

Mobile Terminating Access Service

Final Access Determination

Final Decision

August 2015



Australian Competition and Consumer Commission

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List of abbreviations and acronyms

2G 2nd generation networks

3G 3rd generation networks

4G 4th generation networks

A2P application-to-person

ACCAN Australian Communications Consumer Action Network

ACCC Australian Competition and Consumer Commission

ACMA Australian Communications and Media Authority

AER Australian Energy Regulator

BAK bill and keep

BBM building block model

capex capital expenditure

CCA *Competition and Consumer Act 2010* (Cth)

CCC Competitive Carriers’ Coalition

c-i-c commercial in confidence

cpm cents per minute

CSP carriage service provider

EC European Commission

EU European Union

FAD final access determination

FLBU forward-looking bottom-up

FNO fixed network operator

FSR Fixed-line service review

FTAS fixed terminating access service

FTM fixed-to-mobile

LRIC long run incremental cost

LTE long term evolution

LTIE long-term interests of end-users

MNO mobile network operator

MTAS mobile terminating access service

MTM mobile-to-mobile

MVNO mobile virtual network operator

NPTCs non-price terms and conditions

OECD Organization for Economic Co-operation and Development

opex operational expenditure

PPP purchasing power parity

SAO standard access obligation

SIOs services in operation

SMS short message service

SMSC SMS centre

TSLRIC total service long run incremental cost

TSLRIC+ total service long run incremental cost plus (organisational-level costs)

VHA Vodafone Hutchison Australia

VoLTE Voice over LTE

WACC weighted average cost of capital

Executive Summary

The ACCC has concluded its public inquiry into making a final access determination (FAD) for the declared mobile terminating access service (MTAS). The ACCC has reached a final decision on the price terms for access to the mobile voice termination service and SMS termination service. The latter was declared for the first time in June 2014.

The ACCC’s final decision on the regulated prices for mobile voice and SMS termination services is as follows:

|  |  |  |
| --- | --- | --- |
|  | Regulated price | Effective period |
| Mobile voice termination service | 1.7 cents per minute | 1 January 2016 – 30 June 2019 |
| SMS termination service | 0.03 cents per SMS |

The mobile voice termination rate reflects the estimated cost of mobile voice termination service in Australia in 2015. This is based on the costs of mobile voice termination services estimated by public cost models used by regulators in international markets and adjusted to reflect Australian conditions.

The SMS termination rate reflects the estimate cost of SMS termination service in Australia in 2015. It is the sum of two cost components. The first is a proportion of the mobile voice termination cost based on the relative network capacity used by the two services. The second is the cost of infrastructure required to specifically manage SMS traffic, i.e. SMS centres.

The ACCC reached this decision after commencing a public consultation in 2014 on different ways to determine cost-based prices for mobile termination services, and after engaging an external consultant to undertake the benchmarking study for mobile voice termination and provide advice on implementing the pricing approach for SMS termination service.

In May 2015, the ACCC released a draft decision for consultation along with the consultant’s report on the benchmarking study and derivation of SMS termination cost. The draft decision proposed a mobile voice termination rate of 1.61 cents per minute and an SMS termination rate of 0.03 cents per SMS to be applied from 1 January 2016 to 30 June 2019.

The ACCC received submissions from eight stakeholders in response to the draft decision. In particular, the mobile network operators (MNOs) raised a number of issues on the benchmarking study undertaken by the external consultant. The ACCC reviewed these submissions and worked extensively with the consultant in addressing the issues raised. The consultant revised its benchmarking study in response to some of the issues raised and provided a revised report to the ACCC in July 2015. The regulated prices the ACCC decided to adopt in this final decision are largely based on the findings of the consultant’s revised report.

Consistent with the draft decision, the ACCC has decided that the new MTAS FAD will commence on 1 January 2016. This will provide industry with a short period of transition to adjust their current commercial arrangements to reflect the changes in the regulated MTAS prices. The FAD will expire at the same time as the current MTAS declaration on 30 June 2019.

The ACCC recognises that voice-over-LTE (VoLTE) technology is likely to affect the efficient cost of providing mobile termination services and that VoLTE services are expected to be commercially launched in Australia during the FAD period.

However, the ACCC does not have sufficient information at this time to accurately assess the impact of VoLTE technology on the cost of providing the MTAS. The ACCC will monitor the development of VoLTE services in Australia. If there is evidence that VoLTE deployment has a significant impact on mobile termination costs, the ACCC may consider whether to vary the regulated MTAS prices during the term of this FAD.

The ACCC expects that reductions in the regulated mobile voice termination rate and the SMS termination rate will benefit end-users of mobile and fixed-line voice services. The ACCC expects savings from these two decisions will be passed on to consumers in the form of lower retail charges or through improved call and SMS inclusions in retail plans.

1. Introduction
   1. Background

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

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

**Domestic Mobile Terminating Access Service**

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

Definitions

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

Other definitions

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

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

Point of interconnection is a location which:

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

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

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

Under the *Competition and Consumer Act 2010* (the CCA), the ACCC may make an access determination relating to access to a declared service.[[1]](#footnote-1) An access determination provides a set of terms and conditions that access seekers can rely on if they cannot agree on terms of access with an access provider. If the parties agree on terms of access, an access determination has no effect to the extent that it is inconsistent with an access agreement.[[2]](#footnote-2) The ACCC must hold a public inquiry before it makes an access determination.[[3]](#footnote-3) Further information about the legislative requirements for making an FAD and the ACCC’s approach to applying these legislative requirements is set out in **Chapter 2**.

On 23 May 2014, the ACCC commenced the public inquiry into making a FAD for the MTAS and released a position paper on non-price terms and conditions, and supplementary prices for all declared telecommunications services.[[4]](#footnote-4)

The current MTAS FAD was made in 2011 and was due to expire on 30 June 2014. On 5 June 2014, the ACCC extended the existing MTAS FAD until the day before a new MTAS FAD comes into force.

* 1. Consultation on price terms to date

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

* Discussion paper on pricing approaches (August 2014)

The ACCC commenced consultation on the MTAS primary price terms by releasing a discussion paper on the primary pricing approaches on 1 August 2014. [[5]](#footnote-5) The discussion paper sought stakeholders’ views on a number of pricing options for the mobile voice and SMS termination services. It also sought views on other relevant pricing issues such as FTM pass-through and the implementation of transitional arrangements.

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

* ACCC’s position on pricing methodology (November 2014)

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

* Development on the benchmarking study (February 2015)

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

* MTAS FAD draft decision (May 2015)

On 6 May 2015, the ACCC released a draft decision setting out the findings of the benchmarking study and draft prices for the MTAS for stakeholders’ comment. The consultant’s report was also released with the draft decision to provide stakeholders with the information that the ACCC had taken into account in reaching its draft decision. The ACCC received submissions from eight stakeholders in response to the draft decision.

* MTAS FAD final decision (August 2015)

The ACCC has reached a final decision after carefully considering stakeholders’ submissions in response to the draft decision and undertaking further analysis of the benchmarking study. This final decision sets out the regulated rates for mobile voice and SMS termination services that will apply from 1 January 2016 to 30 June 2019.

* 1. Engagement of WIK-Consult

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

* providing a cost estimate of providing mobile voice termination in Australia by benchmarking against the cost of this service in international markets; and
* providing advice on setting SMS termination rates relative to mobile voice termination rates.

In April 2015, WIK-Consult provided its report on the benchmarking study for mobile voice termination and advice in deriving the SMS termination rates.[[6]](#footnote-6) The ACCC discussed WIK-Consult’s benchmarking study and advice on SMS in determining the draft regulated rates in the draft decision. The ACCC also engaged with WIK-Consult on issues raised by stakeholders in response to the draft decision and in reaching this final decision. In response to the submissions, WIK-Consult made changes to its benchmarking study and provided a revised report detailing the amendments made and the revised outcome in July 2015.[[7]](#footnote-7) The revised report has been released along with this final decision.

* 1. Outline of the final decision

This final decision report should be read in conjunction with WIK-Consult’s revised report. The decision is set out as follows:

* **Chapter 2** sets out the relevant legislative requirements for making an access determination under the CCA. It also outlines the ACCC’s approach in pricing the MTAS under these legislative requirements.
* **Chapter 3** sets out the ACCC’s final decision in relation to the prices terms for mobile voice termination service. It provides a summary of the key issues raised in the submissions and the ACCC’s assessment of those issues. It then sets out the ACCC’s final views in relation to the benchmarking study and the regulated mobile voice termination rate that the ACCC decided to adopt.
* **Chapter 4** sets out the ACCC’s final decision in relation to the price terms for the SMS termination service. It provides a summary of the key issues raised in the submissions and the ACCC’s assessment of those issues with reference to the WIK-Consult’s reports. It then sets out the ACCC’s final views in relation to the derivation of the SMS termination cost and the regulated SMS termination rate that the ACCC decided to adopt.
* **Chapter 5** sets out the ACCC’s final views on whether to include a mandated fixed-to-mobile (FTM) pass-through mechanism in the FAD.
* **Chapter 6** sets out the ACCC’s final decision on the duration of the FAD.
* **Chapter 7** refers to the non-price terms and conditions applicable to the MTAS FAD which have been determined in a separate joint consultation.

1. ACCC approach to pricing the MTAS

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

* 1. Legislative requirements

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

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

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

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

* whether it is or is likely to become technically feasible for the services to be supplied and charged for
* the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
* the incentives for investment in the infrastructure by which the services are supplied, or are likely to become capable of being supplied, which must involve consideration of the risks involved in making the investment.[[10]](#footnote-10)

The ACCC may also take into account any other matters that it considers relevant.[[11]](#footnote-11)

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

* 1. Application of the legislative requirements to pricing the MTAS

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

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

* What are the relevant costs of providing the MTAS that should be used to determine the regulated prices?
* What methodology should be used to derive or estimate these costs?
  + 1. What are the relevant costs of providing the MTAS that should be used to determine the regulated prices?

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

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

Similarly, the objective of promoting competition in downstream markets must also be viewed in light of these principles. While low MTAS prices may promote competition, increased competition will not be sustained if such prices are so low as to discourage MNOs from making efficient investment in, or maintaining, the infrastructure in the long run. The ACCC considers that in assessing whether a FAD will promote the LTIE it is necessary to consider the long-term impact that it will have on competition.

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

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

* + 1. What methodology should be used to derive or estimate these costs?

