



Australian  
Competition &  
Consumer  
Commission

# **Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS)**

## **Access Determination Explanatory Statement**

7 December 2011



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# 1. Introduction

This statement sets out the ACCC's views on making a final access determination (FAD) for the domestic mobile terminating access service (MTAS) under section 152BC of the *Competition and Consumer Act 2010* (CCA).

The FAD specifies the price of the MTAS to be 6 cents per minute (cpm) on 1 January 2012, 4.8 cpm on 1 January 2013 and 3.6 cpm for the period 1 January 2014 to 30 June 2014. The FAD also incorporates non-price terms and conditions.

The ACCC commenced a public inquiry under Part 25 of the *Telecommunications Act 1997* into making a FAD for the MTAS on 15 June 2011, and released the *Public Inquiry to make a final access determination for the mobile terminating access service: Discussion Paper* (discussion paper). The ACCC released a draft FAD on 23 September 2011.

The ACCC received submissions to the discussion paper and the draft FAD from the following interested parties:

- Telstra Corporation Limited
- SingTel Optus Pty Limited
- Vodafone Hutchison Australia Pty Limited
- AAPT Pty Limited
- Macquarie Telecom Group Limited
- Primus Telecommunications (Australia) Pty Limited
- Pivotel Group Pty Limited
- Australian Communications Consumer Action Network
- Competitive Carriers Coalition
- Lycamobile Pty Limited
- Havyatt Associates Pty Limited

All public versions of the submissions are available on [the ACCC website](#). Macquarie Telecom, Optus and Telstra also provided confidential versions of their submissions to the discussion paper. Telstra, Optus, Macquarie Telecom and Lycamobile provided confidential versions of their submissions to the draft FAD.

The ACCC has had regard to all of the relevant submissions from interested parties in forming its views in the FAD. This statement sets out the reasons in support of the FAD and the materials relied on by the ACCC.

## 1.1 Background

The MTAS is a technology-neutral wholesale input, used by providers of voice calls from fixed line, mobile and IP networks, in order to complete voice calls to end-users directly connected to digital mobile networks. The calling party's network pays the

MTAS price to the receiving party's network. This MTAS price is generally passed on to the calling party in the form of retail charges.

The MTAS was declared by the ACCC in its current form on 30 June 2004<sup>1</sup> and re-declared without alteration in 2009. The MTAS declaration will expire on 30 June 2014.<sup>2</sup> The ACCC declared the MTAS because of the monopoly each mobile network operator (MNO) has over termination of calls on its own network. The price for this termination service is regulated because otherwise the originating network operator would have no influence over the price charged for termination.

The ACCC has applied total service long run incremental cost plus an allowance for common costs (TSLRIC+) pricing principles to price the per-minute charge for terminating a voice call on a mobile network since 2004. This approach saw the MTAS rate decline from over 21 cpm to 9 cpm. Table 1 below sets out the historical glide path in MTAS indicative prices.

**Table 1: Historical MTAS indicative prices<sup>3</sup>**

Time period	cpm
1 July 2004 – 31 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

In 2007 and 2009, the ACCC estimated the costs of a hypothetical efficient operator providing the MTAS on a 2G network by using the outputs of the WIK cost model. The ACCC set the indicative MTAS rate at 9 cpm noting that this rate was a conservative upper bound estimate. The *MTAS Pricing Principles Determination for the period 1 January 2009 to 31 December 2011* (2009 pricing principles determination) cautioned that the WIK model's application as a tool to estimate the efficient cost of supplying the MTAS in the Australian context might become increasingly limited.<sup>4</sup>

Under the previous legislative regime the ACCC extensively reviewed the issues relating to pricing of the MTAS in its 2004, 2007 and 2009 pricing principles and published MTAS arbitration decisions.<sup>5</sup> The ACCC also undertook detailed analysis in its decisions to reject access price undertakings by Vodafone, Optus and Hutchinson in 2006<sup>6</sup> and Optus in 2007.<sup>7</sup> Optus and Vodafone appealed the 2006

<sup>1</sup> ACCC, *Mobile Services Review – Final decision on whether or not the Commission should extend, vary or revoke its existing declaration of the mobile terminating access service*, June 2004.

<sup>2</sup> ACCC, *Mobile terminating access service – An ACCC final report on reviewing the declaration of the mobile terminating access service*, May 2009.

<sup>3</sup> ACCC, *MTAS Pricing Principles Determination for the period 1 July 2004 to 30 June 2007*, *MTAS Pricing Principles Determination for the period 1 July 2007 to 31 December 2008* and *MTAS Pricing Principles Determination for the period 1 January 2009 to 31 December 2011*.

<sup>4</sup> ACCC, *MTAS Pricing Principles Determination for the period 1 January 2009 to 31 December 2011*, p. 19.

<sup>5</sup> <http://www.accc.gov.au/content/index.phtml/itemId/793063>

<sup>6</sup> ACCC, *Assessment of Vodafone's mobile terminating access service Undertaking – Final Decision*, March 2006; ACCC, *Optus's Undertaking with respect to the supply of its Domestic GSM Terminating Access Service (DGTS) – Final Decision*, February 2006; ACCC, *Hutchison's undertakings with*

decisions of the ACCC to reject their undertaking to the Australian Competition Tribunal. The Tribunal affirmed the decisions of the ACCC to reject the undertakings and provided guidance in relation to the assessment of relevant legislative criteria dealing with the long term interests of end-users in relation to the MTAS.<sup>8</sup>

The ACCC notes that all of this material provides a long history of consideration of the relevant principles as they relate to the implementation of efficient cost based pricing of the MTAS. This explanatory statement sets out the ACCC's current assessment of efficient cost based pricing of the MTAS based on this work where relevant.

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*respect to the supply of its Mobile Terminating Access Service – Final Decision*, June 2006

<sup>7</sup> ACCC, *The Optus 2007 Undertaking in relation to the Domestic Mobile Terminating Access Service – Final Decision*, November 2007.

<sup>8</sup> Re Optus Mobile Pty Limited & Optus Networks Pty Limited [2006] ACompT 8 (22 November 2006); Re Vodafone Network Pty Limited & Vodafone Australia Limited [2007] ACompT 1 (11 January 2007).

## **2. Relevant legislative framework for final access determinations**

This section sets out the relevant legislative framework in relation to a FAD.

### **2.1 Content of an FAD**

Section 152BC of the CCA specifies what an FAD may contain. It may include, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the standard access obligations (SAOs) in section 152AR of the CCA and terms and conditions of access to a declared service. The FAD sets out both price and non price terms and conditions for the MTAS.

### **2.2 Commencement and expiry provisions**

Section 152BCF of the CCA sets out the commencement and expiry rules for FADs. An FAD must have an expiry date, which should align with the expiry of the declaration for that service unless there are circumstances that warrant a different expiry date.<sup>9</sup> The ACCC has set an expiry date of 30 June 2014 in line with the current MTAS declaration period.

### **2.3 Criteria ACCC must 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 long-term interest of end-users of carriage services or services supplied by means of carriage services
- (b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- (c) the interests of all persons who have rights to use the declared service
- (d) the direct costs of providing access to the declared service
- (e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- (f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and
- (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 in an access dispute. The ACCC interprets the subsection 152BCA(1) criteria in a similar manner to the approach taken in arbitrating access disputes.

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<sup>9</sup> Subsection 152BCF(6) of the CCA.

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

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



### 3. Decision on price

Time period	cpm
1 January 2012 – 31 December 2012	6
1 January 2013 – 31 December 2013	4.8
1 January 2014 – 30 June 2014	3.6

The ACCC considers that the price reductions satisfy the legislative criteria and represent a conservative estimate of the efficient cost of providing the service, including a contribution to common costs.

#### 3.1 Methodology

The ACCC has had regard to submissions on the most appropriate pricing methodology in response to the discussion paper and the draft FAD. In relation to mobile network operators (MNOs), the ACCC notes that Telstra submitted in response to the discussion paper that an MTAS price of 6 cpm is appropriate based on international benchmarking of TSLRIC+ and the 2007 WIK model results.<sup>10</sup> Optus did not support any particular pricing methodology and considered 9 cpm as an appropriate MTAS price.<sup>11</sup> VHA submitted that the ACCC should use a TSLRIC+ and actual costs approach to setting the MTAS price.<sup>12</sup> Pivotal submitted that a bill and keep (BAK) approach to MTAS would be the most appropriate.<sup>13</sup>

The ACCC has arrived at the specified price path for the MTAS set out in the FAD through a consideration of the relevant parameters noted below. The ACCC has not modelled the TSLRIC+ of providing the MTAS but has instead estimated the efficient cost of providing the MTAS by considering the 2007 WIK Model and industry efficiency developments, international estimates of the efficient cost of providing the MTAS and the estimated costs of a hypothetical efficient operator. Given that the ACCC has not formally modelled the TSLRIC+, it believes that a conservative approach should be taken to estimating the efficient cost of providing the MTAS. For reasons set out in section 7.1 below, the ACCC considers that there are practical challenges to implementing a BAK regime in the Australian mobile industry at this point in time.

#### 3.2 2007 WIK model

In 2007 the ACCC estimated the costs of a hypothetical efficient mobile-only operator providing the MTAS on a 2G network by using the WIK model. The WIK model incorporated a variety of benchmarked European equipment prices and modelled a

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<sup>10</sup> Telstra Corporation Limited, *Submission to the MTAS FAD discussion paper*, (Telstra submission), pp. 5, 12–28.

<sup>11</sup> SingTel Optus Pty Limited, *Submission to the MTAS FAD discussion paper*, (Optus submission), pp. 4, 50–55.

<sup>12</sup> Vodafone Hutchison Australia Pty Limited, *Submission to the MTAS FAD discussion paper*, pp. 3, 13–18.

<sup>13</sup> Pivotal Group Pty Limited, *Submission to the MTAS FAD discussion paper* (Pivotal submission), pp. 7–9.

MNO with a 25 percent market share assuming a 3 percent GPRS data usage and a 94 percent penetration rate. This original reference case produced an output of 5.9 cpm.<sup>14</sup>

However, since the 2007 WIK model was first produced, there have been significant developments in the mobile industry which would significantly lower the outputs from the model including:

- increased migration of voice traffic from 2G networks to more cost efficient 3G networks and anticipated phase out of all 2G services by 2015,<sup>15</sup> resulting in improved spectrum utilisation and network efficiencies
- continued growth in mobile voice minutes on mobile networks, reducing the per-minute cost of termination over time<sup>16</sup>
- increased penetration rates above 100 per cent
- decreasing real costs of network equipment
- consolidation of four MNOs to three similarly sized operators, improving economies of scale for the smallest operator
- rapid growth in data consumption and data revenue on mobile networks,<sup>17</sup> lowering the portion of fixed and common costs attributable to voice termination, and
- transition to IP-based mobile networks over which voice calls are delivered as packets with minimal incremental cost.

These factors indicate that an efficient operator should be making sustained improvements in operational efficiency. This would substantially reduce an efficient operator's actual cost of providing the MTAS compared to the outputs of the 2007 WIK model, and that this is likely to continue into the future. Telstra and Optus submitted to the draft FAD that there have been factors that have increased the cost of supplying voice services.<sup>18</sup> Optus identified increased costs such as spectrum acquisition and capacity constraints relating to increased mobile data usage requirements.<sup>19</sup>

The ACCC maintains its previous position, as set out in the WIK report, that the initial outlay for the acquisition of spectrum should be amortised over the duration of the spectrum licence.<sup>20</sup> Moreover, as the ACCC noted in the discussion paper,

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<sup>14</sup> WIK Consult, *Report for the Australian Competition and Consumer Commission – Mobile Termination Cost Model for Australia*, January 2007, p. 121.

<sup>15</sup> Telsyte, *Australian Mobile Services Market, 2009 Review & 2010-2014 Forecast*, April 2010, p. 1.

<sup>16</sup> See, for example, Telstra Corporation Limited and controlled entities, *Full year results and operations review – June 2010*, p. 16; Singapore Telecommunications Limited and subsidiary companies, *Management discussion and analysis of financial condition, results of operations and cash flows for the first quarter ended 30 June 2011*, p. 43.

