



Public inquiry on the access determination for the Domestic Mobile Terminating Access Service Position and consultation paper

18 December 2019

Contents

1. Introduction	2
1.1. Consultation process	3
2. Legislative framework	4
2.1. Factors the ACCC must consider	4
3. Background.....	6
3.1. What is the MTAS?	6
3.2. Why does the ACCC regulate the MTAS?	6
3.3. How has the ACCC priced the MTAS?.....	6
3.4. Interconnection and charging arrangements	7
4. ACCC's view on pricing methodology.....	8
4.1. Pricing options in the Discussion Paper	8
4.2. Submissions	9
4.3. ACCC views.....	15
5. Methodology for international benchmarking	24
5.1. Analysys Mason draft methodology	24
5.2. Determination of WACC.....	29
5.3. Approach to determining the regulated MTAS price	33
6. Non-price issues	34
6.1. Non-price terms and conditions.....	34
6.2. Duration	35
Appendix A Legislative framework for final access determinations	36

1. Introduction

On 6 June 2019, the Australian Competition and Consumer Commission (ACCC) commenced a public inquiry¹ into making a final access determination (FAD) for the mobile terminating access service (MTAS).² The inquiry considers what price terms and non-price terms and conditions (NPTCs) should apply to access to the MTAS.³

On 30 August 2019, the ACCC released a discussion paper (Discussion Paper) setting out the key issues to be considered during the inquiry, including a number of pricing options for determining the regulated price for the MTAS.⁴ The ACCC received submissions from seven stakeholders in response to the Discussion Paper.⁵

This Position and Consultation paper sets out the ACCC's views on an appropriate pricing option for the MTAS and seeks stakeholder views on matters relevant to the implementation of this option. After carefully considering the submissions from stakeholders in response to the Discussion Paper, the ACCC considers that it is appropriate to determine the price for the MTAS through an international benchmarking exercise. This is because in light of the likely decline in the MTAS cost since the last FAD, it would be appropriate and necessary to conduct a pricing exercise to determine the current efficient cost of providing the service. International benchmarking is the most appropriate cost-based pricing option for this FAD as it would be capable of producing a reasonable cost estimate within a relatively short period of time.

The ACCC has commissioned Analysys Mason to undertake the international benchmarking exercise and provide advice on a cost range that reflect the cost of providing the MTAS in Australia. The ACCC will consult on the preliminary outcome of the benchmarking exercise in a draft report.

The reasons for the ACCC's view that international benchmarking is the most appropriate pricing option for this FAD are discussed in Chapter 4. Analysys Mason's draft methodology for undertaking the international benchmarking exercise is outlined in Chapter 5. A separate document containing details of Analysys Mason's draft methodology, *Approach to benchmarking the cost of providing MTAS in Australia*,⁶ has also been released along with this paper. The ACCC also sets out its proposed approach to determining a weighted average cost of capital (WACC) for the purpose of the benchmarking exercise in Chapter 5.

This Position and Consultation paper also sets out the ACCC's preliminary approach to determining non-price issues in response to the stakeholders' submissions. These are discussed in Chapter 6.

¹ See section 498 of the *Telecommunications Act 1997* (Cth).

² See subsection 152BCI(3) of the *Competition and Consumer Act 2010* (Cth) (CCA).

³ On 4 December 2019, the ACCC decided to extend the decision making period for the inquiry as it was not able to make the FAD within the initial six months period that commenced on 6 June 2019. The notice of extension is available on the ACCC website at: <https://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/mobile-terminating-access-service-access-determination-inquiry-2019/extension-of-decision-making-period>.

⁴ ACCC, *Public inquiry on the access determination for the Domestic Mobile Terminating Access Service: Discussion paper*, August 2019. (Discussion Paper).

⁵ The seven stakeholders that submitted were ACCAN, Macquarie Telecom, MNF Group, Optus, Pivotal, Telstra and Vodafone Hutchison Australia.

⁶ Analysys Mason, *Draft methodology report for the ACCC: Approach to benchmarking the cost of providing MTAS in Australia*, 12 December 2019 (Draft Methodology Report), available at: <https://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/mobile-terminating-access-service-access-determination-inquiry-2019/position-and-consultation-paper>.

1.1. Consultation process

Stakeholder views are sought on the draft methodology proposed by Analysys Mason in undertaking the international benchmarking exercise and the ACCC's proposed approach to WACC. Submissions may address any or all aspects of the draft methodology and the ACCC's proposed approach to WACC. Please provide reasons and evidence to support your views.

After considering stakeholder submissions, the ACCC will determine a final methodology to be implemented by Analysys Mason. The outcome of this exercise will form the basis of the ACCC's preliminary position on the new regulated price for the MTAS, to be set out in a draft report for consultation around March 2020. The draft report will also include a set of draft NPTCs for consultation. After considering stakeholder submissions to the draft report, the ACCC expect to issue a final report on the MTAS FAD in early June 2020.

The ACCC will accept submissions in response to this Position and Consultation Paper until **5pm, Friday 24 January 2020**. Submissions received after this time may not be given due consideration. The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format, which allows the submission to be text searched.

Submissions should be sent to: MTASInquiry@acc.gov.au and copied to:

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The ACCC will consider all submissions as public submissions and will post them on the ACCC's website. If you wish to submit commercial-in-confidence material, please submit both a public and confidential version of your submission. The confidential version should clearly identify commercial-in-confidence material and the public version should clearly identify where commercial-in-confidence material has been removed.

The ACCC has published a guideline setting out the process parties should follow when submitting confidential information to the ACCC. The *ACCC/AER Information Policy June 2014* sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline and policy is available on the ACCC website.⁷

The ACCC will also be seeking information from the mobile network operators (MNOs) that is necessary for the implementation of the international benchmarking exercise.

⁷ Please see ACCC website at: <https://www.acc.gov.au/publications/acc-aer-information-policy-collection-and-disclosure-of-information>.

2. Legislative framework

The telecommunications access regime in Part XIC of the CCA gives the ACCC the power to, among other things, make a written determination relating to access to a declared service.⁸ If the ACCC makes a FAD with terms and conditions on which the access provider must comply with the Standard Access Obligations (SAOs) or any other terms and conditions on which the access seekers can seek access to the declared service, the terms and conditions must include terms relating to price or a method of ascertaining price.⁹

A FAD provides a base set of terms and conditions that access seekers can rely on if they are unable to come to a commercial agreement with an access provider on the terms and conditions of access to a declared service. If parties come to an agreement on terms and conditions of access, their access agreement will prevail over the FAD to the extent of any inconsistency.¹⁰

The MTAS is an essential wholesale communications service and was deemed a declared service in June 1997. Since 1997, the declaration has been varied and extended in 2002, 2004, 2009, 2014 and 2019.

The current MTAS FAD was due to expire on 30 June 2019 but was extended until the day immediately before the day on which the new FAD comes into force.¹¹ The ACCC commenced the current inquiry into making a new FAD for the MTAS on 6 June 2019.¹² On 4 December 2019, the ACCC published a written notice on the ACCC website by which the ACCC extended the decision making period for the inquiry by six months.¹³ The ACCC is now required to make the FAD by 6 June 2020.

2.1. Factors the ACCC must consider

The ACCC must consider a range of factors when making a FAD, including:

- a) whether the determination will promote the long-term interests of end-users (LTIE) of carriage services or services supplied by means of carriage services
- b) the legitimate business interests of a carrier or carriage service provider (CSP) who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- c) the interests of all persons who have rights to use the declared service
- d) the direct costs of providing access to the declared service
- e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and

⁸ Subsection 152BC(1) of the CCA.

⁹ Subsection 152BC(8) of the CCA.

¹⁰ Section 152BCC of the CCA.

¹¹ See notice of extension on the ACCC website at: <https://www.accc.gov.au/public-registers/telecommunications-registers/s152bcw-access-determinations-register/final-access-determination-no-1-of-2015-for-the-mobile-terminating-access-service-mtas>.

¹² Subsection 152BCK(2) of the CCA.

¹³ Pursuant to subsection 152BCK(3) of the CCA. The notice of extension is available on the ACCC website at: <https://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/mobile-terminating-access-service-access-determination-inquiry-2019/extension-of-decision-making-period>.

- g) the economically efficient operation of a carriage service, a telecommunications network or a facility.¹⁴

The ACCC may also take into account any other matters that it thinks are relevant.¹⁵

In considering whether the determination will promote the LTIE, the ACCC must have regard to the extent to which the determination is likely to result in the achievement of the objectives of:

- promoting competition in markets for listed services
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and the economically efficient investment in, infrastructure by which listed services are supplied.¹⁶

Detailed discussion of how the ACCC considers the above factors is at **Appendix A**.

Compliance with a FAD is both a carrier licence condition and a service provider rule,¹⁷ the breach of which may lead to a pecuniary penalty of up to \$10 million for each contravention.¹⁸ Private enforcement of a FAD is available in the Federal Court.¹⁹

¹⁴ Subsection 152BCA(1) of the CCA.

¹⁵ Subsection 152BCA(3) of the CCA.

¹⁶ Subsection 152AB(2) of the CCA.

¹⁷ Sections 152BCO and 152BCP of the CCA.

¹⁸ Section 570 of the *Telecommunications Act 1997* (Cth).

¹⁹ Section 152BCQ of the CCA.

3. Background

3.1. What is the MTAS?

The MTAS is a wholesale service provided by an MNO to fixed line operators and other MNOs to connect or ‘terminate’ a call on its mobile network. It is an essential wholesale interconnection service which enables subscribers from a mobile or fixed line network to make calls to subscribers on a different mobile network.

When a person (the A-Party) makes a call (either from a fixed or mobile network) to another person who is directly connected to a mobile network (the B-Party), the A-Party’s network provider completes the call by purchasing MTAS from the B-Party’s network provider. The A-Party’s network provider will recover those costs, and the costs it incurs from originating the call, from the A-Party in the form of the retail price it charges for providing the call. This commercial arrangement is known as the ‘calling party pays’ or ‘termination’ model.

3.2. Why does the ACCC regulate the MTAS?

Each MNO has exclusive access to subscribers on their network. In the absence of regulation, an MNO has the incentive and ability to set unreasonable terms of access to terminating voice calls on their network, including by setting inefficiently high prices for providing voice termination.²⁰

In the calling party pays model, the calling party bears the entire cost of making a call, and the receiving party does not pay for receiving calls. The calling parties cannot choose the network that it calls as that would be determined by the receiving party. On the other hand, the receiving party does not take into account the amount an MNO would charge for terminating a call in choosing their mobile service provider as they do not bear of the cost of termination. In addition, there is at present no effective substitute to the downstream services for which MTAS is an essential input. As the ACCC found in the recent MTAS declaration inquiry, over-the-top (OTT) voice services are not yet effective substitutes to traditional voice services due to issues of interoperability between applications, call quality, practicality and reliability.²¹ These mean that the terminating network is unconstrained in its ability to exercise market power and charge high termination rates. This distorts competition and leads to inefficiently high prices in downstream markets which rely on voice termination as an input. Regulated access and pricing for voice termination is therefore necessary in order to ensure that voice termination is priced at an efficient level.

3.3. How has the ACCC priced the MTAS?

The ACCC’s approach to pricing the MTAS is guided by the matters it must take into account in making an access determination under Part XIC of the CCA. The legislative framework will be discussed in more detail in **Appendix A**.