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

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

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

* + 1. Conservative approach in pricing the MTAS

In implementing the international benchmarking approach for mobile voice service and deriving the cost of SMS termination service, WIK-Consult has consistently applied a ‘conservative’ approach. WIK-Consult explained in its revised report that this is due to the margins of error which are inherent in conducting an international benchmarking study. For this reason, where a choice or judgment has to be made in adopting a particular estimate or approach in the benchmarking study, WIK-Consult has consistently adopted the approach which would limit the possibility that access providers will not be able to fully recover the efficient costs of providing the MTAS. WIK-Consult referred to this in principle approach as ‘being conservative’.[[12]](#footnote-12) WIK-Consult has used this term to explain its decisions in a number of instances in its revised report.

The ACCC recognises that in the course of the benchmarking study, a degree of discretion needs be exercised in adopting different approaches or estimates at various stages of the study, based on available information. In this context, the ACCC considers that a conservative approach in exercising this discretion, as described by WIK-Consult above, is consistent with the legislative criteria in relation to MTAS pricing.

In these circumstances where the choice of an approach or estimate gives rise to a margin of error, the ACCC considers it appropriate under the legislative criteria to adopt an approach that minimises the risk of cost under-recovery.

1. Price terms for mobile voice termination

Key Points

* The ACCC has decided to retain the benchmark countries selected in WIK-Consult’s original benchmarking study on the basis that they have developed cost models which are capable of producing TSLRIC+ cost estimates.
* The ACCC has examined the adjustment factors in response to submissions from stakeholders in consultation with WIK-Consult.
* The ACCC has decided to remove the geographic terrain adjustment in WIK-Consult’s original benchmarking study, retained other adjustment factors and included a new adjustment factor to account for the higher transmission cost in Australia having considered the submissions received.
* Based on the outcome of the benchmarking study, the ACCC has decided to adopt a regulated mobile voice termination rate of 1.7 cents per minute to apply from 1 January 2016.
  1. ACCC’s draft decision
     1. Pricing approach

The ACCC decided to use an international benchmarking approach to estimate the cost of providing mobile voice termination service in Australia. The ACCC considered a number of other pricing options, including the development of a cost model; the building block model (BBM); the use of the fixed terminating access service (FTAS) rate and bill-and-keep (BAK).

The ACCC considered that an international benchmarking approach is the most appropriate because:

* an international benchmarking approach can be implemented relatively quickly and with minimal impost on industry stakeholders
* a cost model, by comparison, would likely take one to two years to implement with proper stakeholder consultation
* a BBM is not appropriate for the MTAS due to the rapid technological change in the industry and the need to develop three BBMs for the three MNOs
* setting the mobile voice termination rate by reference to the FTAS rate does not reflect the efficient cost of providing the service
* the risk of arbitrage associated with a BAK regime still remains.[[13]](#footnote-13)
  + 1. Implementation of international benchmarking

The ACCC engaged WIK-Consult to undertake an international benchmarking study to estimate the cost of providing mobile voice termination service in Australia. The ACCC considered that the TSLRIC+ standard remains the most appropriate pricing principle for this service in Australia taking into account the relevant legislative criteria under section 152BCA of the CCA.[[14]](#footnote-14) As such, the ACCC instructed WIK-Consult that the benchmark countries should be restricted to those that have developed cost models based on TSLRIC+ framework or that are capable of producing TSLRIC+ estimates.[[15]](#footnote-15) The ACCC also instructed WIK-Consult to make appropriate adjustments to the benchmarks to take into account Australia-specific conditions which affect the cost of mobile voice termination services.[[16]](#footnote-16)

Based on these criteria, WIK-Consult selected nine countries to be included in the benchmarking study:

* Denmark
* Portugal
* Romania
* Mexico
* Spain
* Netherlands
* Sweden
* Norway
* UK.

WIK-Consult then applied adjustments to the benchmarks to take into account the following factors which have the most significant impact on the cost of mobile voice termination service:

* Currency conversion
* Share of 2G/3G voice traffic
* WACC
* Network usage
* Geographic terrain
* Spectrum fees.

Based on the outcome of WIK-Consult’s benchmarking study, the estimated cost of mobile voice termination service in Australia was 1.61cents per minute.

WIK-Consult also provided preliminary estimates of the cost of this service over the years 2016 to 2020 based on the projected share of voice-over-LTE (VoLTE) traffic in the UK cost model. The UK cost model shows that on average the cost of termination on a 4G network is around 30% of that on a 3G network. This means that the larger the share of VoLTE traffic on a mobile network, the lower the average cost of termination.

* + 1. Draft mobile voice termination rate

The ACCC considered in the draft decision that the benchmark countries selected by WIK-Consult satisfied the selection criteria that the ACCC specified. The ACCC also considered that the adjustments made to the benchmarks reflected the most significant cost drivers for providing the mobile voice termination service; were based on the current information from Australian sources and had been applied in a conservative manner in order to balance the objective of not discouraging efficient investment through cost under-recovery with the risk of cost over-recovery.[[17]](#footnote-17)

Therefore, the ACCC decided to adopt the estimated cost of mobile voice termination service based on the international benchmarking study of 1.61 cents per minute, as the draft mobile voice termination rate. The ACCC’s draft decision was that this rate would apply from 1 January 2016 to 30 June 2019 to give industry a short period of transition to adjust their commercial arrangement to reflect the new regulated rate. [[18]](#footnote-18)

The ACCC noted in the draft decision that while it did not have sufficient information on the deployment of VoLTE services in Australia to assess its impact on the cost of mobile voice termination service in the coming years, it will monitor these developments during the term of the FAD. The ACCC also indicated that it may review the regulated rate during the term of the FAD if there is sufficient evidence that it no longer reflects the efficient cost of mobile voice termination due to the deployment and take-up of VoLTE services in Australia.[[19]](#footnote-19)

* 1. Submissions to draft decision

The ACCC received submissions from eight stakeholders:

* Dialogue Communications
* iiNet
* Macquarie Telecom (original and supplementary submissions)
* Mblox
* Optus
* Telstra (along with a consultant report from Network Strategies)
* TPG
* Vodafone Hutchison Australia (VHA).

iiNet, Macquarie Telecom and TPG generally supported the benchmarking study conducted by WIK-Consult and adoption of the estimated mobile voice termination cost resulting from the study in the FAD.[[20]](#footnote-20)

Dialogue Communications and Mblox did not specifically comment on the benchmarking study. Their submissions are in relation to the application of the regulated SMS termination to application-to-person (A2P) SMS, which is discussed in **Chapter 4**.

The MNOs raised a number of issues relating to the benchmarking study, in particular the adjustments made to the benchmarks. The section below focuses primarily on the issues raised by the MNOs and the ACCC’s consideration of these issues.

A summary of the submissions to the draft decision is at **Appendix B**.

* 1. ACCC’s final decision

The ACCC has reviewed the submissions from stakeholders and discussed the issues raised in relation to the benchmarking with WIK-Consult. This section presents the ACCC’s assessment of the various issues raised in the submissions and its final views on the approach that should be taken in the benchmarking study.

* + 1. Selected benchmark countries
       - 1. Submissions

Telstra and VHA both made comments on the selection of benchmarking countries that were included in the study.

Telstra submitted that the selection of benchmark countries has not been based on any criteria which considered whether the country is a reasonable comparator to Australia, unlike similar benchmarking exercises undertaken elsewhere such as New Zealand.[[21]](#footnote-21) Telstra noted the differences in a number of factors across the benchmark countries and Australia, including population density, land size and urbanisation, and was concerned with the lack of comparability across a range of factors. Telstra did not suggest any countries that it considered were reasonable comparators to Australia. Telstra submitted that given no refinement to the benchmark countries has been made on the basis of these factors, it is critical to make adjustment to reflect the differences in these factors.[[22]](#footnote-22)

VHA observed that the benchmark set is small and there are not many obvious similarities between the countries selected and Australia. VHA also submitted that WIK-Consult did not build any of the models in the sample set and it is not apparent as to whether the models can be adjusted for Australian conditions. VHA further noted that only one of the countries selected implemented the TSLRIC+ standard being used in Australia and the ACCC should be mindful that elements specific to the TSLRIC+ standard received less regulatory and operator scrutiny than elements of the model associated with the pure LRIC standard in the benchmark countries.[[23]](#footnote-23)

* + - * 1. ACCC’s view

As noted in the draft decision, the ACCC instructed WIK-Consult to restrict the benchmark countries to those that published a cost model which is capable of producing a TSLRIC+ estimate for mobile voice termination service.[[24]](#footnote-24) This is because the ACCC considers that TSLRIC+ is the most appropriate pricing framework for Australia as it best promotes the LTIE.[[25]](#footnote-25)

The ACCC notes that the requirement that the benchmarked cost models must be public is necessary to provide transparency over the inputs and assumptions underlining the cost estimates produced by the models. This information enabled WIK-Consult to undertake the necessary adjustments based on the differences of certain inputs between the benchmark countries and Australia.

The ACCC acknowledged in the draft decision that the benchmark countries selected differ from Australia in characteristics that may impact on the cost of providing the mobile voice termination service. However, the ACCC considered that the adjustment process undertaken by WIK-Consult took these differences into account in determining the cost of voice termination in Australia.[[26]](#footnote-26)

The benchmarking study considered country-specific characteristics raised by Telstra, such as population density, land size and urbanisation and provided reasons why certain characteristics were not adjusted in the study. Following the submissions to the draft decision, these factors have been reconsidered and WIK-Consult has made some amendments to its benchmarking study. This is discussed in detail in **sections 3.3.5 and 3.3.6** below.

As the cost models are all public, the ACCC considers that WIK-Consult had access to the information relevant for undertaking the benchmarking study and for assessing whether those models were adjustable for Australian conditions. The ACCC understands that in countries where a pure LRIC standard is adopted, inputs specific to the calculation of a TSLRIC+ estimate may have received less regulatory and stakeholder scrutiny than those parameters necessary for calculation of the pure LRIC estimate. However, the ACCC considers that as long as the models are capable of producing TSLRIC+ estimates based on properly constructed mechanisms, its TSLRIC+ output provides a credible benchmark to be used in the current study. The WIK-Consult final report discusses the actions taken to choose the benchmark countries for inclusion in the benchmarking study.

For the reasons outlined above, the ACCC remains of the view that the benchmark countries selected are appropriate.

The ACCC notes that WIK-Consult has updated the cost models for the UK, Portugal, Denmark and Sweden with the most recent versions that have become available since the original benchmarking study was undertaken.

