POI (or relocation of an existing POI) for the Service; or
- (c) results in a Service no longer being supplied or adversely affects the quality of that Service (or any services supplied by an Access Seeker to their end-users using the Service), but does not mean, or include, an Emergency Network Modernisation Upgrade or an NBN related upgrade

Month means a period commencing at the beginning of any day of a named month and ending:

- (a) at the end of the day before the corresponding day of the next named month; or
- (b) if there is no such corresponding day – at the end of the next named month

Network of a party, means that party's system, or series of systems, that carries, or is capable of carrying communications by means of guided or unguided electromagnetic energy

Network Deployment Rules means the industry code entitled "ACIF C559:2012 Unconditioned Local Loop Service (ULLS) – Network Deployment Rules" registered by the ACMA under section 117 of the *Telecommunications Act 1997* (Cth) and as amended from time to time.

Non-Billing Dispute means a dispute other than a Billing Dispute

Ongoing Creditworthiness Information has the meaning as set out in clause 4.8 of Schedule 4 of this FAD

Party means a party to this FAD

People of a party, means each of that party's directors, officers, employees, agents, contractors, advisers and representatives but does not include that party's end-users or the other party;

Representative of a Party means each of that party's directors, officers, employees, agents, contractors, advisers and representatives, but does not include that Party's end-users or the other Party;

Retail Business Unit has the same meaning given to that term in Schedule 1 of Telstra's

Structural Separation Undertaking;

Security means the amount and type of security provided, or required to be provided, to the Access Provider in respect of the provision by the Access Provider of Services, as set out in Schedule 4

Security Deposit means any sum of money deposited by the Access Seeker with the Access Provider, from time to time, for the purposes of fulfilling in whole or in part the requirement under this FAD that the Access Seeker provide Security to the Access Provider;

Service means a service declared under section 152AL of the CCA

Structural Separation Undertaking means:

- (a) an undertaking given by Telstra under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which came into force in accordance with section 577AB, and any amendment to that undertaking which comes into force in accordance with subsection

577B(6); and

- (b) a migration plan approved by the ACCC under Subdivision B of Division 2 of Part 33 of the *Telecommunications Act 1997* (Cth) which, pursuant to subsection 577BE(5), formed part of the undertaking referred to in paragraph (a), and any amendment to that plan which is approved by the ACCC in accordance with section 577BF, and includes all binding schedules, annexures and attachments to such documents;

Suspension Event has the meaning set out in clause 7.2 of Schedule 7

Suspension Notice has the meaning set out in clause 7.2 of Schedule 7

8 Schedule 2 - Price

2.1 The price applicable to the MTAS for mobile voice termination services:

Time period	Cents per minute
1 January 2016 to 30 June 2019	1.61

2.2 The price applicable to the MTAS for SMS termination services:

Time period	Cents per SMS
1 January 2016 to 30 June 2019	0.03

Schedule 3 - Billing and notification

- 3.1 The Access Seeker's liability to pay Charges for the Service to the Access Provider arises at the time the Service is supplied by the Access Provider to the Access Seeker, unless the parties agree otherwise.
- 3.2 The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 3.
- 3.3 The Access Provider must provide the Access Seeker with an invoice each month in respect of Charges payable for the Service unless the parties agree otherwise
- 3.4 The Access Provider is entitled to invoice the Access Seeker for previously uninvoiced Charges or Charges which were understated in a previous invoice, provided that:
 - a) the Charges to be retrospectively invoiced can be reasonably substantiated to the Access Seeker by the Access Provider; and
 - b) subject to clause 3.5, no more than 6 Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where:
 - i. the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld); or
 - ii. to the extent that the Charges relate to services supplied by an overseas carrier and the Access Provider has no control over the settlement arrangements as between it and the overseas carrier, in which case the Access Provider shall invoice such amounts as soon as is reasonably practicable.
- 3.5 The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Standard) and the provisions of any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Code) in relation to billing. Where the effect of a Standard or Code is that an Access Seeker is not permitted to invoice its customers for charges that are older than a specified number of days, weeks or months (the Backbilling Period), the Access Provider must not invoice the Access Seeker for a Charge which was incurred by the Access Seeker's customers that, as at the date the invoice is issued, is older than the Backbilling Period.
- 3.6 Subject to clause 3.12
 - a) An invoice is payable in full 30 Calendar Days after the date the invoice was

issued or such other date as agreed between the parties.

- b) The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider.
 - c) All amounts owing and unpaid after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day authorized dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5 per cent.
- 3.7 In addition to charging interest in accordance with clause 3.6 or exercising any other rights the Access Provider has at law or under this FAD, where an amount is outstanding and remains unpaid for more than 20 Business Days after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this FAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.
- 3.8 Unless the parties otherwise agree, there is no setting-off (i.e. netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise the administration and financial costs, the parties must consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.
- 3.9 The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice, and the service the Charge relates to. Nothing in this clause 3.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
- 3.10 If the Access Seeker believes a Billing Dispute exists, it may invoke the Billing Dispute Procedures by providing written notice to the Access Provider (Billing Dispute Notice). A Billing Dispute must be initiated only in good faith.
- 3.11 Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal proceedings in relation to any Billing Dispute.
- 3.12 If a Billing Dispute Notice is given to the Access Provider by the due date for payment of the invoice containing the Charge which is being disputed, the Access Seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved. Otherwise, the Access Seeker must pay the invoice in full in accordance with this FAD (but subject to the outcome of the Billing Dispute Procedures).
- 3.13 Except where payment is withheld in accordance with clause 3.12, the Access

Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.

3.14 A Billing Dispute Notice must be given to the Access Provider in relation to a Charge, as soon as practicable after the Access Seeker becomes aware a Billing Dispute exists, and within six Months of the invoice for the Charge being issued in accordance with clause 3.6.

3.15

- a) The Access Provider must acknowledge receipt of a Billing Dispute Notice within two Business Days by providing the Access Seeker with a reference number.
- b) Within five Business Days of acknowledging a Billing Dispute Notice under clause 3.15(a), the Access Provider must, by written notice to the Access Seeker:
 - i. accept the Billing Dispute Notice; or
 - ii. reject the Billing Dispute Notice if the Access Provider reasonably considers that:
 - A. the subject matter of the Billing Dispute Notice is already being dealt with in another dispute;
 - B. the Billing Dispute Notice was not submitted in good faith; or
 - C. the Billing Dispute Notice is incomplete or contains inaccurate information.
- c) If the Access Provider fails to accept or reject the Billing Dispute Notice within five Business Days of acknowledging the Billing Dispute Notice under clause 3.15(a), the Access Provider is taken to have accepted the Billing Dispute Notice.
- d) For avoidance of doubt, if the Access Provider rejects a Billing Dispute Notice under clause 3.15(b)(ii)C, the Access Seeker is not prevented from providing an amended Billing Dispute Notice to the Access Provider relating to the same dispute provided that the amended Billing Dispute Notice is provided within the timeframe under clause 3.14.