The ACCC has in the past considered a cost-based approach to setting prices for the MTAS is appropriate taking into account the relevant factors listed in section 152BCA of the CCA. When the price of a service reflects the cost of providing that service, it promotes competition and allocative efficiency in the downstream markets in which that service is an essential input. Cost-based pricing also promotes dynamic efficiency as it encourages access providers to invest in the most efficient technology and infrastructure to provide services in downstream markets, and respond to consumer demand and preferences. Taking into account the legitimate business interests of a carrier or carriage service provider

²⁰ ACCC, *Domestic Mobile Terminating Access Service Declaration Inquiry: Final report*, June 2019, p. 6.

²¹ ACCC, *Domestic Mobile Terminating Access Service Declaration Inquiry: Final report*, June 2019, pp. 10–11.

who supplies or is capable of supplying the declared service and their investment in the facilities used to supply the declared service, cost-based pricing, by definition, allows the access provider to recover the cost of providing the declared service.

Page 6 of the Discussion Paper describes the different methodologies that the ACCC has used in the past in determining the regulated price for the MTAS. This has included cost modelling and international benchmarking as well as relying on other available information that is indicative of the cost of providing the service.²² The ACCC also has a general preference for a total service long run incremental cost plus organisational level costs (TSLRIC+) pricing principle when setting prices for the MTAS since 2004.²³ The table below sets out the regulated MTAS price since 2004.

Table 1: Regulated MTAS prices (nominal) set by the ACCC²⁴

Time period	Voice (cent/min)	SMS ²⁵ (cent/SMS)
1 July 2004 – 1 December 2004	21	N/A
1 January 2005 – 31 December 2005	18	N/A
1 January 2006 – 31 December 2006	15	N/A
1 January 2007 – 30 June 2007	12	N/A
1 July 2007 – 31 December 2011	9	N/A
1 January 2012 – 31 December 2012	6	N/A
1 January 2013 – 31 December 2013	4.8	N/A
1 January 2014 – 30 December 2015	3.6	N/A
Since 1 January 2016	1.7	0.03

3.4. Interconnection and charging arrangements

The Discussion Paper briefly outlined the key access seekers for the MTAS and the number of ways in which calls to a mobile network could be made and when the MTAS charge is incurred.

Few stakeholders commented on the interconnection and charging arrangements. Submissions received indicated that apart from the MNOs and fixed line operators, the MTAS is also sought by satellite operators and international carriage service providers.²⁶

The ACCC also understands from information received from several operators that there are a range of commercial arrangements in place for the delivery of calls between the originating and terminating network and that both regulated and commercially negotiated prices are used for the delivery of calls.

²² See ACCC, Discussion Paper, p. 6.

²³ ACCC, Discussion Paper, p. 6.

²⁴ ACCC, *MTAS Final Access Determination — Final Decision (MTAS FAD)*, August 2015; ACCC, *Inquiry to make a final access determination for the MTAS — Access Determination Explanatory Statement (MTAS FAD — Explanatory Statement)*, 7 December 2011; ACCC, *MTAS 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; ACCC, *Mobile Services Review: Mobile Terminating Access Service Final Decision on whether or not the Commission should extend, vary, revoke its existing declaration of the MTAS*, June 2004.

²⁵ SMS termination service was first declared in 2014. The declaration will be removed from 1 January 2020.

²⁶ See Telstra, *MTAS FAD Inquiry*, 27 September 2019, p. 6. (Telstra Submission); Pivotel, *Domestic Mobile Terminating Access Service: Access determination public inquiry Discussion Paper*, September 2019, p. 4. (Pivotel Submission)

4. ACCC's view on pricing option

This Chapter sets out the ACCC's view on the most appropriate pricing option for determining the new MTAS price and the reasons for this view.

Apart from the statutory matters under the CCA that the ACCC must take into account, the ACCC may have regard to other matters that it considers relevant. In the past, the ACCC had regard to matters such as the time and costs involved in implementing a pricing option, the feasibility of implementing different methodologies, and the risks of regulatory errors in determining the appropriate pricing approach.²⁷ The ACCC also noted in the Discussion Paper that it would be appropriate to have regard to signification transitions in the relevant markets in considering possible options for pricing the MTAS in this FAD.²⁸

4.1. Pricing options in the Discussion Paper

In the Discussion Paper, the ACCC expressed the view that the ACCC has traditionally considered that a cost-based pricing approach is appropriate taking into account the relevant factors listed in section 152BCA of the CCA. The ACCC also noted its historical preference for cost methodologies that are consistent with the TSLRIC+ pricing principles. The ACCC sought stakeholder views on whether TSLRIC+, as opposed to pure LRIC or actual historical costs as used in a Building Block Model, is the most appropriate pricing principle for the MTAS.²⁹

The ACCC also discussed a number of specific pricing options for stakeholder comment.

The ACCC raised three options for implementing a cost-based approach. These were:

- Developing a cost model specific to Australia
- International benchmarking
- Applying an adjustment to current MTAS price.

The ACCC has used both cost modelling and international benchmarking for the MTAS in the past. The Discussion Paper noted the relative advantage and disadvantages of cost modelling and international benchmarking:

- Cost modelling is the most direct way of implementing a LRIC pricing principle and is likely to produce the most accurate cost estimate. However, it is time and resource intensive and may lead to significant delays in implementing an efficient MTAS price.
- International benchmarking would not be able to produce a cost estimate as accurate as cost modelling, but it could be implemented relatively quickly with minimal impact on the industry.³⁰

The ACCC raised the possibility of applying a simple adjustment to the current MTAS price to broadly reflect the decline in the cost of providing the MTAS since the last FAD. The ACCC noted that possible proxies to estimate the changes in MTAS cost could include:

- average decrease on overseas mobile termination rates; or
- estimated changes in the average cost providing the MTAS in Australia based on changing traffic shares on 3G and 4G networks.³¹

²⁷ For example, see ACCC, *MTAS FAD — Final Report*, August 2015, pp. 9–10.

²⁸ ACCC, Discussion Paper, p. 14.

²⁹ ACCC, Discussion Paper, pp. 14–15.

³⁰ ACCC, Discussion Paper, p. 15.

³¹ ACCC, Discussion Paper, p. 16.

The ACCC proposed this option as a simpler and less resource intensive alternative to a full pricing exercise, because the ACCC may consider whether to conduct a more comprehensive review of the MTAS and the fixed terminating access service (FTAS) together in the future.³²

The ACCC also discussed two other pricing options which are not cost-based: bill and keep (BAK) and rolling over existing MTAS price without adjustment.

The ACCC raised issues like unsolicited communications with a zero termination rate under a BAK regime and sought views on whether industry implementation of BAK arrangements between networks may be possible in the future.³³

The ACCC noted that some stakeholders may prefer to keep the current MTAS price until the MTAS and FTAS could be considered together in the future. However, the ACCC raised concerns over this approach as it is unlikely to be cost reflective and may prevent further reductions in the MTAS price from being passed onto consumers.³⁴

4.2. Submissions

All seven submissions commented on pricing issues and there are mixed views on the most appropriate pricing approach for this MTAS FAD.

The majority of stakeholders support the TSLRIC+ pricing principle

Five stakeholders commented on the pricing principle. Telstra, Optus and Pivotal consider that TSLRIC+ remains the appropriate pricing principle, whereas Macquarie Telecom and VHA supported other pricing principles.

Telstra submitted that a TSLRIC+ based price for the MTAS will best promote the LTIE as it provides an access provider with an expectation of a return on efficiently invested capital and the recovery of efficiently incurred common costs.³⁵

Optus supported the continued use of the TSLRIC+ cost approach but noted that the ACCC has only implemented this cost approach when it developed a TSLRIC+ model for the MTAS in 2007, i.e. the WIK Model.³⁶ Optus argued that since that time, there had been continual non-cost based adjustments made to the 2007 rates and the MTAS rate can no longer be properly described as cost-based or consistent with the TSLRIC+ method.³⁷

Pivotal submitted that if a cost-based approach is adopted, it supported the existing approach of using TSLRIC+ for determining the MTAS price.³⁸

On the other hand, Macquarie Telecom supported moving towards a pure LRIC pricing principle whereby the relevant increment is the MTAS and which includes only avoidable costs. Macquarie Telecom argued that incentives to invest in mobile infrastructure are now principally driven by the growth of mobile data services and the pursuit of new revenue opportunities enabled by the deployment of 5G, not by retail voice services. It also

³² ACCC, Discussion Paper, p. 16.

³³ ACCC, Discussion Paper, p. 19.

³⁴ ACCC, Discussion Paper, pp. 19–20.

³⁵ Telstra Submissions, p. 3.

³⁶ Details about the WIK Model can be found on the ACCC's website at: <https://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/mobile-terminating-access-service-mtas-2007-pricing-principles-and-the-wik-model/wik-report>.

³⁷ Optus, *Submission in response to ACCC discussion paper: Public inquiry on the access determination for the Domestic Terminating Access Service*, September 2019, p. 6. (Optus Submission)

³⁸ Pivotal Submissions, p. 6.

considered that there cannot be a material risk of cost under-recovery associated with pure LRIC because shared and common costs are increasingly recovered through charges for data services.³⁹

Macquarie Telecom argued that pure LRIC would also be the more practicable approach given:

- The difference between mobile termination rates set based on TSLRIC+ and pure LRIC becomes even smaller as the level of mobile data traffic increase; and
- It would greatly simplify the process to determine an MTAS price through international benchmarking. This includes the need to make fewer adjustments to benchmarks as pure LRIC does not include many of the costs that tend to be driven by country-specific factors, such as costs of spectrum and coverage.⁴⁰

VHA submitted that if the ACCC is to set a new cost-based price for the MTAS, it should consider discontinuing the use of the TSLRIC+ pricing principle in favour of a principle based on the BBM, consistent with the pricing principle for the declared fixed line services.⁴¹ VHA argued that the TSLRIC+ principle has not provided the industry with regulatory certainty over MTAS prices and the processes for setting MTAS prices have been highly varied and pricing outcomes have been unpredictable. VHA also argued that the reasons for discontinuing the use of TSLRIC+ pricing principle for the fixed line services in 2011 are relevant to the ACCC's consideration of the MTAS pricing principle. That said, VHA argued that the cost and complexity of implementing a cost-based pricing principle are not warranted given the lack of impact on retail markets.⁴²

Stakeholders are divided on the preferred pricing option for the MTAS

All submissions commented on the pricing option that should be used to determine the new MTAS price. Four stakeholders preferred some sort of cost-based pricing exercise to determine the relevant cost of the MTAS, and three stakeholders supported rolling over the existing MTAS price.

Cost modelling

Overall, stakeholders recognised the benefits of cost modelling but the time and resource required for this exercise is a major concern.

The Australian Communications Consumer Action Network (ACCAN) supported the development of a cost model to establish the cost of providing the MTAS. ACCAN submitted that while cost modelling is expensive, consumers are likely to benefit significantly from a close examination of the true cost of the service in light of the likely material reduction in the cost.⁴³

While Pivotel did not support undertaking cost modelling to determine the MTAS price for this FAD, it considered that cost modelling is the more appropriate methodology, compared to international benchmarking, to capture the unusual diversity and density spread of the Australian mobile networks, and the unique domestic regulatory imposts on the provision of

³⁹ Macquarie Telecom, *Submission to the ACCC's public inquiry on the access determination for the Domestic Mobile Terminating Access Service*, 27 September 2019, pp. 3–4. (Macquarie Telecom Submission)

⁴⁰ Macquarie Telecom Submission, pp. 3–4.

⁴¹ Vodafone Hutchison Australia (VHA), *Mobile Terminating Access Service: Submission to the Australian Competition and Consumer Commission*, September 2019, p. 9. (VHA Submission)

⁴² VHA Submission, p. 9.