* + 1. Currency conversion

WIK-Consult used an average of market exchange rate (10-year average) and PPP-adjusted exchange rate for converting the cost estimates from cost models in local currency to Australian dollar. This was based on WIK-Consult’s empirical observation that approximately 50% of the cost of mobile voice termination is spent in non-tradeable goods and services, and 50% in tradeable goods and services.

* + - * 1. Submissions

Telstra submitted that it was not aware of any other jurisdictional regulator adopting a hybrid or similar approach for currency conversion in benchmarking exercises, apart from the New Zealand Commerce Commission in 2011.[[27]](#footnote-27) Telstra considered that using both market exchange rates and PPP-adjusted rates leads to double-counting. Telstra also submitted that market exchanges rates are subject to volatile capital movements, bearing little or no relation to relative prices or relative inflation rates.[[28]](#footnote-28) Telstra’s submission was supported by similar views of its consultant Network Strategies’ as outlined in its report.[[29]](#footnote-29) As such Telstra submitted that PPP-adjusted exchange rates alone should be used for currency conversion.[[30]](#footnote-30)

VHA submitted that the MTAS is a non-traded service and it is therefore appropriate to use the PPP-adjusted exchange rate to convert international rates to Australian currency. VHA did not consider that WIK-Consult provided any evidence to support its claim that the even-split between the average market exchange rate and the PPP-adjusted exchange rate represents an empirically observed relation between the shares of a mobile network operator’s cost derived from tradable goods and services and from local resources.[[31]](#footnote-31)

VHA considered that a cross-sectional PPP-adjusted exchange rate will adequately reflect the cost of acquiring tradable inputs and recommended that a one-year average for the 2014 calendar year be used for the market exchange rate.[[32]](#footnote-32)

Optus questioned the upfront application of the currency conversion. It submitted that given the adjustment approach is sequential in nature, it is unclear why the adjustment would occur upfront and not towards the latter end of the selected adjustments.[[33]](#footnote-33)

* + - * 1. ACCC’s view

In response to the submissions, WIK-Consult conducted further analysis on the appropriate use of the market exchange rate and the PPP-adjusted exchange rate in converting the benchmarks to Australian dollars.

Both Telstra and VHA proposed that the ACCC use PPP-adjusted exchange rate alone in converting the currencies. WIK-Consult considered these views but concluded in its revised report that the use of PPP-adjusted exchange rate alone would not be appropriate. Although PPP adjustment is normally used to allow comparison of relative prices for non-tradeable local resources (such as labour) in different countries, WIK-Consult argued that the non-tradeable input for telecommunications networks specifically do not differ to the extent implied by the PPP factors. To demonstrate this, WIK-Consult compared the cost of a mobile site in the benchmark countries and that in the 2007 WIK model for Australia (adjusted to 2015 prices) after converting the foreign currencies using both a pure market exchange rate and a 50:50 blended approach.[[34]](#footnote-34) WIK-Consult found that the values of sites are more homogeneous when converted using pure market exchange than using a blended approach. WIK-Consult considered that this suggests that the application of PPP-adjustment exchange rate may be justified for a share of the MTAS cost which is less than the 50% originally applied.

This outcome is also supported by observations made in a report the ACCC commissioned to Analysys Consulting (Analysys) in 2004 on international benchmarking for mobile voice termination.[[35]](#footnote-35) While some information considered in Analysys’ report is now outdated (such as the results from cost models from other jurisdictions), the ACCC considers the theoretical discussion on the merit of PPP adjustments remains relevant. The report similarly noted that many products in the consumer basket used for deriving the PPP factor only have a limited relationship to the cost base of a mobile network as most of the costs of a mobile network are costs incurred in international currencies and only a minor proportion of the network costs are incurred in the local market.[[36]](#footnote-36) Analysys estimated that around 75% of the total network cost of termination comprises internationally-denominated costs and that only 25% is related to the local costs of production.[[37]](#footnote-37)

The ACCC accepts WIK-Consult’s analysis and considers that a 50:50 blended market exchange rate and PPP-adjusted exchange rate is likely to be a conservative approach to currency conversion. In the absence of any evidence on the shares of the two cost components, a conservative approach in applying the relative weights of market-exchange rate and PPP-adjusted exchange rate is reasonable. Therefore, the ACCC has decided to retain the simple average of the two rates used in the original benchmarking study.

Further, the ACCC considers that the use of a 10-year average market exchange is appropriate. As explained by WIK-Consult in its original report and the revised report, market exchange rates are subject to capital movements and other economic and financial conditions prevailing at a particular point in time.[[38]](#footnote-38) As such, market exchange rates may fluctuate significantly from time to time and the use of a long term average (such as the 10-year average) is likely to better reflect the long-term value of the Australian dollar. The ACCC has considered VHA’s suggestion of a one-year average but does not consider that to be appropriate for the reasons outlined.

The ACCC considers that it is logical and appropriate that the currency conversion is made at the beginning of the adjustment process. While WIK-Consult has shown that the order in which different adjustments are made does not affect the outcome of the benchmarking study,[[39]](#footnote-39) the ACCC considers that the presentation of the benchmarks in a common currency at all stages of the adjustment provides a much clearer picture of the impact of each adjustment and makes it possible to compute the average of the benchmarks at each stage.

* + 1. 2G and 3G voice traffic share

The cost of terminating voice on 2G traffic is substantially greater than that on 3G networks, so the proportion of 2G to 3G voice traffic is an important determinant of the cost of mobile voice termination service. As the share of 3G voice traffic in Australia is substantially higher than the benchmark countries at 94%, this adjustment was expected to lead to significant changes in the cost of mobile voice termination services. In the original benchmarking study, WIK-Consult adjusted for the differences in the costs of 2G and 3G traffic due to the differences in shares observed in the benchmark countries and Australia by applying an elasticity with which the cost reacts to the differences in these shares. The elasticity value applied is uniform across the benchmark models. The elasticity values used for 2G and 3G traffic shares were -0.5 and -0.3 respectively which WIK-Consult considered to be conservative estimates based on a study it conducted for the New Zealand Commerce Commission in 2008.[[40]](#footnote-40)

WIK-Consult applied the adjustments to 2G and 3G traffic shares separately and then blended the results using the proportion of traffic shares in Australia.

* + - * 1. Submissions

Telstra (and Network Strategies) submitted that while the underlying methodology used by WIK-Consult is reasonable, there is no evidence to support the elasticity values used by WIK-Consult. They argued that these values come from an outdated study, only focused on 2G models and were based on changes in traffic shares that are far smaller than that observed in the current study.[[41]](#footnote-41)

Optus submitted that the elasticity values used by WIK-Consult were unjustified and differ significantly from the actual elasticity values calculated in the benchmark models. Optus argued that after analysing the elasticity values calculated in selected benchmarks, it observed that the actual elasticity value for 2G is significantly greater than the one used by WIK-Consult, and the actual elasticity value for 3G is significantly smaller than the one used by WIK-Consult.[[42]](#footnote-42)

VHA also raised issues relating to the elasticity values chosen by WIK-Consult, including the fact that the study that these values come from is outdated, the assumed elasticity values are not linked to the benchmark countries or Australia’s geographic realities and the use of a single elasticity value across all benchmarks is unlikely to be appropriate. VHA further argued that WIK-Consult had not considered elasticity drivers such as the required coverage network in Australia, country specific traffic splits and cost paths. VHA acknowledged that it would be difficult to address all of these elements and therefore proposed that a set of more conservative elasticity values be used for both 2G and 3G of -0.3 and -0.15 respectively.[[43]](#footnote-43)

* + - * 1. ACCC’s views

The ACCC considered the various issues raised by the MNOs in consultation with WIK-Consult. The ACCC’s final views in relation to this adjustment are outlined below.

The ACCC considers that the use of elasticity values in the way undertaken by WIK-Consult is appropriate for the purpose of the benchmarking exercise. As noted by Optus, an alternative approach would be to directly alter the shares of 2G and 3G voice traffic in the cost models and then calculate the corresponding elasticity values from the observed changes in the cost estimate for each 2G and 3G voice termination. However, the ACCC has concerns over the use of this particular approach for the following reasons:

* The benchmark cost models have been constructed separately from each other and can be very complex. Making substantial changes to the cost models leads to the risk of making errors in the operation of the models or being inconsistent in the application of the changes across different models.
* The above concerns are highlighted by the results presented by Optus, which show widely spread elasticity values calculated from altering the benchmark cost models. The ACCC is particularly concerned by the fact that three out of the six models selected by Optus show a positive elasticity values for 3G which implies that as the share of 3G voice traffic increases, the cost of termination on 3G networks also increases. This is contrary to reasonable assumptions regarding the economies of scale in the use of a more efficient technology.

For the above reasons, the ACCC does not consider that making direct changes in the cost models to derive the corresponding elasticity values is appropriate for this adjustment.

The ACCC notes VHA’s submission given not all elements pertaining to the impact of a change in the shares of 2G and 3G voice traffic could be addressed in deriving the elasticity values, more conservative values should be chosen. The ACCC considers that, for the reasons discussed in WIK-Consult’s revised report and below, the elasticity values selected for this adjustment are appropriate.

To address MNOs’ concerns over the lack of evidence to support WIK-Consult’s selected elasticity values used in the original benchmarking study, WIK-Consult conducted further analysis on the likely impact of a change in the shares of 2G and 3G voice traffic. For this purpose, WIK-Consult used its generic WIK Model, which is a multi-technology cost model that has the flexibility to accommodate the changes in the shares of 2G and 3G voice traffic. WIK-Consult conducted simulations on the WIK Model to observe changes in cost estimates resulting from a shift from the average shares of 2G and 3G voice traffic observed in the benchmark countries to the shares of 2G and 3G voice traffic in Australia.[[44]](#footnote-44)

According to the results of the simulation exercise, a change in the shares of 2G and 3G voice traffic from the average levels observed in the benchmark countries (48% for 2G) to that in Australia (6% for 2G) leads to a 52% decrease in the estimated cost of voice termination. WIK-Consult decided to apply elasticity values for 2G and 3G traffic changes that would lead to a decrease of two-thirds of the 52% decrease, i.e. 37%. WIK-Consult considered this to be a reasonable and conservative approach. The resulting elasticity values are -0.55 for 2G, which is slightly higher in absolute value than the one used in the original study, and -0.22 for 3G, which is slightly lower in absolute value than the one used in the original study. The combined effect is that the new elasticity values, although close to those used originally, result in a slight adjustment for the differences in 2G and 3G voice traffic shares.[[45]](#footnote-45)

WIK-Consult has visibility and control over all the assumptions used in the model that underpins the simulation exercise and was able to check the accuracy and robustness of the results. Therefore, the ACCC considers that WIK-Consult’s simulation analysis in the revised report is a reasonable basis for assessing the appropriate elasticity values for the adjustment to the 2G and 3G voice shares.