<sup>17</sup> ACMA, *Towards 2020—Future spectrum requirements for mobile broadband*, May 2011, p. 33.

<sup>18</sup> Telstra, *Response to the Commission's draft final access determination for the MTAS*, 21 October 2011, p. 7; Optus, *Submission in response to the ACCC draft access determination explanatory statement*, October 2011, pp. 13-15.

<sup>19</sup> Optus, *Submission in response to the ACCC draft access determination explanatory statement*, October 2011, p. 13.

<sup>20</sup> WIK Consult, *Mobile Termination Cost Model for Australia—Report for the Australian Competition and Consumer Commission*, January 2007, p. 42.

demand for mobile data services and the data revenue portion of ARPU are growing rapidly.<sup>21</sup> The ACCC is not persuaded that the network capacity issues identified by Optus are attributable to the provision of the MTAS. The ACCC is of the view that the spectrum costs likely to be incurred by MNOs during the period of this FAD will mostly relate to meeting the increased capacity requirements of providing mobile data services. As such, the ACCC does not consider the submissions have sufficiently demonstrated any cost factors that would have a material impact on the per-minute cost of supplying voice termination services.

Telstra acknowledges that there have been operational efficiencies through technology developments in the industry.<sup>22</sup> The ACCC considers that the developments since 2007 identified above are such that the WIK model based on a 2G network has become outdated and that the efficient cost estimate produced by the model in 2007 based on 2G services represents a conservative upper bound estimate.

Further discussion is outlined below relating to future Long Term Evolution (LTE) network deployments and the use of more efficient Internet Protocol (IP) networks to deliver voice calls compared with the current circuit-switched architecture for voice call termination.

### **3.3 International estimates of efficient costs of the MTAS**

The ACCC notes that there have been significant reductions and proposed reductions in equivalent MTAS rates in several overseas jurisdictions. However, there are variations in the efficient cost estimate methodologies used in different jurisdictions.

The ACCC notes the Tribunal's view in relation to international benchmarking that 'in order to place any reliance upon international benchmarking analysis it would be necessary to know much more about the regulatory environment within which they were determined, the state of the relevant markets and the socio-economic environment in which the mobile services were operative'.<sup>23</sup> The ACCC considers that a broad assessment of current best practice international benchmarks can assist the ACCC in identifying efficient costs of providing the MTAS that lie between the upper and lower bound estimates provided by the outputs of the 2007 WIK model and forward-looking LTE efficient costs. However, the ACCC acknowledges that it is difficult to make adjustments for such benchmarks to take into account all the relevant factors relating to the Australian jurisdiction to make them relevant to the Australian market.

The ACCC notes that other regulatory authorities such as the New Zealand Commerce Commission have recently undertaken international benchmarking exercises in relation to mobile termination prices.<sup>24</sup> The New Zealand Commerce

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<sup>21</sup> ACCC, *Public Inquiry to make a final access determination for the mobile terminating access service: Discussion Paper*, June 2011, pp. 11-12.

<sup>22</sup> Telstra, *Response to the Commission's draft final access determination for the MTAS*, 21 October 2011, p. 7.

<sup>23</sup> *Application by Optus Mobile Pty Limited & Optus Networks Pty Limited* [2006] ACompT 8 (22 November 2006) para 297.

<sup>24</sup> New Zealand Commerce Commission, *Standard Terms determination of the designated services of the mobile termination access service (MTAS) fixed to mobile voice (FTM), mobile-to-mobile voice (MTM) and short messaging services (SMS)*, Decision 724, 5 May 2011, section D.

Commission identified numerous issues relating to international benchmarking and settled on a large data set including some historical data for a TSLRIC price approach to mobile termination. This resulted in the regulatory body adopting a price path from NZ5.97 on 1 October 2011, NZ3.97 cpm from 1 April 2012, NZ3.72 cpm from 1 April 2013 to NZ3.56cpm from 1 April 2014. This converts to approximately 5.07 cpm, 3.37 cpm, 3.16 cpm and 3.03 cpm in Australian currency.<sup>25</sup>

In response to the discussion paper and the draft FAD Telstra submitted that the ACCC should adopt a higher benchmark (75<sup>th</sup> percentile) from the dataset obtained by the New Zealand Commerce Commission and use a more appropriate currency conversion methodology.<sup>26</sup> The ACCC notes that New Zealand Commerce Commission benchmark set includes cost estimates relating to several different years from 2008 to 2010/11 and that ‘it is likely that costs have fallen rapidly over recent years’.<sup>27</sup> Also, the New Zealand Commerce Commission showed that the median price of 2011 benchmarks (4.58NZ) was substantially below the median of all benchmarks (5.15NZ).<sup>28</sup> The New Zealand Commerce Commission noted that given the increases in call volumes, mobile data and equipment price trends, the median of the benchmark set may overstate the costs of providing the MTAS. The New Zealand Commerce Commission also states that its advisers, WIK Consult, ‘argue that benchmarked cost estimates are likely to be biased upward, based on regulator’s tendency to be cautious in pricing determinations’.<sup>29</sup> The New Zealand Commerce Commission stated that the median of the benchmarked set is likely to be above the efficient costs of supplying the MTAS in 2011 as more recent cost estimates are lower than older estimates and recent updates in cost estimates tend to be lower than earlier estimates.<sup>30</sup> The ACCC therefore considers that the use of the 25<sup>th</sup> percentile of the benchmarked data by the New Zealand Commerce Commission is robust.

The ACCC considers that regardless of the currency conversion methodology adopted in relation to the New Zealand price reductions, the New Zealand decision on pricing converted to Australian currency remains below the MTAS price reductions adopted by the ACCC.

The ACCC also considers that it is appropriate to consider those regulatory environments which have recently adopted a bottom-up pure long run incremental cost (LRIC) approach to mobile termination efficient cost estimates. In particular, as a result of the European Commission directive in 2009 for European regulatory authorities to adopt a pure LRIC approach,<sup>31</sup> countries including the United Kingdom, Belgium and the Netherlands have regulated mobile termination rates using the pure LRIC methodology. This has led to the regulation of mobile termination rates of

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<sup>25</sup> Based a 10 year average NZD:AUD exchange rate of 0.85 sourced from the Reserve Bank of Australia (<http://www.rba.gov.au/statistics/hist-exchange-rates/index.html>).

<sup>26</sup> Telstra, *Response to the Commission’s draft final access determination for the MTAS*, 21 October 2011, pp. 7–11.

<sup>27</sup> New Zealand Commerce Commission, *Standard Terms determination of the designated services of the mobile termination access service (MTAS) fixed to mobile voice (FTM), mobile-to-mobile voice (MTM) and short messaging services (SMS)*, Decision 724, 5 May 2011, p. 60, para 261.

<sup>28</sup> *ibid*, p. 71, para 302.

<sup>29</sup> *ibid*, p. 77, para 328.

<sup>30</sup> *ibid*, p. 78, para 330.

<sup>31</sup> European Commission, *Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU*, 9 May 2009.

approximately €0.01 and below by 2014,<sup>32</sup> approximately 1.5 cpm to 1.9 cpm in Australian currency.<sup>33</sup>

In contrast to TSLRIC, pure LRIC approaches do not include the common costs of a network providing a full range of services. In the context of regulatory price-setting, pure LRIC only incorporates the costs of producing an additional unit of the service. Essentially, it is the difference in the long-run costs of an access provider who supplies a full range of services and an access provider who supplies the full range of services except voice termination provided to other carriers. However, the ACCC considers that the use of TSLRIC+ with an inclusion of common costs remains the most appropriate cost based approach to regulating the MTAS.<sup>34</sup>

### 3.4 Estimated costs of an efficient hypothetical operator

In the foreseeable future, capital expenditures incurred by MNOs will mostly relate to meeting the growing demand for mobile data through network investment in high speed packet access (HSPA), evolved high speed packet access (HSPA+) or LTE, and acquisition of additional spectrum. The ACCC understands that LTE networks have lower capital and operational costs (expressed as cost per bit of data delivered) than current 3G/HSPA networks. The growing popularity of 3GPP standards such as HSPA and LTE worldwide will help drive down the real costs of network equipment for Australian MNOs. The ACCC also understands that most modern network equipment is software-upgradeable from HSPA to HSPA+ and/or LTE, while others can be co-located with new network equipment.<sup>35</sup> The ACCC notes that the wireless component of the NBN is being built by Ericsson using Time Division (TD)-LTE technology, demonstrating the viability of LTE technology today.<sup>36</sup>

Data and mobile broadband services will also be the primary source of revenue growth for MNOs. Analysys Mason predicts that demand for content and applications will drive mobile data to become the main engine of growth. As mobile voice services become commoditised in mature markets MNOs will become even more reliant on mobile data revenue for growth.<sup>37</sup> In this scenario, voice will increasingly be regarded as an application delivered over mobile data, that is, using IP or over the internet.

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<sup>32</sup> Ofcom, 'Lower mobile rates to benefit consumers', 15 March 2011, <<http://media.ofcom.org.uk/2011/03/15/lower-mobile-rates-to-benefit-consumers/>>; OPTA, *Marktanalysebesluit vaste en mobiele gespreksafgifte (telefonie)*, 7 July 2010, <<http://www.opta.nl/nl/actueel/alle-publicaties/publicatie/?id=3224>>; BIPT, *Decision of the BIPT Council of 10 August 2010 renewing the Decision of 11 August 2006*, 12 August 2010, <[http://www.bipt.be/en/462/ShowDoc/3310/Decisions/Decision\\_of\\_the\\_BIPT\\_Council\\_of\\_10\\_August\\_2010\\_ren.aspx](http://www.bipt.be/en/462/ShowDoc/3310/Decisions/Decision_of_the_BIPT_Council_of_10_August_2010_ren.aspx)>, accessed on 2 September 2011.

<sup>33</sup> Using 10 year average rates of AUD:EUR 0.61 and AUD:GBP 0.46 sourced from the Reserve Bank of Australia (<http://www.rba.gov.au/statistics/hist-exchange-rates/index.html>).

<sup>34</sup> ACCC, *MTAS Pricing Principles Determination 1 July 2007 to 31 December 2008 Report*, November 2007, p. 8.

<sup>35</sup> Rysavy Research, *Transition to LTE*, September 2010.

<sup>36</sup> iTWire, 'NetComm says TD-LTE devices will be Sequans-powered', <<http://www.itwire.com/industry-news/strategy/49326-netcomm-says-td-lte-devices-will-be-sequans-powered>>, accessed on 5 September 2011.

<sup>37</sup> Roz Roseboro, 'Growth returns to telecoms markets – with mobile leading the way', <[http://www.analysismason.com/About-Us/News/Insight/Growth-returns-to-telecoms-markets--with-mobile-leading-the-way/?utm\\_campaign=RES-Insight%2023rd%20September%202010](http://www.analysismason.com/About-Us/News/Insight/Growth-returns-to-telecoms-markets--with-mobile-leading-the-way/?utm_campaign=RES-Insight%2023rd%20September%202010)>, accessed on 5 September 2011.

The principles applied by the Tribunal when considering the LTIE and efficient costs note that:

Forward-looking means prospective costs using best-in-use technology. The access provider should only be compensated for the costs it would incur if it were using this technology, not what it actually incurs, for example in using out-of-date technology which is more costly. Of course, a firm may be using older technology because it was the best available at the time the investment was made and replacing it cannot be justified commercially. In a competitive market, however, that firm would only be able to charge on the basis of using the most up-to-date technology because, if it did not (in this hypothetical competitive market) access seekers would simply take the service from an alternative service provider.<sup>38</sup>

Telstra and Optus submit that LTE networks should be not be considered best in use technology and that Telstra considers that LTE is an example of best available technology.<sup>39</sup> The ACCC notes that section 152AB(6)(a)(i) of the CCA refers to 'technology that is in use, available or likely to become available'. The ACCC considers that while the deployment of LTE technology and all-IP networks are not currently a ubiquitous feature of the Australian industry, they do represent what a hypothetical efficient new operator would implement in the market today and therefore establish the lower bound estimate of the efficient cost of providing the MTAS.