3.16 The Access Seeker must, as early as practicable and in any case within five Business Days, unless the Parties agree on a longer period, after the Access Provider acknowledges a Billing Dispute Notice, provide to the other party any further relevant information or materials (which were not originally provided with the Billing Dispute Notice) on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

3.17 Without affecting the time within which the Access Provider must make the proposed resolution under clause 3.18, the Access Provider may request additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution pursuant to clause 3.18. This additional information may be requested up to 10 Business Days prior to the date on which the Access Provider must make the proposed resolution under clause 3.18. The Access Seeker must provide the requested information within five Business Days of receiving the request. If the Access Seeker fails to do so within five Business Days, the Access Provider may take the Access Seeker's failure to provide additional information into account when making its proposed resolution.

3.18 The Access Provider must try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of accepting a Billing Dispute Notice under clause 3.15 (or longer period if agreed by the parties), by notifying the Access Seeker in writing of its proposed resolution of a Billing Dispute. That notice must:

- a) explain the Access Provider's proposed resolution (including providing copies where necessary of all information relied upon in coming to that proposed resolution); and
- b) set out any action to be taken by:
 - i. the Access Provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or
 - ii. the Access Seeker (e.g. payment of the disputed Charge)

If the Access Provider reasonably considers that it will take longer than 30 Business Days after accepting a Billing Dispute Notice to provide a proposed resolution, then the Access Provider may request the Access Seeker's consent to an extension of time to provide the proposed resolution under this clause 3.18 (such consent not to be unreasonably withheld).

3.19 If the Access Seeker does not agree with the Access Provider's decision to reject a Billing Dispute Notice under clause 3.15 or the Access Provider's proposed resolution under clause 3.17, it must object within 15 Business Days of being notified of such decisions (or such longer time as agreed between the parties). Any objection lodged by the Access Seeker with the Access Provider must be in writing and state:

- a) what part(s) of the proposed resolution it objects to;
- b) the reasons for objection;
- c) what amount it will continue to withhold payment of (if applicable); and
- d) any additional information to support its objection.

If the Access Seeker lodges an objection to the proposed resolution under this clause, the Access Provider must, within 5 Business Days of receiving the objection, review the objection and

- e) provide a revised proposed resolution (Revised Proposed Resolution in this Schedule 3); or
- f) confirm its proposed resolution

3.20 Any:

- a) withdrawal, adjustment or refund of the disputed Charge by the Access Provider; or
- b) payment of the disputed Charge by the Access Seeker (as the case may be),

must occur as soon as practicable and in any event within one Month of the Access Provider's notice of its proposed resolution under clause 3.17 or its Revised Proposed Resolution under clause 3.18 (as applicable), unless the Access Seeker escalates the Billing Dispute under clause 3.22. If the Access Provider is required to make a withdrawal, adjustment or refund of a disputed Charge under this clause but its next invoice (first invoice) is due to be issued within 48 hours of its proposed resolution under clause 3.17 or its Revised Proposed Resolution under clause 3.18 (as applicable), then the Access Provider may include that withdrawal, adjustment or refund in the invoice following the first invoice notwithstanding that this may occur more than one Month after the Access Provider's notice of its proposed resolution or Revised Proposed Resolution.

3.21 Where the Access Provider is to refund a disputed Charge, the Access Provider must pay interest (at the rate set out in clause 3.6) on any refund. Interest accrues daily from the date on which each relevant amount to be refunded was paid to the Access Provider, until the date the refund is paid.

3.22 Where the Access Seeker is to pay a disputed Charge, the Access Seeker must pay interest (at the rate set out in clause 3.6) on the amount to be paid. Interest accrues daily from the date on which each relevant amount was originally due to be paid to the Access Provider, until the date the amount is paid.

3.23 If

- a) the Access Provider has not proposed a resolution according to clause 3.18 or within the timeframe specified in clause 3.18, or
- b) the Access Seeker, having first submitted an objection under clause 3.19 is not satisfied with the Access Provider's Revised Proposed Resolution, or the Access Provider's confirmed proposed resolution, within the timeframes specified in clause 3.19,

the Access Seeker may escalate the matter under clause 3.24. If the Access Seeker does not do so within 15 Business Days after the time period stated in clause 3.18 or after being notified of the Access Provider's Revised Proposed Resolution under clause 3.19(e) or confirmed proposed resolution under clause 3.19(f) (or a longer period if agreed by the parties), the Access Seeker is deemed to have accepted the Access Provider's proposed resolution made under clause 3.18 or Revised Proposed Resolution under clause 3.19(e) or confirmed proposed solution under clause 3.19(f) and clauses 3.21 and 3.22 apply.

- 3.24 If the Access Seeker wishes to escalate a Billing Dispute, the Access Seeker must give the Access Provider a written notice:
- a) stating why it does not agree with the Access Provider's Revised Proposed Resolution or confirmed proposed resolution; and
 - b) seeking escalation of the Billing Dispute.
- 3.25 A notice under clause 3.24 must be submitted to the nominated billing manager for the Access Provider, who must discuss how best to resolve the Billing Dispute with the Access Seeker's nominated counterpart. If the Parties are unable to resolve the Billing Dispute within five Business Days of notice being given under clause 3.24 (or such longer period as agreed between the parties) the Billing Dispute must be escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart who must meet in an effort to resolve the Billing Dispute.
- 3.26 If the Billing Dispute cannot be resolved within five Business Days of it being escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart under clause 3.25 (or such longer period as agreed between the parties):
- a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation must be conducted in accordance with the mediation guidelines of the Australian Commercial Disputes Centre (ACDC) and concluded within three Months of the proposal (unless the parties agree to extend this timeframe); or
 - b) if the parties either do not agree to proceed to mediation within five Business Days of being able to propose the appointment of a mediator under clause 3.26(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal proceedings to resolve the matter.
- 3.27 The parties must ensure that any person appointed or required to resolve a Billing Dispute takes into account the principle that the Access Seeker is entitled to be recompensed in circumstances where the Access Seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end-user an amount which is the subject of a Billing Dispute (a Backbilling Loss), provided that:

- a) such principle applies only to the extent to which the Billing Dispute is resolved against the Access Provider; and
 - b) such principle applies only to the extent to which it is determined that the Backbilling Loss was due to the Access Provider unnecessarily delaying resolution of the Billing Dispute.
 - c) Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
- 3.28 Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
- 3.29 All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause 3.25 (or their respective nominees).
- 3.30 There is a presumption that all communications between the Parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.
- 3.31 If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that three or more out of any five consecutive invoices for a given Service are incorrect by 5 per cent or more, then, for the purposes of clause 3.21, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 3.6, plus 2 per cent. The remedy set out in this clause 3.31 is without prejudice to any other right or remedy available to the Access Seeker.