⁴³ ACCAN, *Public inquiry on the access determination for the Domestic Mobile Terminating Access Service*, 27 September 2019, pp. 1–2. (ACCAN Submission)

the MTAS.⁴⁴ Likewise, VHA did not support the use of cost modelling as the pricing approach for the MTAS, but submitted that if the ACCC intends to revise its cost-based pricing, the decision should be underpinned by a new cost model based on the BBM.⁴⁵

On the other hand, Telstra, Macquarie Telecom and MNG Group considered that developing a new cost model is not the most appropriate methodology due to concerns over the cost and time involved in this approach.

Telstra noted that one of the shortcomings of utilising TSLRIC+ pricing principles is that the development of appropriate models can be time and labour intensive.⁴⁶

Macquarie Telecom submitted that generally a bespoke cost model that reflects the demand and network specificities of the Australian market would be the best way to determine an efficient cost-based price for the MTAS. However, Macquarie Telecom raised concerns over the high costs (including opportunity costs) involved in the development and acceptance of a model and the delay in realisation of any likely reduction in the MTAS price.⁴⁷

MNF Group submitted that the financial cost and time involved in developing a detailed cost model are unlikely to be justified against the outcome that might result from an alternative pricing approach, that is, the MTAS cost estimate resulting from a cost modelling exercise might be the same as a cost estimate from a simpler approach such as international benchmarking. MNF Group also noted that given MTAS price is already low and is trending downwards, the change in the MTAS price will necessarily be low in absolute terms.⁴⁸

International benchmarking

Stakeholder submissions suggest that as a cost-based pricing approach, international benchmarking appears to strike the balance between producing a reasonable cost estimate and achieving this outcome within a relatively short period of time.

Telstra submitted that international benchmarking offers an efficient approach to setting TSLRIC+ based prices. Telstra considered that while most of Europe has moved to a pure LRIC basis of setting prices for mobile termination services, many of the European cost models contain other outputs such as LRIC+ or LRAIC+ which can be used for benchmarking.

On the other hand, Telstra noted its key concern with the previous benchmarking exercise for the 2015 MTAS FAD was the lack of comparable countries included in the benchmark pool, with the benchmark countries having clear differences in relation to population density, land area and size of the mobile network. Telstra considered that it is important that any benchmarking exercise adjust for factors such as this to properly account for the higher cost of deploying and maintaining mobile networks in regional and rural areas of Australia.⁴⁹

Macquarie Telecom submitted that instead of cost modelling, it prefers an international benchmarking approach as it would avoid the high costs in the development and acceptance of a model and realise the likely reduction in the MTAS price much sooner than would be likely with a modelling process. Macquarie Telecom noted that it may be difficult to achieve the same sample size as the previous benchmarking exercise as many of the countries used

⁴⁴ Pivotal Submission, p. 6.

⁴⁵ VHA Submission, p.

⁴⁶ Telstra Submission, p. 3.

⁴⁷ Macquarie Telecom Submission, p. 4.

⁴⁸ MNF Group, *Submission to the ACCC's Inquiry on the Access Determination for the Domestic Mobile Terminating Access Service*, 27 September 2019, p. 6. (MNF Submission)

⁴⁹ Telstra Submission, p. 3.

in that study have not updated their cost model. It also considered that if a pure LRIC cost standard is adopted an international benchmarking process would be straight forward.⁵⁰

ACCAN submitted that in the event that the ACCC does not undertake cost-modelling, its preference would be for international benchmarking to be undertaken.⁵¹

On the other hand, VHA submitted that international benchmarking is not a reasonable approach for determining the cost of the MTAS. VHA argued that if the regulatory error associated with an international benchmarking approach is small, it implies the impact from changes to the MTAS rate are marginal and the benefits from regulatory intervention may not be sufficient to outweigh the costs. VHA submitted that the ACCC should roll over the current MTAS price. VHA also raised concerns over the lack of transparency and due process in the implementation of an international benchmarking approach. It noted that in the previous MTAS FAD inquiry, there was not sufficient time provided to stakeholders to scrutinise the models used in the benchmarking study and highlighted the adjustment for geographic terrain as an issue that was not properly resolved.⁵²

Applying adjustment to current MTAS price

Overall, there is a lack of stakeholder support for applying a simple adjustment to the current MTAS price to broadly account for the change in MTAS cost since the last FAD.

While not explicit, MNF Group appears to be the only stakeholder that prefers this approach. It submitted that the ACCC should seek to 'fine tune' the MTAS price and set it by taking into account the downward pathway of MTAS pricing, in comparison with international benchmarks, and the significant cost savings provided by 4G networks which are being realised by the MNOs.⁵³

Macquarie Telecom submitted that it would only support applying a simple adjustment to the MTAS price if there is a firm commitment by the ACCC to commence a holistic review of the MTAS and FTAS within no more than two years. In such a case, Macquarie Telecom considered that a 30 to 40 per cent reduction of the current rate, based on the price forecast for 2020 in the previous WIK benchmarking study.⁵⁴

On the other hand, Telstra submitted that it does not support the use of a simple adjustment, although no specific reason was provided.⁵⁵

VHA submitted that it advocated the considerations (namely that MTAS and FTAS should not be considered in isolation of each other) that led to the ACCC contemplating the simple adjustment approach. However VHA argued that these considerations do not warrant the ACCC making an arbitrary adjustment to the current MTAS price.⁵⁶

ACCAN did not consider that applying an adjustment to the current MTAS price is appropriate as it is unlikely to capture the full reduction in MTAS costs and in particular the efficiency gains associated with technical improvements in the network. ACCAN argued that a simple adjustment would not be cost-reflective and would result in consumers facing

⁵⁰ Macquarie Telecom Submission, pp. 4–5.

⁵¹ ACCAN Submission, p. 2.

⁵² VHA Submission, pp. 10–11.

⁵³ MNF Submission, pp. 5, 10.

⁵⁴ Macquarie Telecom Submission, p. 5.

⁵⁵ Telstra Submission, p. 4.

⁵⁶ VHA Submission, p. 11.

inefficiently high charges and would be highly detrimental to vulnerable consumers who would face higher than necessary retail prices.⁵⁷

Pivotel submitted that adjusting the MTAS price downwards to follow global trends may result in the MTAS price being below the marginal cost of providing the service, and potentially lead to the unbundling of mobile numbers from the mobile service with the risk of higher end user costs for low use customers. Pivotel also argued that this approach could slow down the rollout of 5G services, given the very significant upfront capital investments that need to be made to enable this technology.⁵⁸

Rolling over current MTAS price without adjustment

Optus, VHA and Pivotel supported the rollover of existing MTAS price without adjustment.

Optus argued that the rollover of MTAS price is justified for a number of reasons:

- It is not clear whether any change to the MTAS rate will have any noticeable impact in any retail market given the use of unlimited voice calls in mobile and fixed markets and the large disconnect between MTAS rates and pay-as-you-go (PAYG) retail fixed rates. This uncertainty is magnified by the lack of full pass-through of wholesale changes into retail rates. Further, the decline of fixed traffic reduces any impact that MTAS has on the related retail fixed line market.⁵⁹
- The transition to more cost-efficient mobile networks cannot be assumed to directly impact the MTAS cost. Due to limitations for transition to voice-over-LTE (VoLTE), mobile voice is predominantly carried by circuit switched 3G network. This means that the assumption that new data-focussed mobile technologies like 4G and 5G automatically lead to implications for traditional voice services is not valid.⁶⁰
- Greater efficiencies would be achieved if the prices for MTAS and FTAS are set relative to each other using the same methodology. However, given the practical constraints in adopting a consistent approach to both termination services at this point in time, and the little consumer benefit that would flow from changes to the MTAS, the optimal approach is to adopt the same approach for the MTAS, as proposed in the fixed line services FAD for the FTAS, and to roll over existing price until post NBN rollout.⁶¹

VHA provided similar arguments in supporting the rollover of existing MTAS price:

- The potential benefits from MTAS price reductions for customers on PAYG plans across fixed and mobile services are negligible.
 - Fixed PAYG customers will not benefit significantly from MTAS reduction due to the lack of fixed-to-mobile (FTM) pass-through. To support this view, VHA revised the analysis conducted by the ACCC in the 2015 MTAS FAD inquiry regarding FTM pass-through to show that, from 2005–06 to 2012–13, Telstra has passed on approximately 68 per cent of the cost reduction to retail prices for FTM calls.⁶² VHA also relied on the data contained in financial reports from Telstra's Economic Model (TEM) to show Telstra's high retail margins on

⁵⁷ ACCAN Submission, p. 2.

⁵⁸ Pivotel Submission, p. 7.

⁵⁹ Optus Submission, pp. 2–4.

⁶⁰ Optus Submission, p. 5.

⁶¹ Optus Submission, p. 8.

⁶² VHA Submission, pp. ii.

FTM calls supplied over the public switched telephone network (PSTN) between 2013 and 2018.⁶³

- Unlimited voice call plans are common in both fixed and mobile services markets. In the fixed services market, there is no indication that the pricing for FTM calls in PAYG plans are trending towards cost. In the mobile services market, PAYG plans constitute a very small part of the overall mix of post-paid and pre-paid plans.⁶⁴
- VHA cautioned against making simplistic statements about changes in the cost of the MTAS due to shifts in voice traffic and consider that if required the determination of MTAS cost estimates can be undertaken as part of developing a cost model.⁶⁵
- It argued that the ACCC should roll over the MTAS price as it is proposing to maintain the current FTAS price. Rolling over MTAS price would also provide priced stability in the transition and delivery of fixed voice services over the NBN and the commencement of the 5G investment cycle.⁶⁶

Pivotel also supported the rollover of existing MTAS price as its cost of providing the MTAS service already significantly exceeds the regulated MTAS rate.⁶⁷

Other stakeholders raised concerns over the approach to roll over existing MTAS price.

ACCAN considered that such an approach would support inefficiently high MTAS pricing that is unlikely to reflect the underlying cost of delivery. ACCAN argued that for those plans remaining in the market that continue to charge based on usage, this would discourage the efficient use of services.⁶⁸

Macquarie Telecom submitted that the efficient cost of supplying the MTAS is likely to have significantly decreased since the last FAD, and rolling over existing MTAS price would be highly likely to impose an inefficiently high price on access seekers and deny access seekers and end-users the benefit from a reduction in the costs of supplying off-net calls.⁶⁹

MNF Group submitted that in light of the implications for the MTAS price arising from the transition to more efficient networks and trend in international benchmarks, any suggestion that the existing MTAS price should be rolled over must be rejected. MNF Group argued that while this approach is administratively expedient, it would be in ignorance of the available evidence and would indicate a failure of the ACCC to act fairly and responsibly in the LTIE and to promote competition.⁷⁰

Bill and keep (BAK)

None of the stakeholders supported the adoption of a BAK arrangement for the termination of voice calls.

Telstra considered that BAK arrangements make sense only when significant calling externalities exist, where the benefits of a call are enjoyed not only by the calling party, but

⁶³ VHA Submission, p. 5.

⁶⁴ VHA Submission, pp. 6–7.

⁶⁵ VHA Submission, p. 9.

⁶⁶ VHA Submission, pp. 9, 13.

⁶⁷ Pivotel Submission, p. 8.

⁶⁸ ACCAN Submission, p. 2.

⁶⁹ Macquarie Telecom Submission, p. 6.