* + 1. WACC

WIK-Consult identified the weighted average cost of capital (WACC) as one of the factors that affects the cost of termination as it has direct impact in the annualised capital expenditure incurred by operators.

As the WACC is a country-specific factor, the benchmark values need to be adjusted to reflect the differences between the cost of capital in Australia and that in the benchmark countries. In its draft decision the ACCC considered that the WACC determined in the Fixed-line Services Review (FSR) would be appropriate to reflect the cost of capital of an efficient mobile operator in Australia.

* + - * 1. ***Submissions***

Telstra submitted that the use of a common WACC for the fixed line network operator and an MNO is appropriate as two of the three MNOs are integrated (i.e. fixed and mobile) operators. Telstra also claimed that using the FSR WACC calculated for Telstra is adequate since it is the benchmark efficient operator with the best credit ratio and consequently the lowest debt issuance cost. However, Telstra disagrees with the proposed level of the FSR WACC on the basis that it underestimates the cost of financing capital expenditure in Australia.[[46]](#footnote-46)

Telstra also submitted that the elasticity value utilised by WIK-Consult in the adjustment for WACC relies on a 10-year-old model that solely involves 2G technology. Telstra also argued that WIK’s use of a constant elasticity value to make the adjustments is misleading. Telstra suggests that WIK should instead run each of the models using the Australian WACC to obtain adjusted benchmarks directly.[[47]](#footnote-47)

Optus submitted that the use of the FSR WACC differs from previous MTAS decisions where a mobile-specific WACC was used. Optus argued that the ACCC does not provide evidence supporting this departure from its long-standing position. Optus also submitted that the Draft FAD may be contrary to previous decisions of the Australian Competition Tribunal (ACT), in that considering the costs of a stand-alone carrier best promotes the legislative objectives set out in s.152AB.

Optus argued that the proposed WACC is inconsistent with a hypothetical new entrant as it is based on Telstra as an operator of a monopoly fixed-line network. Optus is of the view that the ACCC should consider instead the cost of capital for a stand-alone mobile operator entering the market.

Optus submitted that the international evidence shows that the average asset beta for mobile operators is greater than the asset beta used in the FSR WACC. Optus also noted that the standard debt premium used in MTAS decisions in Europe is higher than the one proposed in the FSR FADs. Updating these two parameters with those determined in other jurisdictions result in a higher WACC of 6.7%. Optus therefore recommended that the ACCC conduct further consultation on the appropriate WACC values.[[48]](#footnote-48)

VHA was also of the view that the WACC used in FSR FADs is not a proxy for the investment risks associated with the provision of mobile services. VHA argued that MNOs have a riskier profile than fixed-line network operators due to competition and shorter technology and investment cycles in the mobile market. VHA noted that all WACC figures in the benchmark models are higher than the proposed WACC for MTAS. In the absence of a specific assessment for a mobile operator’s WACC, VHA recommended its own WACC of [c-i-c] to be applied for the adjustment.

As an alternative approach, VHA suggested that the ACCC could identify the differences in the risk-free rate between Australia and the benchmarked countries implicitly to determine implicitly mobile-specific risk factors and debt-gearing levels.[[49]](#footnote-49)

* + - * 1. ***ACCC’s view***

The draft decision adopted the nominal WACC of 5.43%, which was the WACC calculated in the FSR FADs draft decision released in March 2015. The ACCC considered this WACC to be applicable to the MTAS because the parameters used for this WACC were generally applicable to an Australian telecommunications service provider.[[50]](#footnote-50)

The ACCC is not seeking to align the WACC for the MTAS to the WACC in the FSR process directly. Rather the ACCC has formed the view that the approach taken in the FSR FADs draft decision in calculating the WACC means that the resulting value can reasonably reflects the cost of capital for a hypothetical efficient MNO in Australia. This is because:

* Most of the parameters in the determination of WACC are appropriate for either fixed-line network operators or MNOs, such as the risk-free rate, market risk premium, debt premium and tax rate.
* The only parameter that is arguably different for mobile services and fixed-line services, the equity beta, was determined by benchmarking against the betas of integrated telecommunications operators in OECD countries in the FSR FADs draft decision. As noted in the draft decision, the ACCC considers that this equity beta is appropriate for a hypothetical efficient operator as two out of the three MNOs are integrated operators.

Further, the ACCC considers that the sensitivity of the overall benchmarking result to a change in WACC value is likely to be small due to the role of the WACC in the benchmarking study. The benchmarking study does not seek to precisely determine a WACC to be applied to the asset base of an Australian mobile operator or for a hypothetical efficient mobile operator in Australia. In the international benchmarking study, the WACC is used as an Australia-specific input for the purpose of comparing it with the WACC identified in the benchmark cost models. The actual impact of the Australian WACC value on the overall benchmarking result is further minimised by the selection of a low elasticity value, which, as explained by WIK-Consult, reflects a conservative estimate based on its study for the New Zealand Commerce Commission in 2008 and more recent simulations using the generic WIK model.[[51]](#footnote-51) To illustrate, ACCC’s analysis shows that adopting Optus’ proposed WACC of 6.7% only increases overall benchmarking result by around 0.04 cents per minute, or 2%.

The ACCC notes Optus’ submission that using the WACC of an integrated operator is inconsistent with the decision of the ACT in relation to Optus’ undertaking in providing the MTAS in 2006.[[52]](#footnote-52) However, the ACCC does not consider that the decision of the ACT in assessing whether the terms of an undertaking provided by a specific operator restricts the ACCC’s assessment of a reasonable WACC value to include in an international benchmarking study.

Given the low impact of the WACC value on the overall benchmarking result, the ACCC considers that the use of a WACC consistent with an integrated operator is a reasonable way to account for the costs of investment in an Australian mobile network as an input to the international benchmarking study. To this end, the ACCC considers that the WACC determined in the FSR FADs draft decision provides a reliable estimate of a WACC for an integrated operator in Australia.

Updating the WACC used for the MTAS draft decision with the latest economic indicators, such as inflation rate and risk-free rate, the ACCC has decided to use a revised nominal WACC of 5.89% for the final decision.

The ACCC acknowledges that as part of the FSR process, it is continuing to assess the WACC for the purpose of the FSR final decision. That is an ongoing process. Given the timeframe for implementation of the MTAS decision, the ACCC considers that in these circumstances it is appropriate to adopt a WACC of 5.89% as it represents the best WACC estimate for MTAS at this point in time. The ACCC does not consider that it is in the LTIE or the interests of the industry to further delay the MTAS final decision.

* + 1. Network usage

A number of stakeholders argued that an adjustment needs to be made to account for the very low population density in Australia. In its draft decision, the ACCC set out reasons for its view that network usage (per mobile site) is a more appropriate adjustment factor, since it reflects the larger economies of scale of Australian mobile networks in relation to the benchmark countries and captures the effect of a higher proportion of low-traffic coverage-driven sites.

* + - * 1. ***Submissions***

Telstra submitted that WIK’s conclusion is not consistent with international precedent as well as previous ACCC’s decisions. Telstra considered that WIK’s analysis is oversimplified and relies on unsupported assumptions on the relationship between network usage and the cost of deploying networks across non-comparable jurisdictions.

Telstra cites the views of its consultant Network Strategies, that the adjustment for network usage partially addresses the coverage issue as is does not consider the additional costs of longer backhaul necessary to provide interconnection to sites in larger coverage areas.

Telstra argued that it is likely that Australian networks would have incurred additional capital expenditure to carry a higher level of traffic than the benchmark countries. Telstra also maintained that since the benchmark cost models are developed to ascertain voice termination costs, they are likely to be under-dimensioned for data and that WIK is not making a like-for-like comparison.[[53]](#footnote-53)

Optus submitted that the ACCC”s draft decision on network usage was based on errors in WIK-Consult’s original report on the correct values and recommends the ACCC reconsider its view based on appropriate values. Optus noted the significant variation between the figures for ‘users per site’ for Australia in WIK’s report and those used in the Australian Communications and Media Authority’s (ACMA) Network Capacity Forecasting Model developed by Analysys Mason and considers that there is little evidence supporting the finding of high network use in Australia. Optus considered that the significant difference in usage per site between Australia and the benchmark countries is due to the inclusion of 4G data traffic, which most of the benchmark models do not involve. Optus recommended that Australian 4G data should be excluded from the analysis for a like-for-like comparison. According to Optus’ calculations this would result in a figure for Australian network usage consistent with the usage of benchmark countries with no 4G traffic.[[54]](#footnote-54)

VHA submitted that while 4G networks bring about efficiency gains, it is difficult to estimate the impact of 4G on mobile termination costs without a cost model developed for Australia. VHA also argues that a rapid migration to 4G would shorten the economic life of 2G and 3G which would drive a higher cost of MTAS. VHA proposed to disregard 4G traffic as it is not possible to determine the effect of 4G on network costs. VHA also considers that the comparison of network usage in terms of gigabytes per site is misleading as eight of the nine benchmark models only provide cost estimates for 2G and 3G.

VHA proposed adjusting the figure for average traffic per site in Australia using the forecast ‘busy hour’ proportion of 3G/4G traffic for a 33.33% market share operator as specified in the ACMA’s Network Capacity Forecasting Model.

* + - * 1. ***ACCC’s view***

The ACCC acknowledges that Australia’s low population density means that Australian mobile networks are likely to have a relatively higher proportion of coverage-driven sites in comparison to the benchmark countries. A number of sites, for example those along roads or in regional or remote locations, are built with the purpose of mainly providing coverage only. Coverage-driven sites have a lower level of traffic, and therefore have associated higher costs per unit than ‘traffic-driven’ sites generally located in urban areas.

However, as noted in WIK’s report, the average usage per site is much higher in Australia than in the benchmark countries. This means that, despite a relative higher number of coverage-driven areas, Australian mobile networks are on average displaying significantly larger economies of scale than other countries in the benchmark.[[55]](#footnote-55) The ACCC is of the view that this disparity warrants the correction of benchmarks to reflect the effect that this higher efficiency has on the cost of providing termination services.