Schedule 4 - Creditworthiness and Security

4.1 Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide to the Access Provider and maintain, on terms and conditions reasonably required by the Access Provider and subject to clause 4.2, the Security (as is determined having regard to clause 4.3 and as may be varied pursuant to clause 4.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.

4.2

- a) The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the Security specified in clause 4.1 for a period of six Months following (but not including) the date on which the last of the following occurs:
 - i. cessation of supply of the Service under this FAD, and
 - ii. payment of all outstanding amounts under this FAD.
- b) Notwithstanding clause 4.2(a), the Access Provider has no obligation to release the Security if, at the date the Access Provider would otherwise be required to release the Security under clause 4.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.

4.3 The Security (including any varied Security) may only be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services, and must be of an amount and in a form determined reasonably by the Access Provider. As a statement of general principle the amount of any Security is calculated by reference to:

- a) the aggregate value of all Services likely to be provided to the Access Seeker under this FAD over a reasonable period; or
- b) the value of amounts invoiced in respect of the Service but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).

For the avoidance of doubt, any estimates, forecasts or other statements made or provided by the Access Seeker may be used by the Access Provider in determining the amount of a Security

4.4 Examples of appropriate forms of Security, having regard to the factors referred to in clause 4.3, may include without limitation:

- a) fixed and floating charges;
- b) personal guarantees from directors;
- c) Bank Guarantees;
- d) letters of comfort
- e) mortgages;
- f) a right of set-off;
- g) a Security Deposit; or
- h) a combination of the forms of security referred to in paragraphs (a) to (g) above.

If any Security is or includes a Security Deposit, then:

- i) the Access Provider is not obliged to invest the Security Deposit or hold the Security Deposit in an interest bearing account or otherwise; and
- j) the Access Seeker is prohibited from dealing with the Security Deposit or its rights to that Security Deposit (including by way of assignment or granting of security).

If any security is or includes a Bank Guarantee and that Bank Guarantee (Original Bank Guarantee) has an expiry date which is the last day by which a call may be made under a Bank Guarantee, the Access Seeker must procure a replacement Bank Guarantee for the amount guaranteed by the Original Bank Guarantee no later than two Months prior to the expiry date of the Original Bank Guarantee, such replacement Bank Guarantee to have an expiry date of no less than 14 Months from the date of delivery of the replacement Bank Guarantee.

If the Access Seeker fails to procure a replacement Bank Guarantee, then in addition to any other of the Access Provider's rights under this FAD, the Access Provider may, at any time in the Month prior to the expiry date of the Bank Guarantee, make a call under the Bank Guarantee for the full amount guaranteed. The amount paid to the Access Provider pursuant to a call on the Bank Guarantee will become a Security Deposit.

- 4.5 The Access Provider may from time to time where the circumstances reasonably require, request Ongoing Creditworthiness Information from the Access Seeker to determine the ongoing creditworthiness of the Access Seeker. The Access Seeker must supply Ongoing Creditworthiness Information to the Access Provider within 15 Business Days of receipt of a request from the Access Provider for such information. The Access Provider may, as a result of such Ongoing Creditworthiness Information, having regard to the factors referred to in clause 4.3 and subject to clause 4.7,

reasonably require the Access Seeker to alter the amount, form or the terms of the Security (which may include a requirement to provide additional security), and the Access Seeker must provide that altered Security within 20 Business Days of being notified by the Access Provider in writing of that requirement.

4.6 The Access Seeker may from time to time request the Access Provider to consent (in writing) to a decrease in the required Security and/or alteration of the form of the Security. The Access Provider must, within 15 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors referred to in clause 4.3). The Access Provider may request, and the Access Seeker must promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 4.6.

4.7 If the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 4, the Access Seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the Access Provider and that there has been no material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider. If there has been a material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider, the Access Seeker must disclose the nature and effect of the change to the Access Provider at the time the information is provided.

4.8 For the purposes of this Schedule 4, **Ongoing Creditworthiness Information** means:

- a) a copy of the Access Seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);
- b) a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker must co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the Access Seeker's creditworthiness. To that end, the Access Seeker agrees to procure written consents (as required under the *Privacy Act 1988* (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the Access Provider to:
 - i. obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;
 - ii. disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and
 - iii. obtain and use a consumer credit report;

- c) a letter, signed by the company secretary or duly authorised officer of the Access Seeker, stating that the Access Seeker is not insolvent and not under any external administration (as defined in the *Corporations Act 2001* (Cth)) or under any similar form of administration under any laws applicable to it in any jurisdiction; and
 - d) the Access Seeker's credit rating, if any has been assigned to it; and
 - e) any other information reasonably required to determine the ongoing creditworthiness of the Access Seeker, as agreed between the parties before the request under clause 4.5 is made.
- 4.9 The Access Seeker may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.
- 4.10 Subject to this Schedule 4, the parties agree that a failure by the Access Seeker to provide the warranties set out in clause 4.7 or to provide Ongoing Creditworthiness Information constitutes:
- a) an event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) of the Access Seeker and the Access Seeker must provide that altered Security within 15 Business Days after the end of the period set out clause 4.5; or
 - b) breach of a material term or condition of this FAD.

Any disputes arising out of or in connection with Schedule 4 must be dealt with in accordance with the procedures in Schedule 5. Notwithstanding that a dispute arising out of or in connection with Schedule 4 has been referred to the procedures in Schedule 5 and has not yet been determined, nothing in this clause 4.10 or Schedule 5 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 7.

Schedule 5 - General dispute resolution procedures

5.1 If a dispute arises between the parties in connection with or arising from the terms and conditions set out in this FAD for the supply of the Service, the dispute must be managed as follows:

- a) in the case of a Billing Dispute, the dispute must be managed in accordance with the Billing Dispute Procedures; or
- b) subject to clause 5.2, in the case of a Non-Billing Dispute, the dispute must be managed in accordance with the procedures set out in this Schedule 5.