⁷⁰ MNF Submission, p. 9.

also the recipient of the call. In the absence of these externalities, BAK arrangements are best left for commercial negotiation.⁷¹

Similarly, VHA submitted that it is open to adopting BAK where it makes commercial sense to do so, but is opposed to regulator-imposed BAK arrangements regardless of whether traffic is balanced or not. VHA argued that BAK arrangements would give rise to a range of unintended consequences as a result of a regulated price that is disconnected from the cost, the most notable of which is unsolicited calls that impose a negative externality on consumers.⁷²

Pivotel and MNF Group also raised the risk of unsolicited calls as a significant issue associated with BAK arrangements.⁷³ Pivotel further disputed the likelihood that the cost of voice termination will tend to zero and that a BAK arrangement will not be appropriate without unbundling mobile numbers from the call termination service.⁷⁴

4.3. ACCC views

After considering the submissions from stakeholders, the ACCC has reached the position that TSLRIC+ remains the appropriate pricing principle having regard to the factors under subsection 152BCA(1) of the CCA. For this FAD, the ACCC considers that a cost estimate consistent with the TSLRIC+ pricing principle is best derived from an international benchmarking exercise.

The ACCC discusses the reasons for this position in this section.

TSLRIC+ remains the appropriate pricing principle

As noted in the Discussion Paper, a key issue for the ACCC is whether TSLRIC+ or pure LRIC is the more appropriate pricing principle when determining the regulated price for the MTAS.

In the draft report for the 2015 MTAS FAD inquiry, the ACCC reached the view that pure LRIC is likely to give rise to the risk of cost under-recovery as it does not allow common costs incurred to provide off-net mobile voice termination service and other services to be recovered from the price of the MTAS. The ACCC considered that this undermines the legitimate business interests of the access provider and is likely to discourage the efficient investment in infrastructure used to provide the service. Due to this risk of cost under-recovery, the ACCC noted that even though pure LRIC may result in a lower termination rate and promote competition in the short term, this is unlikely to be efficient or sustainable in the long term.⁷⁵

The ACCC notes that three stakeholders expressed support for the continual use of TSLRIC+, but two stakeholders supported other pricing principles.

Macquarie Telecom considered that the ACCC should adopt a pure LRIC pricing principle as discussed in the previous section.

⁷¹ Telstra Submission, p. 4.

⁷² VHA Submission, p. 12.

⁷³ Pivotel Submission, p. 7; MNF Submission, p. 6.

⁷⁴ Pivotel Submission, p. 7.

⁷⁵ ACCC, *Mobile Terminating Access Service: Final Access Determination Draft Decision*, May 2015, pp. 8–9. (ACCC MTAS Draft Report 2015)

First, Macquarie Telecom disputed the proposition that pure LRIC risks cost under-recovery. It argued that mobile businesses have become overwhelmingly data centric and that shared and common costs are increasingly recovered through charges for data services.⁷⁶

The ACCC agrees that as data traffic increases, shared and common costs are increasingly recovered through charges for data services. However, even under TSLRIC+ this would likely be the case — as voice traffic as a proportion of overall traffic becomes smaller, the shared and common costs that are attributed to voice services (including mobile termination services) becomes smaller. For example, VHA estimates that voice traffic accounts for [c-i-c] [c-i-c] of total network traffic in 2018,⁷⁷ and Telstra estimates that it represents just one per cent of its total traffic in 2018–19.⁷⁸ This trend does not in itself justify the allocation of shared and common costs to services other than mobile voice termination service.

Macquarie Telecom also argued that the MTAS price now has no impact on MNO's investment incentives which are principally driven by the growth of mobile data services and the pursuit of new revenue opportunities enabled by the deployment of 5G.⁷⁹ The ACCC does not dispute this, however it does not mean that voice services are no longer important or that the MNOs are not incentivised to make investments for the purpose of providing voice services. For example, VHA submitted that the small voice traffic (as a proportion of overall traffic) does not reflect the high value many customers place on being able to make and receive calls, nor does it reflect resources that it invests in ensuring that it can offer high quality voice calls to its customers, such as [c-i-c] [c-i-c].⁸⁰ Further, the CCA requires the ACCC to have regard to the legitimate business interests of an access provider and their investments in facilities *used* to provide the declared service.⁸¹ As such, the ACCC considers that an approach which disregards the investments made by the access provider in facilities that are principally driven by data growth, even if the facilities are used to provide the MTAS, is unlikely to be appropriate.

On the other hand, VHA does not appear to support any variant of LRIC principles and preferred the use of the BBM for the MTAS, consistent with the current pricing approach for the fixed line services. The ACCC has reviewed our views regarding the use of the BBM for the MTAS as expressed in the MTAS FAD draft report as part of the 2015 inquiry and considers that the same considerations still apply. In particular, the ACCC noted that BBM's approach of locking in the regulatory asset base, and therefore providing certainty for access providers and seekers, is appropriate where the infrastructure and technology used to provide the service do not fundamentally change for an extended period 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.⁸²

On the other hand, TSLRIC+ pricing principle involves the examination of the cost of providing the service by a hypothetically efficient operator based on the best-in-use technology. This encourages the operators to invest in the most efficient technology in providing the services in question and can reflect the rapid development of technology in the

⁷⁶ Macquarie Telecom Submission, p. 4.

⁷⁷ VHA, *Mobile Terminating Access Service: Submission to the Australian Competition and Consumer Commission (Commercial-in-confidence)*, September 2019, p. 8. (VHA Confidential Submission)

⁷⁸ Telstra Submission, p. 6.

⁷⁹ Macquarie Telecom Submission, pp. 3–4.

⁸⁰ VHA Confidential Submission, p. 8.

⁸¹ Subsection 152CBA(1)(b) of the CCA.

⁸² ACCC MTAS Draft Report 2015, p. 11.

mobiles industry. For the reasons above, the ACCC is of the view that TSLRIC+ remains the appropriate pricing principle for the MTAS.

Rolling over existing MTAS price is inappropriate

In the Discussion Paper, the ACCC raised concerns with the rolling over of the existing MTAS price without adjustment. This approach does not take into account the likely decline in the cost of providing the service since the last FAD.⁸³ Submissions from ACCAN, MNF Group and Macquarie Telecom, which also opposed this approach, concurred with the ACCC.

However, Optus and VHA made strong arguments in support of rolling over the existing MTAS price. The ACCC has carefully considered the matters raised by both stakeholders.

VHA argued that the ACCC's recent proposal (now decision⁸⁴) to roll over the fixed line FAD prices is an exceptional consideration that is highly relevant for the MTAS FAD. It considers that the ACCC should roll over the existing MTAS price to provide price stability in the transition to the delivery of fixed voice services over the NBN and the commencement of the 5G investment cycle.⁸⁵

The need to provide price stability during the transition to the NBN was a key consideration for rolling over the existing FAD prices for the fixed line services.⁸⁶ However, the transition to the NBN does not impact on the delivery of the MTAS on the mobile networks — neither the technology nor the manner in which the service is provided will change as a result of the change in the originating network, from the PSTN to the NBN. The ACCC also does not consider the commencement of 5G deployment and investment provides a justification for rolling over the existing MTAS price. The MNOs make continuous investments to upgrade their network, and the moves to previous generations of mobile technology have never provided grounds for maintaining the FAD prices for the MTAS.

Therefore, the ACCC is not persuaded by VHA's argument that there are exceptional considerations that would support a decision to rollover the existing MTAS price.

The ACCC has also considered the other reasons provided by Optus and VHA in support of the rollover, specifically that:

- The transition to more efficient networks does not necessarily imply that the cost of the MTAS has declined;
- Any reduction in the MTAS price will have negligible effect on downstream markets; and
- Prices for the MTAS and FTAS should be set according to some price relativities and that given the FTAS is rolled over, MTAS should also be rolled over until they can be considered together.

Relevant market trends provide broad indication of likely MTAS cost reduction

In the Discussion Paper, the ACCC discussed relevant mobiles market developments since the last FAD, including the continued shift from voice towards data use and the transition to

⁸³ ACCC, Discussion Paper, p. 19.

⁸⁴ See ACCC, *Inquiry into final access determinations for fixed line services: Final Decision*, November 2019, available at ACCC website at: <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fixed-line-services-fad-inquiry-2018/final-decision>.

⁸⁵ VHA Submission, pp. iii, 9.

⁸⁶ ACCC, *Inquiry into final access determinations for fixed line services: Final Decision*, November 2019, p. 6.

more cost efficient mobile networks for the carriage of voice services.⁸⁷ The ACCC considers these are factors which are relevant in considering the appropriate pricing options for the MTAS.

Optus and VHA disputed that these market trends have implications for the MTAS costs and provided information on the use of their 3G networks for voice services to support their views.⁸⁸

While the ACCC accepts that market trends can only provide an indication of the change in MTAS costs, if those trends indicate that the cost of the MTAS is likely to have declined since the last FAD, then the ACCC considers that further analysis is required to determine the exact impact of these trends.

The ACCC notes that there have been some important changes since the last MTAS FAD inquiry. For instance, the share of voice traffic on different generations of networks, has changed. In the previous MTAS FAD inquiry, the cost estimate of the MTAS was based on the cost of providing the service on 2G and 3G networks only, as VoLTE had not been introduced at the time. Since then, 2G has been decommissioned and voice traffic is now carried on 3G and 4G networks. Regardless of the respective share of traffic on 3G and 4G, this trend would reasonably indicate, all things being equal, that the cost of the MTAS is likely to have declined since the last FAD. Conversely, this trend does not support rolling over the current MTAS because there is a high risk that it would lead to a price that is above the efficient cost of providing the service, which does not promote the LTIE.

Reduction in MTAS price creates environment for more competitive retail offerings

In its Discussion Paper, the ACCC noted the prevalence of unlimited call plans in both fixed and mobile services markets. However, the ACCC also noted that there remain some plans that charge PAYG rates for calls to mobiles and these charges appear high.⁸⁹ Information received from service providers also indicate that the proportion of consumers on PAYG plans does not necessarily correspond to the proportion of PAYG plans on the market as many consumers may still be on historical plans that are no longer available. For example, Telstra indicated that for mobiles, [c-i-c] [redacted] [c-i-c], whereas for fixed voice services, [c-i-c] [redacted] [c-i-c].⁹⁰ On the other hand, VHA indicated that only around [c-i-c] [redacted] [c-i-c] of its customers are on plans without unlimited calls.⁹¹ Although the proportion of customers that do not have access to plans with unlimited calls may vary across service providers, there is an indication that overall, there remains a significant segment of end-users who are still using plans that do not include unlimited calls.

The ACCC notes ACCAN's comments that the use of PAYG plans are particularly common amongst some consumer segments, such as low income consumers, elderly consumers and those in rural, regional and remote areas. For various reasons, these consumers may not be able to switch to plans with unlimited calls and would likely benefit from cheaper access to essential communications services as a result of a reduction in the wholesale cost of services.⁹²

⁸⁷ ACCC, Discussion Paper, pp. 9–11.

⁸⁸ See Optus Submission, p. 5; VHA Submission, p. 9.

⁸⁹ ACCC, Discussion Paper, pp. 9–10.

⁹⁰ Information provided by Telstra via email on 25 October 2019; See also, Telstra, *MTAS FAD Inquiry (Confidential)*, 27 September 2019, pp. 6–7. (Telstra Confidential Submission)

⁹¹ VHA Confidential Submission, p. 7.

⁹² ACCAN Submission, p. 3.

The ACCC acknowledges that as the MTAS price becomes lower and unlimited call plans becomes more prevalent, the impact of any further reduction in the MTAS price on the retail markets is likely to become smaller. However, the ACCC does not agree with Optus' and VHA's view that the impact would be so negligible such as to warrant maintaining the MTAS price despite indication that the cost has likely declined.

