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Consumer
Commission**

Mobile terminating access service

**Final access determination
discussion paper**

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List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
AER	Australian Energy Regulator
BAK	bill and keep
CCA	<i>Competition and Consumer Act 2010</i>
c-i-c	commercial in confidence
cpm	cents per minute
EC	European Commission
EU	European Union
FAD	final access determination
FLBU	forward-looking bottom-up
FNO	fixed network operator
FTM	fixed-to-mobile
LRIC	long run incremental cost
LTIE	long-term interests of end-users
MNO	mobile network operator
MTAS	mobile terminating access service
MTM	mobile-to-mobile
SIOs	services in operation
SLCs	special linkage charges
SMS	short message service
TSLRIC	total service long run incremental cost
TSLRIC+	total service long run incremental cost plus (organisational-level costs)
VHA	Vodafone Hutchison Australia

1 Introduction

1.1 Background

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

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

Domestic Mobile Terminating Access Service

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

Definitions

Where words or phrases used in this Declaration are defined in the *Competition and Consumer Act 2010*, or the *Telecommunications Act 1997* or the *Telecommunications Numbering Plan 1997*, they have the meaning given in the relevant Act or instrument.

Other definitions

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

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

Point of interconnection is a location which:

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

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

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

Under the *Competition and Consumer Act 2010* (the CCA), the ACCC may make an access determination relating to a declared service.¹ An access determination provides a set of terms and conditions that access seekers can rely on if they cannot agree on terms of access with an access provider. If the parties agree on terms of access, an access determination does not have any effect where it is inconsistent with an access agreement.² The ACCC must hold a public inquiry before it makes an access determination.³ Further information about the legislative requirements is at **Appendix A**.

On 23 May 2014, the ACCC commenced the public inquiry into making a final access determination (FAD) for the MTAS and released a position paper on non-price terms and

¹ Section 152BC of the *Competition and Consumer Act 2010* (the CCA).

² Section 152BCC of the CCA.

³ Section 152BCH of the CCA.

conditions, and supplementary prices for all declared telecommunications services (the Position Paper).⁴

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

This discussion paper begins consultation on the primary price terms that should apply to the MTAS in a new FAD. Primary prices are the charges for direct use of a declared service, whereas supplementary prices are additional charges incurred for using a declared service.

This discussion paper seeks stakeholder views on the issues the ACCC considers relevant to determine the primary price terms for mobile voice termination services and SMS termination services in the MTAS FAD. A number of questions are asked throughout the paper. We invite parties to address any of these questions and any other matter they consider relevant. Information about how to make a submission and a list of all questions is in **Chapter 9**.

After considering submissions received in response to this discussion paper and any other relevant information, the ACCC will reach a view on the appropriate pricing methodology for pricing the MTAS, which may or may not be different for voice termination and for SMS termination. The ACCC will consult further on implementing the proposed methodology to determine price terms for the MTAS. The process of consultation on the primary price terms for the MTAS FAD is outlined below.

1.2 Consultation on price terms

The ACCC envisages that the consultation process for determining the price terms for the MTAS FAD is likely to involve a number of stages during the FAD inquiry. At each stage, stakeholders will be afforded opportunities to provide submissions. In the event that a cost model is utilised to inform the regulated price for the MTAS, the ACCC will provide opportunities for stakeholders to contribute to the development of this model.

The following provides an indicative timeline for consultation on primary MTAS pricing:

- Discussion paper on pricing approaches (July 2014)

This discussion paper consults on how the ACCC should approach the pricing of the MTAS. It seeks views on the overall methodology that the ACCC should adopt and how this methodology should be implemented.
- ACCC's proposal on pricing methodology (around October 2014)

After considering stakeholders' views in response to the discussion paper, the ACCC is likely to issue a paper proposing the adoption of a preferred pricing methodology. Depending on the pricing methodology selected, the ACCC may need to engage an external consultant to develop a new pricing model. In such a case, the ACCC will also outline the process for engaging the external consultant, the likely timeframe in developing the model, and how stakeholders will be able to contribute to developing the model.

⁴ The declared telecommunication services are the six fixed line services (the unconditioned local loop service, line sharing service, public switched telephone network originating access, public switched telephone network terminating access, the wholesale line rental service, and the local carriage service) the domestic transmission capacity service, and the MTAS. Supplementary prices refer to additional charges incurred for using a declared service.

- Draft FAD report (around March/April 2015)

The timing of the release of the draft FAD report will depend on the complexity of the modelling exercise, if required. The ACCC expects that the draft FAD will set out the output of any model developed as well as the ACCC's preliminary views on the regulated prices for the MTAS informed by the output of the model. The draft FAD will also seek views on both the output of the model and the ACCC's proposed regulated prices.

- Final FAD report (around June/July 2015)

After considering stakeholders' views in response to the draft FAD report, the ACCC will issue a FAD report setting out the final regulated MTAS prices for the next FAD period. The ACCC expects that this FAD report will also incorporate the outcomes of the separate consultation on the non-price terms and conditions as they apply to the MTAS.

2 ACCC approach to pricing the MTAS

2.1 The ACCC's objectives

The ACCC's objectives for determining primary price terms in an access determination are guided by legislation. Under the CCA, the ACCC may make an FAD that specifies terms and conditions of access to a declared service, which must include terms relating to price or a method for ascertaining price.⁵ This enables the ACCC to determine pricing for a declared service which access seekers can rely on if they are unable to commercially agree on prices with the access provider.

The CCA requires the ACCC to have regard to a number of matters when making an FAD, including, amongst others:

- whether the FAD will promote the long-term interests of end-users (LTIE), which involves considering the achievement of the following objectives
 - promoting competition in markets for listed services
 - achieving any-to-any connectivity
 - encouraging the economically efficient use of, and the investment in, the infrastructure by which the listed services are supplied
- the legitimate business interests of a carrier or carriage service provider who supplies the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- the direct costs of providing access to the declared service.⁶

The ACCC recognises that the legislative criteria are independent and in some cases may be conflicting. It is possible that a particular price may promote competition in the short run but may not be consistent with the legitimate business interests of the access provider or encourage economically efficient use of, and investment in, infrastructure in the long run. The ACCC will need to balance these considerations in determining the terms and conditions of access to a declared service.

As noted in the recent MTAS declaration inquiry, the declaration of the MTAS is necessary to address the potential problems caused by MNOs' ongoing monopoly control over a bottleneck service. In particular, in the absence of regulation, MNOs will have the ability and incentive to set inefficiently high prices for access to mobile termination services.⁷

As such, the ACCC considers that an overall objective in this part of the FAD inquiry is to determine an efficient price for the provision of the MTAS in accord with criteria under the CCA.

The ACCC considers that a cost-based approach to pricing the declared service is generally consistent with these legislative criteria. When the price of the declared service reflects the cost of providing the service, it promotes allocative efficiency in downstream markets where the declared service is an essential input and promotes competition in these markets. By promoting of competition in these markets, a cost-based approach is also likely to promote

⁵ Sections 152BC(3) and (8) of the CCA.

⁶ Section 152BCA of the CCA. A full list of the legislative criteria is set out and explained in **Appendix A**.

⁷ ACCC, *Domestic Mobile Terminating Access Service Declaration Inquiry: ACCC's Final Decision*, June 2014, p. 5.

dynamic efficiency as carriers are more likely to invest in new technology and infrastructure to respond to changing consumer preferences and demand.

A cost-based approach also ensures that carriers are able to recover the direct cost of providing the service, thereby protecting their legitimate business interests. A cost-based price that takes into account a reasonable rate of return on invested capital also ensures that the carriers have ongoing incentives to invest in the infrastructure used to provide the declared service.

For these reasons, the ACCC considers that a cost-based pricing approach is likely to satisfy the legislative criteria under the CCA.

The ACCC recognises that there are number of different approaches that could be used to estimate the costs of supplying the MTAS. The ACCC considers that the key issues involved in identifying an appropriate cost-based approach for setting the MTAS are:

- the relevant costs of providing the MTAS that should be used to determine the regulated price
- how these relevant costs should be determined or estimated.

This discussion paper identifies a number of options to address these two issues and seeks views on these options, as well as other pricing methodologies that may be appropriate for the MTAS. These are discussed in **Chapter 4**.

2.2 Different pricing approaches for different services

Fixed-to-mobile vs mobile-to-mobile termination

Mobile voice termination services are an input to two retail services: calls from fixed networks to mobile networks (FTM calls) and calls between mobile networks (MTM calls).