The ACCC considers that over time the deployment of all-IP networks such as LTE networks will mean that the incremental cost of providing the MTAS will tend towards zero. However, the ACCC acknowledges that the industry in Australia may not reach that position during the period of the FAD expiring on 30 June 2014. As discussed in section 3.3 above, the ACCC also considers that the most appropriate cost-based approach to MTAS pricing is TSLRIC+ with an inclusion for common costs.

### 3.5 Price path

The ACCC has arrived at the specified price path for the MTAS through a consideration of the relevant parameters noted above. The 2007 WIK model represents a conservative 2G upper bound estimate while a forward-looking all-IP efficient cost estimate approaching zero represents a lower bound estimate. The price reductions in the FAD are a measured approach when considered against industry developments regarding WIK model parameters and recent international efficient cost regulation of the MTAS.

In response to the draft FAD, Telstra submitted that a rate of 6 cpm is appropriate but that the end price of the ACCC's draft price trajectory is too low.<sup>40</sup> Optus submitted that maintaining a price at the current rate of 9 cpm will promote competition and benefit consumers.<sup>41</sup> VHA submitted that a smooth transition from the existing MTAS

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<sup>38</sup> *Seven Network Limited (no 4)* [2004] ACompT 11 at [135].

<sup>39</sup> Telstra, *Response to the Commission's draft final access determination for the MTAS*, 21 October 2011, p. 12; Optus, *Submission in response to the ACCC draft access determination explanatory statement*, October 2011, p. 11.

<sup>40</sup> Telstra Corporation Limited, *Response to the Commission's draft FAD for the MTAS*, 21 October 2011, p. 4.

<sup>41</sup> SingTel Optus Pty Limited, *Optus submission in response to the ACCC Draft AD*, October 2011, pp. 3, 7-8.

rate of 9 cpm to the ACCC's estimate of supplying the MTAS at 3.6 cpm is required.<sup>42</sup> VHA submitted that a glide path beginning at 7.2 cpm, reducing to 5.4 cpm in 2013 and 3.6 cpm in 2014 is more appropriate.<sup>43</sup>

In relation to fixed network operators, Macquarie Telecom submitted in response to the discussion paper that the MTAS price should be based on international benchmarking and reduced to 3.5 cpm in 2012.<sup>44</sup> AAPT submitted that MTAS pricing should trend towards zero or BAK in 2014 from 4 cpm in 2012.<sup>45</sup> Primus submitted that the MTAS price should be reduced on the basis of international benchmarking.<sup>46</sup>

AAPT submitted that it did not agree with the draft FAD glide path. AAPT submitted that there should be no glide path and that the MTAS should be immediately moved to 3.6 cpm with further reductions tending towards zero or an alignment with the fixed termination rate.<sup>47</sup> Macquarie Telecom submitted that the price should be immediately reduced to 3.5 cpm.<sup>48</sup>

As set out further below, the ACCC considers that the current efficient cost of providing the MTAS is likely to be substantially lower than 6cpm, having regard to:

- a TSLRIC+ upper bound of 5.9cpm based on the 2007 WIK model, but noting the significant industry changes since the model input parameters were finalised
- international efficient cost estimates, and
- a lower bound approaching zero for the efficient cost of providing voice termination on a LTE network, but taking into account that the industry in Australia may not reach this position prior to 30 June 2014

The initial reduction from the current MTAS pricing principles approach of 9 cpm to 6 cpm on 1 January 2012 reflects the ACCC's consideration of the WIK model as a conservative upper bound estimate of the current efficient cost of providing the MTAS. The 3 cpm reduction also accords with the ACCC's previous approach to reducing the MTAS in 3 cpm increments in the 2004 and 2007 pricing principles.

In relation to its submission for a shallower glide path VHA submitted that 'at the very least a smoother glide path will be more likely to avoid the mere transfer of rents to Telstra in the short term'.<sup>49</sup> Such an approach unnecessarily prolongs pricing that is not reflective of the efficient cost of supplying the MTAS. The ACCC reiterates that it has taken a conservative view of efficient cost based on its benchmarking analysis and the conservative upper bound of modelling a less efficient network. The ACCC notes that the Tribunal has stated 'that operators in the fixed-to-mobile market – and in

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<sup>42</sup> Vodafone Hutchison Australia Pty Limited, *MTAS: Comments on the Draft AD Explanatory Statement*, October 2011, p. 3.

<sup>43</sup> *ibid*, pp. 3-4.

<sup>44</sup> Macquarie Telecom Group Limited, *Submission to the MTAS FAD discussion paper*, pp. 2, 7.

<sup>45</sup> AAPT Pty Ltd, *Submission to the MTAS FAD discussion paper*, pp. 3-6.

<sup>46</sup> Primus Telecommunications (Australia) Pty Limited, *Submission to the MTAS FAD discussion paper*, p. 1.

<sup>47</sup> AAPT Pty Limited, *Submission to ACCC Explanatory Statement*, 21 October 2011, p. 10.

<sup>48</sup> Macquarie Telecom Group Limited, *Submission to the draft FAD*, 24 October 2011.

<sup>49</sup> Vodafone Hutchison Australia Pty Limited, *MTAS: Comments on the Draft AD Explanatory Statement*, October 2011, p. 15.

particular Telstra – may obtain some degree of windfall gains from lower mobile termination charges. This is not sufficient in itself to justify ... charges higher than those based on efficient costs'.<sup>50</sup>

As the unit cost of providing voice termination continues to decline over time, the further reductions in 2013 and 2014 represent a conservative price path to the ACCC's estimate of the efficient cost of providing the MTAS of 3.6 cpm. This price is conservative when considered against the New Zealand Commerce Commission's international benchmarking results and the regulated termination rates in Europe, set out in section 3.2 above. The ACCC also considers that the reductions in the MTAS price on 1 January 2013 and 1 January 2014 are an appropriate way of recognising that a number of the developments in the mobile industry described in section 3.1 are likely to be ongoing between now and (at least) the end of the current regulatory period.

An assessment of the ACCC's approach in the access determination considered against the legislative criteria is set out in section 4 below.

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<sup>50</sup> Re Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 (22 November 2006), para 89.



## 4. Assessment of the pricing approach against the subsection 152BCA(1) criteria

### 4.1 Long-term interests of end-users

Section 152AB(2) of the Act notes in determining whether a thing promotes the LTIE regard must be had to the objectives of:

- promoting competition in markets for carriage services and for services supplied by means of carriage services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users, and
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied.

#### Promote competition in relevant markets

##### *Individual markets for the MTAS on each MNO's network*

The ACCC concluded in its 2004 *MTAS Final Report* that there is a separate single market for the MTAS on each MNO's network as each MNO has monopoly power in the individual market for termination on its network. The ACCC remains of this view, which is based on the lack of alternative substitutes for the service.<sup>51</sup> The ACCC also considers that MNOs are not constrained in their pricing decisions for the MTAS, and have both the ability and incentive to raise the price of this service above its underlying cost of production.

Consequently the ACCC considers that competition will be unaffected in this market by pricing in this access determination.

##### *Market within which Fixed to Mobile (FTM) Services are provided*

The market within which FTM services are provided is considered one of the relevant markets for the supply of the MTAS. The ACCC considers that a reduction in the price of the MTAS towards the underlying cost of production will promote competition in the market within which FTM services are provided. This is because such reductions are likely to lessen (or remove) any advantage conferred on horizontally integrated providers of retail fixed line services (that is, providers of such services who also provide retail mobile services), this is because those horizontally integrated providers would not have to pay inefficiently high MTAS charges to themselves for the termination of FTM calls on their own mobile networks.

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<sup>51</sup> In the *MTAS Final Report*, the ACCC found that the termination services of individual MNOs are not substitutable for each other, irrespective of the size of the individual operators of the network technology they employ. Further, the ACCC concluded that alternative forms of communication, such as fixed-line network services, SMS messages, email and calls using Voice over Internet Protocol (VoIP), are not sufficiently substitutable means of contacting a mobile subscriber to constrain MTAS providers. See ACCC, *MTAS Final Report*, June 2004, pp. 29–56.

In previous ACCC inquiries the ACCC indicated that it did not consider a FTM pass through mechanism was warranted as it expected competitive forces would ensure that consumers benefit from lower FTM calling prices. Section 7 outlines the ACCC's consideration of submissions regarding FTM pass through. Additionally the Commission considers that efficient cost-based MTAS pricing is consistent with the objective of promoting competition in the market within which FTM services are provided. It would make it more likely that the fixed only operators would be able to compete more effectively against the horizontally integrated operators if other barriers to competition in the market in which FTM services are provided were to diminish over time (for example, as a result of the rollout of the National Broadband Network).

#### *Retail mobile services*

If the MTAS price is set at efficient cost then the ACCC considers that MNOs are left to compete on their relative efficiencies and competitive merits in the market for retail mobile services, rather than having to pay inefficiently high MTAS prices to other MNOs in order to be able to provide retail mobile services. Thus, the ACCC considers that setting MTAS prices at efficient costs is consistent with the objective of promoting competition in the market for retail mobile services.

#### *Promotion of competition in relevant markets – conclusion*

The ACCC notes that in determining the extent to which terms and conditions are likely to result in the objective of promoting competition, regard must be had to the extent to which the terms and conditions will remove obstacles to end-users of gaining access to listed services.

The ACCC considers that competition in relevant markets is best promoted by a price associated with the efficient cost of providing the MTAS. The ACCC therefore considers that the FAD price reductions are likely to promote competition in the relevant markets.

### **Any-to-any connectivity**

In the 2004 *MTAS Final Report*, the ACCC concluded that any-to-any connectivity can be promoted through declaration of the MTAS. This view was a key reason for the ACCC defining the MTAS in such a way that it applies to termination of both FTM and MTM calls on all types of mobile networks. The ACCC reached this conclusion due to the ability of established MNOs (possessing limited monopoly power described above) to frustrate a new entrant's ability to offer a full end-to-end service to its subscribers by hampering supply of the MTAS on reasonable terms and conditions.

The ACCC remains of this view, and considers that the terms and conditions in the FAD are consistent with achieving any-to-any connectivity.

### **Efficient use of, and investment in, infrastructure**

In the ACCC's view the phrase 'economically efficient use of, and economically efficient investment in ... infrastructure' refers to the concept of economic efficiency. This concept consists of three efficiency components: productive, allocative and dynamic efficiency.

The ACCC has considered the following factors in respect of encouraging the efficient use of infrastructure:

- whether it is technically feasible for the services to be supplied and charged for with regard to technology that is in use, available or likely to become available; the costs involved in supplying and charging for, the services that 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 by which services are or likely to become capable of being supplied, and
- the risks involved in determining incentives for investment.

As discussed in section 3.4 above, it is appropriate to assess efficient costs on a forward looking basis by reference to technology that is in use, available or likely to become available. The ACCC has therefore assessed the efficient cost of providing the MTAS by reference to the technology that a hypothetical new entrant would employ today, having regard to the current state of best-in-use mobile technology, available mobile technology, and existing spectrum and other constraints on mobile network deployment. An MTAS price that reflects the deployment of more efficient technology sets appropriate incentives regarding investment in the infrastructure used to provide the MTAS. The FAD MTAS prices represent the ACCC's conservative forward-looking assessment of the efficient costs of providing the MTAS during the FAD period.

The ACCC also considers that basing the price of a key wholesale input for fixed network providers on efficient cost is more likely, in the long run, to encourage investment and reduce any associated risks for any potential and existing fixed network infrastructure owners. In general the ACCC considers that pricing aligned to the efficient cost of supply of the MTAS will increase demand and expand the economically efficient use of, and economically efficient investment in, fixed network infrastructure. Conversely, pricing the MTAS service above efficient cost is likely to contribute to a dissociation arising between retail pricing for FTM services, and the cost of providing those services, thereby resulting in an inefficient under-utilisation of the infrastructure that is used to provide fixed network services (and a corresponding inefficient over-utilisation of the infrastructure that is used to provide retail mobile services).