The ACCC considers that further reductions in the MTAS will likely have a different impact on the MNOs and other service providers. VHA argued that the materiality of the MTAS has declined for the MNOs in recent years, and provided information which shows that [c-i-c] [redacted] [c-i-c].⁹³ The ACCC acknowledges that given the MNOs both receive and pay the MTAS charges, the net impact of MTAS payments on the MNOs, regardless of whether it is net revenue or net cost, may have become quite small compared to the overall revenue earned by the MNOs. This could mean that further changes in the MTAS price may not have significant impact on how MNOs market their retail plans in the downstream mobile services market.

However, the MTAS is likely to have more significant impact on smaller fixed line operators and the MVNOs, for whom the MTAS only represents a direct or indirect cost and not revenue.

MNF Group noted that as its customer base grows, MTAS payments represent a significant and increasing direct cost to the MNF Group.⁹⁴ MNF Group also noted that reductions in the MTAS price in the past have enabled it to provide more competitive retail offers in the fixed line voice services market by introducing plans with unlimited fixed-to-mobile calls.⁹⁵

Both MNF Group and Macquarie Telecom submitted that in the absence of regulated MVNO access arrangements, the MTAS price represents an important point of reference for MVNOs in commercially negotiating the prices of wholesale mobile services with MNOs.⁹⁶ This shows that reductions in the MTAS price will also impact the cost of wholesale mobile services that the MVNOs acquire from the MNOs, and will in turn affect the ability of MVNOs to make competitive offerings in the retail mobile services market.

For the above reasons, the ACCC considers that any reduction in the MTAS price, that is consistent with reduction in cost, is still likely to promote competition in the retail mobile and fixed line services market by enabling smaller fixed line operators and MVNOs to offer more competitive retail products.⁹⁷

Other than the impact on competition, the MTAS price is also likely to have an impact on investment incentives and therefore, on the LTIE. An MTAS price that reflects changes in the efficient cost of providing the service is more likely to provide incentives for the MNOs to make efficient investments in the infrastructure used to provide the service.⁹⁸

As noted above, VHA provided analysis on the extent of historical fixed-to-mobile (FTM) pass-through of the MTAS in support of its argument that further MTAS price reductions will have negligible benefits for customers on PAYG fixed voice plans. The ACCC has reviewed VHA's analysis, including its observations on the data referred to by the ACCC in the 2014

⁹³ VHA Confidential Submission, p. ii.

⁹⁴ MNF Submission, p. 3.

⁹⁵ MNF Submission, p. 8.

⁹⁶ MNF Submission, p. 3; Macquarie Telecom Submission, p. 6.

⁹⁷ Subsections 152BCA(1)(a) and 152AB(2)(c) of the CCA.

⁹⁸ Subsections 152(BCA)(1)(a) and 152AB(2)(e) of the CCA.

MTAS declaration inquiry and 2015 MTAS FAD inquiry⁹⁹ and the more recent data from the TEM.¹⁰⁰

We note that there is some discrepancy between the data relied upon by VHA and the primary data in the 2014 and 2015 MTAS reports. Nevertheless, even accounting for these discrepancies, the updated analysis provided by VHA demonstrates the difficulty of assessing the extent of any FTM pass-through, largely due to the difficulty in ascertaining the different costs of providing FTM services. The TEM data does not provide further insight as it only shows comparison between unit cost and revenue, not the movement of MTAS and non-MTAS related costs. It is also important to note that the 2019 TEM data shows a significant change, with Telstra's imputed retail margin dropping to 28 per cent from an average of around 69.5 per cent from 2013 to 2018. VHA attributed this to the transition to the NBN which is disrupting legacy pricing structures around PSTN pricing in potentially uneven ways, but has not commented on how this may have impacted the data and what the implications might be.

While the analysis provided by VHA highlights the problem of estimating the extent of any pass through, this is consistent with our previous position on the issue of FTM pass-through and its implications for MTAS pricing. Because FTM calls are sold as part of a bundle of fixed line services, service providers can choose to pass on savings from reduced MTAS prices in many ways, some of which will not be transparent. As such, we accept the observation made by the Australian Competition Tribunal that a pass-through mechanism that only focuses on the reduction in price 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.¹⁰¹

For these reasons, the ACCC considers VHA's arguments and analysis on historical FTM pass-through do not show that further MTAS reductions could not benefit downstream consumers.

Relationships between MTAS and FTAS need to be examined

Optus and VHA argued that the use of different pricing methodologies for MTAS and FTAS is causing competitive distortions in the downstream markets and resulting in a significant transfer to the dominant fixed line operator, namely Telstra.¹⁰² Both argued that MTAS price should be materially higher than FTAS price, or at a certain ratio above the FTAS price, and given the FTAS price is being rolled over, the same approach should be taken regarding the MTAS price.

The ACCC has discussed the appropriateness of using different methodologies for the MTAS and FTAS in the Discussion Paper and earlier sections of this paper.¹⁰³ The ACCC has also flagged its intention to consider a holistic review for the MTAS and FTAS in the future once the rollout of the NBN is concluded.¹⁰⁴ However, the ACCC does not accept the argument that the MTAS price should be maintained in order to achieve a certain price gap with the FTAS price. To do so would be to pre-determine the relationships between the MTAS and FTAS, if any, without having the benefit of conducting the necessary analysis and scrutiny in order to reach such a conclusion.

⁹⁹ VHA Submission, pp. 2–3.

¹⁰⁰ VHA Submission, pp. 5–6.

¹⁰¹ ACCC, *Mobile Terminating Access Service: Final access determination Draft decision*, May 2015, p. 28; See also *Application by Vodafone Network Pty Ltd and Vodafone Australia Limited* [2007], ACompT 1, [289]–[290].

¹⁰² Optus Submission, pp. 7–8; VHA Submission, p. iii.

¹⁰³ ACCC Discussion Paper, p. 17.

¹⁰⁴ ACCC Discussion Paper, pp. 17–18.

Optus argued that using the same common methodology, the MTAS cost would always be higher than the FTAS cost because it necessarily includes the cost of the access network cost.¹⁰⁵ However, there is no evidence on what the appropriate price gap should be. VHA provided information comparing the MTAS and FTAS rates for Australia and 37 European countries, which shows that Australia has the sixth highest FTAS rate in the sample and its MTAS to FTAS ratio is among the lowest in the sample (32 of 38).¹⁰⁶ However, the data show a range of different MTAS to FTAS ratio amongst the European countries and no explanation is provided as to why the countries with the higher MTAS to FTAS ratio have the more appropriate approach. The ACCC notes that in a recent article appraising 25 years of telecommunications regulation in Europe, Cave et al. remark that, 'as a result of regulation, mobile termination rates are getting increasingly close to fixed termination rates, eliminating differences across operators and technologies, which makes sense in a phase of convergence'.¹⁰⁷

Whether there are cost relativities between the MTAS and the FTAS and, if so, what is the appropriate ratio between the two prices, are questions that would need to be examined if the ACCC conducts a holistic review of the MTAS and the FTAS in the future. However, until those matters can be examined, it would not be appropriate to roll over the MTAS price in line with the approach taken for the FTAS price, particularly in light of indications that the efficient cost of providing the MTAS has likely declined since the last FAD.

MTAS price should be based on efficient cost of providing the service

The ACCC also had regard to Pivotel's argument that the MTAS price should be rolled over as its actual cost of connecting incoming calls already exceeds the regulated MTAS price.¹⁰⁸

The ACCC understand that Pivotel may have a higher cost of providing mobile voice termination services than other MNOs as it would need to acquire services from satellite operators to provide satellite mobile services. The ACCC appreciates that Pivotel provides an important service which enables end-users to use mobile services when outside the coverage of the other MNOs' networks. However, the ACCC considers that the MTAS price should be based on the efficient cost of providing the service by a terrestrial mobile network operator, as it would provide the right incentives for the national MNOs to make efficient investments in their infrastructure used to providing that service.¹⁰⁹

Regulator-imposed BAK unlikely to be appropriate

The ACCC notes concerns raised by stakeholders regarding the risks associated with a zero termination rate, specifically that there will be increased risk of unsolicited communications, which undermines the efficient use of the infrastructure used to provide mobile services.¹¹⁰ The ACCC also understands that operators do have, and will consider, commercially negotiated BAK arrangements for some services where it makes commercial sense.

In light of these considerations, the ACCC accepts the matters raised by stakeholders and considers it would not be appropriate to impose a regulated BAK regime between network providers and that a cost-based approach remains the most appropriate pricing option for the MTAS.

¹⁰⁵ Optus Submission, p. 7.

¹⁰⁶ VHA Submission, pp. 11–12.

¹⁰⁷ Martin Cave, Christos Genakos and Tommaso Valletti, The European Framework for Regulating Telecommunications: A 25-year Appraisal, *Review of Industrial Organisation* (2019) 55:47–62, p. 58.

¹⁰⁸ Pivotel Submission, p. 8.

¹⁰⁹ Subsections 152(BCA)(1)(a) and 152AB(2)(e) of the CCA.

¹¹⁰ Subsections 152(BCA)(1)(a) and 152AB(2)(e) of the CCA.

Applying an adjustment to current MTAS price may not reflect efficient cost

The ACCC proposed the option of applying a simple adjustment as a less resource intensive and pragmatic approach to the more rigorous cost modelling or international benchmarking approaches.

However, the ACCC notes the lack of support for this approach from stakeholders and understands concerns that this approach may not fully capture the changes in the cost of providing the MTAS and could potentially result in arbitrary adjustments. As such, the ACCC considers that it would not be appropriate to apply a simple adjustment to the current MTAS price.

International benchmarking is more appropriate than cost modelling for this FAD

The ACCC considers that a full pricing exercise such as cost modelling or international benchmarking is more likely to provide a reasonable examination of the efficient cost of providing the MTAS. The ACCC recognises that between these two options, stakeholders are split on the more appropriate pricing approach.

While some stakeholders raised concerns about the time and resources required for a cost modelling exercise, the ACCC acknowledges that there appears to be some appetite for a new cost model to be developed for the MTAS at some point, even amongst stakeholders that have advocated for the rollover of the MTAS for this FAD. The ACCC acknowledges that the key benefits of having a specific cost model is that it could accurately reflect the deployment costs of providing the service in Australia. However, the fact that the ACCC has last undertaken a cost modelling exercise more than 10 years ago and concerns regarding the international benchmarking approach are also cited in support of a cost model.

Having carefully considered the respective benefits and risks of cost modelling and international benchmarking, the ACCC considers that international benchmarking is the more appropriate pricing methodology for this MTAS FAD. While the ACCC recognises the benefits of a cost model, given the following circumstances, we do not consider that this FAD inquiry is the most appropriate time to develop a cost model.

Any forward looking cost model should incorporate the most efficient technology used to provide the service, and specifically, should include 5G technology which the industry is deploying or preparing to deploy. However, at this point in time, it may be difficult to do so as the 5G deployment is at its very early stage, with uncertainties around the type of spectrum that will be used for 5G radio, the optimal network topography, the types of equipment and forecast traffic and usage. These uncertainties mean that it may be impossible to commence the cost modelling exercise immediately or that the modelling exercise may take a considerable time to develop. This would entail significant delay in implementing the new MTAS price and the current MTAS price would essentially be kept for an extended period of time, which would not promote the LTIE.

On the other hand, it would not be justifiable to invest in the time and resources in developing a cost model that does not incorporate the use of 5G technology, as by the time such a cost model is developed, it would become obsolete very quickly.

For the above reasons, the ACCC does not consider that it would be appropriate to develop a cost model for this MTAS FAD. The ACCC considers that if a cost model is to be developed, it should ideally be done in a timeframe that could readily inform a more holistic review of the MTAS and the FTAS if a decision is made to do so in the future. The ACCC will give more consideration to this option after the finalisation of this inquiry.