During the previous MTAS FAD inquiry in 2011, the ACCC expressed the view that although FTM and MTM terminations are technically identical, the market dynamics in the retail mobile services market and fixed voice services market were different. The ACCC sought stakeholders' views as to whether FTM and MTM termination services should be regulated using different pricing approaches.⁸

At that time, the ACCC considered that the regulated MTAS pricing may have become less relevant for MTM termination than for FTM termination. As such, the ACCC proposed that a commercially negotiated bill and keep (BAK) arrangement could potentially be adopted for MTM termination.⁹ In response, stakeholders raised concerns in relation to different regulatory treatment of MTM and FTM termination services. In particular, there were concerns about the risk of arbitrage if the FTM termination rate was higher than MTM termination rate, as fixed network operators (FNO) may have attempted to circumvent FTM termination fees. Taking these concerns into account, the ACCC did not adopt a different pricing approach for FTM and MTM termination in the MTAS FAD 2011.

The BAK approach and its appropriateness for the MTAS are discussed in **Section 4.4**. Regardless of which pricing approach is adopted, the ACCC considers that concerns in relation to arbitrage are likely to remain as long as FTM and MTM termination are priced

⁸ ACCC, *Domestic Mobile Terminating Access Service (MTAS) – Public Inquiry to make an Access Determination: Discussion Paper*, June 2011, p. 7.

⁹ *ibid*, pp. 7, 19.

differently. As such, the ACCC's preliminary view is that a uniform pricing approach to FTM and MTM termination services is likely to be appropriate.

Voice termination vs SMS termination

The ACCC considers the objectives of voice and SMS termination service pricing are the same. As such, the ACCC's preliminary view is that a consistent pricing approach for voice and SMS termination services is likely to be appropriate.

However, the ACCC notes that international jurisdictions that have regulated SMS termination do not always adopt a consistent pricing approach when regulating voice and SMS termination. For example, in France, while the pure LRIC approach is used to price mobile voice termination, the regulated SMS termination rate is based on a fully distributed costs model. In contrast, an international benchmarking approach based on countries that use TSLRIC+ methodology has been adopted for both voice and SMS termination in New Zealand.¹⁰

The ACCC is open to views as to whether different pricing approaches should be adopted for voice and SMS terminations. In assessing this possibility, the ACCC considers a practical approach should be taken. For instance, if there is evidence of a relationship between the cost of providing SMS and the cost of providing voice termination, then it is possible to estimate the costs of voice termination first and then use that relationship to estimate the cost of SMS termination. Such an approach would be simple and cost effective and may be appropriate if the cost of providing SMS termination is very low.

Questions

1. Are there different factors that should be taken into account in determining the pricing approaches for FTM termination and MTM termination? Please give details and supporting evidence.
2. Are there different factors that should be taken into account in determining the pricing approaches for voice termination and SMS termination? Please give details and supporting evidence.

¹⁰ The pure LRIC and TSLRIC+ pricing approaches will be discussed in **Chapter 4**.

3 Mobile market changes since the 2011 MTAS FAD

The mobile market has changed considerably since the previous MTAS FAD inquiry in 2011. A number of these changes may impact the pricing of the MTAS. This chapter outlines the main developments the ACCC considers may be relevant to pricing mobile termination services and seeks stakeholder views on these issues.

3.1 Mobile voice and SMS services

Mobile phones have become ubiquitous in contemporary society, and more people use mobile phones to make phone calls than ever before, with approximately 31 million mobile phone services in operation (SIOs) in Australia making the mobile penetration rate in Australia around 135 per cent.¹¹

At this saturated level, growth in the number of mobile SIOs in Australia is slowing.¹² In the 2011–12 and 2012–13 financial years, mobile SIOs grew by 3 per cent, compared to an average growth rate of 12 per cent in the previous two years.¹³

While growth in mobile SIOs is slowing, more people are using their mobiles to make phone calls. Between June 2011 and June 2013, the number of voice call minutes originating from mobile phones grew 24 per cent (from 35.7 billion minutes to 44.4 billion minutes).¹⁴ At the same time, calls from fixed-line phones continue to fall, with fixed originating minutes falling 29 per cent.¹⁵ Further, the number of consumers who only use a mobile phone and have no fixed line phone service, has increased 45 per cent to 3.7 million Australians.¹⁶

The steady increase in voice traffic on mobile networks since the 2011 MTAS FAD inquiry is likely to have reduced the cost per minute of providing mobile voice termination services due to economies of scale.

In addition, SMS remains a popular service with Australian consumers. While Ovum predicts that SMS traffic will peak in 2014, Ovum figures show that the volume of SMS being sent is significant.¹⁷ For example, Ovum predicts that in 2014 Australians will send around 21 billion SMS.¹⁸ Further, it appears the number of Australians using SMS may still be growing. The ACMA has also found that the percentage of Australians using text messaging has increased between May 2012 and May 2013, from 81 to 84 per cent.¹⁹

¹¹ Australian Communications and Media Authority (ACMA), *Communications Report 2012–13*, p. 23. The mobile penetration rate is calculated based on a population of around 23 million as at June 2013. See Australian Bureau of Statistics, *3101.0 Australian Demographics Statistics*, Jun 2013, December 2013, viewed 26 May 2014.

¹² ACMA, *Communications Report 2012–13*, p. 23

¹³ ACMA, *Communications Report 2012–13*, p. 23.

¹⁴ ACCC, *ACCC telecommunications reports 2012–13*, January 2014, p. 17.

¹⁵ *ibid.*

¹⁶ See, ACMA, *Communications Report 2012–13*, p. 19

¹⁷ Ovum, *Mobile Messaging Traffic and Revenues Forecast: 2013–18*, September 2013.

¹⁸ *ibid.*

¹⁹ ACMA, *Communications Report 2012–13*, p. 23.

Relevance of the 4G network rollout

All three MNOs have launched their 4G mobile networks since the last MTAS FAD in 2011. The ACCC understands that 4G networks in Australia are not currently used to provide voice calls and traditional SMS. Therefore, the ACCC does not consider that the 4G networks are directly relevant to the provision of the MTAS at this point in time.

However, the ACCC notes that 4G technology may be indirectly relevant if the rollout of the networks have impacted on the cost of providing voice or SMS services on 2G or 3G networks in any way. For example, the 4G network may be relevant to the efficient use of networks that arises from the routing of data traffic over 4G networks that would otherwise have used other networks, such as the 3G networks. The ACCC seeks stakeholders' views as to the ways in which the rollout of the 4G networks may be relevant in determining the pricing of the MTAS even though voice and SMS services are not currently provided over these networks.

The ACCC understands that mobile voice and SMS services are expected to be provided in Australia using IP technologies on 4G networks in the future. The ACCC also understands that providing such services over a 4G network is expected to be at lower per unit cost than on a 3G network.

It is not yet clear when voice and SMS services will be offered over 4G networks. In submissions to the MTAS declaration inquiry, Optus indicated that it did not expect that voice services would be provided over 4G networks before the end of 2015 at the earliest.²⁰ Telstra indicated that voice services may be provided on 4G networks in the next three to five years.²¹

The ACCC considers that the expected timing of MNOs offering voice and SMS services over 4G networks is a relevant consideration in making the new MTAS FAD. For example, if the MNOs plan to make available voice and SMS services over their 4G networks within the current declaration period, it would have implications for the appropriate duration of provisions in the new MTAS FAD. The ACCC seeks stakeholders' views as how this consideration should be taken into account in the current inquiry.

3.2 Increased importance of mobile data services

The growth in the use of mobile data services has been the most significant development since the 2011 FAD Inquiry.²² The number of mobile data services increased 45.3 per cent between June 2011 and December 2013 to 26.3 million.²³ Further, the volume of data

²⁰ Optus, *Submission to the ACCC Discussion Paper – Review of the declaration of the domestic mobile terminating access service (MTAS)*, July 2013, p. 28.

²¹ Telstra Corporation Limited (Telstra), *Response to the Commission's Discussion Paper on the Review of the declaration of the Domestic Mobile Terminating Access Service*, 5 July 2013.

²² Here mobile data services refers to data services which are provided on a mobile network using a mobile handset, or other mobile wireless device such as a dongle, datacard or USB modem.