The Commission's views on the appropriateness of an FTM pass-through safeguard are set out in section 7 below. Additionally, and even to the extent that issues associated with the performance of relevant retail fixed line markets means that pass-through does not immediately occur, setting MTAS prices on the basis of efficient cost is nevertheless consistent with the promotion of economically efficient investment, both in fixed line network infrastructure and in mobile network infrastructure. This is because, even in this scenario, setting MTAS prices on the basis

of efficient costs would make it more likely that efficient pricing signals would be sent in the relevant retail fixed line market in the event that the competitive performance of those retail markets were to improve in the future (for example, as a result of the rollout of the National Broadband Network).

### ***Overall conclusion on LTIE***

The ACCC has identified the MTAS price reductions as satisfying the legislative criteria after considering relevant information relating to the ACCC's previous outcomes from the WIK model, international comparisons and consideration of the mobile network costs of using best in use technology.

The ACCC believes that the prices set out in the MTAS FAD will:

- promote competition in relevant markets
- achieve any-to-any connectivity; and
- encourage efficient investment in, and use of, telecommunications infrastructure.

## **4.2 Legitimate business interests and investment in facilities**

As outlined in the ACCC's *Access Dispute Guidelines*, the ACCC is of the view that the concept of legitimate business interests should be interpreted in a manner consistent with the phrase 'legitimate commercial interests' used elsewhere in Part XIC of the Act. Accordingly, it would cover the access provider's interest in earning a normal commercial return on its investment.

The ACCC considers that prices that reflect a conservative view of the forward-looking efficient costs of providing the MTAS as set out in the FAD allow an access provider to recover its costs of production without compromising its legitimate business interests. The ACCC also considers that the FAD prices will allow an access provider to invest in facilities to supply the MTAS. The ACCC notes that the cost of supplying voice termination services over more efficient LTE networks will be significantly less than the costs of supplying the service over 2G and 3G networks. The ACCC also considers that the FAD prices will allow an access provider to recover its efficient costs of providing the MTAS and allow investment in providing MTAS services over more efficient networks.

## **4.3 The interests of all persons who have the right to use the declared service**

The ACCC considers that pricing that reflects the efficient cost of supplying the MTAS is in the interests of those persons who have the rights to use the service. Such pricing enables access seekers to compete on their merits (that is, on the basis of their own efficiency) in downstream markets, both fixed line and mobile.

The ACCC notes that it is in the interests of those persons who have the right to use the declared service for the pricing of FTM and MTM calls to be priced symmetrically.

#### **4.4 Direct cost of providing access to the declared service**

The direct costs of providing access to a declared service encompass those costs that are necessarily incurred (or caused) by the provision of access. In this context the phrase ‘direct costs’ is interpreted to mean that an access price should cover the direct incremental costs incurred in providing access. However, it does not extend to receiving compensation for loss of any ‘monopoly profits’ that occur as a result of increased competition.<sup>52</sup>

In relation to estimating these costs the ACCC considers that the significant efficiency enhancing developments in the mobile industry that have occurred since the 2007 pricing principles determination of 9 cpm would have led to a commensurate reduction in the direct incremental costs of providing access to the MTAS.

The ACCC notes submissions to the discussion paper that raised concerns that pure LRIC does not allow for efficient cost recovery.<sup>53</sup> However, the ACCC considers that the pure LRIC approach adopted by European regulators allows for direct cost recovery and that pure LRIC estimates provide an indication of direct costs of providing the MTAS over existing hybrid networks. As mobile networks implement all-IP architecture, over which voice as an application will represent an insignificant incremental cost, the direct costs of providing the MTAS will be further reduced.

The ACCC notes that the price points for 2013 and 2014 are significantly higher than the European pure LRIC estimates, and even the New Zealand Commerce Commission TSLRIC+ benchmarked estimates. The ACCC is of the view that, by adopting a TSLRIC+ approach to the determination of the FAD MTAS prices, which includes the direct costs incurred in providing access to the MTAS, the proposed MTAS prices appropriately include the estimated direct costs of supplying the MTAS over the period of the FAD.

#### **4.5 The value to a person of extensions, or enhancement capability, whose cost is borne by someone else**

The ACCC takes the view that 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 itself 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.<sup>54</sup>

The ACCC does not consider this criterion applicable to the provision of the MTAS.

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<sup>52</sup> See for example, *Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44.

<sup>53</sup> Telstra Corporation Limited, *Submission to the MTAS FAD discussion paper*, para 112; SingTel Optus Pty Limited, *Submission to the MTAS FAD discussion paper*, paras 6.2 –6.10.

<sup>54</sup> ACCC, *Access Pricing Principles — Telecommunications, a guide*, July 1997, p. 11.

#### **4.6 The operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility**

The ACCC is of the view that the FAD will not compromise the operational and technical requirements necessary for the safe and reliable operation of carriage services, or telecommunications networks or facilities.

#### **4.7 The economically efficient operation of a carriage service, a telecommunications network or a facility**

The Commission's *Access Dispute Guidelines* note that the phrase 'economically efficient operation' embodies the concept of economic efficiency as discussed earlier under the LTIE. It would not appear to be limited to the operation of carriage services, networks and facilities by the access provider supplying the declared service but would seem to include those operated by others (for example, service providers using the declared service).<sup>55</sup>

Like the test described under the 'efficient use of, and investment in, infrastructure' LTIE criterion, this criterion also relates to productive and allocative efficiencies. For the reasons outlined under the 'efficient use of, and investment in, infrastructure' the ACCC considers that the FAD price reductions promote the economically efficient operation of a carriage service, telecommunications network or a facility. The ACCC believes that the economically efficient operation of a carriage service or telecommunications facility is more likely to be promoted by a MTAS price that reflects the efficient cost of supplying the service. The ACCC considers that the FAD price reductions are likely to promote the economically efficient operation of carriage services and telecommunications facilities.

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<sup>55</sup> ACCC, *Access Dispute Guidelines*, p. 57.

## 5. Non-price terms and conditions

The ACCC has included non-price terms and conditions (NPTCs) in making this FAD. These terms:

- are modelled on the non-price terms contained in the draft MTAS FAD, and
- incorporate interested parties' submissions to the MTAS and other declared services' Access Determination processes.

The ACCC has made amendments to the draft NPTCs where it considers the legislative criteria set out in the *CCA* will be promoted.

### 5.1 Responses to the draft FAD

The ACCC received four submissions on the non-price terms and conditions in response to the draft MTAS FAD.

Macquarie Telecom submitted that the NPTCs should include all the terms from the 2008 Model Terms but did not provide further details or evidence in its submission explaining why all the non-price terms are necessary.

Optus submitted that the NPTCs should include two additional non-price terms for network conditioning for mobile numbers and facilities access. Optus also suggested various drafting amendments to the NPTCs.

Telstra submitted that NPTCs should not be included in the FAD because parties have always been able to be commercially negotiate NPTCs and these terms have never been points of dispute between parties. Telstra submitted various amendments to the draft NPTCs in the event the ACCC includes NPTCs in the FAD.

VHA submitted various drafting amendments to the draft FAD.

### 5.2 ACCC final view

The ACCC disagrees with Optus' submission that the NPTCs should be expanded. The provision of the MTAS is not dependent on provisions for network conditioning for mobile numbers, and does not require the intermingling of property between Access Seekers and Access Providers.

The ACCC disagrees with Telstra's submission and maintains the view that it will promote the LTIE to include NPTCs in the FAD. Access providers and access seekers will continue to have the ability to commercially negotiate terms in access agreements to suit individual needs. The FAD would only be relevant in the situation where parties that cannot come to a commercial agreement. In such case, the NPTCs would provide certainty to both parties.

## **Schedule 2 – Billing and Notifications**

Telstra submitted that timeframes set out in the billing dispute procedures should be reduced due to the legitimate business interests of access providers.<sup>56</sup> The ACCC generally disagrees with Telstra, and considers the proposed amendments inappropriate because they would not balance the interests of the parties.

The ACCC has reduced the timeframe in clause 2.22 to 15 business days because it considers the previous 30 business day period to be excessive. The ACCC has also increased the timeframe in clause 2.18 to 15 business days from five business days. The ACCC is of the view that these amendments will not cause undue delays in the dispute resolution process while providing adequate time to access seekers to consider decisions made by the access provider.

Telstra submitted that clauses 2.30 and 2.31 do not promote the LTIE because efficient investment is not encouraged where an access provider can be heavily penalised for an inadvertent error.<sup>57</sup> The ACCC considers that clause 2.30 will promote the LTIE because it would incentivise access providers to provide correct billing services and rectify errors in a timely manner. The ACCC has decided to remove clause 2.31 from the FAD. The ACCC considers that clause 2.31 would not promote the LTIE as it would provide parties an opportunity to be unnecessarily litigious where clause 2.30 is adequate in penalising an access provider for the same breach.

## **Schedule 3 – Creditworthiness and Security**

Telstra submitted that schedule 3 should be amended to the effect that security must be provided as a prerequisite for the supply of MTAS. Telstra also submitted that access providers should be given wide discretion in requesting securities and information.<sup>58</sup> The ACCC does not agree. The ACCC is of the view that mandatory security requirements will unnecessarily increase the cost of access. Access providers of MTAS are generally also access seekers of MTAS, this reciprocal relationship between parties is generally sufficient security to ensure that the parties will pay each other. In the case of non-integrated operators, access providers are still able to request security when there is a reasonable doubt of an access seeker's ability to pay.

The ACCC has decided to amend clause 3.3 by narrowing the circumstances where the access provider can request security from the access seeker. The ACCC considers this amendment clarifies the situation where it is necessary to request security and reduces the risk of abuse of schedule 3. The ACCC considers that this is will promote the LTIE by minimising artificial constraints on an access seeker's ability to seek access.

Telstra has sought amendments to the definition of 'Ongoing Creditworthiness Information', to require access seekers to submit management prepared balance sheets, profit and loss statements, cash flow statements and other information required

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<sup>56</sup> Telstra Corporation Limited, *Submission to the MTAS FAD discussion paper*, pp. 19, para 78-84.

<sup>57</sup> *ibid*, pp. 20, para 85-97.

<sup>58</sup> *ibid*, p. 22, para 99-102.



by the access provider to assess the access seeker's creditworthiness.<sup>59</sup> The ACCC considers that such obligation would be excessive and would therefore not be in the LTIE.

#### **Schedule 4 – General dispute resolution procedures**

Telstra submitted that clause 4.1 should be amended to limit the scope of the dispute resolution procedures to the terms and conditions of the FAD and to preclude an access seeker from initiating a Billing Dispute and Non-Billing dispute regarding the same subject matter.<sup>60</sup> The ACCC considers that such amendments would not be in the LTIE as the same subject matter could give rise to both a Billing Dispute and Non-Billing Dispute.

#### **Schedule 5 – Confidentiality provision**

Telstra submitted that the definition of confidential information should be narrowed and the allowed uses of confidential information should be broadened.<sup>61</sup> The ACCC does not agree. The ACCC considers that its own definition of confidential information, and its own list of permitted uses are necessary to protect the sensitivity of information that is exchanged during normal business operations, and that it is therefore in the LTIE for this schedule to be maintained in its current form.

#### **Schedule 6 – Suspension and termination**

Telstra submitted that schedule 6 should be amended to allow access providers to immediately suspend or terminate the provision of MTAS in limited circumstances.<sup>62</sup> The ACCC does not agree, as it considers that imposing unnecessarily onerous NPTCs would not promote the LTIE. The ACCC considers that the circumstances envisaged by Telstra are not relevant to the provision of the MTAS, as the MTAS only involves the termination of calls on the access provider's mobile network, rather than the use of the access provider's fixed services infrastructure. The ACCC also considers that clause 6.7 adequately protects the access provider's legitimate interests in the event that an access seeker finds itself in financial difficulties.

The ACCC's assessment of the terms against the legislative criteria in section 152BCA(1) is set out in section 6 below.

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<sup>59</sup> *ibid*, p.24, para 112-115.

<sup>60</sup> *ibid*, p.26, para 123-125.

<sup>61</sup> *ibid*, pp. 27-28.

<sup>62</sup> *ibid*, pp. 29-30.