The ACCC considers that under the current circumstances, international benchmarking is the most reasonable and practical pricing approach that would promote the LTIE, as it is capable of producing a reasonable cost estimate for the MTAS relatively quickly, which enables the implementation of a new MTAS price as soon as practicable.

Having said this, the ACCC recognises that an international benchmarking exercise is not without its challenges:

- It depends on the availability of appropriate benchmarks, and there is a risk of a small benchmark pool.
- There need to be appropriate adjustments to benchmarks to account for country-specific factors that drive differences in the cost of providing the MTAS. It is unlikely that all the differences could be adjusted for so this process would require judgement on the most important factors that should be adjusted.

The ACCC is also cognisant of the concerns raised by stakeholders regarding the process of undertaking the international benchmarking study in the previous MTAS FAD inquiry. Specifically, VHA raised concerns over the lack of transparency and due process, noting that stakeholders did not have sufficient time to scrutinise the models used for the benchmarking exercise.¹¹¹ The ACCC also notes comments by Telstra that an international benchmarking exercise would need to make appropriate adjustments for factors such as population density, land area and the size of mobile network to account for the higher cost of deploying and maintaining mobile networks in regional and rural areas of Australia.¹¹²

To address these concerns, the ACCC considers it is appropriate to conduct further consultation in developing the international benchmarking study before issuing a draft report for the MTAS FAD. This would enable interested stakeholders to be involved early in the process of developing the specific methodology for the benchmarking exercise and allows early engagement on key issues that are likely to be important.

The ACCC discusses the proposed methodology for the international benchmarking exercise in Chapter 5.

¹¹¹ VHA Submission, p. 10.

¹¹² Telstra Submission, p. 3.

5. Methodology for international benchmarking

The ACCC has commissioned Analysys Mason to undertake an international benchmarking exercise for the purpose of estimating the cost of the MTAS in Australia. In undertaking this exercise, the ACCC has asked Analysys Mason to:

- Select an appropriate benchmark pool consisting of TSLRIC+ (or equivalent) cost estimates from cost models published by other regulators for the purpose of setting a regulated price for mobile voice termination service; where a publicly available cost model only produces a pure LRIC estimate, the ACCC has asked Analysys Mason to investigate whether a TSLRIC+ estimate could be constructed.
- Make appropriate adjustments to the benchmarks to account for country-specific factors that drive differences in the cost of providing the mobile voice termination service. Such factors could include the mix of mobile technology, spectrum costs, network usage, cost of capital and geographic differences.
- Provide advice and recommendation on a cost range that it considers will reflect the cost of providing the MTAS in Australia.

This Chapter provides an outline of Analysys Mason's proposed methodology for the international benchmarking exercise in response to the ACCC's instructions. It also provides the ACCC's preliminary views on the approach taken by Analysys Mason. A detailed description of the draft methodology is contained in Analysys Mason's Draft Methodology Report published along with this Position and Consultation Paper.¹¹³

The ACCC will determine an appropriate WACC for the MTAS for the purpose of making the necessary adjustments in the benchmarking exercise. The ACCC's proposed approach to the WACC parameters is discussed in Section 5.2. The ACCC provides a brief discussion of how the international benchmarking exercise will inform the determination of the new MTAS price in Section 5.3.

The ACCC invites stakeholder submissions on any aspect of Analysys Mason's draft methodology, the ACCC's views, and the ACCC's proposed approach to WACC.

5.1. Analysys Mason draft methodology

5.1.1. Benchmark pool

In its Draft Methodology Report, Analysys Mason proposes to include a list of nine cost models developed by national regulatory authorities or similar bodies from the following regions or countries:

- East Caribbean
- France
- Mexico
- Netherlands
- Peru
- Portugal
- Spain

¹¹³ Available on the ACCC website at: <https://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/mobile-terminating-access-service-access-determination-inquiry-2019/position-and-consultation-paper>.

- Sweden
- United Kingdom (UK).¹¹⁴

The ACCC understands that the number of suitable benchmark models is limited by a number of factors.

First, the models must be publicly available for the purpose of undertaking the benchmarking exercise and to ensure that stakeholders can scrutinise the models and replicate the adjustments made as necessary.

Second, the models must include modelling of network technologies that are in use in Australia, i.e. 3G and 4G technologies. Models not including 4G technology that are otherwise publicly available (such as those of Denmark, Norway and Romania) are therefore excluded.¹¹⁵

Finally, models that contain anonymised inputs (such as those of Bulgaria and the European Commission) are not suitable as they would not be reflective of any specific country or operator.¹¹⁶

The cost models for France and Mexico only contain pure LRIC outputs and do not currently contain a calculation for TSLRIC+ or LRAIC+ outputs. For the model for Mexico, Analysys Mason proposes to make use of LRAIC+ calculations implemented in an earlier version of the model. For the model for France, Analysys Mason proposes to adopt the LRAIC+ calculation structure from a similar model in the benchmark pool.¹¹⁷ The ACCC considers this approach is consistent with the ACCC's requirements and will result in a benchmark pool that includes cost outputs that are consistent with the TSLRIC+ pricing principle.

5.1.2. Proposed adjustment process

Analysys Mason proposes to make a number of adjustments to the benchmarks to account for country-specific factors that drive differences in the cost of providing mobile voice termination services.

The ACCC understands that most of the adjustments will be made by changing the relevant inputs directly in the benchmark cost models. These include:

- Levels of market demand
- Assumed market share
- Geography
- Cell coverage radii
- Mobile radio technologies in use
- Spectrum holdings
- Spectrum costs
- WACC.

¹¹⁴ Analysys Mason, Draft Methodology Report, p. 2.

¹¹⁵ Analysys Mason, Draft Methodology Report, p. 3.

¹¹⁶ Analysys Mason, Draft Methodology Report, pp. 2–3.

¹¹⁷ Analysys Mason, Draft Methodology Report, p. 3.

Analysys Mason also proposes to make two further adjustments externally to the cost models. These are the inclusion of Australia-specific spectrum costs and currency conversion.

The proposed approach to the adjustments is discussed briefly below.

Levels of market demand and assumed

The level of market demand for mobile services is a significant driver of the cost of providing the mobile voice termination service in a country. Analysys Mason proposes to derive a time series of demand volumes (traffic and subscribers) for future years based on historical demand information.¹¹⁸ Separate time series will be derived for the voice, SMS, data and subscriber services relevant to each benchmark model.

Analysys Mason proposes that the level of demand for services on the network of a hypothetically efficient operator in Australia will then be determined by applying an assumed market share on the level of market demand. Analysys Mason proposes that on the basis that there are three national MNOs with extensive mobile network coverage in Australia, it would be appropriate to assume a network level market share of 33.3 per cent.¹¹⁹ The ACCC considers that this is a reasonable approach.

Geography and cell coverage radii

Analysys Mason noted that a key input to a cost model of mobile networks is the way in which areas within a country with different geo-demographic characteristics are handled.¹²⁰ Analysys Mason proposes to take into account the different geographic characteristics of Australia by implementing the Australian 'geo-typing' of Australian areas within each of the benchmark cost models. This process involves:

- Identifying a list of geographic areas in Australia that could be grouped together into 'geotypes'. Analysys Mason proposes to use the list of approximately 2200 Statistical Local Areas Level 2 (SA2) used for the purpose of the Mobile Network Infrastructure Forecasting Model for the Australian Communications and Media Authority (ACMA).¹²¹ Each SA2 area has an associated land area covered and population.
- Replace the relevant geographic areas specified in each benchmark model with the SA2s of Australia. This is achieved by, for each benchmark model, assigning to each SA2 a geotype based on the definition of geotypes in that benchmark model (these geotypes are typically defined according to population density in the benchmark models).

The ACCC understands that, by implementing the Australian areas within each of the benchmark models in this manner, the models would seek to reflect the cost of deploying a mobile network in a country with the geographic characteristics similar to those of Australia. Importantly, this means that the size of Australia (and hence the scale of the network required) and the higher cost of deploying mobile network in the much larger rural areas of Australia is taken into account.

Analysys Mason also proposes to adjust the cell coverage radii of mobile coverage in the most rural geotype in each of the benchmark models to reflect the cell coverage radii of mobile coverage in Australia. In this case, the cell radii assumed for low-band spectrum used

¹¹⁸ Analysys Mason, Draft Methodology Report, p. 4.

¹¹⁹ Analysys Mason, Draft Methodology Report, p. 4.

¹²⁰ Analysys Mason, Draft Methodology Report, p. 5.

¹²¹ Analysys Mason, Draft Methodology Report, p. 5. See also ACMA website at: <https://www.acma.gov.au/publications/2015-06/report/mobile-network-infrastructure-forecasting-model>.

in the rural and remote geotypes in the ACMA's Mobile Network Infrastructure Forecasting Model will be used as a starting point.¹²² The ACCC considers this to be appropriate as it will ensure that the number of coverage sites calculated for the most rural geotypes of each benchmark model more closely reflect the number of sites actually deployed in the rural and remote areas of Australia.

Mobile radio technologies in use

As 2G networks have been decommissioned in Australia by all three MNOs, the ACCC has asked Analysys Mason to reflect this in adjusting for the mix of mobile technologies in the benchmark models. Analysys Mason proposes to 'switch off' 2G network in the benchmark models, where this is possible, or reduce 2G deployment to negligible levels (e.g. 1 site per geotype) where doing so is necessary to avoid formula errors.¹²³ Analysys Mason has advised that leaving 2G deployment at 1 site per geotype would mean that the 2G networks have a negligible impact on the cost outputs from the benchmark models.

Analysys Mason proposes to develop a time series of forecast voice traffic on 3G and 4G networks respectively based on historical information. For the purpose of this adjustment, the ACCC has asked Analysys Mason to assume that the 3G network will continue to operate beyond the current declaration period ending 30 June 2024.

The ACCC sought information from the MNOs on the likely timeframe for the phasing out of 3G networks in the Discussion Paper. While Telstra has publicly announced a shut-down of its 3G network by June 2024, the other MNOs have not determined the likely timing. [c-i-c]

[c-i-c]¹²⁴ Given this, the ACCC considers it appropriate to assume that the 3G network will continue to operate beyond the current declaration period ending June 2024.

Spectrum holdings and spectrum costs

Analysys Mason proposes to adjust the spectrum holdings used in the benchmark models and the spectrum costs incurred by the modelled operators to reflect those of a hypothetically efficient operator in Australia. This requires making assumptions regarding a portfolio of spectrum holdings for such an operator and deriving the relevant spectrum costs based on those holdings.

Analysys Mason noted that a necessary simplification for the purpose of applying a consistent set of spectrum holdings in the benchmark models is to assume nationwide licences only, even though in Australia some spectrum bands are allocated via sub-national licences. Analysys Mason proposes to start from a conservative assumption of nationwide spectrum holdings in the following bands but will be conducting sensitivity testing as part of the implementation.¹²⁵

¹²² Analysys Mason, Draft Methodology Report, pp. 6–7.

¹²³ Analysys Mason, Draft Methodology Report, pp. 7–8.

¹²⁴ VHA Confidential Submission, p. 9.

¹²⁵ Analysys Mason, Draft Methodology Report, pp. 8–9.