Optus and VHA suggested that the network usage figure relevant to Australia is artificially inflated by the inclusion of 4G data traffic, when 4G traffic is not present in most of the benchmark models.[[56]](#footnote-56) They argued that 4G data traffic should be removed from the analysis to allow a ‘like-for-like’ comparison.

The ACCC considers that 4G data services must be included in the analysis as they are provided using existing mobile network infrastructure that 4G shares with 2G and 3G services. The inclusion of 4G data services in the analysis reflects the fact that capital and operating network costs incurred are allocated to each of the services sharing the mobile network infrastructure. This allocation is based on relative usage of the services. As explained in WIK-Consult’s revised report, this means that the implementation of 4G data services has a proportionate impact on the cost of providing voice services over 2G and 3G networks. The ACCC considers that the provision of 4G data traffic in Australia reduces significantly the portion of common network costs that can be attributed to 2G and 3G services, such as those incurred to provide MTAS. While a relatively less efficient use of the networks in non-4G countries is likely to reflect in comparatively lower levels of traffic, this lower efficiency is also likely to be expressed as higher MTAS benchmarks for those countries.

For these reasons, the ACCC considers that 4G data traffic should be included in making adjustments in the benchmarking study. Removing 4G data traffic would risk overestimating the cost of mobile voice termination in Australia by over-allocating costs to 2G and 3G services. This approach would not reflect the efficient cost of providing the mobile voice termination service and therefore would not promote the LTIE.

As discussed in the section dealing with 2G/3G traffic share above, WIK undertook further analysis to help substantiate the elasticity value utilised for the network usage adjustment. For this purpose, WIK ran a number of simulations on a generic multi-technology WIK model to observe the change in the cost of termination when usage per site is adjusted to Australian levels. WIK observed that when the input for traffic per site shifts from the average of the benchmark sample (4,700GB/site) to Australian levels (15,000GB/site) the cost of termination decreases 11%.[[57]](#footnote-57)

Taking this percentage decrease as the upper limit of the impact of higher network usage in Australia, WIK decided to consider an elasticity value corresponding to an overall decrease of 2/3 of the observed 11%. The result corresponds to an elasticity value of 0.022, which is similar to the one proposed in WIK’s original report.[[58]](#footnote-58)

The ACCC acknowledges that the use of a generic model lacks the accuracy of a model developed for Australia. However, the ACCC considers that using a generic model provides further substantiation to WIK’s choice of elasticity values and addresses a recurrent concern expressed in submissions.

In summary, the ACCC decides that the benchmarks in the sample must be adjusted to reflect differences in network usage and their impact on termination costs. The ACCC considers that *network usage per site* is an appropriate indicator to use for the correction and that the elasticity value applied by WIK reasonably to reflects the sensitivity of MTAS costs to changes in network efficiency.

* + 1. Geographic coverage

WIK-Consult did not include any adjustment relating to geographic coverage in the original benchmarking study. While the ACCC has discussed population density in the context of the network usage adjustment process, in this section the ACCC also discusses population density as it is related to geographic coverage. The MNOs have referred to the two concepts together.

* + - * 1. Submissions

Telstra submitted that WIK-Consult failed to take into account the cost of deploying geographically larger mobile networks in Australia compared to relatively small geographic networks in European countries. Given the relatively greater presence of higher cost, low-density coverage sites in Australia, Telstra considered it is necessary to explicitly take into account the different cell site density and network coverage in benchmarking network costs.[[59]](#footnote-59)

Telstra also noted that in discussing population density as a relevant measure, the ACCC and WIK-Consult made no allowance for distance between cell sites in Australia.[[60]](#footnote-60) This is supported by discussion in the Network Strategies Report which noted that mobile networks with larger coverage areas will have more base stations and the average backhaul distance per site is likely to be greater particularly in rural areas.[[61]](#footnote-61)

Similarly, VHA noted that Australia’s mobile networks cover much greater land mass than mobile networks overseas. It submitted that the implication of higher users per site is not that population density does not matter, but it is a reflection of the fact that the cost of deploying sites in Australia is expensive compared to the benchmark countries and so fewer sites are deployed than what would typically occur in other countries. VHA submitted that the absence of a geographic coverage adjustment will lead to a lower than is efficient cost and will discourage economically efficient investment, particularly in regional and remote Australia.[[62]](#footnote-62)

Therefore VHA proposes the inclusion of an adjustment to reflect the differences in the number of coverage sites between Australia and each of the benchmark countries. VHA also proposed the inclusion of a uniform 3% uplift across the benchmarks to account for higher backhaul costs due to Australia’s geographic size.[[63]](#footnote-63)

As noted in the previous section, Optus criticised the adjustment for network usage on the basis of the inclusion of 4G data traffic. It therefore considered that the ACCC’s conclusion that it was appropriate not to adjust for population density because of extremely high network usage per site was based on errors in the Australian value.[[64]](#footnote-64)

* + - * 1. ACCC’s views

The ACCC in principle accepts the views of stakeholders that the extent of geographic coverage of networks in Australia relative to the size of networks in the benchmark countries has an impact on the cost of mobile voice termination. The largest Australian network (covering around 2.4 million square kilometres), while only covering a small proportion of the Australian land mass, is still significantly larger than the comparable networks in the benchmark countries. To assess how this difference should be taken into account, the ACCC considers it important to examine how the size of a network affects the costs relevant to the mobile voice termination service. In particular, it is important to examine the way in which a TSLRIC+ cost model determines the cost of providing the service and the relevant parameters in the models given it is the cost models which produce the benchmarks on which adjustments are made.

In general, the ACCC considers that the size of the network affects the deployment of a mobile network in two different ways.

Effect on the density of demand

The size of the network and the population together determines the population density that is relevant for a mobile network.[[65]](#footnote-65) The larger the coverage area of the network is for a given population size, the lower the population density. Australia has the lowest population density compared to the benchmark countries. However, Australia’s population is not evenly distributed across the coverage area because of the high urbanisation rate of 89%. This means that at the sub-national level, population density in urban areas is likely to be high but it is likely to be extremely low in non-urban areas.

Population density affects per unit cost of traffic in the radio access network. Generally in areas where population density is low, the average user per mobile site is likely to be low so the average traffic per site is also likely to be low. In such areas, there is a greater proportion of coverage-driven sites where the demand for traffic is less than the minimum capacity deployed. In other words, deploying mobile sites in low-density areas is costly because the cost of deploying the site must be allocated over a smaller amount of traffic. Thus from a cost-recovery point of view, per unit cost of traffic is higher.

Following this, the ACCC considers that the effect of population density is encapsulated and reflected in the average volume of traffic per site (which of course, is also affected by a variety of other exogenous factors). In Australia, non-urban areas are likely to have high per unit cost of traffic due to the lower average traffic per site. However, this tends to be offset by the low per unit cost of traffic in traffic-driven sites in urban areas. Based on the TSLRIC+ framework the overall per unit cost of traffic will depend on the (annualised) capital and operating costs of the total network and the total traffic conveyed in a year.

Based on the reasoning above, the ACCC considers that in the inclusion of a network usage adjustment, which compares the differences between total traffic in benchmark countries and Australia, the effect of population density on per unit cost of traffic has been properly taken into account.

The ACCC notes Telstra’s observations in its submission that it is impossible to draw any meaningful relationship between the number of mobile sites/user per site and population density across the benchmark countries. Telstra argued that this lack of observable relationship is problematic given WIK-Consult used this as part of the basis for dismissing the case for adjustment for population density.[[66]](#footnote-66)

The ACCC considers that the lack of observable relationship was precisely why WIK-Consult dismissed the notion that the low population density in Australia necessarily means that the cost of termination is higher than in the benchmark countries. The ACCC considers that population density may be useful to speculate on the differences in per unit cost of traffic between countries in the absence of information such as user per site and network usage per site. However, the ACCC considers that it would not be appropriate to rely on population density when information on number of users per site and average traffic per site, which are directly relevant to the determination of per unit cost in a cost model, is available.

The ACCC also notes VHA’s proposed adjustment to reflect differences in the number of coverage sites between Australia and each of the benchmark countries. This proposal appears to be based on the rationale that because the network footprint in Australia is much larger, there are significantly more coverage sites. The ACCC does not consider that there is a clear justification for the new adjustment proposed by VHA for the following reason.

The number of sites *per se* has been taken into account in the network usage adjustment because the relevant parameter adjusted is traffic *per site*. In other words, if there are more sites needed to provide coverage in a mobile network, it should be reflected in a lower amount of traffic per site on average.

Effect on distance between sites

After reviewing stakeholders’ submission to the draft decision on the implications of the size of the Australian networks, the ACCC considers that deploying a mobile network over a larger coverage area is likely to incur higher capital costs due to larger distance between mobile sites. This effect is unrelated to traffic volumes or the density of demand and is solely because of the larger distance that network infrastructure, most significantly transmission links, must cover.

To provide a clearer picture of likely differences in the transmission links in Australia and the benchmark countries required for the deployment of mobile networks, the ACCC reviewed information provided by the MNOs under the Infrastructure Record Keeping Rules (RKR). The ACCC focused on Telstra’s transmission networks and mobile network coverage (being the most extensive) and was able to obtain an approximation of the length of transmission links that are required to reach all the areas covered by its mobile network.

WIK-Consult advised that similar information regarding the transmission links in the benchmark countries is not available in the cost models. However, WIK-Consult was able to provide an estimation of the length of transmission links in a typical European country using its generic WIK model. The ACCC found that based on the information available, the average length of transmission links per site in Australia is around four times of that in a typical European country. The ACCC considers that this supports the assumption that a hypothetical efficient operator in Australia is likely to incur higher backhaul costs than in the benchmark countries. The ACCC therefore considers that including an upward adjustment to the benchmarks is appropriate.

Ideally, an adjustment of this sort would be based on the average length of transmission links in each of the benchmark countries in comparison to Australia and applied to known effect of backhaul length on the cost of mobile voice termination. This information however is not available. As such it is not feasible to quantitatively assess the impact of the backhaul length on the cost of voice termination.