²³ In June 2011, the Australian Bureau of Statistics (ABS) reported that there were around 13.3 million mobile handset internet subscribers, and 4.7 million mobile wireless subscribers (dongle, datacard and USB modems). At December 2013, the ABS reported there were 20.3 million mobile handset internet subscribers, and 6.0 million mobile wireless subscribers. See, ACMA, *Communications Report 2012–13*, p. 24; and ABS, *8153.0 – Internet Activity, Australia*, December 2013, April 2014.

downloaded using mobile networks has also increased. Between June 2011 and December 2013, the volume of data downloaded using mobile networks increased by 184 per cent.²⁴

To respond to the increasing demand for data, MNOs have made significant investments in their 3G and 4G mobile networks. MNOs have focussed on rolling out 4G networks, but have also continued to invest in their 3G networks to increase coverage and capacity. Much of this investment has been to increase the quality of data services on these networks. For example, in late 2012, VHA announced that it had completed a \$1.7 billion upgrade of its 3G base stations.²⁵ In July 2012, Optus announced that it had upgraded mobile towers in metro and regional areas to improve 3G service coverage.²⁶ Telstra also reported that it has continued to invest in its 3G network.²⁷

As 4G networks are not yet used to provide mobile voice or SMS services, investments made in such networks are likely to be less relevant to pricing mobile termination services. 4G networks are currently only used to provide mobile data services, and mobile subscribers who have a 4G service are switched to 3G networks to make and receive voice calls and SMS. However, the ACCC recognises that 4G technologies are expected to impact the efficient cost of providing the MTAS in the future.

Overall, the increased use of mobile data services, and MNOs' investment in mobile networks to respond to increasing demand, are likely to mean that the portion of network costs that relates to providing mobile voice termination services is likely to have fallen since the 2011 MTAS FAD Inquiry.

3.3 Trends in termination pricing

As outlined in the previous section, changes in consumer use of mobile services and investments in technological advancements mean the cost of providing mobile termination services is likely to have fallen since the 2011 MTAS FAD inquiry.

Globally, mobile voice termination rates have been declining over the past decade with technological advances and greater demand in the use of mobile services. Ovum indicates that the decline has been most significant in Europe and South and Central America.²⁸ The average termination rate in Europe declined from 20.18 cents per minute (cpm) in January 2004 to 2.77 cpm in January 2014,²⁹ and Europe now has the lowest average voice termination rate in the world.³⁰

²⁴ The combined mobile handset and wireless data use in June 2011 was 22,844 tetrabytes, and in December 2013 was 65,053 tetrabytes. See, ABS, *8153.0 – Internet Activity, Australia, December 2013*, April 2014.

²⁵ See, Vodafone Hutchison Australia (VHA), *Vodafone activates 3G+ in time for smartphone season*, media release, 13 September 2012, <http://www.vodafone.com.au/doc/media-voda-ntwkrlse-3gplus.pdf>.

²⁶ See, Optus, *Optus strengthens 3G network and launches 4G business services*, 31 July 2012, <http://www.optus.com.au/aboutoptus/About+Optus/Media+Centre/Media+Releases/2012/Optus+stren+gthens+3G+network+and+launches+4G+business+services>.

²⁷ Telstra reported it invested \$1.2 billion on its mobile networks to improve coverage and capacity of both its 3G and 4G networks. See, Telstra, *Telstra Annual Report 2013*, 7 August 2013, p6.

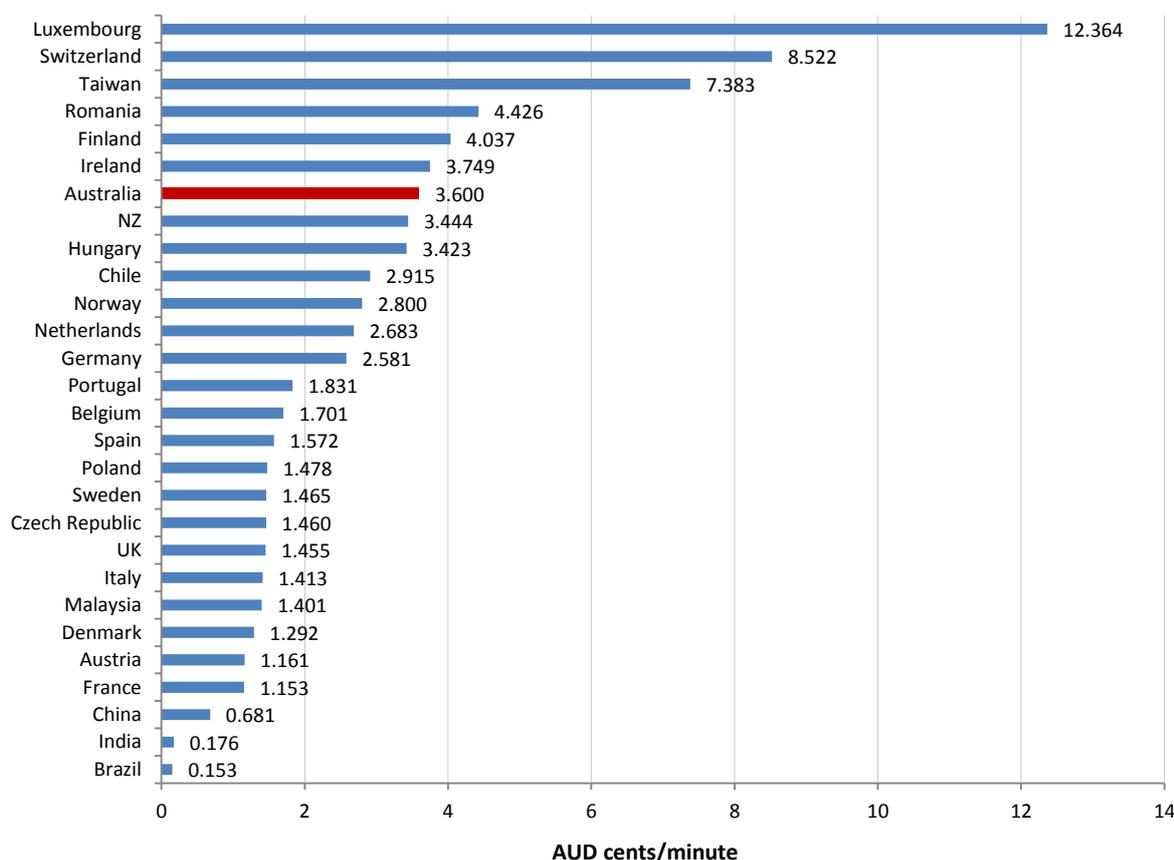
²⁸ Ovum, *The Global Regulation of Mobile Termination Rates*, 11 February 2014.

²⁹ See BEREC, *Termination Rates Benchmark Snapshot (as of January 2014)*, May 2014; Ofcom, *Mobile call termination market review 2014–18*, 4 June 2014, p. 14. The average mobile termination rates in Europe have been converted into Australian currency using RBA exchange rate on 26 June 2014.

³⁰ Ovum, *The Global Regulation of Mobile Termination Rates*, 11 February 2014.

The regulated rate for mobile voice termination has also fallen significantly in Australia from 21 cpm to 3.6 cpm since the MTAS was declared in 2004. However, as shown in the figure below, as of January 2014, the regulated mobile termination rate in Australia appears to be high in comparison to termination rates in many other countries.

Figure 3.1 – Mobile voice termination rates in selected countries as of January 2014



Source: BEREC, *Termination Rates Benchmark Snapshot (as of January 2014)*, May 2014; Ovum data;³¹ RBA data;³² XE Currency data.³³

Questions

3. How have developments in the mobile services market impacted on the efficient cost of providing the MTAS? Please give details and supporting evidence.
4. When will voice and SMS termination services be offered over 4G networks? How should the ACCC take this into account for the purposes of the MTAS FAD?

³¹ Ovum, *The Global Regulation of Mobile Termination Rates*, 11 February 2014.

³² RBA exchange rates as of 24 June 2014 were used to convert mobile termination rates in foreign currency into Australian currency for all countries except Chile and Brazil: <http://www.rba.gov.au/statistics/tables/index.html#exchange-rates>.

³³ XE Currency exchange rates as of 24 June 2014 were used to convert mobile termination rates in foreign currency into Australian currency for Chile and Brazil: <http://www.xe.com/currencyconverter/>.

4 Methodologies for pricing the MTAS

This chapter outlines a number of options that the ACCC could use to set prices for the MTAS based on approaches used previously in Australia and internationally. The ACCC seeks submissions from interested parties on these or any other pricing methodologies the ACCC should consider.

4.1 Previous ACCC approaches to pricing the MTAS

Between 2004 when the MTAS was declared, and 2011 when the current regulated mobile voice termination prices were determined, the ACCC set indicative prices for mobile voice termination services by applying total service long run incremental cost plus organisational-level costs (TSLRIC+) principles.