Table 2: Assumed spectrum holdings in draft methodology¹²⁶

Band	Assumed allocation	Proposed use in models
700 MHz	2 x 10 MHz	4G coverage
800/900 MHz	2 x 10 MHz	3G coverage (previously 2G coverage)
1800 MHz	2 x 15 MHz	4G capacity (previously 2G capacity)
2100 MHz	2 x 10 MHz	3G coverage
2.5 GHz	2 x 20 MHz	4G capacity

The assumed spectrum holdings reflect most of the bands currently used by the MNOs in providing 3G and 4G mobile services in Australia, with the exception of the 2300 MHz band.¹²⁷ The ACCC considers the assumed spectrum holdings represents a reasonable set of spectrum bands that are expected to be held by a hypothetical operator in Australia in deploying a mobile network. As the MNOs hold different amounts of spectrum in each band specified, the ACCC understands the assumed spectrum allocation in each band is conservative. This means that the number of mobile sites necessary to provide coverage and capacity, particularly in the urban areas, would be higher than would be required with a larger spectrum allocation. The ACCC considers this to be a reasonable starting point for adjusting for spectrum holdings and that sensitivity testing would be necessary to explore the impact of larger spectrum allocations.

Analysys Mason also proposes to adjust the spectrum costs incurred by the modelled operator to reflect that likely to be incurred by a hypothetically efficient operator in Australia. This involves setting the spectrum costs assumed within the benchmark models to zero in the first instance and then adding on a per-unit cost of spectrum reflecting fees incurred in Australia. To derive the per-unit cost of spectrum in Australia, Analysys Mason proposes to estimate the spectrum costs likely to be incurred for acquiring and using the spectrum as specified in the assumed spectrum holdings (based on the relevant auction fees, renewal fees and annual fees) and allocate this cost over a time series of traffic volumes.¹²⁸ The ACCC understands that the costs of spectrum used for a specific technology will be allocated only to the traffic volumes of that technology and the spectrum cost will be depreciated with the intention of allowing full recovery by the end of the licence period.

WACC

As the cost of capital is likely to be significantly different from country to country, it is important to take this into account in the benchmarking exercise. Analysys Mason proposes to adjust the WACC input used in each of the benchmark models to a WACC reflective of the cost capital for a hypothetically efficient operator in Australia. Analysys Mason noted that both a nominal pre-tax WACC and a real pre-tax WACC would be required for this purpose, depending on the specific parameterisation in each benchmark model.¹²⁹

¹²⁶ Analysys Mason, Draft Methodology Report, pp. 8–9.

¹²⁷ The ACCC understands that Optus is the only MNO that has substantial holdings in the 2300 MHz band and is using it widely. Telstra has some holdings in limited areas and does not appear to be using it extensively.

¹²⁸ Analysys Mason, Draft Methodology Report, p. 9.

¹²⁹ Analysys Mason, Draft Methodology Report, p. 10.

The ACCC will be determining a WACC for the purpose of this adjustment. The ACCC's proposed approach to the WACC parameters is outlined in Section 5.2 below.

Currency

After the adjustments to input have been finalised in the benchmark models, Analysys Mason proposes to convert the cost outputs to Australia currency. This involves converting the output values to Australian dollars using the most recent foreign exchange rates and adjust the proportion of cost that relate to non-tradeable items for purchasing power parity (PPP).¹³⁰ The proportion of the cost that relate to non-tradeable items will be estimated using the asset-by-asset cost breakdowns within the benchmark cost models.¹³¹

The ACCC considers this to be an appropriate approach as it accounts for the fact that not all the costs incurred in operating a mobile network relate to tradeable items. The ACCC also considers that the use of the benchmark models to estimate the proportion of costs that relate to non-tradeable items provides a reasonable and transparent basis for making any required PPP adjustments.

5.2. Determination of WACC

In assessing the efficient costs incurred by regulated businesses, the ACCC evaluates the return on capital of these businesses. The return on capital is the opportunity cost to investors of deciding to finance the regulated businesses. The ACCC calculates this return on capital by estimating a weighted average of the opportunity cost of debt and the opportunity cost of equity, which is referred to as the weighted average cost of capital or WACC.

As noted in the previous section, the ACCC will determine a WACC appropriate for a hypothetically efficient operator in Australia for the purpose of making the necessary adjustment in the benchmark cost models.

Analysys Mason advised that as different forms of WACC are used in the benchmark models, the adjustment process would require the calculation of two forms of WACC, a nominal pre-tax WACC and a real pre-tax WACC. These two forms of WACC can be calculated as follows:

$$WACC_{pre-tax,nominal} = \left[\frac{(r_f + \beta_e \times MRP)}{[1 - T_c \times (1 - \gamma)]} \right] \times (1 - D) + (K_d + DIC) \times D$$

$$WACC_{pre-tax,real} = \frac{1 + WACC_{pre-tax,nominal}}{1 + \text{forecast inflation}} - 1$$

Where:

$$\begin{aligned} r_f &= \text{risk free rate}, & \beta_e &= \text{equity beta}, & MRP &= \text{market risk premium}, \\ T_c &= \text{company tax rate}, & \gamma &= \text{gamma}, & D &= \text{gearing}, \\ K_d &= \text{cost of debt}, & DIC &= \text{debt issuance cost} \end{aligned}$$

¹³⁰ Analysys Mason, Draft Methodology Report, p. 10.

¹³¹ Analysys Mason, Draft Methodology Report, p. 11.

The key WACC parameters that will need to be determined are the market risk premium (MRP), gamma (the value of imputation credits), the risk free rate, the cost of debt, equity beta, the gearing ratio, debt issuance cost, expected inflation and company tax rate.

In considering the appropriate values for these parameters, the ACCC will have regard to recent determinations of the ACCC and the AER in relation to WACC.

The ACCC's proposed approach to deriving the values for each of the key parameters are outlined below.

MRP and Value of imputation credits

The market risk premium (MRP) is the difference between the expected return on a market portfolio and the return on the risk free asset. The MRP compensates an investor for the systematic risk of investing in the market portfolio or the 'average firm' in the market. The MRP is a key driver of the return on equity.

Under a pre-tax WACC framework, the value of imputation credits is a WACC parameter. Gamma (γ) represents the value of imputation credits attached to dividends that shareholders receive.¹³²

The ACCC proposes to obtain estimates of the MRP and gamma from the latest AER Rate of Return instrument.¹³³ The relevant estimate of the MRP is 6.1 per cent and the estimate of Gamma is 0.585.

The ACCC considers that adopting the estimates from the most recent AER decision-making process is appropriate because:

- By definition, the MRP is not an industry specific parameter, but is economy wide
- The AER's estimate of Gamma is based on economy wide benchmarks rather than industry specific benchmarks.

Risk free rate

The risk free rate measures the return an investor would expect from a 'riskless' investment, and is a key parameter in estimating the return on equity. The ACCC proposes to derive an estimate of the risk free rate by obtaining the average of the yields on the 10-year Commonwealth Government Bonds (CGBs) for 20 trading days close to the ACCC decision date.

The CGBs provide a good proxy for a risk free return, because the Commonwealth government is regarded as having a very low probability of defaulting on its debt. The ACCC considers that a 10-year maturity for the risk free rate is consistent with the Sharpe-Lintner Capital Asset Pricing Model (CAPM)¹³⁴, which estimates the returns to an investor over a long-term horizon.¹³⁵

¹³² AER, *Rate of return instrument — explanatory statement*, December 2018, p. 307.

¹³³ AER, *Rate of return instrument*, December 2018.

¹³⁴ For a description of the Sharpe-Lintner CAPM, see AER, *Rate of return instrument — explanatory statement*, December 2018, p. 127–129.

¹³⁵ AER, *Rate of return instrument — explanatory statement*, December 2018, p. 88.

Cost of debt

The cost of debt is the return required by the market to lend to an entity. The cost of debt must be reflective of the creditworthiness of the borrower (indicated by the credit rating) and the maturity of the debt.

The ACCC proposes to derive an estimate of the cost of debt in the following way:

- Obtain the typical credit rating or range of credit ratings of MNOs in Australia
- Obtain the yields of Australian corporate 10-year bonds with that typical credit rating or range of credit ratings
- Obtain the average of these yields across 20 trading days close to the ACCC decision date.

The ACCC considers that the estimate of the cost of debt should be based on a forward looking expected cost of debt, based on a benchmarking approach to calculating the WACC, rather than reflecting a business's actual cost of debt.

Equity beta and gearing ratio

The equity beta measures the systematic risk of an investment relative to that of the market, and is a key parameter in estimating the return on equity.

The gearing ratio of an entity is the ratio of debt to total capitalisation, and is used to weight the cost of equity and the cost of debt in the WACC.

The ACCC proposes to derive estimates for the equity beta and gearing ratio of a hypothetically efficient operator in the following way:

- Choose a set of publically listed companies that are comparable to Australian MNOs
- For each of these comparable companies, obtain estimates of its equity beta based on five years of weekly data
- For each of these comparable companies, obtain estimates of its gearing ratio by taking averages of its gearing ratios for the past five years
- Obtain the equity beta parameter for the WACC on the basis of the estimates of the equity betas for these comparable companies
- Obtain the gearing ratio parameter for the WACC on the basis of the estimates of the gearing ratios for these comparable companies.

Consistent with the ACCC's benchmarking approach to the WACC, the ACCC proposes to use a benchmarking approach to estimating the relevant equity beta and gearing ratio for a hypothetically efficient operator.

It would be necessary to determine an appropriate set of comparable companies for which the relevant equity beta estimates and gearing ratios will be used.

In the benchmarking exercise conducted for the MTAS FAD in 2015, the ACCC expressed the view that the WACC determined for the fixed line services FAD at the time would be an appropriate WACC for the purpose of making adjustments to the benchmark values. This was based on the fact that equity beta used for the calculation of the fixed line services WACC was consistent with benchmarking equity betas for comparable companies that provided a range of services, including fixed and mobile services. On this basis, the ACCC considered that the equity beta was appropriate for a hypothetically efficient operator in

Australia as two out of the three MNOs were integrated fixed and mobile network operators at the time.¹³⁶ However, given the expected conclusion of the NBN rollout during the declaration period,¹³⁷ Telstra and Optus would no longer be operating fixed line access networks.¹³⁸ The ACCC's preliminary view is that it may not be appropriate to assume therefore that a hypothetically efficient operator in Australia should be an integrated operator of mobile and fixed line networks. For this reason, the ACCC's preliminary view is that it may be more appropriate to include a list of standalone MNOs (both in Australia and overseas) in the set of comparable companies for the purpose of deriving equity beta and gearing ratio estimates for this international benchmarking exercise.

The gearing ratio is measured as the ratio of the market value of debt to the market value of total capital, where the latter is the sum of the market value of debt and the market value of equity. The ACCC proposes to use the book value of debt as a proxy for the market value of debt.

The ACCC proposes to obtain the estimates for equity beta and relevant data for calculating the gearing ratios from the Bloomberg database.

Debt issuance cost

Debt issuance cost is the cost associated with the initial raising of debt. Including debt issuance costs in the WACC is consistent with approach taken in the 2015 Fixed Line Services FADs.¹³⁹

The ACCC proposes to set a debt issuance cost of 0.07, which is consistent with the debt issuance cost adopted by the ACCC for setting the WACC in the 2015 fixed line services FADs.¹⁴⁰ The ACCC considers that the same debt issuance cost is likely to be appropriate as it can be expected to be relatively constant over time.

Expected inflation

Inflation is a general measure of an increase in prices and a fall in the purchasing value of money. It refers to changes in the overall price level, rather than prices for particular products.

The ACCC proposes to obtain an estimate of expected inflation using the method adopted by the AER in its 2017 final position on the regulatory treatment of inflation.¹⁴¹

Under this approach, the ACCC will estimate expected inflation using a ten year geometric annualised average where:

- The forecast inflation for the first two years is the Reserve Bank of Australia's (RBA) headline forecast of inflation, and
- The forecast inflation for years 3–10 is the mid-point of the RBA's target inflation band i.e. 2.5%.