5.2 To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless otherwise determined, that Non-Billing Dispute must be resolved in accordance with the Billing Dispute Procedures. The Access Provider may seek a determination from an independent third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access Provider.

For the purposes of this clause 5.2:

- a) the independent third party must be a person who:
 - i. has an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
 - ii. have an appreciation of the competition law implications of his/her decisions; and
 - iii. not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
- b) the independent third party may include an arbiter from the ACDC.

5.3 If a Non-Billing Dispute arises, either party may, by written notice to the other, refer the Non-Billing Dispute for resolution under this Schedule 5. A Non-Billing Dispute must be initiated only in good faith.

5.4 Any Non-Billing Dispute notified under clause 5.3 must be referred:

- a) initially to the nominated manager (or managers) for each party, who must

endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 5.3 or such other time agreed by the parties; and

- b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within a further five Business Days to refer the Non-Billing Dispute to an Expert Committee under clause 5.11, or by written agreement submit it to mediation in accordance with clause 5.10.

5.5 If:

- a) under clause 5.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation; or,
- b) under clause 5.10(f), the mediation is terminated; and
- c) after a period of five Business Days after the mediation is terminated as referred to in paragraph (b), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise)

either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.

5.6 A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:

- a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 5 or clause 5.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 5.5; or
- b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 5 or clause 5.2 (if applicable).

5.7 Each party must continue to fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 5 are pending.

5.8 All communications between the parties during the course of a Non-Billing Dispute and in connection with that Non-Billing Dispute, are made on a without prejudice and confidential basis.

5.9 Each party must, as early as practicable, and in any case within 14 Calendar Days

unless a longer period is agreed between the parties, after the notification of a Non-Billing Dispute pursuant to clause 5.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

- 5.10 Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 5.4(b):
- a) any agreement must include:
 - i. a statement of the disputed matters in the Non-Billing Dispute; and
 - ii. the procedure to be followed during the mediation, and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;
 - b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the provisions of this clause 5.10. In the event of any inconsistency between them, the provisions of this clause 5.10 prevail;
 - c) it must be conducted in private;
 - d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator must:
 - i. have an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
 - ii. have an appreciation of the competition law implications of his/her decisions; and
 - iii. not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
 - e) the parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who will attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation;

- f) it must terminate in accordance with the ACDC Guidelines;
- g) the parties must bear their own costs of the mediation including the costs of any representatives and must each bear half the costs of the mediator; and
- h) any agreement resulting from mediation binds the parties on its terms.

5.11 The parties may by written agreement in accordance with clause 5.4(b), submit a Non-Billing Dispute for resolution by an Expert Committee (**Initiating Notice**), in which case the provisions of this clause 5.11 apply as follows:

- a) The terms of reference of the Expert Committee are as agreed by the parties. If the terms of reference are not agreed within five Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee is deemed to be terminated.
- b) An Expert Committee acts as an expert and not as an arbitrator.
- c) The parties are each represented on the Expert Committee by one appointee.
- d) The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 5.10(d)(i), (ii) and (iii).
- e) Each party must be given an equal opportunity to present its submissions and make representations to the Expert Committee.
- f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.
- g) Unless the parties agree otherwise the parties must ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.
- h) If the dispute is not resolved within the timeframe referred to in clause 5.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
- i) The Expert Committee has the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.
- j) The Expert Committee must give written reasons for its decision.
- k) A decision of the Expert Committee is final and binding on the parties except in the

case of manifest error or a mistake of law.

- 1) Each party must bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties must each bear half the costs of the independent member of the Expert Committee.

5.12 Schedule 5 does not apply to a Non-Billing Dispute to the extent that:

- a) there is a dispute resolution process established in connection with, or pursuant to, a legal or regulatory obligation (including any dispute resolution process set out in a Structural Separation Undertaking)
- b) a party has initiated a dispute under the dispute resolution process referred to in clause 5.12(a), and
- c) the issue the subject of that dispute is the same issue in dispute in the Non-Billing Dispute.

Schedule 6 - Confidentiality provisions

- 6.1 Subject to clause 6.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:
- a) use or copy such Confidential Information except as set out in this FAD; or
 - b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.
- 6.2 For the avoidance of doubt, information generated within the Access Provider's Network as a result of or in connection with the supply of the relevant Service to the Access Seeker or the interconnection of the Access Provider's Network with the Access Seeker's Network (other than information that falls within paragraph (d) of the definition of Confidential Information) is the Confidential Information of the Access Seeker.
- 6.3 The Access Provider must upon request from the Access Seeker, disclose to the Access Seeker quarterly aggregate traffic flow information generated within the Access Provider's Network in respect of a particular Service provided to the Access Seeker, if the Access Provider measures and provides this information to itself. The Access Seeker must pay the reasonable costs of the Access Provider providing that information.
- 6.4 Subject to clauses 6.5 and 6.10, Confidential Information of the Access Seeker may be:
- a) used by the Access Provider:
 - i. for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;
 - ii. for the purposes of supplying Services to the Access Seeker;
 - iii. for the purpose of billing; or
 - iv. for another purpose agreed to by the Access Seeker; and
 - b) disclosed only to personnel who, in the Access Provider's reasonable opinion require the information to carry out or otherwise give effect to the purposes referred to in paragraph (a) above.
- 6.5 A party (**Disclosing Party**) may to the extent necessary use and/or disclose (as the case may be) the Confidential Information of the other party:
- a) to those of the Disclosing Party's directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential

Information is reasonably required to be disclosed in connection with the provision of the Service to which this FAD relates;

- b) to any professional person for the purpose of obtaining advice in relation to matters arising out of or in connection with the supply of a Service under this FAD;
- c) to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;
- d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this FAD, provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party so that the other party has an opportunity to protect the confidentiality of its Confidential Information;
- e) as required by law provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information, except that no notice is required in respect of disclosures made by the Access Provider to the ACCC under section 152BEA of the CCA;
- f) with the written consent of the other party provided that, prior to disclosing the Confidential Information of the other party:
 - i. the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party;
 - ii. if required by the other party as a condition of giving its consent, the Disclosing Party must provide the other party with a confidentiality undertaking in the form set out in Annexure 1 of this Schedule 6 signed by the person or persons to whom disclosure is to be made; and
 - iii. if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 6.6;
- g) in accordance with a lawful and binding directive issued by a regulatory authority;
- h) if reasonably required to protect the safety of personnel or property or in connection with an emergency;
- i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted;
- j) in accordance with a reporting obligation, or in response to a request from a regulatory authority or any other Government body, in connection with the Access

Provider's Structural Separation Undertaking, provided that prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the confidential information of the other party.