The ACCC set indicative prices in Pricing Principle Determinations in 2007 and 2009 by estimating the costs of a hypothetical efficient MNO providing the MTAS on a 2G network, using a cost model developed for the ACCC by Wik-Consult (the WIK Model).³⁴

In 2011, the ACCC set price terms for the MTAS in an MTAS FAD. These prices were to apply from 1 January 2012 to 30 June 2014. To determine these prices the ACCC did not model the TSLRIC+ of providing the MTAS. Instead, the ACCC assessed the efficient cost of providing the MTAS based on the WIK Model, industry developments and international estimates of the efficient cost of providing the MTAS.

These approaches have seen the price of the MTAS fall from 21 cpm in 2004 to 3.6 cpm in 2014, which will apply until a new regulated price is determined in a new MTAS FAD.

Table 4.1 – Mobile voice termination prices set by the ACCC

Time period	Rate (cpm)
1 July 2004 – 1 December 2004	21
1 January 2005 – 31 December 2005	18
1 January 2006 – 31 December 2006	15
1 January 2007 – 30 June 2007	12
1 July 2007 – 31 December 2011	9
1 January 2012 – 31 December 2012	6
1 January 2013 – 31 December 2013	4.8
1 January 2014 – 30 June 2014	3.6

Source: ACCC pricing decisions for the MTAS³⁵

³⁴ The WIK model estimated these costs using a variety of benchmarked European equipment prices. It modelled the costs of an MNO with a 25 per cent and 31 per cent market share, and assumed a three per cent data usage and a 94 per cent mobile penetration rate.

³⁵ ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS): Access Determination Explanatory Statement*, 7 December 2011; ACCC, *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, March 2009; ACCC, *MTAS Pricing Principles Determination 1 July 2007 to 31 December 2008: Report*, November 2007; ACCC, *Mobile Services*

The ACCC considers that the WIK Model is no longer an appropriate means of estimating the costs of providing mobile termination services because:

- the large majority of voice calls are now provided on 3G networks;
- data services make up a considerably larger portion of mobile services;
- there is greater mobile penetration.³⁶

The ACCC therefore does not propose to use the WIK Model to determine pricing for the MTAS in the current inquiry.

The ACCC has not previously priced SMS termination services. While SMS termination is not regulated as widely as voice termination, it is priced in a number of international jurisdictions. Table 4.2 provides an indication of regulated prices for SMS termination in a number of international jurisdictions.

Table 4.2 – Regulated SMS termination rates in selected countries as of January 2014

Countries	Regulated SMS termination rates (AUD cents/SMS)
India	0.04
New Zealand	0.06
China	0.17
Colombia	0.54
France	1.46
Denmark	1.56
Poland	1.74

Source: Ovum data;³⁷ RBA data;³⁸ XE Currency data.³⁹

The ACCC notes that these regulated SMS termination rates are significantly lower than the current commercially negotiated SMS termination rates charged by the MNOs in Australia.

4.2 Long run incremental costs (LRIC) methodologies

Regulators most commonly use long run incremental cost (LRIC) methodologies (including TSLRIC+ and pure LRIC) to price mobile termination services. For example, the ACCC has previously used a TSLRIC+ framework to set MTAS prices and New Zealand continues to use a cost concept similar to TSLRIC+. Most European Union (EU) countries have

Review: Mobile Terminating Access Service Final Decision on whether or not the Commission should extend, vary, revoke its existing declaration of the mobile terminating access service, June 2004.

³⁶ The cost estimates produced by the WIK model were also based on certain assumptions of network coverage and market shares of a hypothetical efficient operator at the time the model developed. The ACCC notes that these measures are likely to be different today.

³⁷ Ovum, *The Global Regulation of Mobile Termination Rates*, 11 February 2014.

³⁸ RBA exchange rates as of 24 June 2014 were used to convert mobile termination rates in foreign currency into Australian currency for all countries except Colombia:

<http://www.rba.gov.au/statistics/tables/index.html#exchange-rates>.

³⁹ XE Currency exchange rates as of 24 June 2014 were used to convert mobile termination rates in foreign currency into Australian currency for Colombia: <http://www.xe.com/currencyconverter/>.

historically used an equivalent cost concept to regulate mobile termination services, including the UK, which has been known as LRIC+. However, the use of pure LRIC approaches has increased in Europe following recommendations by the European Commission (EC) in 2009.⁴⁰

This section looks at TSLRIC, TSLRIC+ and pure LRIC pricing approaches. The starting point of all of these approaches is that the regulated price should be determined based on the long run incremental costs of providing the service. Long run incremental costs are costs over a specified 'increment' of the service being provided in the long run. The TSLRIC and pure LRIC concepts differ in terms of what this 'increment' is.

Under the pure LRIC approach, the relevant increment is defined narrowly as the wholesale termination service provided to access seekers. It includes only terminating traffic originating from access seekers' networks and does not include the MNO's own terminating traffic.

In contrast, under the TSLRIC approach, the relevant increment is more widely defined to include total network traffic, including the MNO's own terminating traffic. It also includes all other traffic that is generated using common network elements, such as originating traffic.

This treatment of the relevant increments means that TSLRIC generally allows the recovery of traffic-related costs that are common to the provision of termination services and other services, whereas the pure LRIC approach does not.

TSLRIC+ adds a mark-up over TSLRIC to allow the recovery of some organisational-level costs (which are also a type of common costs). These are costs that have no direct relationship with the provision of any particular services, but are necessary for the carrier to operate as a business (e.g. business overheads).^{41, 42} Pure LRIC also does not allow the recovery of these organisational-level costs.

Other things being equal, the costs estimated using a pure LRIC approach will be lower than the costs estimated under a TSLRIC approach, which themselves would be lower than the costs estimated under a TSLRIC+ methodology.

4.2.1 TSLRIC and TSLRIC+

The ACCC has previously adopted TSLRIC+ based pricing. The reasons that the ACCC has used TSLRIC+ pricing include:⁴³

- it encourages competition in telecommunications markets by promoting efficient entry and exit in relevant downstream markets
- it encourages economically efficient investment in infrastructure and provides the appropriate incentives for further investment in decision by access seekers to 'build' or 'buy'
- in the long run, TSLRIC+ based pricing provides for the efficient use of existing infrastructure, promoting allocative efficiency in the use of infrastructure

⁴⁰ European Commission, *Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile termination Rates in the EU (2009/396/EC)*, Official Journal of the European Union, L 124/67, 20 May 2009 (EC Recommendation 2009).

⁴¹ This cost concept is equivalent to concepts known as LRAIC or LRIC+ in Europe.

⁴² Organisational-level costs are common to the provision of all retail and wholesale activities of an MNO, and are not directly attributable to the provision of a particular service. An example of an organisation-level cost may be the cost incurred to operate an IT system used to support the business of an MNO.

⁴³ ACCC, *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, March 2009, p. 12.

- it provides incentives for access providers for to minimise the costs of providing access by using the most efficient technology available
- by allowing efficient access providers to fully recover the costs of producing the service, it promotes the legitimate business interests of access providers
- it protects the interests of those who have rights to use the MTAS.

However, the ACCC notes that there has been a shift away from TSLRIC+ type approaches in Europe. In 2009, one of the objectives of the European Commission (EC) was to harmonise the approach to pricing fixed and mobile termination rates, which led to its recommendations that pricing mobile termination rates should be priced using a pure LRIC approach.⁴⁴

In making this recommendation, the EC considered that the pure LRIC approach reflects the efficient cost of providing termination services. The EC observed that:⁴⁵

The further termination rates move away from incremental cost, the greater the competitive distortions between fixed and mobile networks and/or between operators with asymmetric market shares and traffic flows. Therefore it is justified to apply a pure LRIC approach whereby the relevant increment is the wholesale call termination service and which includes only avoidable costs.

In 2011, the UK telecommunications regulator, Ofcom, adopted the pure LRIC approach to replace the TSLRIC+ approach it had historically used when reviewing the regulation of mobile call termination. In doing so, Ofcom considered that the pure LRIC approach would maximise benefit to consumers as it better promotes sustainable competition, is economically efficient and is unlikely to raise material equity concerns.⁴⁶

Many of the arguments in favour of the pure LRIC approach involve a comparison between pure LRIC and TSLRIC+. These will be discussed in detail in relation to the pure LRIC approach in section 4.2.2.

Cost allocation

If the ACCC adopts a TSLRIC or TSLRIC+ approach, it will need to determine how common costs (traffic-related common costs and organisational-level costs) are to be allocated to the MTAS.