¹³⁶ ACCC MTAS FAD Draft Report 2015, p. 14.

¹³⁷ NBN Co is aiming to complete network build by 30 June 2020. See NBN Corporate Plan 2020-2023, p. 12, available at: <https://www.nbnco.com.au/corporate-information/about-nbn-co/corporate-plan/corporate-plan>.

¹³⁸ Except in limited areas outside the NBN fixed line footprint where Telstra will continue to operate the PSTN to provide voice services.

¹³⁹ ACCC, *Public inquiry into final access determinations for fixed line services: final decision*, October 2015, p. 92.

¹⁴⁰ ACCC, *Public inquiry into final access determinations for fixed line services: final decision*, October 2015, p. 66.

¹⁴¹ AER, *Regulatory treatment of inflation — final position*, December 2017, p. 88.

The ACCC considers that adopting the approach from the AER's final position on the regulatory treatment of inflation is appropriate. This approach is also consistent with the 2015 Fixed Line Services FADs.¹⁴²

Company tax rate

The ACCC proposes to set the company tax rate at 30 per cent, which is consistent with Australian company tax rate.

5.3. Approach to determining the regulated MTAS price

The ACCC has asked Analysys Mason to provide advice and recommendation on a cost range that reflects the cost of providing the MTAS in Australia based on the outcome of the international benchmarking exercise.

The ACCC will consider the cost range advised by Analysys Mason and determine the price point most appropriate for setting the new regulated MTAS price. In considering the appropriate price point, the ACCC will have regard to factors such as whether matters of implementation, such as the availability of information for the purpose of the adjustment process, have implications on the benchmark outcome.

¹⁴² ACCC, *Public inquiry into final access determinations for fixed line services: final decision*, October 2015, p. 72.

6. Non-price issues

The Discussion Paper also sought stakeholder views on a number of non-price issues, including the need for non-price terms and conditions (NPTCs) and the appropriate duration for the MTAS FAD. This Chapter briefly outlines the ACCC's preliminary views regarding non-price issues for the MTAS FAD in response to stakeholder submissions.

6.1. Non-price terms and conditions

The NPTCs provide a baseline set of terms and conditions for access to the declared service in the event that commercial agreement cannot be reached. The current MTAS FAD contains a targeted set of NPTCs covering a range of matters including:

- Billing and notification
- Creditworthiness and security
- General dispute resolution
- Confidentiality (including disclosure of confidential information to regulators)
- Suspension and termination
- Liability and indemnity
- Communication with end-users
- Network modernisation and upgrade notice periods
- Changes to operating manuals
- Recourse to regulated terms.¹⁴³

The Discussion Paper sought stakeholder views on the NPTCs, specifically:

- The extent to which the NPTCs incorporated into the access agreements between access providers and access seekers
- Whether the NPTCs provide a useful set of reference terms for commercial negotiation if they are not incorporated into access agreements
- Whether the current NPTCs for the MTAS continue to be appropriate.¹⁴⁴

Submissions

Telstra submitted that [c-i-c] [REDACTED] [c-i-c].¹⁴⁵ VHA submitted that the NPTCs have not been an important consideration in its recent MTAS-related agreements.¹⁴⁶ However, stakeholders generally considered that the NPTCS provide a useful set of reference terms for commercial negotiation, for both access providers and seekers of the MTAS and MVNOs who wish to negotiate wholesale arrangements with the MNOs.¹⁴⁷ All who commented in this issue support the continued inclusion of the NPTCs in the FAD.¹⁴⁸

¹⁴³ The current NPTCs can be found in the 2015 MTAs FAD instrument at: <http://registers.accc.gov.au/content/index.phtml/itemId/1188746>.

¹⁴⁴ ACCC Discussion Paper, pp. 21–22.

¹⁴⁵ Telstra Confidential Submission, p. 10.

¹⁴⁶ VHA Submission, p. 13.

¹⁴⁷ See VHA Submission, p. 13; MNF Submission, p. 6; Macquarie Telecom Submission, pp. 6–7.

¹⁴⁸ Telstra Submission, p. 4; VHA Submission, p. 13; MNF Submission, p. 6; Macquarie Telecom Submission, pp. 6–7.

VHA further indicated that it is important for the ACCC to ensure consistency between the NPTCs for the MTAS FAD and those for other declared services (e.g. the DTCS or fixed line services) to prevent access providers from being able to exploit any ambiguities or inconsistencies in circumstances where multiple declared services are being acquired by an access seeker.¹⁴⁹

ACCC's preliminary view

The ACCC's preliminary view is that it would be appropriate to continue to include the NPTCs in the MTAS FAD as they appear to provide a useful set of terms and conditions for commercial negotiation for both access seekers and access providers of the MTAS as well as other service providers such as the MVNOs. The ACCC will also review the NPTCs to ensure that where appropriate they are consistent with the NPTCs in the most recent FADs of other declared services.

The ACCC will provide a set of draft NPTCs in the draft report for further comment.

6.2. Duration

The Discussion Paper noted that the expiry date for an FAD should normally align with the expiry of the associated declaration unless there are circumstances that warrant a different expiry date.¹⁵⁰ The current MTAS declaration expires on 30 June 2024.

Submissions

Telstra, VHA and Pivotal supported an expiry date of 30 June 2024, to align either with the current MTAS declaration, or the FTAS service declaration.¹⁵¹ VHA noted that a mid-term review would result in inefficient regulatory costs.¹⁵²

Macquarie Telecom and MNF supported a shorter FAD term of three terms, i.e. until June 2022, with a mid-term review to better assess the impact of 5G deployment and phasing out of 3G on MTAS pricing.¹⁵³

ACCC's preliminary view

The ACCC considered whether there are justifications for setting a shorter term of 3 years to enable a review of the MTAS price to take into account the rollout of 5G and the phasing out of 3G networks. In principle, this has the advantage of ensuring that the regulated price reflects changes in the efficient cost of providing the service.

However, the ACCC does not consider that any mid-term review of the MTAS price would be a straight-forward update of the MTAS price. In particular, the inclusion of 5G technology, if possible, would be a significant change and it is unlikely that any pricing update could be completed in a short timeframe. This defeats the purpose of having a mid-term review. In addition, as the ACCC is considering whether to conduct a holistic review of the MTAS and the FTAS in the future, a mid-term review for the MTAS is likely to be impractical and unnecessary.

For the above reasons, the ACCC's preliminary view is that the expiry date of the MTAS FAD should align with the expiry of the MTAS declaration, i.e. 30 June 2024.

¹⁴⁹ VHA Submission, p. 13.

¹⁵⁰ ACCC Discussion Paper, p. 23.

¹⁵¹ Telstra Submission, p. 5; VHA Submission, p. 14; Pivotal Submission, p. 8.

¹⁵² VHA Submission, p. 14.

¹⁵³ MNF Submission, p. 10; Macquarie Telecom Submission, p. 7.

Appendix A Legislative framework for final access determinations

This section sets out the relevant legislative framework in relation to FADs and the approach the ACCC will take in applying the legislative provisions.

Content of a FAD

Section 152BC of the CCA specifies what a FAD may contain. It includes, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the standard access obligations provided for in the CCA and terms and conditions of access to a declared service.

A FAD may make different provisions with respect to different access providers or access seekers.¹⁵⁴

Matters to consider when making a FAD

The ACCC must have regard to the matters specified in subsection 152BCA(1) of the CCA when making a FAD. These 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
- e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

The subsection 152BCA(1) matters mirrors 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.

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

The first matter for the ACCC to consider when making a FAD is 'whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services'.

¹⁵⁴ Subsection 152BC(5) of the CCA.

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.¹⁵⁵ This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for making FADs for the declared services.

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

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.¹⁵⁶

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

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

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

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

Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth — as well as entry and/or exit — strategies.¹⁵⁷

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.¹⁵⁸

Promoting competition

¹⁵⁵ 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.

¹⁵⁶ *Ibid*, p. 33.

¹⁵⁷ *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

¹⁵⁸ Subsection 152AB(2) of the CCA.

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 consider whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.¹⁵⁹

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

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

Any-to-any connectivity

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service. This must be the case whether or not the end-users are connected to the same telecommunications network.¹⁶⁰

The ACCC considers that this criterion is relevant to ensuring that the terms and conditions contained in FADs do not create obstacles for the achievement of any-to-any connectivity.

Economically efficient use of and economically efficient investment in infrastructure

In determining the extent to which terms and conditions are likely to encourage the economically efficient use of and economically efficient 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:
 - .1. the technology that is in use, available or likely to become available
 - .2. whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable
 - .3. the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks
 - .4. 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
 - .5. 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
 - .6. the risks involved in making the investment.¹⁶¹

¹⁵⁹ 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].

¹⁶⁰ Subsection 152AB(8) of the CCA.

¹⁶¹ Subsections 152AB(6) and (7A) of the CCA.

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 efficient 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 productive opportunities.

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

...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.¹⁶²

...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.¹⁶³

...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.¹⁶⁴

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

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

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment.¹⁶⁵ 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.¹⁶⁶

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.¹⁶⁷

¹⁶² *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

¹⁶³ *ibid.* at [164].

¹⁶⁴ *ibid.*

¹⁶⁵ ACCC, *Resolution of telecommunications access disputes — a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

¹⁶⁶ ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

¹⁶⁷ *Telstra Corporation Limited* [2006] ACompT 4 at [89].

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

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

The ACCC considers that this criterion requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.¹⁶⁸ 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.¹⁶⁹

People who have rights to currently use a declared service will generally use that service as an input to supply carriage services, or a service supplied by means of carriage service, to end-users.

The ACCC considers that this class of persons has an interest in being able to compete for the custom of end-users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.¹⁷⁰

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

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

The fourth matter requires that the ACCC consider ‘the direct costs of providing access to the declared service’ when making a FAD.

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

The ACCC interprets this 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.¹⁷¹ A contribution to indirect costs can also be supported by other criteria.

However, the matter does not extend to compensation for loss of any ‘monopoly profit’ that occurs as a result of increased competition.¹⁷²

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs criterion ‘is concerned with ensuring that the costs of providing the service are recovered’.¹⁷³ The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.¹⁷⁴

¹⁶⁸ *Telstra Corporation Limited* [2006] ACompT 4 at [91].

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

¹⁷² 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.

¹⁷³ *Telstra Corporation Limited* [2006] ACompT 4 at [92].

¹⁷⁴ *ibid.* at [139].

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

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 a FAD.

In the 1997 Access Pricing Principles, the ACCC stated:

This criterion requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.¹⁷⁵

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

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

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 a FAD.

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

The ACCC has previously stated in the context of model non-price terms and conditions 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.¹⁷⁶

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

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

The final 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 a FAD.

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.¹⁷⁷

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

¹⁷⁵ 1997 Access Pricing Principles, p. 11.

¹⁷⁶ ACCC, *Final determination — Model Non-price Terms and Conditions*, November 2008, p. 8.

¹⁷⁷ Access Dispute Guidelines, p. 57.

- 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.¹⁷⁸

Subsection 152BCA(2) — other eligible services

Subsection 152BCA(2) provides that, in making an FAD 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,¹⁷⁹ take into account:

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

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in making an FAD, does not consider the declared service in isolation, but also considers other relevant services.¹⁸⁰ 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.¹⁸¹

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

Subsection 152BCA(3) — any other relevant matters

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

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

¹⁷⁸ *Telstra Corporation Limited* [2006] ACompT at [94]–[95].

¹⁷⁹ Eligible service' has the same meaning as in section 152AL of the CCA.

¹⁸⁰ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

¹⁸¹ *ibid.*