- k) in response to a request from a regulatory authority or any other Government body in connection with interception capability (as that term is used in Chapter 5 of the *Telecommunications (Interception and Access) Act 1979* (Cth)) relating to access to a declared service, provided that prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the confidential information of the other party.

6.6 Each party must co-operate in any action taken by the other party to:

- a) protect the confidentiality of the other party's Confidential Information; or
- b) enforce its rights in relation to its Confidential Information.

6.7 Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction or disclosure.

6.8 Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the Disclosing Party that the Confidential Information is or will be correct.

6.9 Each party acknowledges that a breach of this Schedule 6 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this Schedule 6.

6.10 If:

- a) the Access Provider has the right to suspend or cease the supply of the Service under:
 - i. Schedule 6 due to a payment breach, or
 - ii. under clause 6.7

- b) after suspension or cessation of supply of the Service under this FAD, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment,

then the Access Provider may do one or both of the following:

- c) notify and exchange information about the Access Seeker (including the Access Seeker's Confidential Information) with any credit reporting agency or the Access Provider's collection agent; and
- d) without limiting clause 6.10, disclose to a credit reporting agency:
 - i. the defaults made by the Access Seeker to the Access Provider; and
 - ii. the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD.

Annexure 1 of Schedule 6

Confidentiality undertaking form

[Amend where necessary]

CONFIDENTIALITY UNDERTAKING

I, _____ of [employer's company name] ([undertaking company]) undertake to [full name of party who owns or is providing the confidential information as the case requires] ([Provider]) that:

- 1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking (Confidential Information) that is in my possession, custody, power or control.
- 2 I acknowledge that:
 - (a) this Undertaking is given by me to [Provider] in consideration for [Provider] making the Confidential Information available to me for the Approved Purposes (as defined below);
 - (b) all intellectual property in or to any part of the Confidential Information is and will remain the property of [Provider]; and
 - (c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [undertaking company] in relation to the Confidential Information except as expressly provided in this Undertaking.
- 3 I will:
 - (a) only use the Confidential Information for:
 - (i) the purposes listed in Attachment 2 to this Undertaking; or
 - (ii) any other purpose approved by [Provider] in writing;(the Approved Purposes);
 - (b) comply with any reasonable request or direction from [provider] regarding the Confidential Information.
- 4 Subject to clause 5, I will not disclose any of the Confidential Information to any other person without the prior written consent of [Provider].
- 5 I acknowledge that I may disclose the Confidential Information to which I have access to:
 - (a) any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:

(i) the person to whom disclosure is proposed to be made (**the person**) is notified in writing to [Provider] and [Provider] has approved the person as a person who may receive the Confidential Information, which approval shall not be unreasonably withheld;

(ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [Provider]; and

(iii) a signed undertaking of the person has already been served on [Provider];

(b) other persons, if required to do so by law, but then only:

(i) if I notify [Provider] of that request within 7 days of receiving the request;

(ii) to the person(s) to whom I am obliged to provide the Confidential Information;

(iii) to the extent necessary as required by law; and

(iv) if I notify the recipient of the Confidential Information that the information is confidential and is the subject of this Undertaking to the [Provider]; and

(c) any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(a) for the Approved Purpose.

6 I will establish and maintain security measures to safeguard the Confidential Information from unauthorised access, use, copying, reproduction or disclosure and will protect the Confidential Information using the same degree of care as a prudent person in my position would use to protect their own confidential information.

7 Except as required by law and subject to paragraph 10 below, within 14 days after whichever of the following first occurs:

(a) termination of this Undertaking;

(b) my ceasing to be employed or retained by [undertaking company] (provided that I continue to have access to the Confidential Information at that time); or

(c) my ceasing to be working for [undertaking company] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [undertaking company]);

I will destroy or deliver to [Provider] the Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the Confidential Information in my possession, custody, power or control other than electronic records stored in IT backup system that cannot be destroyed or deleted.

8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:

(a) that is in the public domain; or

(b) that has been obtained by me otherwise than from [Provider] in relation to this Undertaking;

provided that the information has not been obtained by me by reason of, or in circumstances involving, any breach of this Undertaking, any other confidentiality undertaking in favour of [Provider] for the Approved purpose, or by any other unlawful means.

9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that [Provider] may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to [Provider] at law or in equity.

10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to [Provider] of the Confidential Information pursuant to paragraph 7 above.

11 I acknowledge that this Undertaking is governed by the law in force in the State of [insert relevant state] and I agree to submit to the non-exclusive jurisdiction of the court of that place.

Signed: _____

Print name: _____

Dated: _____

Witness signature: _____

Witness name: _____

ATTACHMENT 1

Any document, or information in any document provided by [provider] to [undertaking company] which [provider] claims is confidential information for the purposes of this Undertaking.

ATTACHMENT 2

[Approved purpose(s)]

Schedule 7 – Suspension and termination

7.1 The Access Provider may immediately suspend the supply of a Service or access to the Access Provider's Network, provided it notifies the Access Seeker where practicable and provides the Access Seeker with as much notice as is reasonably practicable:

- a) during an Emergency; or
- b) where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider's Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency;
- c) where, in the reasonable opinion of the Access Provider, the Access Seeker's Network or equipment adversely affects or threatens to affect the normal operation of the Access Provider's Network or access to the Access Provider's Network or equipment (including for the avoidance of doubt, where the Access Seeker has delivered Prohibited Traffic onto the Access Provider's Network);
- d) where an event set out in clauses 7.8(a) to (i) occurs
- e) and is entitled to continue such suspension until (as the case requires) the relevant event or circumstance giving rise to the suspension has been remedied.

7.2 If:

- a) the Access Seeker has failed to pay monies payable under this FAD;
- b) a Court determines that (and the decision is not subject to an appeal) the Access Seeker's use of:
 - a. its Facilities in connection with any Service supplied to it by the Access Provider;
 - b. the Access Provider's Facilities or Network; or
 - c. any Service supplied to it by the Access Providers,

is in contravention of any law; or

- c) the Access Seeker breaches a material obligation under this FAD (**Suspension Event**) and;
- d) as soon as reasonably practicable after becoming aware of the Suspension Event, the

Access Provider gives a written notice to the Access Seeker:

- i. citing this clause;
 - ii. specifying the Suspension Event that has occurred;
 - iii. requiring the Access Seeker to institute remedial action (if any) in respect of that event; and
 - iv. specifying the action which may follow due to a failure to comply with the notice, (**Suspension Notice**) and:
- e) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 7.2, the **Remedy Period**), the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable after the expiry of the Remedy Period:
- f) refuse to provide the Access Seeker with the Service:
- i. of the kind in respect of which the Suspension Event has occurred; and
 - ii. a request for which is made by the Access Seeker after the date of the breach, until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist; and
- g) suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed.