The WIK model previously used by the ACCC allocates these common costs in the following way:

- in relation to traffic-related common costs, the WIK model allocates some of these to the MTAS based on the proportion that MTAS traffic made of the total traffic generated by all services using common network elements⁴⁷
- in relation to organisational-level costs, the WIK model allocates some of these to the MTAS based on the equi-proportional mark-up (EPMU) approach.⁴⁸

⁴⁴ See EC Recommendation 2009.

⁴⁵ EC Recommendation 2009, L 124/69.

⁴⁶ Ofcom, *Wholesale mobile voice termination statement*, 15 March 2011, p. 168. See also Ofcom, *Mobile call termination market review 2015–18*, 4 June 2014, p. 89.

⁴⁷ WIK-Consult considered that for these common costs, the cost drivers are the minutes of traffic of various services for which the network elements are used to produce. Therefore, the allocation based on traffic minutes are in accordance with cost causation principles. See WIK-Consult, *Mobile Termination Cost Model for Australia*, January 2007, pp. 21, 88.

The ACCC is open to views from stakeholders as to the appropriate allocation method should a TSLRIC or TSLRIC+ pricing methodology be adopted.

Questions

5. Will the use of a TSLRIC or TSLRIC+ methodology to price mobile voice or SMS termination services promote the LTIE? Please explain your answer.
6. If a TSLRIC or TSLRIC+ methodology is used to price mobile voice or SMS termination services:
 - a) Which cost allocation method should be used for allocating traffic-related common costs?
 - b) Which cost allocation method should be used for allocating organisational-level costs?

4.2.2 Pure LRIC

As pure LRIC does not take into account traffic-related common costs or organisational-level costs, MNOs would not be able to achieve full cost recovery if all of its services were priced using a pure LRIC approach.

While a pure LRIC approach will lead to lower MTAS rates compared to TSLRIC or TSLRIC+, it could result in higher prices for other services offered by MNOs if service providers seek to recover traffic-related common costs or organisational costs through the prices of other services. The use of a pure LRIC approach to price the MTAS would also mean that an MNO's cost of terminating its own traffic (which would include traffic-related common costs and organisational-level costs) would be higher than the price it could charge access seekers for providing termination services.

As noted in the previous section, the EC has recommended pure LRIC be used to price mobile termination rates across the EU and this recommendation has been followed by many European regulators, including Ofcom in the UK. Ofcom recently proposed to continue to adopt the pure LRIC approach in reviewing the regulation of mobile termination.⁴⁹

Ofcom compared the pure LRIC approach with TSLRIC+ using a number of criteria, which are promoting efficiency, promoting competition and conferring benefits on end-users.⁵⁰ After comparing the mobile termination rates derived under both approaches, Ofcom found that there is no conclusive evidence that either approach is more likely to promote allocative or dynamic efficiency than the other.⁵¹ However, Ofcom considered that the pure LRIC approach better promotes competition amongst MNOs, and between MNOs and FNOs, because it results in lower mobile termination rates and that this would benefit end-users. Ofcom considered that higher mobile termination rates under TSLRIC+ would dampen competition because:

- the presence of on- and off-net retail price differences makes MNOs with more subscribers more attractive than those with fewer subscribers

⁴⁸ WIK-Consult considered that these are common costs for which cost drivers cannot be identified. See WIK-Consult, *Mobile Termination Cost Model for Australia*, January 2007, p. 21.

⁴⁹ Ofcom, *Mobile call termination market review 2015–18*, 4 June 2014.

⁵⁰ Ofcom, *Wholesale mobile voice termination statement*, 15 March 2011, p. 165.

⁵¹ *ibid*, pp. 170–175.

- higher mobile termination rates under TSLRIC+ would result in a retail price floor for voice calls that is higher than it would be under pure LRIC and this has a market-wide competition-dampening effect
- higher mobile termination rates may reduce the incentive for MNOs with fewer subscribers to compete for post-paid high-end end-users because they usually have high outbound to inbound calling ratios. This in turn leads to large out-payments for smaller MNOs.⁵²

Ofcom reached these conclusions after a detailed assessment of the impact of pure LRIC and TSLRIC+ pricing approaches on competition between MNOs and between MNOs and FNOs. In the absence of a similar assessment, the ACCC does not consider that the conclusions of Ofcom could directly apply in Australia, particularly in light of the significant differences in market structure and dynamics between Australia and the UK.

The ACCC also notes that in considering allocative efficiency, Ofcom considered that prices set at short run marginal cost lead to efficient outcomes as they are closer to prices found in a competitive market. Ofcom then stated that pure LRIC is a better approximation of short run marginal cost than TSLRIC+.⁵³ In contrast, the ACCC's 1997 Access Pricing Guide favoured a concept of long-run marginal cost in considering allocative efficiency.⁵⁴

Further, the legislative obligations under the CCA require the ACCC to consider issues that may not have been considered by Ofcom. In particular, the CCA requires the ACCC to consider the legitimate business interests of carriers and carriers' investments in infrastructure.⁵⁵ As a result, the analysis and conclusions drawn by Ofcom about the UK mobile termination market may have limited application to the ACCC's assessment of MTAS pricing in Australia.

The ACCC seeks views on whether it should adopt a pure LRIC approach to pricing the MTAS.

Questions

7. Will the use of a pure LRIC methodology to price mobile voice or SMS termination services promote the LTIE? Please give reasons.

8. If a pure LRIC methodology is adopted, are there risks that the prices of other services offered by MNOs may increase? If so, how significant are these risks? Please give reasons and any supporting evidence.

4.2.3 Options for implementing a LRIC methodology

There appear to be two ways to implement an LRIC methodology for the MTAS in practice. This section discusses using a forward-looking bottom-up (FLBU) model and an actual costs model.

Forward-looking bottom-up model

⁵² *ibid.*, p. 184.

⁵³ *ibid.*, p. 170.

⁵⁴ ACCC, *Access Pricing Principles – Telecommunications: a guide*, July 1997, p. 30.

⁵⁵ Section 152BCA(1)(b) of the CCA.

LRIC methodologies are often implemented using FLBU models.⁵⁶ These models estimate the cost of providing a service by a hypothetical efficient provider. Under such a model, a provider is assumed to have an efficient network structure which utilises the best-in-use technology to provide its services.

If such a model were used to price the MTAS, all network components necessary to provide the service and how they were used would be clearly defined. This enables changes in costs over time to be identified.

A FLBU model does not rely on carrier-specific information and does not reflect the actual cost structure of a specific carrier. It produces an estimate that reflects the efficient cost of providing a service by a hypothetical operator. As such, this approach creates incentives for MNOs to provide their services efficiently.

While the 2007 WIK model was a FLBU model the ACCC considers that this model is no longer appropriate to price the MTAS.⁵⁷ Therefore, if the ACCC were to adopt FLBU modelling of MTAS prices, a new model would be needed to estimate MTAS prices.

Developing a new cost model would involve identifying costs and cost allocation principles that are relevant to providing the MTAS in the Australian market. The ACCC will likely engage an external consultant. These inputs and the resulting model would be subject to public consultation and refinement in consultation with stakeholders. As such, a new cost model will be time and resource intensive for the ACCC and stakeholders.

Actual costs

Another option for implementing a LRIC approach is to use the actual costs of providing the MTAS in Australia. There are two ways in which this can be done to price the MTAS.

First, the actual costs to MNOs of providing the MTAS can be used in top-down models. Top-down models, in contrast to FLBU models, use the actual network architecture and configurations used by an MNO to establish the cost of providing the service. With this approach, all costs incurred by the MNO, whether efficiently or inefficiently, are included.

There are a number of issues that could potentially arise using this approach. Firstly, as it accounts for all actual costs incurred, it provides little incentive for MNOs to increase efficiency in providing the MTAS. Secondly, it relies on carrier-specific information, which may lead to difficulties in reconciling data provided by different MNOs, as they are likely to allocate costs differently.

Alternatively, actual costs may be used to cross check the output produced under a FLBU model. The use of actual costs in this way can ensure that no relevant costs of providing the service are ignored.⁵⁸ A reasonable and transparent reconciliation process may make the results from an FLBU model more reliable, as it will help mitigate the effects of discrepancies between the costs of a hypothetical efficient operator and an actual operator.

Using actual costs to inform the development of regulated prices will require considerable information from MNOs, much of which will be commercially sensitive. The use of such information to inform the development of regulated prices will require consultation with stakeholders. Stakeholders' confidential information will need to be protected, while at the same providing an opportunity for stakeholders to consider and comment on important information used to inform regulated prices. This process is also likely to be time and resource intensive.