Taking this limitation, the ACCC considers that the application of a uniform uplift across the benchmarks is the best means to appropriately reflect the higher backhaul costs in Australia. The ACCC notes that VHA proposed a similar approach in its submission and recommended an uplift of 3%. VHA provided commercial-in-confidence information in support of its proposal. The ACCC has carefully considered VHA’s proposal and the supporting information provided and has formed the view that there is a reasonable basis for the proposed 3% uplift. WIK-Consult considered this to be consistent with a conservative approach, noting the difficulty in precisely adjusting for the impact of backhaul length in Australia due to the possible countervailing factors such as the differences in backhaul capacity.[[67]](#footnote-67)

The ACCC sought the MNOs’ comments on a proposed 3% uplift to address the higher transmission cost in Australia. Some of the MNOs expressed concern that the confidential nature of some of the information limited their ability to offer informed comments. However, the main objection was based on the MNOs’ previous submissions made to draft decision in relation to the other adjustments which they considered to be more important to address or, which they argued, should be addressed in conjunction with the backhaul cost. The ACCC has discussed its views in relation to other adjustments in other sections of this chapter.

The ACCC notes that while the MNOs support the inclusion of an adjustment to account for costs incurred to meet Australia’s mobile network coverage requirements, the MNOs, apart from VHA, have not provided an alternative methodology supported by evidence to make such an adjustment.

Based on the information available to the ACCC and in the absence of an alternative proposal supported by information and reasons, the ACCC has decided to adopt the uniform 3% uplift to account for the impact of longer transmission links required to cover a substantially larger coverage area in Australia. This position is endorsed in WIK-Consult’s revised benchmarking study.

* + 1. Geographic terrain

In its original benchmarking study, WIK-Consult included an adjustment to account for the different geographic terrain features of the benchmark countries and Australia. In particular, this adjustment took into account the differences in the extent that the countries are covered by mountainous features which affect the propagation of radios waves, the size and number of cells required in a mobile network and consequently the average cost of mobile voice termination. The effect of this adjustment was small with an upward adjustment of 0.009 cents per minute over the average of the benchmarks.[[68]](#footnote-68)

* + - * 1. Submissions

Telstra (and Network Strategies) submitted that there is no international standard for terrain classification and any attempts at classification and adjustment are highly subjective and subject to considerable uncertainty. Telstra considered that given the small scale of the adjustment applied and the inherent uncertainty associated with the adjustment, it would be preferable for the ACCC not to include any adjustment for geographic terrain.[[69]](#footnote-69)

Optus observed that the geographic terrain adjustment applied by WIK-Consult had no relationship with the geotype information in the benchmark cost models and neglected the CIA World Factbook terrain description set out in Table 4-10 in the WIK Report. Optus concluded that there is no reasonable evidence on which to base a proposal to adjust the geographic terrain and if any adjustment is decided it should be directly made into the models.[[70]](#footnote-70)

VHA submitted that the geographic terrain adjustment made by WIK-Consult in the original benchmarking study is not relevant if the ACCC accepts its proposed coverage-related geographic adjustment. However, as noted in the previous section, it considered that backhaul related adjustment is still appropriate.[[71]](#footnote-71)

* + - * 1. ACCC’s views

While adjusting for differences in geographic terrain which may impact on the cost of mobile voice terminations services is sound in principle, the ACCC acknowledges that the lack of an international standard in classifying geographic terrain makes this adjustment difficult to make in practice. WIK-Consult revisited the need for this adjustment in response to stakeholders’ views and decided to remove the adjustment in the revised study.[[72]](#footnote-72) The ACCC agrees with this approach and notes that this has not made a significant impact on the revised result.

* + 1. Spectrum fees

WIK-Consult adopted a two-step process to account for the differences in spectrum fees incurred in the benchmark countries and in Australia. The first step involves removing spectrum fees from the original benchmarks from the cost models. The second step involves the calculation of a reasonable spectrum mark-up for per minute of voice traffic and adding that to the benchmarks with spectrum fees removed. For the purpose of the second step, the ACCC provided WIK-Consult with information regarding the spectrum licence fees paid by the three MNOs in all the frequency bands used to provide mobile services and traffic information sought from the MNOs.

* + - * 1. Submissions

Telstra’s submissions primarily reflect the discussion in Network Strategies’ report. It argued that the approach by WIK-Consult failed to take account of the implications of the differences in spectrum fees, i.e. the impact of different spectrum holdings on the network cost overall. As such, it considered that WIK-Consult’s spectrum adjustment represents only a particular adjustment for the effect of spectrums on mobile termination costs.[[73]](#footnote-73)

Telstra also submitted that Network Strategies found a number of deficiencies in WIK-Consult’s approach, including discrepancies in the value of spectrum fees for Norway and Portugal, a lack of explicit assumption on the spectrum that a hypothetical efficient operator would hold, and the use of a simple annuity rather than tilted annuity.[[74]](#footnote-74)

Optus questioned the need for adjusting for spectrum fees at all, on the basis that there is no principled reason why the capital costs incurred to acquire spectrum should be treated differently from those incurred to build base stations or provide backhaul.[[75]](#footnote-75)

Despite this, Optus raised a number of issues relating to the spectrum fees adjustment, such as the apparent inconsistent approach relating to the removal of spectrum fees, whether the 1800MHz spectrum fees reflect the renewals value paid in 2014, whether historic values have been adjusted to 2015 current nominal value and the use of the 2% and 10% cost mark-ups. Optus also noted that the spectrum fees adjustment also depended on the approach taken for previous adjustments, such as the value of the WACC and the inclusion of 4G data traffic.[[76]](#footnote-76)

VHA submitted that the main error in WIK-Consult’s spectrum adjustment is taking into account 4G in terms of both spectrum costs and data traffic. VHA did not consider that the 4G spectrum costs and traffic are relevant to efficient cost recovery of the MTAS for the purpose of the benchmarking exercise.[[77]](#footnote-77)

VHA also submitted that the spectrum fee adjustment appears not to properly take into account the renewal cost of the 2100MHz spectrum (which will be renewed in 2016). VHA further argued that the allocation of spectrum costs should not be based on total traffic but on forecast ‘busy hour’ traffic.[[78]](#footnote-78)

* + - * 1. ACCC’s views

There are broadly a number of issues raised in relation to the adjustment for spectrum fees:

* the need to adjust for spectrum fees
* the effect of spectrum holdings on network costs
* the spectrum holding of and spectrum licence fees paid by the hypothetical efficient operator
* what traffic should be included in allocating spectrum fees
* renewal fees for 1800MHz and 2100MHz band spectrum
* the cost mark-ups applied to spectrum fees
* the use of tilted annuity
* an apparent inconsistent approach to the removal of spectrum fees in the benchmarking study.

The ACCC discusses these issues and provides its views below.

Spectrum fees need to be adjusted

Spectrum fees are a significant capital cost which depend on regulatory decision making and therefore can vary significantly from country to country. As shown in WIK-Consult’s adjustment approach, the spectrum fee mark-up per minute of voice traffic also depends on the traffic volumes and the proportion of voice to data traffic in each country. As these factors are likely to be significantly different between Australia and the benchmark countries, the per-minute spectrum fee mark-up will also differ significantly. As information on the spectrum fees for the benchmark countries and Australia are readily available, there is no practical difficulty in making this adjustment.

On the other hand, the ACCC recognises that it is impossible to adjust for all cost differences between Australia and the benchmark countries – this is an inherent issue of a benchmarking approach which has already been acknowledged and balanced against other benefits in deciding on the overall pricing methodology for this FAD. In this context, the ACCC considers the best way to achieve a reasonably accurate cost estimate is to make adjustments for those factors which are likely to be most significant and where information or proxies are available for this purpose.

Spectrum holdings have been considered

WIK-Consult advised that the calculation of the impact of differences in spectrum holding on network costs would require re-optimisation of the benchmark models as well as a specific cost model for Australia. In other words, an explicit consideration of spectrum fees would be impossible in an international benchmarking study.

WIK-Consult considered the amount of spectrum holdings in Australia and benchmark countries in its original benchmarking report and whether any differences should be addressed in the benchmarking study. WIK-Consult compared the spectrum allocations per operators in Australia and the benchmark models for those bands that are commonly used for voice and SMS services and observed that operators, whether in Australia or in the benchmark countries, are liberally equipped with spectrum for the delivery of voice and SMS services. As the degree to which this spectrum is used for voice is the result of commercial decisions, WIK-Consult concluded that there is no need to carry out adjustments to the benchmarks due to the differences in spectrum holding.[[79]](#footnote-79)

Spectrum holdings and spectrum fees of a hypothetical efficient operator

The ACCC considers that WIK-Consult’s determination of spectrum fees paid by the hypothetical efficient operator does not need to replicate the real allocation or the costs of any particular MNO in Australia. The fact that spectrum licence fees across all bands that are used to provide mobile services are included in the calculation of the spectrum fee mark-up is consistent with the assumption that the hypothetical efficient operator has spectrum holdings in all of these bands. To the extent that some MNOs do not have spectrum holdings in all bands, the spectrum fees assumed to be paid by a hypothetical efficient operator are likely to be higher than the fees actually paid by those MNOs.

The ACCC notes that the upfront spectrum licence payments for all bands have been indexed in WIK’s revised report to reflect 2015 current nominal values.

All traffic should be included in allocating spectrum fees

For the same reasons discussed in **section 3.3.5** above in relation to the traffic that should be included in the network usage adjustment, the ACCC considers that all traffic, including 4G data traffic, should be included in allocating spectrum fees.

Renewal fees for 1800MHz and 2100MHz band spectrum

The ACCC obtained information on spectrum licence fees paid by the MNOs from the ACMA and verified information regarding renewal fees.

The upfront licence payment for the 1800MHz band spectrum is now updated to reflect all renewal payments that have been made by the MNOs. This figure is also indexed to reflect 2015 current nominal value.

The current licences for the 2100MHz bands spectrum are due to expire in October 2017. The renewal fees to be applied to this band are subject to Ministerial direction and the formal process for determining the renewal fees will not start until 2016. The ACCC does not consider that the renewal fees that are expected to be paid in the future are relevant in determining the cost of spectrum in 2015. As the current licences for 2100MHz are still within their terms, the relevant cost of spectrum to be included in the benchmarking study should be the fees paid for the current licences.

Cost mark-ups are reasonable

WIK-Consult applied two cost mark-ups in the calculation of spectrum fees. A 2% cost mark-up is included to reflect the opex for spectrum specifically. As noted by WIK-Consult in its original benchmarking report, this approach is different from the one adopted in the benchmark models and in the 2007 WIK Model for the ACCC, where no opex on spectrum was included.[[80]](#footnote-80)

On top of the 2% opex, WIK-Consult also applied a 10% common cost mark-up, which is an estimate based on WIK-Consult’s knowledge of other cost models and operators’ cost accounting records.[[81]](#footnote-81)

While these mark-ups are based on rough estimates only, the ACCC considers that in the absence of direct information, the mark-ups are reasonable and reflect a conservative approach to estimating the cost of spectrum.