7.3 For the avoidance of doubt, subclause 7.2(a) does not apply to any monies payable that are the subject of a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.

7.4 In the case of a suspension pursuant to clause 7.2, the Access Provider must reconnect the Access Seeker to the Access Provider's Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider must do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.

7.5 If:

- a) an Access Seeker ceases to be a carrier or carriage service provider; or

- b) an Access Seeker ceases to carry on business for a period of more than 10 consecutive Business Days or
- c) in the case of an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or
- d) an Access Seeker breaches a material obligation under this FAD, and:
 - i. that breach materially impairs or is likely to materially impair the ability of the Access Provider to deliver Listed Carriage Services to its customers; and
 - ii. the Access Provider has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and
 - iii. the Access Seeker fails to institute remedial action as specified in the Breach Notice within 10 Business Days after receiving the Breach Notice (in this clause 7.5, the **Remedy Period**), or
- e) the supply of the Service(s) to the Access Seeker has been suspended pursuant to the terms and conditions of this FAD for a period of three Months or more, the Access Provider may cease supply of the Service under this FAD by written notice given to the first-mentioned party at any time after becoming aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be).

7.5A If an Access Provider ceases to carry on business for a period of more than 10 consecutive Business Days, the other party may cease acquisition of the Service under this FAD by written notice given to the Access Provider at any time after becoming aware of the cessation.

7.6 A party must not give the other party both a Suspension Notice under clause 7.2 and a Breach Notice under clause 7.5 in respect of:

- a) the same breach; or
- b) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events;
except:
 - c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 7.2 in respect of a Suspension Event and the Suspension Event has not been rectified by the Access Seeker within the relevant Remedy Period specified in clause 7.2; and

d) where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 7.5(d)(ii), the time period for the purposes of clause 7.5(d)(ii) will be 20 Business Days from the expiry of the time available to remedy the Suspension Event.

7.7 For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 7.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause 7.5.

7.8 Notwithstanding any other provision of this FAD, either Party may at any time immediately cease the supply of the Service under this FAD by giving written notice of termination to the other Party if:

- a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other Party; or
- b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other Party; or
- c) a holder of an encumbrance takes possession of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or
- d) the other party is or is likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
- e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or
- f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of three Months; or
- g) the other party breaches any of the terms of any of its loans, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to the supply of the Service under this FAD; or
- h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
- i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

7.9 The cessation of the operation of this FAD:

- a) does not operate as a waiver of any breach by a party of any of the provisions of this FAD; and
- b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.

7.10 Without prejudice to the parties' rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service:

- a) for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, or
- b) for a period of no less than 10 days commencing on the date on which the service is suspended under Schedule 7 of this FAD.

subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in Schedule 5 of this FAD.

Schedule 8 - Liability and Indemnity

8.1 Subject to clause 8.2, each Party's liability in respect of:

- a) the 12 Month period commencing on the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in that initial 12 Month period;
- b) any subsequent 12 Month period commencing on any anniversary of the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in the 12 Month period immediately prior to that anniversary.

For the purposes of this clause 8.1, Liability arises when the act or omission giving rise to the Liability occurs, not when any claim is made by a party under this FAD in connection with that Liability.

8.2 The liability limitation in clause 8.1 does not apply to the Access Seeker's liability to pay the Charges for the Service provided under this FAD, or the Parties' indemnification obligations under clauses 8.3 and 8.4.

8.3 Each Party indemnifies the other Party against all Loss arising from the death of, or personal injury to, a Representative of the other Party, where the death or personal injury arises from:

- a) an act or omission that is intended to cause death or personal injury; or
- b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

8.4 Each Party indemnifies the other Party against all Loss arising from any loss of, or damage to, the property of the other party (or the property of a representative of the other Party), where the loss or damage arises from:

- c) an act or omission that is intended to cause death or personal injury; or
- d) a negligent act or omission;

by the first Party or by a Representative of the first Party.

8.5 Each Party indemnifies the other Party against all Loss arising from a claim by a third person against the Innocent Party to the extent that the claim relates to a negligent act or omission by the first Party or by a Representative of the first Party.

8.6 Subject to clauses 8.3 and 8.4, a Party has no Liability to the other Party for or in respect of any consequential, special or indirect Loss or any loss of profits or data.

8.7 A Party has no Liability to the other Party for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any end-user of a Party or any other third person who is not a Representative of a Party.

8.8 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 8 to the extent that the liability the subject of the indemnity claim is caused or contributed to by:

- a) a breach of this FAD;
- b) an act intended to cause death, personal injury, or loss or damage to property; or
- c) a negligent act or omission;

by the Innocent Party.

8.9 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 8 or for in respect of a claim brought against the Innocent Party by an end-user of the Innocent Party, or a third person with whom the Innocent Party has a contractual relationship, to the extent that the Loss under such claim could have been excluded or reduced (regardless of whether such a Liability actually was excluded or reduced) by the Innocent Party in its contract with the end-user or third person.

8.10 The Innocent Party must take all reasonable steps to minimise the Loss it has suffered or is likely to suffer as a result of an event giving rise to an indemnity under this Schedule 8. If the Innocent Party does not take reasonable steps to minimise such Loss then the damages payable by the Indemnifying Party must be reduced as is appropriate in each case.

8.11 A Party's liability to the other Party for Loss of any kind arising out of the supply of the Service under this FAD or in connection with the relationship established by it is reduced to the extent (if any) that the other Party causes or contributes to the Loss. This reduction applies whether the first Party's liability is in contract, tort (including negligence), under statute or otherwise.

8.12 The Indemnifying Party must be given full conduct of the defence of any claim by a third party that is the subject of an indemnity under clause 8.3 or 8.4, including, subject to the Indemnifying Party first obtaining the written consent (which must not be unreasonably withheld) of the Innocent Party to the terms thereof, the settlement of such a claim.

8.13 Nothing in this Schedule 8 excludes or limits a Party's entitlement to damages under Part 5 of the Telecommunications (Consumer Protection and Service Standards) Act 1999.