## **6. Assessment of the non-price terms and conditions against the subsection 152BCA(1) criteria**

### ***Schedule 2 – Billing and notifications***

The terms regarding Billing and Notifications are set out in schedule 2 of the FAD. These terms concern how an access provider may bill for services and the billing dispute process.

### **Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE**

The ACCC has considered whether the terms and conditions in Schedule 2 of the FAD will promote the LTIE. The ACCC has formed the view that the terms and conditions set out in the clause will promote competition in markets relevant for MTAS.

The terms and conditions set out in schedule 2 of the FAD specify the timeframes for providing invoices and making payments for MTAS provided. These terms and conditions provide certainty regarding these transactions. This provides assurance as to how the costs of investment will ultimately be recouped and lowers the risk of investment. This in turn promotes the economically efficient investment in infrastructure by which listed services are supplied, and any other infrastructure by which listed services are capable of being supplied.

The objective of achieving any-to-any connectivity is not relevant to schedule 2, as it does not concern connectivity between telecommunications networks.

### **Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP**

The ACCC has balanced the legitimate business interests of the access provider with other competing considerations under subsection 152BCA(1) of the CCA. The ACCC considers that the terms and conditions in Schedule 2 of the FAD take into account those legitimate business interests. For example, the clause stipulates the timeframe within which an invoice is payable to the access provider, which facilitates recovery of payment for services provided in a timely manner. This consequently promotes certainty and encourages efficient investment in the declared service. The terms and conditions also set a timeframe in which a billing dispute notice may be given to an access provider, and a process whereby a billing dispute can be escalated.

### **Paragraph 152BCA(1)(c) – interests of all persons who have rights to use the declared service**

The ACCC has considered the interests of all persons who have rights to use the declared service. The terms and conditions in Schedule 2 of the FAD create obligations regarding payment of invoices and billing dispute notification. However, it is relevant to note that these obligations are not unnecessary or excessive to the point of deterring potential access seekers' entry into the market (which in turn could displace less efficient service providers).

The clear and practical processes set out in Schedule 2 will assist parties who rely on the FAD by setting rules and responsibilities around billing and dispute resolution. Such procedures can reduce the time spent in disputes and lead to more efficient and economical dispute resolution outcomes.

### **Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service**

The ACCC considers that the terms and conditions in Schedule 2 of the FAD do not directly impact on the direct costs of providing access to the declared services. Rather, the terms stipulate the invoicing processes by which costs are recovered.

### **Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that the terms and conditions in Schedule 2 of the FAD will not affect the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else because this clause refers to billing and notifications and not the value of network enhancements.

### **Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 2 of the FAD will not affect operational and technical requirements necessary for the safe and reliable operation of a carriage service, as they do not address operational and technical requirements.

### **Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 2 of the FAD help to promote the economically efficient operation of a carriage service. Clear billing and dispute resolution procedures help to make operations more efficient by reducing time spent on dispute resolution.

### ***Schedule 3 – Creditworthiness and security***

The terms regarding creditworthiness and security are set out in Schedule 3 of the FAD. These provisions concern the access provider's rights to make enquiries of the access seeker's ability to pay, and to require that security be provided in certain circumstances.

### **Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE**

The ACCC has considered whether the terms and conditions in Schedule 3 of the FAD will promote the LTIE.

Unnecessary or excessive creditworthiness information or security requirements could potentially delay or frustrate an access seeker's ability to acquire services, which may affect access seekers' ability to compete in the markets for telecommunication services.

The ACCC does not consider the terms and conditions in the schedule to be unnecessary or excessive to the extent that they would deter entry or hinder an access seeker's ability to compete in telecommunication markets. The ACCC considers that the terms relating to the creditworthiness information and provision of Security by the access seeker minimise the financial risk of the access provider. This indirectly promotes the economically efficient investment in infrastructure because the access provider has greater assurance that it will recover the costs of its investment.

The ACCC considers that practical and functional creditworthiness and security terms will satisfy the objective of promoting competition by removing unnecessary barriers for access seekers, while providing protection for the access provider. The terms and conditions in Schedule 3 effectively balance the interests of access seekers and the access providers.

The ACCC considers that the terms and conditions in Schedule 3 of the FAD do not concern the connectivity of telecommunication networks.

### **Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP**

The terms and conditions in Schedule 3 of the FAD generally go to the access provider's legitimate business interest of conducting its business to a normal commercial standard and to protecting its financial risk.

There are a number of specific terms in Schedule 3 which benefit the access provider. The provision of Security itself protects the access provider's interests in being paid for a debt due. Allowing the access provider to request security before all credit checks are completed benefits the access provider by not exposing it to the risk of default in the intervening period of supply.

The access provider's ability to request creditworthiness information from the access seeker, to receive it within a certain timeframe, and then require Security to be altered, further supports the legitimate business interests of the access provider.

The ACCC therefore considers that the terms and conditions in Schedule 3 of the FAD benefit the legitimate business interests of a carrier or CSP by facilitating the management of financial risk, and protecting its commercial return on its investments.

### **Paragraph 152BCA(1)(c) – interests of all persons who have rights to use the declared service**

The ACCC considers that the terms and conditions in Schedule 3 of the FAD strike a balance between the interests of access seekers who have the right to use the declared service and access providers.

As noted above in relation to paragraph 152BCA(1)(b) of the CCA, the interests of all access seekers are supported because access is not conditional on the completion of credit checks or the provision of security. Such conditions would have potential to frustrate access and deter entry into telecommunication markets. Rather, the terms specify that conditional access is to be requested in certain circumstances only. This could be when the access seeker first acquires the service and where it does not have a credit history, or when a subsequent event occurs that would give rise to genuine concerns around the access seeker's ability to pay its debts.

Further, the ACCC does not consider the timeframes related to creditworthiness information or Security to be onerous on access seekers to the extent that it would deter access seeker entry. The timeframes strike a balance between enabling an access seeker to develop and conduct its business operations, and the access provider's interest in managing financial risk.

The terms and conditions also provide for the access seeker to reduce its Security where the access seeker can demonstrate an improvement in the creditworthiness or a material change in circumstances. Such credit reviews have the potential to free up working capital for the access seeker. This counterbalances the lack of incentive for the access provider to reduce Security requirements for its downstream competitors.

For these reasons, the ACCC considers that the terms and conditions in Schedule 3 of the FAD accommodate the interests of all persons who have the right to use the declared service.

### **Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service**

The creditworthiness and security terms and conditions in Schedule 3 of the FAD will not impact the direct costs of providing access to the declared services, as they do not contribute to those costs. Indirectly, the protections afforded to the access provider by the terms mean that any direct costs incurred are likely to be recovered.

### **Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that the terms and conditions in Schedule 3 of the FAD will not affect the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else because this schedule does not refer to the value of network enhancements.

### **Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 3 of the FAD will not affect operational and technical requirements necessary for the safe and reliable

operation of a carriage service, as they do not address operational and technical requirements.

### **Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 3 of the FAD will not affect the economically efficient operation of a carriage service, as they do not impact on the ability of the access provider and access seeker to operate their respective services, networks and facilities in an economically efficient manner.

### ***Schedule 4 – General dispute resolution procedures***

The terms regarding the general dispute resolution procedures (as distinct from the billing dispute procedures in Schedule 2) are set out in Schedule 4 of the FAD.

### **Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE**

The ACCC does not consider that the terms and conditions in Schedule 4 of the FAD directly impact on the promotion of the LTIE considering the objectives of promoting competition, achieving any-to-any connectivity, and the objective of encouraging the economically efficient use of, and the economically efficient investment in infrastructure.

In respect of promoting competition, the terms and conditions do not deal explicitly with substantive issues regarding access to the MTAS. However, any dispute about access may be dealt with under this schedule.

In terms of any-to-any connectivity, the terms and conditions do not deal directly with the connectivity of telecommunication networks. In relation to the objective of encouraging the economically efficient use of, and the economically efficient investment in infrastructure, the terms and conditions do not deal directly with issues that would impact on the efficient use of the infrastructure or with incentives for investment in infrastructure.

Indirectly however, the LTIE is promoted by having defined dispute resolution procedures. Such procedures can reduce the time and expense of dispute resolution for all parties. Having a well defined and balanced dispute resolution process is important. If the process provides too much discretion to the access provider, it can undermine the operation of the other terms and conditions.

### **Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP**

The ACCC is of the view that the general dispute resolution procedures strike a balance between the legitimate business interests of the access provider and the interests of the access seeker. The procedures, obligations and rights in Schedule 4 of the FAD apply equally to both access providers and access seekers.

The terms and conditions in Schedule 3 of the FAD will benefit both the legitimate business interests of the access provider and access seeker, as it encourages dispute

resolution procedures which are simple, flexible, quick and inexpensive. This prevents undue reliance on legal proceedings or arbitration.

The ACCC considers this to be in the legitimate business interests of the access provider and access seekers. It does not unduly constrain their ability to conduct overall business operations by ensuring that any non-billing disputes are resolved expeditiously. The ACCC considers it is the mutual interests of both the access provider and access seeker to have certainty about processes regarding dispute resolution.

Further, equal representation at the mediation is possible, and is required in relation to the Expert Committee. Each party is also required to bear its own costs of mediation and the expert committee, and share the costs of the mediator or the independent member of the expert committee. In this way, the terms clearly do not place an unreasonable share of the costs on one party.

### **Paragraph 152BCA(1)(c) – interests of all persons who have rights to use the declared service**

For the reasons set out above regarding paragraph 152BCA(1)(b) of the CCA, the ACCC is of the view that dispute resolution procedures benefit both the legitimate interests of the access provider and the interests of the access seekers who have the right to use the declared service.

### **Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service**

The ACCC considers that the terms and conditions in Schedule 4 of the FAD do not affect the direct costs of providing access to the declared services, as they do not directly contribute to the costs of providing access to the declared service.

### **Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that the terms and conditions in Schedule 4 of the FAD will not affect the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else because this clause does not refer to the value of network enhancements.

### **Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 4 of the FAD will not affect operational and technical requirements necessary for the safe and reliable operation of a carriage service.

### **Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 4 of the FAD will not affect the economically efficient operation of a carriage service, as they do not impact on the ability of the access provider and access seeker to operate their respective services, networks and facilities in an economically efficient manner.

## **Schedule 5 – Confidentiality provisions**

The terms regarding use and protection of confidential information are set out in Schedule 5 of the FAD.

### **Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE**

The ACCC considers that that the terms and conditions in Schedule 5 of the FAD will promote the LTIE. Schedule 5 protects the confidential information of both access seekers and access providers from unauthorised use by the other party. Under the terms and conditions, parties are not able to use confidential information inappropriately to gain a competitive advantage in downstream markets.

The ACCC considers that the terms and conditions do not have an effect on any-to-any connectivity, because they concern the use of information only.

Access seekers are more likely to make efficient investments in infrastructure knowing that their confidential information is protected and will not be used by the access provider to gain a competitive advantage to the detriment of the access seeker. This will ensure that the access seeker and access provider are competing on a level playing field in downstream markets.

### **Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP**

The ACCC considers that to the terms and conditions in Schedule 5 service the legitimate business interests of the access provider. If the confidential information of the access provider is not properly protected, the access provider may suffer losses. These provisions help to prevent that loss.

### **Paragraph 152BCA(1)(c) – interests of all persons who have rights to use the declared service**

The ACCC considers that the terms and conditions at Schedule 5 of the FAD serve the interests of access seekers. They help to protect the confidential information from misuse by the access provider by outlining procedures for handling confidential information. The confidential information that is provided by access seekers when provisioning services is potentially very valuable. Protecting that information from misuse is in the access seekers interests and the ACCC has taken this into account in the terms and conditions in Schedule 5 of the FAD.

### **Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service**

The ACCC understands that the confidentiality provisions in Schedule 5 may require an access provider to develop systems to comply with the provisions, as was noted in the 2008 Model Terms.<sup>63</sup> The ACCC considers that any costs associated with this development are not unreasonable given the necessity of protecting confidential information. The ACCC considers that the terms and conditions in Schedule 5 of the

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<sup>63</sup> 2008 Model Terms, p. 25.



FAD strike the right balance between imposing additional costs and protecting the interests of access seekers.

**Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that this criterion is not relevant because the terms and conditions in Schedule 5 of the FAD only include processes for confidentiality, not any network enhancements.

**Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service**

The ACCC considers that this criterion is not relevant because the terms and conditions in Schedule 5 of the FAD do not have implications for the safe and reliable operation of the network.

**Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 5 of the FAD promote the economically efficient operation of a carriage service by outlining procedures for secure information sharing. Without the fear of confidential information being disclosed, parties are able to candidly share information necessary for the provision of services.

***Schedule 6 – Suspension and termination***

The terms regarding suspension and termination of services are set out in Schedule 6 of the FAD.

**Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE**

The ACCC has considered the LTIE in determining the suspension and termination provisions in Schedule 6 of the FAD.

The ACCC considers that the access provider may only suspend the service of an access seeker once it has given notice of its intention to suspend the service to the access seeker. These provisions are likely to encourage investment in infrastructure and are therefore in the LTIE, because access seekers have an assurance that their service will not be indiscriminately suspended or terminated for trivial matters.

The ACCC considers that the suspension and termination provisions in Schedule 6 of the FAD are not relevant to the objective of any-to-any connectivity as they do not affect the ability of an end-user who is supplied with a carriage service to communicate, by means of that service, with each other end-user who is supplied with the same or similar service.

**Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP**

The ACCC has taken into account the legitimate business interests of the access provider when including the terms and conditions in Schedule 6 of the FAD. The

suspension and termination provisions are important for the access provider as they are a means by which it can protect its legitimate business interests in being paid for the services it provides.

### **Paragraph 152BCA(1)(c) – interests of all persons who have rights to use the declared service**

The ACCC has also taken into account the interests of other parties when including the terms and conditions in Schedule 6 of the FAD. The interests of access seekers have been addressed, because the provisions ensure that their businesses are not disrupted for trivial matters. In situations where an access seeker is in breach of an access agreement, the terms in Schedule 6 protect the interests of access seekers by providing that the access provider can only suspend or terminate a service after giving notice of its intention to do so and providing an opportunity for the breach to be remedied. This ensures that a service will not be unreasonably interrupted.

### **Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service**

Providing access to a declared service imposes direct costs on the access provider. The ACCC has had regard to these costs in including the terms and conditions in Schedule 6 of the FAD. Schedule 6 provides a means by which the access provider may suspend or terminate a service of an access seeker in specific circumstances. This allows the access provider to protect itself from an access seeker that is not paying its bills.

The provisions also provide some protection for access seekers where the service has been terminated. An access provider must refund to an access seeker a fair and equitable proportion of those sums paid under the FAD for a period extending beyond the date on which the supply of the service has been terminated.

The terms and conditions in Schedule 6 of the FAD therefore balance the interests of all parties in relation to the costs associated with access to the declared fixed line service.

### **Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else**

The ACCC considers that the terms and conditions in Schedule 6 of the FAD do not concern the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else. This is because the provisions relate to the circumstances under which an access provider may suspend or terminate a service, rather than the circumstances under which a party may recover costs relating to network enhancements.

### **Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of a carriage service**

The ACCC considers that the terms and conditions in Schedule 6 of the FAD take into account the operational and technical requirements necessary for the safe and reliable operation of a carriage service.

**Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service**

The provisions in Schedule 6 of the FAD allow an access provider to suspend the supply of a service when the access seeker has failed to pay money owing or has otherwise breached its obligations under the FAD. The ACCC considers that these provisions encourage and support the economically efficient operation of carriage services and associated networks of the access provider and access seekers. It is not economically efficient for an access provider to be required to supply a carriage service where an access seeker is consistently defaulting on payment.

## 7. Other matters

### 7.1 Differential regulatory treatments of MTM and FTM termination

The ACCC sought stakeholders' views on whether BAK arrangements for MTM calls could be reached commercially among MNOs, paving the way for MTM termination to be deregulated.

The ACCC notes that although BAK received some support,<sup>64</sup> the majority of stakeholders have a strong preference for the ACCC to continue applying a uniform approach to regulating MTM and FTM termination. The rationales for their submissions fall under three broad categories:

- risk of arbitrage and the potentially significant costs associated with monitoring arbitrage activities and rectifying their consequences
  - the ACCC notes that the arbitrage risk arises if traffic originating on a fixed network is presented by an access seeker as mobile-originated traffic. Such traffic would be terminated at zero price under a BAK system while fixed-originated traffic would normally be charged at the FTM termination rate<sup>65</sup>
- practical difficulties in reaching commercial BAK arrangements among MNOs, and
- a preference for the MTAS rate to be reduced and aligned with efficient cost regardless of the originating network.<sup>66</sup>

After assessing stakeholders' arguments against the relevant legislative criteria and commercial realities, the ACCC considers that these submissions present valid concerns regarding the implementation of BAK arrangements for MTM termination at this point in time. Accordingly, the ACCC does not propose to price MTM and FTM termination differently for the period of this FAD.

### 7.2 FTM pass-through safeguard

The discussion paper sought stakeholder views on whether reductions in the MTAS rate should be subject to a pass-through safeguard for fixed or integrated operators for FTM calls. The ACCC considered submissions to the discussion paper but elected not to impose a pass-through safeguard in the draft FAD. The ACCC has considered stakeholders' submissions to the draft FAD and confirms its view not to include a FTM pass-through safeguard.

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<sup>64</sup> Pivotal Group Pty Limited, *Submission to the MTAS FAD discussion paper*, p. 7; ACCAN, *Submission to the MTAS FAD discussion paper*, p. 5.

<sup>65</sup> Telstra Corporation Limited, *Submission to the MTAS FAD discussion paper*, p. 6; SingTel Optus Pty Limited, *Submission to the MTAS FAD discussion paper*, p. 34; Vodafone Hutchison Australia Pty Limited, *Submission to the MTAS FAD discussion paper*, p. 19.

<sup>66</sup> See, for example, submissions from AAPT Pty Limited, Macquarie Telecom Group Limited, SingTel Optus Pty Limited, Telstra Corporation Limited and Vodafone Hutchison Australia Pty Limited.

The ACCC considers that imposing a pass-through safeguard in the MTAS FAD would not be in the LTIE as it would not promote allocative or dynamic efficiency. In this respect, the ACCC agrees with the Tribunal's comments in its review of the ACCC decision to reject Vodafone's 2004 MTAS undertaking which included a proposal to include a pass-through safeguard provision. The Tribunal stated:

We are also concerned that the pass through safeguard is inflexible in relation to the opportunity for competition to be promoted as a result of any reduction in the price of the VMTAS. It limits the opportunity of access seekers to determine the form in which any reductions they may receive in the supply of the VMTAS may be passed through to the retail fixed services market.

We consider that the pass through provisions in the undertaking deprive access seekers of the flexibility to determine competitively the individual price elements for services within the basket of services that are supplied within the fixed-to-mobile market, and the form in which that pass through will take place. This approach retards allocative and dynamic efficiency, inhibits competition, is not in the long-term interests of end-users and, in our view, is not reasonable.<sup>67</sup>

The ACCC is also cognisant that a pass-through safeguard that is linked to a FAD may not necessarily be invoked because the parties can still reach an access agreement on terms and conditions other than those provided for in the FAD. Under section 152BCC of the CCA, access agreements prevail over inconsistent access determinations. The existence of a mandatory pass-through requirement may incentivise access providers and access seekers to settle on MTAS rates that are higher than the FAD prices, and the FAD pass-through mechanism does not have to be triggered. The ACCC is of the view that this would not promote the LTIE because:

- it would lead to a settled MTAS price that is above the ACCC's conservative estimate of the efficient cost of supplying the MTAS, and
- it would not result in lower prices for end-users in the market within which FTM services are provided.

The ACCC also considers that, even if a FTM pass-through safeguard were put in place, it could be circumvented by fixed line operators (whether integrated or not) raising the pricing of other fixed line bundled services. Thus, the ACCC is not satisfied that an FTM safeguard would be effective in any event, and is therefore also not satisfied that it would promote the objective of the efficient use of, or investment in, the infrastructure by which fixed line services are provided or the infrastructure by which mobile services are provided.

The ACCC also notes recent evidence of fixed line retail initiatives which permit consumers of fixed to mobile calls to make calls at a lower cost than the headline rates suggest. In the absence of empirical data on take-up of such offers and given the complex nature of service bundling and tariffs, the ACCC considers it is too early to definitively conclude pass-through is occurring. Nevertheless the ACCC considers that these signs of greater competition in the FTM market are encouraging and will be further enhanced by the on-going structural developments in the fixed market.

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<sup>67</sup> Vodafone Network Pty Limited & Vodafone Australia Limited [2007] ACompT 1 (11 January 2007), paras 289-290.

# Appendix – FAD instrument for the domestic mobile terminating access service



## Final Access Determination No. 7 of 2011

### *Competition and Consumer Act 2010*

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

Date of decision: 7 December 2011

## **1. Application**

1.1 This instrument sets out final access determination (FAD) in respect of the declared domestic mobile terminating access service ('MTAS').

1.2 The price in this FAD is exclusive of Goods and Services Tax (GST).

Note:

1. From 1 January 2011:
  - a carrier licence held by a carrier is subject to a condition that the carrier must comply with any access determinations that are applicable to the carrier; and
  - a carriage service provider must comply with any access determinations that are applicable to the provider.
2. An Access Provider and Access Seeker may enter into an Access Agreement relating to a declared service. Access Agreements prevail over inconsistent access determinations: section 152BCC of the *Competition and Consumer Act 2010*.

## **2. Definitions and interpretation**

2.1 Schedule 7 applies to the interpretation of this instrument. The Schedules form part of this instrument.

## **3. Commencement and duration**

3.1 This final access determination commences on 1 January 2012.

3.2 This final access determination remains in force up until and including 30 June 2014.

Note:

1. An access determination may come into force on a day which is earlier than the day the determination is made: subsections 152BCF(1), 152BCF(2) and 152BCF(2A) of the *Competition and Consumer Act 2010*.

## **4. Terms and conditions of access**

4.1 If a carrier or carriage service provider is required to comply with any or all of the standard access obligations in respect of a relevant declared service, the carrier or carriage service provider must comply with those obligations on the terms and conditions set out in this clause 4.

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

4.2 If the carrier or carriage service provider is required to supply the relevant declared service to a service provider, the carrier or carriage service provider must supply the service:

- (a) at the price specified in Schedule 1; and
- (b) on the non-price terms and conditions specified in Schedules 2–6.

## INDEX TO SCHEDULES

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## **Schedule 1 – Price terms for the domestic mobile termination access service (MTAS)**

- 1.1 The prices applicable to the MTAS for the period 1 January 2012 to 30 June 2014 are as follows:

<b>Time period</b>	<b>cpm</b>
1 January 2012 – 31 December 2012	6
1 January 2013 – 31 December 2013	4.8
1 January 2014 – 30 June 2014	3.6

## Schedule 2 – Billing and Notifications

- 2.1. The Access Seeker's liability to pay Charges for the Service to the Access Provider arises at the time the Service is supplied by the Access Provider to the Access Seeker, unless the parties agree otherwise.
- 2.2. The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 2.
- 2.3. The Access Provider shall provide the Access Seeker with an invoice each month in respect of Charges payable for the Service unless the parties agree otherwise.
- 2.4. The Access Provider shall be entitled to invoice the Access Seeker for previously uninvoiced Charges or Charges which were understated in a previous invoice, provided that:
  - (a) the Charges to be retrospectively invoiced can be reasonably substantiated to the Access Seeker by the Access Provider; and
  - (b) subject to clause 2.5, no more than six months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld).
- 2.5. The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and the provisions of any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to billing.
- 2.6. Subject to any Billing Dispute notified in accordance with this FAD, an invoice is payable in full 30 Calendar Days after the date the invoice was issued or such other date as agreed between the parties. The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider. All amounts owing and unpaid after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day authorised dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5 percent.
- 2.7. In addition to charging interest in accordance with clause 2.6 or exercising any other rights the Access Provider has at law or under this FAD, where an amount is outstanding and remains unpaid for more than 20 Business Days after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this FAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.