Tilted annuity not appropriate for spectrum

An annuity approach is usually used to smooth out the recovery of capital costs over the life of an asset and a simple or tilted annuity approach could be used. The ACCC does not consider that the tilted annuity approach could be appropriately applied to spectrum. The ACCC understands that a tilted annuity approach is commonly used to determine economic depreciation for physical assets in a telecommunications network. The reason is that tilting an annuity usually reflects price trends in the replacement costs of an asset due to, in most cases, technological advances. For instance, where the replacement cost of an asset is expected to fall, the annuity will be tilted such that the bulk of the capital cost could be recovered early on in the life of the asset. In contrast, the price movements in spectrum are determined by numerous factors, including regulatory decisions, and are therefore not amenable to the use of the tilted annuity. For this reason, the ACCC considers that a simple annuity approach to determine the annual cost of spectrum is appropriate.

Removal of spectrum fees

In response to comments by stakeholders that there appears to be an inconsistent approach to removing spectrum fees across the models, WIK-Consult has reviewed the removal of spectrum fees from the cost models. WIK-Consult found that in the case of Portugal, while upfront spectrum fees were removed, the yearly fees were not removed in the original benchmarking study. WIK-Consult has rectified this in the updated benchmarking study. This resulted in a 0.4% reduction in the benchmark figure for Portugal and an insignificant impact on the overall results.

* + 1. Summary on the benchmarking study

For reasons discussed in the sections above, the ACCC decided that the benchmark countries selected by WIK-Consult are appropriate. The ACCC also considers that the following adjustment factors reflect the most significant Australia-specific factors which were addressed in the revised benchmarking study:

* Currency conversion
* Shares of 2G and 3G voice traffic
* WACC
* Network usage
* Cost of backhaul
* Spectrum fees.

The average of the benchmarks after undertaking the adjustments listed above is 1.68 cents per minute with extreme values removed. The ACCC notes that the revised average is slightly above the 1.61 cents per minute in the draft decision. As discussed in WIK-Consult’s revised report and the sections above, WIK-Consult made a number of changes to the benchmarking study in response to submissions to the draft decision, some had the effect of decreasing the benchmarks and some had the effect of increasing the benchmarks. The ACCC notes that the slight increase in the average of the adjusted benchmarks is primarily due to the inclusion of the upward adjustment on the benchmarks to account for the higher cost of transmission in Australia.

According to WIK-Consult’s revised report, the cost of mobile voice termination of a hypothetical efficient operator in Australia lies in the range of 1.41 to 1.95 cents per minute.[[82]](#footnote-82)

* + 1. Voice-over-LTE

The ACCC expressed the view in the draft decision that there is currently insufficient information to take into account the pending deployment of VoLTE in determining the mobile voice termination rate. However, the ACCC noted that it would monitor the progress of deployment during the term of this FAD and review the regulated prices if there is evidence that the regulated rate no longer reflects the efficient cost of providing the mobile voice termination service.[[83]](#footnote-83)

* + - * 1. Submissions

TPG submitted that the ACCC’s position in the draft decision regarding VoLTE was concerning given the imminent launch of VoLTE and evidence that the cost of termination 4G networks averages 30% of that on 3G networks. TPG considered that the ACCC should seek to review the regulated price as soon as there is sufficient evidence that it no longer reflects the efficient cost of providing mobile voice termination service in Australia.[[84]](#footnote-84)

iiNet submitted that given the termination costs are likely to “drastically” reduce even further through the use of VoLTE, it is appropriate that the ACCC should continue to monitor the development of VoLTE services in Australia.[[85]](#footnote-85)

Telstra agreed with the ACCC’s draft decision not to adjust the mobile voice termination rate for VoLTE. Telstra submitted that the timing of the VoLTE deployment is not yet certain due to the need to develop industry standards and ensure the availability of compatible handsets. Telstra also argued that the actual impact of the deployment of VoLTE is also uncertain and making any adjustment to take into account VoLTE at this point in time risks regulatory error. Telstra also considered that the cost of reviewing the regulated price during the term of the FAD to account for VoLTE is likely to outweigh any benefit.[[86]](#footnote-86)

Macquarie Telecom considered that there should be a formal trigger for a reduction in the voice and SMS termination rate when VoLTE penetration in Australia reaches 25%. Macquarie Telecom argued that setting a formal trigger increases regulatory certainty.[[87]](#footnote-87) In its supplementary submission, Macquarie Telecom also estimated that within 12 months more than 10 million mobile phones will support VoLTE in Australia.[[88]](#footnote-88)

* + - * 1. ACCC’s views

The ACCC maintains the view in the draft decision that there is currently insufficient information to take into account the pending VoLTE deployment in determining the mobile voice termination rate.

The ACCC does not consider that a formal trigger for a reduction in the voice and SMS termination rate in response to a level of VoLTE penetration is appropriate at this point in time. The impact of VoLTE deployment on the efficient cost of mobile voice termination is largely dependent on the share of VoLTE traffic and the cost of voice termination on 4G networks. However, the estimated cost of voice termination over 4G networks appears to be subject to variation. In WIK’s revised report, it updated the forecast voice termination cost based on the forecast VoLTE information in both the UK and Portugal models. It shows that on average, the cost of voice termination on 4G networks is around 41% of that on 3G networks, compared to the 30% in WIK’s original report when only the UK forecast was considered.

The ACCC considers that continuing to monitor the progress of the VoLTE deployment and take-up is the best course of action. This will enable the ACCC to both monitor the share of VoLTE voice traffic and to consider further information and analysis on the impact of VoLTE on the cost of voice termination as they become available over time.

* 1. Other submissions
     + - 1. The effect of an MTAS reduction on the LTIE

Optus submitted that consumers already have the choice of mobile plans that provide unlimited voice and SMS and therefore a further reduction of the MTAS rate would provide no additional benefit to end-users. Optus maintains that the reduction may instead have detrimental impact on consumers on low-value plans (usually pre-paid plans).

Optus argued that users on pre-paid plans are generally net receivers of mobile calls and therefore a reduction of MTAS would make them less profitable for MNOs as lower MTAS rates reduce the ‘customer lifetime value’ (CLV) of this group of users. Conversely, consumers on high end plans generally make more calls than they receive and therefore, the customer lifetime value of this group increases with each MTAS reduction.

Optus did not consider that a reduction of MTAS would be directly reflected in price increases for low-end plans, but Optus is of the view that the reduction could reduce the level of inclusions in these types of plans, for the detriment of the most vulnerable segment of consumers.

At the same time, Optus considered that, an MTAS reduction would provide no extra benefit to consumers on the more expensive plans, since they already enjoy unlimited voice and SMS inclusions.

Optus argued that the ACCC should conduct an analysis based on the CLV of customer types to be able to conclude that the reduction of MTAS promotes the LTIE.[[89]](#footnote-89)

* + - * 1. ***ACCC’s view***

The ACCC considers that the regulation of termination rates that align with the cost of providing the services promotes competition and is in the LTIE. The underlying rationale for this view has been extensively discussed in the 2014 MTAS declaration and has been addressed in each of the ACCC’s declaration enquiries.

The ACCC does not support the view that whether the reduction of the MTAS rate is in the LTIE depends on each MNO’s individual re-assessment of the lifetime value of each segment of its customers following a reduction. The ACCC considers that while such analysis may provide a useful indication of the immediate impact of a reduction in the MTAS rate on consumers (that is, end-users) on different types of plans, it does not consider the overall pro-competitive effect of a reduction in the mobile voice termination rate in the longer term.

The ACCC notes that the retail market for mobile services in Australia is competitive. The extent of inclusions in each of the MNO’s plans is strongly influenced by competitive threats. The reduction of mobile voice termination rates reflects a reduction in the cost of providing off-net calls for the MNOs. In a competitive market, this provides the MNOs with an incentive to make more competitive offerings to consumers.

Optus suggests in its submission that MNOs would value customers on low-value plans less after an MTAS reduction, because they generally receive more calls than they make. However, consumers’ usage of mobile services is highly dependent on the prices they pay or the inclusions they get in an included-value plan. Optus’s analysis discounts the real possibility that a reduced MTAS rate makes it possible to offer cheaper off-net call rates to customers on low-value plans which may increase the number of calls they make. The ACCC considers that an explanation for customers on low value plans making fewer calls is more likely to be based on the price of voice calls, rather than an inherent preference. To this end, the reduction in the mobile voice termination rate is necessary to enable and encourage MNOs and MVNOs to make more competitive offerings.

The ACCC further notes that Optus recognises in its submission that a direct price increase for low-value plans in response to a lower MTAS rate is unlikely.[[90]](#footnote-90)

The ACCC also does not agree with the claim that consumers that already have access to unlimited voice and SMS inclusions do not benefit from a reduction of the MTAS rate. Again in this case, the ACCC considers that the proposed analysis disregards the constraints imposed by competitive forces on MNOs. The ACCC notes that while unlimited voice and SMS inclusions are unlikely to be improved further, there are still a number of alternatives for MNOs to benefit more valued segment of consumers, such as an increase in monthly data allowances and/or a reduction in the price of plans.

* 1. Regulated mobile voice termination rate

In its draft MTAS FAD decision the ACCC adopted a MTAS price of 1.61 cpm for voice termination for the FAD regulatory period ending 30 June 2019. A number of stakeholders provided submissions on the outcome of WIK’s analysis and the proposed MTAS rate.