⁵⁶ For example, the 2007 WIK model is a FLBU model based on the TSLRIC+ framework.

⁵⁷ See **Section 4.1**.

⁵⁸ See WIK-Consult, *Mobile Termination Cost Model for Australia*, January 2007, p. 6.

Questions

9. If the ACCC adopts a LRIC pricing methodology (i.e. TSLRIC, TSLRIC+ or pure LRIC), should it use a FLBU or actual costs model? Please give reasons.

10. If the ACCC uses an FLBU model, should actual costs be used to cross check the outputs from the model? If so, how would any discrepancies be resolved in determining the costs to be used in setting prices?

4.3 International benchmarking

The ACCC notes that where an appropriate cost model is not available, some jurisdictions, such as New Zealand, have adopted an international benchmarking approach for regulated pricing of mobile termination. A benchmark based on prices in other jurisdictions that have adopted a cost-based methodology may provide an approximation of cost-based prices for mobile termination services in Australia.

The ACCC understands that, in this context, there are two main types of benchmarks that can be used: a benchmark of actual mobile termination prices adopted by regulators in other jurisdictions, or a benchmark of the costs of providing mobile termination estimated in other jurisdictions.

The ACCC's preliminary view is that the actual regulated termination prices adopted in other jurisdictions will reflect country-specific policy, regulatory and other considerations that may not reflect the cost of providing the service. As a result it may not be appropriate to benchmark against these rates to determine efficient prices for the MTAS in Australia.

On the other hand, the ACCC considers that benchmarking the costs of providing mobile termination services may, subject to the comments below, be more useful for approximating cost-based prices for mobile termination services in Australia.

The effectiveness of an international benchmarking methodology depends on developing an appropriate set of benchmark jurisdictions, taking into account a range of technological, economic and regulatory factors.

One factor the ACCC is likely to consider important in determining which jurisdictions to include is the pricing approach used in the potential jurisdictions. For example, it may be appropriate to only include jurisdictions that use a TSLRIC+ (or equivalent) cost model if the ACCC considers that a TSLRIC+ approach is more appropriate to price the MTAS than other pricing approaches.

There are also a number of factors that influence the cost of providing termination services. As these factors may be different in Australia compared to other jurisdictions, the ACCC will need to take these factors into account in selecting the appropriate jurisdictions for the benchmarking exercise and/or in making appropriate adjustments to the cost estimates in other jurisdictions. For example, network usage and scale and population density are likely to directly impact the costs of providing termination services. Unlike many countries in Europe, Australia is a sparsely populated country, with the cost of deploying a national network much higher than in a small densely populated country.

While a dedicated cost model specific to the MTAS in Australia would likely provide the most accurate estimate of the cost of providing the MTAS, the ACCC considers that choosing a cost-effective method such as international benchmarking may be justified for two reasons.

Firstly, as the MTAS rate is currently low and the cost of providing the MTAS is likely to have fallen further, the difference between the outputs of a cost model and an international benchmark study may be minimal.

Secondly, depending on how soon mobile voice and SMS services become available on 4G networks in the future, the utility of a cost model based on the current 3G network, while still relevant to some extent, may become limited.

For these reasons, the ACCC seeks views from stakeholders as to whether in the current circumstances, an international benchmark methodology is appropriate for pricing the MTAS.

Questions

11. Would regulated pricing for voice termination and SMS termination in Australia be assisted by:

(a) an international benchmarking study of regulated mobile termination prices adopted in other jurisdictions,

(b) an international benchmarking study of mobile termination costs in other jurisdictions?

Please give reasons.

12. What are the important factors that need to be taken into account in developing a robust and effective benchmarking study?

13. Is it appropriate to restrict the benchmark set to jurisdictions that have adopted a particular pricing methodology, and if so, which methodology would be appropriate? Please give reasons.

4.4 Bill and keep

Another approach to pricing mobile voice and SMS termination services would be to adopt bill and keep (BAK) arrangements. Under BAK arrangements, MNOs would not pay each other for the exchange of mobile traffic and payments for termination services would effectively be waived.

BAK regimes are thought to be simple and may reduce the regulatory burden associated with determining and implementing a regulated termination rate. A BAK regime may also reduce the costs of collecting and reconciling large volumes of call data required under the current interconnection charging regime.⁵⁹

In general BAK arrangements are considered appropriate where traffic between networks is relatively balanced. This is because where traffic is balanced, the net payments between MNOs are close to zero. As there are no charges for termination under a BAK arrangement, BAK would have little impact on MNOs' interconnection balances.

However, it is worth noting that in the recent MTAS declaration inquiry, the ACCC found that neither MTM voice traffic nor SMS traffic were so closely balanced that termination rates did not have an impact on downstream retail markets. BAK arrangements may therefore be less appropriate for the MTAS in the Australian market.

The ACCC also notes that even if traffic is balanced, a BAK arrangement may not be ideal. This is because termination rates reflect the perceived marginal cost to an MNO of providing

⁵⁹ ACCC, *Domestic Mobile Terminating Access Service (MTAS): Public Inquiry to make an Access Determination Discussion Paper*, June 2011, p. 19.

off-net mobile calls and SMS to its retail customers. A termination rate of zero would mean that the perceived marginal cost to the MNO would be lower than the actual cost of providing the termination services. In such a case, the MNO may set retail prices that are inefficiently low and lead to an over-use of mobile infrastructure, and may lead to costs being recovered in the prices of other services.⁶⁰

There may, however, be merit in a BAK arrangement where the actual costs of providing the MTAS are close to zero. In such a case, a BAK arrangement would simply reflect the low cost of providing the MTAS. In this case, a BAK approach would be justified according to costs, rather than the balance of traffic.

The ACCC considered a BAK arrangement for MTM voice termination in the MTAS FAD 2011 inquiry. The ACCC consulted on a proposal for MNOs to commercially negotiate a BAK arrangement for mobile-to-mobile calls between them, but ultimately did not adopt this approach.

Stakeholders expressed concerns about the risk of arbitrage if MTM and FTM termination were treated differently. Arbitrage arises when FNO direct FTM calls through a mobile network in order to avoid the MTAS charge and take advantage of the BAK arrangement for MTM terminations.⁶¹

Stakeholders also expressed concerns about difficulties in commercially agreeing a BAK arrangement. More fundamentally, stakeholders expressed a general preference for cost-based pricing for the MTAS.

As a result of these industry concerns, the ACCC did not pursue a BAK approach in the MTAS FAD 2011 inquiry.⁶²

Questions

14. Will a BAK arrangement for MTM voice or SMS termination services promote the LTIE? Please give reasons.

4.5 Other options for an MTAS pricing methodology

While the ACCC considers that the above options are the most relevant to pricing the MTAS, the ACCC is open to views from stakeholders on other possible pricing methodologies that could potentially be used or different mechanisms that could be used to implement the relevant pricing methodology.

The ACCC recognises that developing a new cost model and obtaining actual cost information from MNOs will be time and resource intensive. The ACCC also notes that the

⁶⁰ See Laffont, J.J. and Tirole, J., *Competition in Telecommunications*, 2000, p. 190. Note that their argument is based on the assumption of linear pricing. Linear pricing is where the customer pays a fixed amount (say 30 cents) for each SMS or each call. Non-linear pricing is any other pricing scheme, such as unlimited SMS packages. In practice, the pricing structure of retail mobile packages are complicated and varied and non-linear pricing is commonly observed.

⁶¹ In this context, arbitrage arises when fixed network operators route FTM calls through a mobile network in order to evade the MTAS charge and take advantage of the BAK arrangement for MTM terminations. See ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS): Draft Access Determination Explanatory Statement*, 23 September 2011, p. 17

⁶² ACCC, *Domestic Mobile Terminating Access Service (MTAS): Public Inquiry to make an Access Determination Discussion Paper*, June 2011, pp. 7–8.

current level of regulated MTAS prices – 3.6 cents per minute for voice termination – is low and, as noted earlier, the efficient costs of providing the MTAS are likely to fall further. Similarly, as SMS termination requires significantly less network resources than voice termination, the efficient costs of providing SMS termination are likely to be even lower.

There is therefore a need to balance implementing a sufficiently robust methodology for regulated MTAS pricing with the regulatory burden that may be imposed on stakeholders.

In the interests of minimising the regulatory burden of developing a new cost model and obtaining relevant information from stakeholders, the ACCC invites views on ways to implement an approach to regulated prices for the MTAS which is in the LTIE, while providing sufficient robustness, transparency and certainty to industry and minimising the regulatory impost involved.