- 2.8. Unless the parties otherwise agree, there shall be no setting-off (i.e. netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise the administration and financial costs, the parties shall consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.
- 2.9. The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice. Nothing in this clause 2.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
- 2.10. If the Access Seeker believes a Billing Dispute exists, it may, invoke the Billing Dispute Procedures by providing written notice to the Access Provider (**Billing Dispute Notice**). A Billing Dispute must be initiated only in good faith.
- 2.11. Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal or regulatory proceedings in relation to any Billing Dispute.
- 2.12. If a Billing Dispute Notice is given to the Access Provider by the due date for payment of the invoice containing the Charge which is being disputed, the Access Seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved. Otherwise, the Access Seeker must pay the invoice in full in accordance with this FAD (but subject to the outcome of the Billing Dispute Procedures).
- 2.13. Except where payment is withheld in accordance with clause 2.12, the Access Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.
- 2.14. A Billing Dispute Notice may not be given to the Access Provider in relation to a Charge later than six Months after the due date for the invoice for the Charge issued in accordance with 2.6.
- 2.15. (a) The Access Provider shall acknowledge receipt of a Billing Dispute Notice within two Business Days by providing the Access Seeker with a reference number.
- (b) Within five Business Days of acknowledging a Billing Dispute Notice under clause 2.15(a), the Access Provider must, by written notice to the Access Seeker:
- (i) accept the Billing Dispute Notice; or
  - (ii) reject the Billing Dispute Notice if the Access Provider reasonably considers that:
    - (A) the subject matter of the Billing Dispute Notice is already being dealt with in another dispute;

- (B) the Billing Dispute Notice was not submitted in good faith; or
- (C) the Billing Dispute Notice is incomplete or contains inaccurate information.

(c) If the Access Provider fails to accept or reject the Billing Dispute Notice within five Business Days of acknowledging the Billing Dispute Notice under clause 2.15(a), the Access Provider is taken to have accepted the Billing Dispute Notice.

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

Without affecting the time within which the Access Provider must make the proposed resolution under clause 2.17, the Access Provider may request additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution pursuant to clause 2.17. This additional information may be requested up to 10 Business Days prior to the date on which the Access Provider must make the proposed resolution under clause 2.17. The Access Seeker must provide the requested information within five Business Days of receiving the request. If the Access Seeker fails to do so within five Business Days, the Access Provider may take the Access Seeker's failure to provide additional information into account when making its proposed resolution.

2.17. The Access Provider shall try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of accepting a Billing Dispute Notice under clause 2.15 (or longer period if agreed by the parties), by notifying the Access Seeker in writing of its proposed resolution of a Billing Dispute. That notice shall:

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

If the Access Provider reasonably considers that it will take longer than 30 Business Days after acknowledging a Billing Dispute Notice to provide a proposed resolution, then the Access Provider may request the Access Seeker's consent to an extension of time to provide the proposed resolution under this clause 2.17 (such consent not to be unreasonably withheld).

2.18. If the Access Seeker does not agree with the Access Provider's decision to reject a Billing Dispute Notice under clause 2.15 or the Access Provider's proposed resolution under clause 2.17, it must object within 15 Business Days of being notified of such decisions (or such longer time agreed between the parties). Any objection lodged by the Access Seeker with the Access Provider must be in writing and state:

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

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

- (e) provide a revised proposed resolution (**Revised Proposed Resolution** in this Schedule 2); or
- (f) confirm its proposed resolution.

2.19. Any:

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

must occur as soon as practicable and in any event within one Month of the Access Provider's notice of its proposed resolution under clause 2.17 or its Revised Proposed Resolution under clause 2.18 (as applicable), unless the Access Seeker escalates the Billing Dispute under clause 2.22. If the Access Provider is required to make a withdrawal, adjustment or refund of a disputed Charge under this clause but its next invoice (**first invoice**) is due to be issued within 48 hours of its proposed resolution under clause 2.17 or its Revised Proposed Resolution under clause 2.18 (as applicable), then the Access Provider may include that withdrawal, adjustment or refund in the invoice following the first invoice notwithstanding that this may occur more than one Month after the Access Provider's notice of its proposed resolution or Revised Proposed Resolution.

2.20. Where the Access Provider is to refund a disputed Charge, the Access Provider shall pay interest (at the rate set out in clause 2.6) on any refund. Interest shall accrue daily from the date on which each relevant amount to be refunded was paid to the Access Provider, until the date the refund is paid.

2.21. Where the Access Seeker is to pay a disputed Charge, the Access Seeker shall pay interest (at the rate set out in clause 2.6) on the amount to be paid. Interest

shall accrue daily from the date on which each relevant amount was originally due to be paid to the Access Provider, until the date the amount is paid.

2.22. If:

- (a) the Access Provider has not proposed a resolution according to clause 2.17 or within the timeframe specified in clause 2.17; or
- (b) the Access Seeker having first submitted an objection under clause 2.18 is not satisfied with the Access Provider's Revised Proposed Resolution, or the Access Provider's confirmed proposed resolution, within the timeframes specified in clause 2.18,

the Access Seeker may escalate the matter under clause 2.23. If the Access Seeker does not do so within 15 Business Days after the time period stated in clause 2.17 or after being notified of the Access Provider's Revised Proposed Resolution under clause 2.18(e) or confirmed proposed resolution under clause 2.18(f) (or a longer period if agreed by the parties), the Access Seeker shall be deemed to have accepted the Access Provider's proposed resolution made under clause 2.17 or Revised Proposed Resolution under clause 2.18(e) or confirmed proposed solution under clause 2.18(f) and clauses 2.20 and 2.21 shall apply.

2.23. If the Access Seeker wishes to escalate a Billing Dispute, the Access Seeker must give the Access Provider a written notice:

- (a) stating why it does not agree with the Access Provider's Revised Proposed Resolution or confirmed proposed solution under clause 2.18; and
- (b) seeking escalation of the Billing Dispute.

2.24. A notice under clause 2.23 must be submitted to the nominated billing manager for the Access Provider, who shall discuss how best to resolve the Billing Dispute with the Access Seeker's nominated counterpart. If the parties are unable to resolve the Billing Dispute within five Business Days of notice being given under clause 2.23 (or such longer period as agreed between the parties) the Billing Dispute must be escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart who must meet in an effort to resolve the Billing Dispute.

2.25. If the Billing Dispute cannot be resolved within five Business Days of it being escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart under clause 2.24 (or such longer period as agreed between the parties):

- (a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation shall be conducted in accordance with the mediation guidelines of the ACDC and concluded within three Months of the proposal (unless the parties agree to extend this timeframe); or

- (b) if the parties either do not agree to proceed to mediation within five Business Days of being able to propose the appointment of a mediator under clause 2.25(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal or regulatory proceedings to resolve the matter.
- 2.26. The parties shall ensure that any person appointed or required to resolve a Billing Dispute shall take into account the principle that the Access Seeker shall be entitled to be recompensed in circumstances where the Access Seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end-user an amount which is the subject of a Billing Dispute (a **Backbilling Loss**), provided that:
  - (a) such principle shall apply only to the extent to which the Billing Dispute is resolved against the Access Provider; and
  - (b) such principle shall apply only to the extent to which it is determined that the Backbilling Loss was due to the Access Provider unnecessarily delaying resolution of the Billing Dispute.
- 2.27. Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
- 2.28. All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause 2.24 (or their respective nominees).
- 2.29. There shall be a presumption that all communications between the parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.
- 2.30. If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that three or more out of any five consecutive invoices for a given Service are incorrect by five percent or more, then, for the purposes of clause 8.20, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question shall be the rate set out in clause 8.7, plus 2 percent. The remedy set out in this clause 2.30 shall be without prejudice to any other right or remedy available to the Access Seeker.

## Schedule 3 – Creditworthiness and security

- 3.1. Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide to the Access Provider and maintain, on terms and conditions reasonably required by the Access Provider and subject to clause 3.2, the Security (as shall be determined having regard to clause 3.3 and as may be varied pursuant to clause 3.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.
- 3.2. (a) The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the Security specified in clause 3.1 for a period of six Months following the last to occur of:
- (i) cessation of supply of a Service or Services under this FAD, and
  - (ii) payment of all outstanding amounts under this FAD.
- (b) Notwithstanding clause 3.2(a), the Access Provider has no obligation to release the Security if, at the date the Access Provider would otherwise be required to release the Security under clause 3.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.
- 3.3. The Security (including any varied Security) shall only be requested when the Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for Services. The Security shall be of an amount and in a form which is reasonable in all the circumstances. As a statement of general principle the amount of any Security shall be calculated by reference to:
- (a) the aggregate value of all Services likely to be provided to the Access Seeker under this FAD over a reasonable period; or
  - (b) the value of amounts invoiced under this FAD but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).
- For the avoidance of doubt, any estimates, forecasts or other statements made or provided by the Access Seeker may be used by the Access Provider in determining the amount of a Security.
- 3.4. Examples of appropriate forms of security, having regard to the factors referred to in clause 3.3, may include without limitation:
- (a) fixed and floating charges;



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

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

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

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

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

- 3.5. The Access Provider may from time to time where the circumstances reasonably require, request Ongoing Creditworthiness Information from the Access Seeker to determine the ongoing creditworthiness of the Access Seeker. The Access Seeker must supply Ongoing Creditworthiness Information to the Access Provider within 15 Business Days of receipt of a request from the Access Provider for such information. The Access Provider may, as a result of such Ongoing Creditworthiness Information, having regard to the factors referred to in clause 3.3 and subject to clause 3.7, reasonably require the Access Seeker to alter the amount, form or the terms of the Security (which may include a requirement to provide additional security), and the Access Seeker must provide that altered Security within 20 Business Days of being notified by the Access Provider in writing of that requirement.

- 3.6. The Access Seeker may from time to time request the Access Provider to consent (in writing) to a decrease in the required Security and/or alteration of the form of the Security. The Access Provider must, within 15 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors referred to in clause 3.3). The Access Provider may request, and the Access Seeker shall promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 3.6.
- 3.7. In the event that the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 3, the Access Seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the Access Provider and that there has been no material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider. In the event that there has been a material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider, the Access Seeker must disclose the nature and effect of the change to the Access Provider at the time the information is provided.
- 3.8. For the purposes of this Schedule 3, **Ongoing Creditworthiness Information** means:
- (a) a copy of the Access Seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);
  - (b) a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker shall co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the Access Seeker's creditworthiness. To that end, the Access Seeker agrees to procure written consents (as required under the *Privacy Act 1988* (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the Access Provider to:
    - (i) obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;
    - (ii) disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and
    - (iii) obtain and use a consumer credit report;
  - (c) a letter, signed by the company secretary or duly authorised officer of the Access Seeker, stating that the Access Seeker is not insolvent and not under any external administration (as defined in the *Corporations Act*

2001 (Cth)) or under any similar form of administration under any laws applicable to it in any jurisdiction; and

- (d) the Access Seeker's credit rating, if any has been assigned to it.
- 3.9. The Access Seeker may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.
- 3.10. Subject to this Schedule 3, the Access Provider may, in its absolute discretion, deem a failure by the Access Seeker to provide Ongoing Creditworthiness Information or an altered Security in accordance with clause 3.5 as:
- (a) an event entitling the Access Provider to alter the amount, form and terms of the Security of the Access Seeker; or
  - (b) a breach of a material term or condition of this FAD.
- 3.11. Any disputes arising out of or in connection with Schedule 3 shall be dealt with in accordance with the procedures in Schedule 4.