Schedule 9 - Communication with end users

9.1 The Access Provider may communicate and deal with an Access Seeker's end-users as expressly provided in clauses 9.2 to 9.4 and as otherwise permitted by law.

9.2 Subject to clause 9.3, the Access Provider may communicate and deal with the Access Seeker's end-users:

- a) in relation to goods and services which the Access Provider currently supplies or previously supplied to the end-user provided that the Access Provider only communicates and deals through its Retail Business Unit;
- b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;
- c) where the Access Provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;
- d) in a manner or in circumstances agreed by the Parties; or
- e) in or in connection with an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property.

9.3 If:

- a) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services with the Access Seeker and must not engage in any form of marketing or discussion of the Access Provider's goods and/or services;
- b) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider, the Access Provider may engage in any form of marketing or discussion of the Access Provider's goods and/or services; and
- c) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider and the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services, with the Access Seeker, but may otherwise engage in any form of

marketing or discussion of the Access Provider's goods and/or services.

- 9.4 Where a Party communicates with the end-user of the other Party, that first mentioned Party must, where practicable, make and maintain records of that communication with the other Party's end-user in circumstances where that communication discusses anything concerning the other Party's goods or services with the end-user. For the avoidance of doubt, the obligation in this paragraph does not include a requirement to provide such records to the other Party (however such a requirement may arise pursuant to any dispute resolution procedure).
- 9.5 For the purposes of clauses 9.2 to 9.4, a "**communication**" shall include any form of communication, including without limitation telephone discussions and correspondence.
- 9.6 Neither Party may represent that:
- a) it has any special relationship with or special arrangements with the other Party, including through the use of the other party's trade marks, service marks, logos or branding;
 - b) there are no consequences for an end-user when an end-user signs an authority to transfer their accounts or services;
 - c) a Service has any characteristics or functionality other than as specified in a relevant standard form of agreement or the service description for the Service or in any specifications, collateral or brochures published in relation to the Service; or
 - d) the other Party participates in the provision of the first mentioned Party's services, provided that a Party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other Party.
- 9.7 Where a Party communicates with an end-user of either Party, the first mentioned Party shall ensure that it does not attribute to the other Party:
- a) blame for a Fault or other circumstance; or
 - b) the need for maintenance of a Network; or
 - c) the suspension of a Service,
- provided that this requirement does not require a Party to engage in unethical, misleading or deceptive conduct.
- 9.8 This Schedule 9 shall be subject to any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to communications or dealings with end-users.

Schedule 10 - Network modernisation and upgrade notice periods

Notice to be provided where Access Provider undertakes a Major Network Modernisation and Upgrade

- 10.1 Except where the parties agree otherwise, the Access Provider may make a Major Network Modernisation and Upgrade by:
- a) providing the Access Seeker with notices in writing in accordance with clauses 10.2 and 10.4 (**General Notification**) and clauses 10.3 and 10.5 (**Individual Notification**); and
 - b) consulting with the Access Seeker, and negotiating in good faith, to address any reasonable concerns of the Access Seeker, in relation to the Major Network Modernisation and Upgrade.

This clause 10.1 does not apply to an Emergency Network Modernisation and Upgrade.

- 10.2 The period of notices given under a General Notification provided by the Access Provider to the Access Seeker:
- a) must be an Equivalent Period of Notice; and
 - b) in any event, must not be less than 30 weeks before the Major Network Modernisation and Upgrade is scheduled to take effect.
- 10.3 An Individual Notification must be provided by the Access Provider to the Access Seeker as soon as practicable after the General Notification, taking account of all the circumstances of the Major Network Modernisation and Upgrade.

Information to be provided in the notices

- 10.4 A General Notification must include information on:
- a) the ESA affected by the proposed Major Network Modernisation and Upgrade;
 - b) the distribution area affected by the proposed Major Network Modernisation and Upgrade; and
 - c) a general description of the proposed Major Network Modernisation and Upgrade,

including the indicative timing for the implementation of the Major Network Modernisation and Upgrade.

- 10.5 An Individual Notification must include the following information in addition to the information provided in the relevant General Notification:
- a) the anticipated commencement date for implementing the Major Network Modernisation and Upgrade
 - b) the anticipated amount of time it will take to implement the Major Network Modernisation and Upgrade;
 - c) details of the Access Seeker's activated Services, or Services in the process of being activated at the date of the notice, that are likely to be affected by the Major Network Modernisation and Upgrade;
 - d) the likely action required by the Access Seeker as a result of the Major Network Modernisation and Upgrade (including the possible impact of the Major Network Modernisation and Upgrade upon the Access Seeker's Service); and
 - e) details of who the Access Seeker may contact to obtain further information about the Major Network Modernisation and Upgrade.
- 10.6 An Individual Notification only needs to be given where a Service has been activated or the Access Provider is in the process of activating a service as at the date of the Individual Notification, and:
- a) the Major Network Modernisation and Upgrade will require the Access Seeker to take particular action in order to continue to use the Service; or
 - b) the Major Network Modernisation and Upgrade will result in the Service no longer being supplied or the Service being suspended for a period of no less than 20 Business Days.
- 10.7 Where the Access Provider has provided the Access Seeker with an Individual Notification, the Access Provider must provide the Access Seeker with:
- a) updates about the Major Network Modernisation and Upgrade covered by the notice, including:
 - i. any update or change to the information provided in the Individual Notification;
 - ii. any new information available at the time of the update about:
 1. Services provided by the Access Provider in the relevant ESA that may be available to the Access Seeker;

2. how the Access Seeker may be impacted by the Major Network Modernisation and Upgrade; and
 3. what steps the Access Seeker will be required to take to facilitate the Major Network Modernisation and Upgrade; and
- b) weekly reports about the anticipated cutover dates for the Access Seeker's affected Services, beginning no less than five weeks prior to the anticipated commencement date for the Major Network Modernisation and Upgrade.

10.8 The updates referred to in subclause 10.7(a) must be provided regularly (which is not required to be any more frequently than Monthly) after the Individual Notification.

Emergency Network Modernisation and Upgrade

10.9 In the event of an Emergency, the Access Provider may conduct an Emergency Network Modernisation and Upgrade, and

- a) must use its best endeavours to provide the Access Seeker with an Individual Notification prior to the Emergency Network Modernisation and Upgrade being implemented; or
- b) where it is not practicable for prior notice to be given, the Access Provider must provide the Access Seeker with an Individual Notification as soon as reasonably practicable after the Emergency Network Modernisation and Upgrade is implemented.