Questions

15. Are there other options for determining the price of mobile voice termination and SMS termination that the ACCC should consider? If so, please explain why.

5 Fixed-to-mobile pass-through

In the 2011 MTAS FAD inquiry, some stakeholders raised concerns that retail prices for calls from fixed networks to mobile networks (FTM calls) remained high despite reductions in regulated MTAS rates. Stakeholders argued that this benefited Telstra to the detriment of consumers and other MNOs. Stakeholders consequently called for Telstra to be subject to a requirement for MTAS rate reductions to be passed through to retail FTM prices.⁶³

Similar concerns were raised during the 2014 MTAS declaration inquiry. VHA again submitted that reductions in MTAS rates had been retained by Telstra not passed onto its FTM end-users.⁶⁴

In the 2014 MTAS Declaration Final Decision, the ACCC explained that it had observed signs that lower MTAS rates have been passed through to some extent to end-users in the form of lower retail FTM call rates.⁶⁵

The ACCC examined changes in Telstra's average FTM call rates and compared them with reductions in MTAS rates from 2005–06 to 2012–13.⁶⁶ These are shown in the table below.

Table 5.1: Average FTM prices and MTAS rates from 2005–06 to 2012–13

	2005–06	2006–07	2007–08	2008–09	2009–10	2010–11	2011–12	2012–13	Total
Change in MTAS rate (cents/minute)	-3.00	-3.00	-4.50	0.00	0.00	0.00	-1.50	-2.10	-14.10
Change in average retail FTM call price (cents/minute)	-2.00	-0.93	0.51	4.46	-4.00	-2.66	-0.96	-6.20	-11.77

Source: ACCC, *Imputation testing and non-price terms and conditions reports*, from September quarter 2004 to June quarter 2013.

As the table above shows, Telstra's average retail FTM call rate have consistently fallen, other than in the 2007–08 and 2008–09 periods. The reductions in Telstra's average FTM call rates have been, in most years and in total, less than the reductions in MTAS rates over the period.

The ACCC also examined Telstra's retail FTM revenues to take account of the fact that Telstra only incurs MTAS charges for calls made to other mobile networks (off-net FTM calls).⁶⁷ As explained in the 2014 MTAS Declaration Final Decision, the ACCC found that accumulated reductions in FTM call revenue have been greater than the accumulated

⁶³ Vodafone Hutchison Australia (VHA), *Declaration of the Domestic Mobile Terminating Access Service: Response to the ACCC*, 5 July 2013, pp. 6–7; and Australian Communications Consumer Action Network, *Review of the declaration of the Domestic Mobile Terminating Access Service: ACCAN Submission to the ACCC*, July 2013, pp. 5–6.

⁶⁴ ACCC, *Domestic Mobile Terminating Access Service Declaration Inquiry: ACCCs Final Decision*, June 2014, p. 5.

⁶⁵ *ibid*, pp. 29–32.

⁶⁶ These calculations have used 2004–05 as the base year.

⁶⁷ To take into account changes in total call volume each year, the changes in FTM revenues have been calculated by multiplying the changes in average FTM call price per minute by the total call minutes in each year.

reductions in the MTAS rate.⁶⁸

The ACCC recognises that a review of average FTM prices over time is not definitive of the extent to which savings from falling regulated rates are passed on in retail prices and services. There will, for example, be other factors which affect the level of retail FTM prices, such as the costs of origination and transmission need to provide FTM services.

The ACCC also recognises that Telstra may have passed through reductions in the MTAS rate in other ways. As FTM services are purchased in a bundle with other fixed voice services, the reductions in the MTAS rate could be reflected in the prices of other elements of these bundles.

In this respect, in the MTAS FAD 2011 inquiry⁶⁹, the ACCC noted the Australian Competition Tribunal's view that access seekers should have the flexibility to determine the form in which cost reductions are passed on to the retail fixed services market, and that a pass-through mechanism that focussed on price may not be in the LTIE if it limits a service provider's ability to flexibly determine the way it passes on its costs savings.⁷⁰

In deciding not to introduce a mandatory pass-through requirement in the MTAS FAD 2011, the ACCC agreed with the Tribunal's comments, and also noted that it is possible for parties to circumvent a mandated pass-through obligation by having access agreements with terms and conditions that depart from the terms of an FAD.⁷¹

The ACCC invites stakeholder views and evidence on the extent that pass-through has occurred, as well as the merits of a mandatory pass-through requirement.

Questions:

16. To what extent have reduced regulated MTAS rates been passed-through to retail prices for fixed to mobile calls? Please provide evidence.

17. Should integrated operators (i.e. operators of both mobile and fixed networks) be subject to a mandated pass-through of MTAS reductions? If so, how would this be implemented? Please provide reasons for your answer, including by reference to the LTIE.

⁶⁸ See ACCC, *Domestic Mobile Terminating Access Service Declaration Inquiry: ACCCs Final Decision*, June 2014, p. 30.

⁶⁹ ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS): Access Determination Explanatory Statement*, 7 December 2011, p. 35; See also *Vodafone Network Pty Limited & Vodafone Australia Limited* [2007] ACompT 1 (11 January 2007), [289]–[290].

⁷⁰ *Application by Vodafone Network Pty Ltd and Vodafone Australia Limited* [2007], ACompT 1, [289]–[290].

⁷¹ ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS): Access Determination Explanatory Statement*, 7 December 2011, p. 35.

6 Transitional arrangements

In previous MTAS pricing decisions, the ACCC has implemented the move to significantly lower regulated prices by way of incremental step changes over a period of time in order to smooth the transition to the new regulated charges. This was done with a view to promoting industry certainty and stability.

As noted above, on the basis of the cost information currently available to the ACCC, future regulated prices for mobile voice termination and SMS termination are likely to be lower than current regulated and commercial rates. In line with previous approaches, there may be merit in considering the circumstances that might warrant any transitional arrangements for the introduction of the new mobile voice and SMS termination rates and the form that such arrangements might take.

Questions:

18. What, if any, transitional arrangements should apply to potentially lower voice termination and SMS termination rates? Should there be different implementation times for potential reductions in regulated voice termination and SMS termination? Please give reasons, including by reference to the LTIE.

7 Duration of regulated terms and conditions

Under the CCA, the ACCC must include an expiry date in an access determination for a declared service. The expiry date should align with the expiry of the associated declaration, unless there are circumstances that warrant a different expiry date.⁷²

The MTAS declaration expires on 30 June 2019 which suggests a new MTAS FAD should also apply until that time.

However, the ACCC recognises that the mobile services industry is in a state of transition, particularly in relation to the deployment of 4G services for mobile voice termination and SMS termination. The ACCC therefore invites views on an appropriate regulatory period for a new MTAS FAD, including in relation to appropriate commencement and expiry dates for regulated terms for mobile voice termination and SMS termination.

Questions:

19. What is an appropriate regulatory period for primary prices relating to mobile voice termination and for SMS termination?

20. Should there be different commencement and expiry dates for mobile voice termination and SMS termination?

⁷² Subsection 152BCF(6) of the CCA.

8 Non-price terms and conditions for the MTAS FAD

As noted in **Chapter 1**, the ACCC is undertaking a separate consultation on the non-price terms and conditions and supplementary prices for all the declared services, including the MTAS.⁷³ This consultation is considering:

- non-price terms and conditions – including the appropriate principles for determining non-price terms and conditions to be included in FADs, whether certain non-price terms and conditions should be consistent across some or all of the declared services, and any specific non-price terms and conditions that should be included in FADs
- supplementary prices – including how to set connection and special linkage charges (SLCs) and other facilities access service charges.

Stakeholders are invited to refer, and make submissions to, that consultation on issues that do not relate to the primary price terms for the MTAS, which are covered by this paper. The ACCC will consider the submissions to the non-price terms and conditions and supplementary prices consultation, when developing the non-price terms and conditions, and any supplementary prices that may be considered necessary, for the MTAS FAD.

⁷³ ACCC, *Telecommunications Final Access Determination inquiries—non-price terms and conditions and supplementary prices – Position paper*, May 2014.

9 Submissions and list of questions

Submissions to this discussion paper will be accepted until **29 August 2014**.

All submissions received will be considered public and posted on the ACCC website, unless indicated otherwise. If you wish to make a submission containing commercial-in-confidence material to the inquiry, you should submit both a confidential and public version of the submission. The confidential version should clearly identify any commercial-in-confidence material, and the public version should also indicate where confidential information has been redacted.