## **Schedule 4 – General dispute resolution procedures**

- 4.1. If a dispute arises between the parties in connection with or arising from the supply of the Service under this FAD, the dispute shall be managed as follows:
  - (a) in the case of a Billing Dispute, the dispute shall be managed in accordance with the Billing Dispute Procedures; or
  - (b) subject to clause 4.2, in the case of a Non-Billing Dispute, the dispute shall be managed in accordance with the procedures set out in this Schedule 4.
- 4.2. To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless the Access Provider otherwise determines, that Non-Billing Dispute shall be resolved in accordance with the Billing Dispute Procedures. The Access Provider may seek a determination from an independent third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access Provider.
- 4.3. If a Non-Billing Dispute arises, either party may, by written notice to the other, refer the Non-Billing Dispute for resolution under this Schedule 3. A Non-Billing Dispute must be initiated only in good faith.
- 4.4. Any Non-Billing Dispute notified under clause 4.3 shall be referred:
  - (a) initially to the nominated manager (or managers) for each party, who shall endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 4.3 or such other time agreed by the parties; and
  - (b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within a further five Business Days to refer the Non-Billing Dispute to an Expert Committee under clause 4.11, or by written agreement submit it to mediation in accordance with clause 4.10.
- 4.5. If:
  - (a) under clause 4.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation; or,
  - (b) under clause 4.10(f), the mediation is terminated; and

- (c) after a period of five Business Days after the mediation is terminated as referred to in paragraph (b), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise) either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.
- 4.6. A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:
- (a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 4.5; or
  - (b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable).
- 4.7. Each party must continue to fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 4 are pending.
- 4.8. There shall be a presumption that all communications between the parties during the course of a Non-Billing Dispute are made on a without prejudice and confidential basis.
- 4.9. Each party shall, as early as practicable after the notification of a Non-Billing Dispute pursuant to clause 4.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).
- 4.10. Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 4.4(b):
- (a) any agreement shall include:
    - (i) a statement of the disputed matters in the Non-Billing Dispute; and
    - (ii) the procedure to be followed during the mediation,and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;
  - (b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the provisions of this clause 4.10. In the event of any inconsistency between them, the provisions of this clause 4.10 shall prevail;

- (c) it is to be conducted in private;
- (d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator should:
  - (i) have an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
  - (ii) have an appreciation of the competition law implications of his/her decisions; and
  - (iii) not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
- (e) the parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who shall attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation;
- (f) it shall terminate in accordance with the ACDC Guidelines;
- (g) the parties shall bear their own costs of the mediation including the costs of any representatives and shall each bear half the costs of the mediator; and
- (h) any agreement resulting from mediation shall bind the parties on its terms.

4.11. The parties may by written agreement in accordance with clause 4.4(b), submit a Non-Billing Dispute for resolution by an Expert Committee (**Initiating Notice**), in which case the provisions of this clause 4.11 shall apply as follows:

- (a) The terms of reference of the Expert Committee shall be as agreed by the parties. If the terms of reference are not agreed within five Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee shall be deemed to be terminated.
- (b) An Expert Committee shall act as an expert and not as an arbitrator.
- (c) The parties shall each be represented on the Expert Committee by one appointee.
- (d) The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 4.10(d)(i), (ii) and (iii).
- (e) Each party shall be given an equal opportunity to present its submissions and make representations to the Expert Committee.

- (f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.
- (g) Unless the parties agree otherwise the parties shall ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.
- (h) If the dispute is not resolved within the timeframe referred to in clause 4.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
- (i) The Expert Committee shall have the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.
- (j) The Expert Committee must give written reasons for its decision.
- (k) A decision of the Expert Committee is final and binding on the parties except in the case of manifest error or a mistake of law.
- (l) Each party shall bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties shall each bear half the costs of the independent member of the Expert Committee.

4.12 Schedule 4 does not apply to a Non-Billing Dispute to the extent that:

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

## Schedule 5 – Confidentiality provisions

- 5.1. Subject to clause 5.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:
- (a) use or copy such Confidential Information except for the purposes of this FAD; or
  - (b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.
- 5.2. For the avoidance of doubt, information generated within the Access Provider's Network as a result of or in connection with the supply of the relevant Service to the Access Seeker or the interconnection of the Access Provider's Network with the Access Seeker's Network (other than the aggregate Network information of the Access Provider and all Access Seekers to whom the relevant Service is supplied) is the Confidential Information of the Access Seeker.
- 5.3. The Access Provider shall upon request from the Access Seeker, disclose to the Access Seeker quarterly aggregate traffic flow information generated within the Access Provider's Network in respect of a particular Service provided to the Access Seeker, if the Access Provider measures and provides this information to itself. The Access Seeker must pay the reasonable costs of the Access Provider providing that information.
- 5.4. Subject to clause 5.5, Confidential Information of the Access Seeker referred to in clause 5.2 may be:
- (a) used by the Access Provider:
    - (i) for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;
    - (ii) for the purposes of this FAD;
    - (iii) for the purpose of billing; or
    - (iv) for another purpose agreed to by the Access Seeker; and
  - (b) disclosed only to personnel directly involved in the purposes referred to in paragraph (a) above.
- 5.5. A party (**Disclosing Party**) may to the extent necessary disclose the Confidential Information of the other party:
- (a) to those of its directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential



Information is reasonably required to be disclosed for the purposes of this FAD;

- (b) to any professional person acting for the Disclosing Party to permit that person to protect or advise on the rights of the Disclosing Party in respect of the obligations of the Disclosing Party under this FAD;
- (c) to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;
- (d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this FAD, provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party so that the other party has an opportunity to protect the confidentiality of its Confidential Information, or for the purpose of seeking advice from a professional person in relation thereto;
- (e) as required by law provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information, except that no notice is required in respect of disclosures made by the Access Provider to the ACCC under section 152BEA of the CCA;
- (f) with the written consent of the other party provided that if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 5.6;
- (g) in accordance with a lawful and binding directive issued by a regulatory authority;
- (h) if reasonably required to protect the safety of personnel or property or in an emergency;
- (i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted.

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

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

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

5.8. Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no

warranty is given by the Disclosing Party that the Confidential Information is or will be correct.

- 5.9. Each party acknowledges that a breach of this Schedule 5 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this Schedule 5.
- 5.10. If the Access Provider has the right to suspend or cease the supply of the Service pursuant to this FAD, and after suspension or cessation of supply of the Service, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment;

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

- (a) notify and exchange information about the Access Seeker (including the Access Seeker's Confidential Information) with any credit reporting agency or the Access Provider's collection agent; and
- (b) without limiting clause 5.10, disclose to a credit reporting agency:
  - (i) the defaults made by the Access Seeker to the Access Provider; and
  - (ii) the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD.

## Schedule 6 – Suspension and termination

6.1. If:

- (a) the Access Seeker has failed to pay monies payable under this FAD;
- (b) the Access Seeker's use either of its Facilities or the Access Provider's Facilities is in contravention of any law;
- (c) the Access Seeker breaches a material obligation under this FAD; or
- (d) any of the events described in clause 6.7 occurs in respect of the Access Seeker,

**(Suspension Event)** and:

- (e) within 20 Business Days after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:
  - (i) citing this clause;
  - (ii) specifying the Suspension Event that has occurred;
  - (iii) requiring the Access Seeker to institute remedial action (if any) in respect of that event; and
  - (iv) specifying the action which may follow due to a failure to comply with the notice,

**(Suspension Notice)** and:

- (f) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 20 Business Days after receiving the Suspension Notice (in this clause 6.1, the **Remedy Period**),

the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable after the expiry of the Remedy Period:

- (g) refuse to provide the Access Seeker with the Service:
  - (iii) of the kind in respect of which the Suspension Event has occurred; and
  - (iv) a request for which is made by the Access Seeker after the date of the breach,

until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist; and

- (h) suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed.

- 6.2. For the avoidance of doubt, subclause 6.1(a) does not apply to a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.
- 6.3. In the case of a suspension pursuant to clause 6.1, the Access Provider shall reconnect the Access Seeker to the Access Provider's Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider shall do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.
- 6.4. If:
- (a) a party ceases to be a carrier or carriage service provider; or
  - (b) a party ceases to carry on business for a period of more than 10 consecutive Business Days or
  - (c) in the case of the Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or
  - (d) a party breaches a material obligation under this FAD, and:
    - (i) that breach materially impairs or is likely to materially impair the ability of the other party to deliver Listed Carriage Services to its customers; and
    - (ii) the other party has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and
    - (iii) the other party fails to institute remedial action as specified in the Breach Notice within 20 Business Days after receiving the Breach Notice (in this clause 6.4, the **Remedy Period**),
- the other party may cease supply of the Service under this FAD by written notice given to the first-mentioned party at any time after becoming aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be).
- 6.5. A party must not give the other party both a Suspension Notice under clause 6.1 and a Breach Notice under clause 6.4 in respect of:
- (a) the same breach; or
  - (b) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events;
- except:
- (c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 6.1 in respect of a Suspension Event and the Suspension Event has not been rectified

by the Access Seeker within the relevant Remedy Period specified in clause 6.1; and

- (d) where an Access Seeker has not rectified a Suspension Event, notwithstanding clause 6.4(d)(ii), the Access Provider has given written notice to the Access Seeker within 20 Business Days of the expiry of the time available to remedy the Suspension Event.
- 6.6. For the avoidance of doubt, a party shall not be required to provide a Suspension Notice under clause 6.1 in respect of a breach before giving a Breach Notice in respect of that breach under clause 6.4.
- 6.7. Notwithstanding any other provision of this FAD, either party may at any time immediately cease the supply of the Service under this FAD by giving written notice of termination to the other party if:
- (a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other party; or
  - (b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other party; or
  - (c) a holder of an encumbrance takes possession of the whole or any substantial part of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or
  - (d) the other party is or likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
  - (e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or
  - (f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of three Months; or
  - (g) the other party breaches any of the terms of any of its loans, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to the supply of the Service under this FAD; or
  - (h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
  - (i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

- 6.8. The cessation of the operation of this FAD:
- (a) shall not operate as a waiver of any breach by a party of any of the provisions of the FAD; and
  - (b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.
- 6.9. Without prejudice to the parties' rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD.

## Schedule 7 – Interpretation and definitions

### *Interpretation*

In this agreement, unless the contrary intention appears:

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

### *Definitions*

“**ACCC**” means the Australian Competition and Consumer Commission;

“**ACDC**” means the Australian Commercial Disputes Centre Limited;

“**ACMA**” means the Australian Communications and Media Authority;

“**Billing Dispute**” means a dispute relating to a Charge or an invoice issued by the Access Provider to the Access Seeker;

“**Billing Dispute Notice**” means a notice given pursuant to clause 2.11;

“**Billing Dispute Procedures**” means the procedures set out in clauses 2.11 to 2.29;

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

“**Calendar Day**” means a day reckoned from midnight to midnight;

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

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

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

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

“**Charge**” means a charge for the supply of the Service;

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

- (a) information which is or becomes part of the public domain (other than through any breach of this FAD);
- (b) information rightfully received by the other party from a third person without a duty of confidentiality being owed by the other party to the third person, except where the other party has knowledge that the third person has obtained that information either directly or indirectly as a result of a breach of any duty of confidence owed to the first mentioned party; or
- (c) information which has been independently developed or obtained by the other party;

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

- (a) endangers or threatens to endanger the safety or health of persons; or
- (b) destroys or damages, or threatens to destroy or damage property,

being an emergency which requires a significant and co-ordinated response;

**“Event”** means an act, omission or event relating to or arising out of this agreement or part of this agreement;

**“Expert Committee”** means a committee established under clause 4.11;

**“Facility”** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth);

**“FAD”** means Final Access Determination;

**“Month”** means a calendar month;

**“MTAS”** means the domestic mobile terminating access service declared under section 152AL of the CCA;

**“Network”** of a party, means that party’s system, or series of systems, that carries, or is capable of carrying communications by means of guided or unguided electromagnetic or optical energy;

**“Non-Billing Dispute”** means a dispute other than a Billing Dispute;

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

**“Security”** means the amount and form of security required to be provided to the Access Provider in respect of the provision by the Access Provider of MTAS under Schedule 3’

**“Service”** means the MTAS.

**“Structural Separation Undertaking”** means:



- (a) an undertaking given by Telstra under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which comes into force in accordance with section 577AB, and any amendment to that undertaking which comes into force in accordance with subsection 577B(6); and
- (b) a migration plan approved by the ACCC under Subdivision B of Division 2 of Part 33 of the *Telecommunications Act 1997* Cth) which, pursuant to subsection 577BE(5), forms part of the undertaking referred to in paragraph (a), and any amendment to that plan which is approved by the ACCC in accordance with section 577BF,

and includes all binding schedules, annexure and attachments to such documents.