Coordinated Capital Works Program

10.10 The Access Provider must provide the Access Seeker with a written three year Coordinated Capital Works Program forecast in accordance with clause 10.11 of this schedule 14 Calendar Days from the date this Schedule takes effect (**Coordinated Capital Works Program Forecast**).

10.11 The Coordinated Capital Works Program Forecast will:

- a) be for the three year period commencing on the date the forecast is provided;
- b) describe generally the Access Provider's indicative investment plans (as at the date of the forecast) for its Coordinated Capital Works Program over the next three years;
- c) include an evaluation of the impact that the Access Provider's indicative investment plans may have on individual ESAs and Distribution Areas; and
- d) specify anticipated timeframes for implementation.

10.12 The Access Provider must update the Coordinated Capital Works Program Forecast (and provide the update forecasts in writing to the Access Seeker) regularly, at not less than six Month intervals.

10.13 At the same time as the Access Provider provides a Coordinated Capital Works Program Forecast under clause 10.10 of this Schedule, the Access Provider must provide a copy of the Coordinated Capital Works Program Forecast to the ACCC.

10.14 The Access Provider must provide a written Coordinated Capital Works Program schedule to the Access Seeker by giving notice not less than 12 Months before the anticipated commencement date of the Coordinated Capital Works Program in accordance with clause 10.15 of this Schedule (**Coordinated Capital Works Program Schedule**).

10.15 The Access Provider must provide the Coordinated Capital Works Program Schedule and make its best endeavours to identify:

- a) the ESAs and Distribution Areas affected;
- b) the Access Provider's plan for the Coordinated Capital Works Program for each ESA;
- c) the Access Seeker's Services in that Exchange that will be affected and the expected impact of the Coordinated Capital Works Program on the Access Seeker's Services; and
- d) the anticipated timeframe for implementation of the Coordinated Capital Works Program.

10.16 At the same time as the Access Provider provides a Coordinated Capital Works Program Schedule under clause 10.15 of this Schedule, the Access Provider must provide a copy of the Coordinated Capital Works Program Schedule to the ACCC.

10.17 For the avoidance of doubt, the Access Provider must also comply with clauses 10.1 to 10.8 of this Schedule when complying with clauses 10.10 to 10.16 of this Schedule.

10.18 The Access Provider is taken to have complied with clause 10.10 if it has complied with subparagraph 11.1(a) in Schedule 4 of the Structural Separation Undertaking.

Negotiations in good faith

10.19 Except where the parties agree otherwise, the Access Provider must not commence implementation of a Major Network Modernisation and Upgrade unless:

- a) it complies with clauses 10.1 to 10.8; and

- b) it has consulted with the Access Seeker and has negotiated in good faith, and addressed the reasonable concerns of the Access Seeker in relation to the Major Network Modernisation and Upgrade.

10.20 Except where the parties agree otherwise, the Access Provider must not commence the implementation of a Coordinated Capital Works Program unless:

- a) it complies with clauses 10.14 to 10.16 of this Schedule; and
- b) it has consulted with the Access Seeker and has negotiated in good faith, and addressed the reasonable concerns of the Access Seeker in relation to the Coordinated Capital Works Program.

10.21 Notwithstanding any continuing negotiations between the Access Provider and the Access Seeker pursuant to clauses 10.1, 10.19 and 10.20, if the Access Provider has complied with this Schedule 10, a Major Network Modernisation and Upgrade may proceed within a reasonable time period, taking account of all the circumstances, after an Individual Notification has been issued, unless both parties agree otherwise.

10.22 In attempting to reach a mutually acceptable resolution in relation to a variation under clauses 10.1, 10.19 and 10.20, the parties must recognise any need that the Access Provider may have to ensure that the specifications for the Services which the Access Providers supplies to more than one of its customers need to be consistent (including, without limitation having regard to the incorporation by the Access Provider of any relevant international standards).

Dispute Resolution

10.23 If a dispute arises in relation to a Major Network Modernisation and Upgrade, then the matter may be resolved in accordance with the dispute resolution procedures set out in Schedule 5 of this FAD.

Miscellaneous

10.24 A requirement for the Access Provider to provide information in written form includes provision of that information in electronic form.

10.25 Any information provided by the Access Provider in electronic form must be in a text-searchable and readable format.

Schedule 11 - Changes to operating manuals

11.1 Operational documents concerning the Service that have been provided to the Access Seeker by the Access Provider may be amended:

(a) by the Access Provider from time to time to implement or reflect a change to its standard processes, subject to:

- i. giving 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and a marked-up copy of the proposed new operational document that clearly identifies all amendments; and
- ii. allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and reasonably implementing any comments which the Access Seeker has made on the proposed amendments; and

(b) otherwise, by agreement of the parties.

11.1A Operational documents referred to in this clause include ordering and provisioning manuals, fault management procedures and operational manuals.

11.2 Upon completion of the process set out in clause 11.1, the Access Provider must notify the Access Seeker and make available to the Access Seeker a copy of the new operational document

11.3 Where operational documents concerning the Service are amended in accordance with clause 11.1 and the Access Seeker believes that the amendments:

- a) are unreasonable; or
- b) deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;

the Access Seeker may seek to have the matter resolved in accordance with the dispute resolution procedures set out in Schedule 5 of this FAD.

Schedule 12 – Recourse to regulated terms

12.1 If

- (a) an Access Agreement between an Access Provider and an Access Seeker is in force and the Access Agreement relates to the same Service which one of the FADs relates to;
- (b) the ACCC makes or varies a Regulatory Determination in relation to the service and the new Regulatory Determination or the variation deals with a matter other than price; and
- (c) a party to the Access Agreement proposes to the other party to vary the Access Agreement to reflect the terms and conditions in the new or varied Regulatory Determination about that matter,

each party must negotiate the proposal in good faith, including to:

- (d) if requested by the other party, meet with the other party to discuss the other party's proposal;
- (e) if the party refuses any variation to the Access Agreement or refuses a variation proposed by the other party, give reasons to the other party for the refusal.

12.2 If

- (a) an Access Agreement between an Access Provider and an Access Seeker is in force and the Access Agreement relates to access to the same Service which one of the FADs relates to; and
- (b) the ACCC makes or varies a Regulatory Determination in relation to the Service and the new Regulatory Determination or the variation deals with a matter other than price;

either party may terminate the Access Agreement in respect of that Service (but only in respect of that Service) by providing the other party with a written notice, and termination will take effect on the expiry of the period specified in the notice, which must be no less than 40 Business Days after the day that notice is provided.