The ACCC and AER general policy on the collection, use and disclosure of information is set out in the *ACCC/AER information policy*.⁷⁴

In addition, in April 2014, the ACCC published a guideline on the process parties should follow when submitting confidential information to the ACCC's communications inquiries.⁷⁵

Both the general guide and communications guideline are available on the ACCC website.

The ACCC prefers to receive text searchable electronic copies of submissions in either PDF or Microsoft Word format.

Please send submissions to MTASFADInquiry@acc.gov.au.

9.1 Consolidated list of questions

1. Are there different factors that should be taken into account in determining the pricing approaches for FTM termination and MTM termination?
2. Are there different factors that should be taken into account in determining the pricing approaches for voice termination and SMS termination?
3. How have developments in the mobile services market impacted on the pricing of the MTAS? Please give details and supporting evidence.
4. When will voice and SMS termination services be offered over 4G networks? How should the ACCC take this into account for the purposes of the MTAS FAD?
5. Will the use of a TSLRIC or TSLRIC+ methodology to price mobile voice or SMS termination services promote the LTIE? Please explain your answer.
6. If a TSLRIC or TSLRIC+ methodology is used to price mobile voice or SMS termination services:
 - a) Which cost allocation method should be used for allocating traffic-related common or costs?
 - b) Which cost allocation method should be used for allocating organisational-level costs?
7. Will the use of a pure LRIC methodology to price mobile voice or SMS termination services promote the LTIE? Please give reasons.

⁷⁴ ACCC and AER, *Information Policy*, June 2014 available at <http://acc.gov.au/publications/acc-aer-information-policy-collection-and-disclosure-of-information>.

⁷⁵ ACCC, *Communications inquiries: submitting confidential material*, 3 April 2014 available at: <http://www.acc.gov.au/publications/communications-inquiries-submitting-confidential-material>.

8. If a pure LRIC methodology is adopted, are there risks that the prices of other services offered by MNOs may increase? If so, how significant are these risks? Please give reasons and any supporting evidence.
9. If the ACCC adopts a LRIC pricing methodology (i.e. TSLRIC, TSLRIC+ or pure LRIC), should it use an FLBU or actual costs model, or some combination of the two? Please give reasons.
10. If the ACCC uses a FLBU model, should actual costs be used to cross check the outputs from the model? If so, how would any discrepancies be resolved in determining the costs to be used in setting prices?
11. How will regulated pricing for voice termination and SMS termination in Australia be assisted by:
 - (a) an international benchmarking study of regulated mobile termination prices adopted in other jurisdictions,
 - (b) an international benchmarking study of mobile termination costs in other jurisdictions?Please give reasons.
12. What are the important factors that need to be taken into account in developing a robust and effective benchmarking study?
13. Is it appropriate to restrict the benchmark set to jurisdictions that have adopted a particular pricing methodology, and if so, which methodology would be appropriate? Please give reasons.
14. Will a BAK arrangement for MTM voice or SMS termination services promote the LTIE? Please give reasons.
15. Are there other options for determining the price of mobile voice termination and SMS termination that the ACCC should consider? If so, please explain why.
16. To what extent have reduced regulated MTAS rates have been passed-through to retail prices for fixed to mobile calls? Please provide evidence.
17. Should integrated operators (i.e. operators of both mobile and fixed networks) be subject to a mandated pass-through of MTAS reductions? If so, how would this be implemented? Please provide reasons for your answer, including by reference to the LTIE.
18. What, if any, transitional arrangements should apply to potentially lower voice termination and SMS termination rates? Should there be different implementation times for potential reductions in regulated voice termination and SMS termination? Please give reasons, including by reference to the LTIE.
19. What is an appropriate regulatory period for primary prices relating to mobile voice termination and for SMS termination?
20. Should there be different commencement and expiry dates for mobile voice termination and SMS termination?

Appendix A – Legislative framework for making 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 an FAD

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

An FAD may make different provisions with respect to different access providers or access seekers.⁷⁶

Fixed principles provisions

An FAD may contain a fixed principles provision, which allows a provision in an FAD to have an expiry date after the expiry date of the FAD.⁷⁷ Such a provision would allow the ACCC to 'lock-in' a term so that it would be consistent across multiple FADs.

Varying an FAD

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

A fixed principles provision cannot be varied or removed unless the FAD sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.⁷⁸

Commencement and expiry provisions

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

AN FAD may be backdated up to 1 January 2011.⁷⁹

AN FAD must have an expiry date, which should align with the expiry of the declaration for that service unless there are circumstances that warrant a different expiry date.⁸⁰

Criteria to consider when making an FAD

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

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

⁷⁶ Subsection 152BC(5) of the CCA.

⁷⁷ Section 152BCD of the CCA.

⁷⁸ Subsection 152BCN(4) of the CCA.

⁷⁹ Subsections 152BCF(2) and (2A) of the CCA.

⁸⁰ Subsection 152BCF(6) of the CCA.

- d) the direct costs of providing access to the declared service
- e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

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

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

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

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

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

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

The ACCC has published a guideline explaining what it understands by the phrase 'long-term interests of end-users' in the context of its declaration responsibilities.⁸¹ This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for making FADs for the declared fixed line services.

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

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.⁸²

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

⁸¹ 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.

⁸² *ibid.*, p. 33.

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.⁸³

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.⁸⁴

9.1.1.1.1 Promoting competition

In assessing whether particular terms and conditions will promote competition, the ACCC will analyse the relevant markets in which the declared services are supplied (retail and wholesale) and consider whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.⁸⁵

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.

9.1.1.1.2 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.⁸⁶

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.

⁸³ *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

⁸⁴ Subsection 152AB(2) of the CCA.

⁸⁵ 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].

⁸⁶ Subsection 152AB(8) of the CCA.

9.1.1.1.3 Efficient use of and investment in infrastructure

In determining the extent to which terms and conditions are likely to encourage the economically efficient use of and investment in infrastructure, the ACCC must have regard to:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
- the technology that is in use, available or likely to become available
- whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and
- the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the NBN) by which services are, or are likely to become, capable of being supplied, and
- the risks involved in making the investment.⁸⁷

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

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

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

...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.⁸⁸

...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.⁸⁹

⁸⁷ Subsections 152AB(6) and (7A) of the CCA.

⁸⁸ *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

⁸⁹ *ibid.* at [164].

*...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.*⁹⁰

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

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

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment.⁹¹ 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.⁹²

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.⁹³

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

The third criterion requires the ACCC to consider ‘the interests of all persons who have the right to use the service’ when making an 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.⁹⁴ 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.⁹⁵

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.⁹⁶

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

⁹⁰ *ibid.*

⁹¹ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

⁹² ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

⁹³ *Telstra Corporation Limited* [2006] ACompT 4 at [89].

⁹⁴ *Telstra Corporation Limited* [2006] ACompT 4 at [91].

⁹⁵ *ibid.*

⁹⁶ *ibid.*

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

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

The ACCC interprets this criterion, and the use of the term ‘direct costs’, as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal’s approach in an undertaking decision.⁹⁷ A contribution to indirect costs can also be supported by other criteria.

However, the criterion does not extend to compensation for loss of any ‘monopoly profit’ that occurs as a result of increased competition.⁹⁸

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.’⁹⁹ 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.¹⁰⁰

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

The fifth criterion requires that the ACCC consider ‘the value to a party of extensions, or enhancements of capability, whose cost is borne by someone else’ when making an 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.¹⁰¹

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 criterion requires the ACCC to consider ‘the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility’ when making an 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.

⁹⁷ *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

⁹⁸ 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.

⁹⁹ *Telstra Corporation Limited* [2006] ACompT 4 at [92].

¹⁰⁰ *ibid.* at [139].

¹⁰¹ 1997 Access Pricing Principles, p. 11.

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

*...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.*¹⁰²

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

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

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

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.¹⁰³

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

retail services provided by access seekers using the access provider’s services or by the access provider in competition with those access seekers, and

the telecommunications networks and infrastructure used to supply these services.¹⁰⁴

Subsection 152BCA(2) – other eligible services

Subsection 152BCA(2) provides that, in making an AD that applies to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,¹⁰⁵ 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 AD, does not consider the declared service in isolation, but also considers other relevant services.¹⁰⁶ 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

¹⁰² ACCC, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

¹⁰³ Access Dispute Guidelines, p. 57.

¹⁰⁴ *Telstra Corporation Limited [2006] ACompT at [94]-[95]*.

¹⁰⁵ Eligible service’ has the same meaning as in section 152AL of the CCA.

¹⁰⁶ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

*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.*¹⁰⁷

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

¹⁰⁷ *ibid.*