* + - * 1. Submissions

Telstra noted that the proposed rate of 1.61 cpm is the lowest of TSLRIC+ termination rates and is below many pure LRIC termination rates present in a sample of 30 international jurisdictions. Telstra submits that this suggests that the approach taken by WIK is flawed and the ACCC must reassess its acceptance of the recommended termination rate. Telstra argued that the nature of mobile networks in Australia make it unlikely that the efficient cost of providing MTAS be only marginally above the pure LRIC-based estimate for the UK and below the estimate for Netherlands.[[91]](#footnote-91)

Optus claimed that WIK’s report does not contain sufficient evidence to support its conclusion of an efficient cost of MTAS of 1.61 cpm and that the report should be set aside and the benchmarking process should be re-run. Optus agreed with the unadjusted benchmarks, but objected to the validity of the adjustments. Optus noted that the proposed MTAS rate is below the average EU rates, which are mainly the outcome of pure LRIC models. This, according to Optus, suggested that the adjustments proposed by WIK are incorrect. Optus argued that it is not reasonable that the ACCC rejected the pure LRIC framework and yet adopts a MTAS that is consistent with LRIC outcomes.[[92]](#footnote-92)

VHA submitted that no reduction in the mobile voice termination rate is necessary; noting that the current MTAS rate of 3.6 cpm is already below the PPP-adjusted average of the benchmark sample. VHA also submitted that the selection of adjustment factors seems arbitrary and that the evidence supporting the adjustments is insufficient. VHA was concerned that WIK’s proposed adjustments overestimate factors that drive down the termination costs in Australia while ignoring or discounting factors that drive up the cost of MTAS. After suggesting a number of alternative adjustment factors (discussed in the relevant sections above), VHA recommended that the ACCC adopt a MTAS rate that falls between the trimmed mean and the 75th percentile of VHA’s proposed adjusted benchmarks.[[93]](#footnote-93)

Optus also submitted that the reduction of MTAS will have a significant impact on the businesses of MNOs. Optus claims that the large percentage declines in the rates, which (as a percentage) are significantly larger than reductions imposed in previous decisions, means that the decision was not reasonably forecasted by MNOs. Optus also considers that the decision to commence the new rates midway through the financial reporting year does not provide commercial entities with an opportunity to alter committed business plans. Optus noted that no previous MTAS pricing decision has dropped immediately to the target rate. Optus considered that the level and timing of the reduction represents a regulatory shock and is inconsistent with principles of regulatory certainty applied to the fixed-line pricing decisions. Optus suggested two changes to limit the potential for detrimental impacts on businesses - first, the reductions should align with the MNO’s financial years and secondly, a multi-year glide path should be adopted.[[94]](#footnote-94)

* + - * 1. ***ACCC’s view***

In response to submissions on the draft mobile voice termination rate

As stated in the draft decision report, the ACCC concluded that the benefits of developing a TSLRIC+ cost model for the estimation of the cost of MTAS would be outweighed by the detriment resulting from the associated delay in setting a new mobile voice termination rate. The ACCC considered that an international benchmarking approach could produce a suitable estimate of the cost of mobile termination in Australia as long as the benchmark set was restricted to jurisdictions using a TSLRIC+ framework and the appropriate adjustments were made to the benchmarks to reflect differences between Australia and the benchmarked countries.

For the reasons discussed above, the ACCC is satisfied with the benchmark set selected by WIK and considers the adjustment factors identified by WIK are appropriate. The ACCC’s position on each of the adjustments has been discussed in earlier sections in response to submissions.

A number of stakeholders disputed the validity of the draft mobile voice termination rate of 1.61 cents per minute, on the basis that it is below the majority of TSLRIC+ estimates and a number of pure LRIC estimates in a sample of international jurisdictions.

The ACCC considers it is problematic to compare overseas pure LRIC and TSLRIC+ rates which have not been adjusted to account for Australian conditions with the outcome of the benchmarking study which had undergone an adjustment process. The ACCC notes that while TSLRIC+ estimates are on average higher than pure LRIC estimates, individual outcomes vary. This reflects differences in relative costs in each country and the characteristics of each network at the time the cost model is developed. As shown in Telstra’s submission, pure LRIC estimates and TSLRIC+ estimates overlap over the range of the countries provided.

As such, the ACCC does not consider that the fact that the cost estimates resulting from the benchmarking study is below most TSLRIC+ estimates overseas and only marginally above the pure LRIC rates is in itself, indicative of a conclusion that the benchmarking study is flawed.

The ACCC has carefully considered the submissions made on the adjusting factors and, where appropriate, it took further steps to validate the underlying assumptions or, as in the case of backhaul, undertake additional adjustments.

Final mobile voice termination rate

The ACCC has decided to adopt a rate of 1.7 cents per minute as the new regulated mobile voice termination rate to apply from 1 January 2016. This rate is marginally above the average of the adjusted benchmarks with extreme values removed and well within the range of estimated cost of mobile voice termination in 2015 based on WIK-Consult’s revised benchmarking study. The ACCC considers that adopting a cost estimate slightly above the central value is consistent with a conservative approach that seeks to balance the risk of under-recovery, and the potential to discourage investment with the risk of over-recovery of costs.

The ACCC notes the new rate reflects the efficient cost of providing mobile voice termination service in 2015 and this rate will apply as a flat rate until 2019 (unless varied). The ACCC expects the efficient cost of providing mobile voice termination is likely to fall below this regulated rate during the FAD period. This is considered likely because of the expectation of further migration of voice services from 2G to 3G (with the decommissioning of 2G networks altogether within the FAD term highly likely to occur) and the migration to the technically more efficient voice over 4G technology. However, there is currently insufficient information to measure or predict the precise impact on mobile voice termination costs due to these technological changes.

The ACCC therefore considers adopting a conservative estimate of the internationally benchmarked cost of mobile termination in Australia in 2015 for the duration of the regulatory period brings pre-existing rates in line with efficient costs, and provides a sustained period of regulatory certainty as the industry transitions to the new technological environment.

The ACCC considers that the glide path proposed by Optus would significantly delay the implementation of efficient cost-based pricing and would not be in the LTIE.

While the ACCC is cognisant of the impact of large reductions in regulated prices on access providers, the ACCC is not persuaded that in this instance, the one-off reduction in the mobile voice termination rate to apply with a short period of transition is likely to impose a significant regulatory shock as argued by Optus for a number of reasons:

* the MTAS has been regulated for over a decade and the mobile voice termination rate has continued to decline throughout that period, which is consistent with global trend;
* the current consultation on MTAS pricing was commenced in August 2014. In its initial discussion paper, the ACCC expressed the view that the cost of providing mobile voice termination is likely to have significantly declined due to the use of more efficient technology such as 3G and the ever-increasing utilisation of the networks for data usage. The evidence obtained during the inquiry supports this view ;[[95]](#footnote-95)
* as noted above, the reduction in the mobile voice termination rate is moderate in absolute terms; while the percentage decrease compared to previous reductions is higher, this reflects the fact that the mobile voice termination rate is now significantly lower than it was a decade ago.

The ACCC has carefully considered submissions, which seek the introduction of a glide path and/or delay in commencement of the FAD. While the ACCC acknowledges that a reduction in the MTAS rate is likely to impact MNOs’ revenue, the ACCC considers that this must be weighed against the benefit of reduced MTAS rates to the market. On balance, the ACCC has decided to retain the commencement date of 1 January 2016 which provides a reasonable period for MNOs to renegotiate existing commercial arrangements, with the introduction of a mobile voice termination rate that reflects the efficient cost of providing the service.

1. Price terms for SMS termination

Key Points

* The ACCC maintains its pricing approach to SMS termination adopted in the draft decision:
  + A conversion factor is used to determine the part of the cost incurred by using the same network elements used for voice termination (conveyance cost)
  + SMS-specific cost is determined based on benchmarks of investment costs for SMS centres in the benchmark cost models.
* Based on the derived cost, the ACCC has decided to adopt a regulated SMS termination rate of 0.03 cents per SMS to apply from 1 January 2016.
  1. ACCC’s draft decision
     1. Pricing approach

After seeking WIK-Consult’s advice on the pricing approach for SMS termination services, the ACCC decided to estimate the cost of the SMS termination service in two parts:

* The conveyance cost of the SMS termination service was determined relative to the cost of mobile voice termination based on a conversion factor – this cost is incurred using the same infrastructure used for mobile voice termination service
* The SMS specific cost, i.e. cost of SMS centres (SMSCs), was added to the conveyance cost to provide the total cost of SMS termination service.[[96]](#footnote-96)

The ACCC considered an international benchmarking approach is not appropriate for pricing SMS termination service. This is because, unlike mobile voice termination services, there are few countries which regulate SMS termination services and the pricing approaches taken by those that do vary significantly.[[97]](#footnote-97)

* + 1. Derivation of SMS termination cost

WIK-Consult derived the SMS termination cost based on the approach described above.

For the conveyance cost, WIK-Consult calculated that on Australia’s 2G and 3G networks, an average 825 SMS could be sent using the capacity which is used to carry one minute of voice traffic (i.e. a conversion factor of 0.00121). Applying this conversion factor to the estimated cost of mobile voice termination in the original benchmarking report (1.61 cents per minute) gives a conveyance cost of 0.002 cents per SMS.

For the purpose of calculating SMS specific cost, WIK-Consult utilised information on investment costs and numbers of SMSCs from the cost models used in the benchmarking study. Applying a conservative approach, WIK-Consult selected upper range values from the figures for its calculation. Taking into account mark-ups for operating expenditure, common costs and SMS traffic volumes in Australia, the SMS specific cost was estimated to be around 0.026 cents per SMS.

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

* + 1. Draft SMS termination rate

The ACCC’s draft decision was to adopt a regulated SMS termination rate of 0.03 cents per SMS from 1 January 2016 to 30 June 2019. [[98]](#footnote-98) This would give industry a short period of transition to adjust their commercial arrangements to reflect the new regulated rate.[[99]](#footnote-99)

* 1. Submissions to draft decision
     + - 1. WIK-Consult’s approach to deriving the cost of SMS termination

In its report WIK-Consult considered the cost of acquiring an SMS centre (SMSC) as an important input to calculate the unitary cost of terminating an SMS. Both Telstra and Optus opposed the use of SMSC cost information from the cost models to estimate the capital cost incurred by an efficient operator in Australia. They submitted that WIK-Consult should use the information provided by the three MNOs. Telstra argued that the information in the cost models might be outdated and that capacity and other features of SMSCs were not comparable across countries. Optus submitted that its own SMSC information should be used since Optus’ market share approaches the average of the market (i.e. 33.33%). Optus also argued that in addition to SMS centres other SMS-specific elements, like gateways, billing systems and International integration systems needed to be taken into account in the calculation of SMS-specific costs.

Telstra also submitted that the 2G/3G proportion of voice traffic should not be applied for the calculation of the conveyance costs of terminating an SMS since the 2G/3G share is not the same for voice as for SMS services. [[100]](#footnote-100)

Other submitters supported the ACCC’s approach to setting a price for SMS termination. iiNet submitted that the use of a conversion factor along with the recovery of SMS-specific costs is appropriate and in the LTIE.[[101]](#footnote-101) Macquarie Telecom recommended setting an SMS termination rate of 0.028 cents per SMS (i.e. WIK-Consult’s estimated cost without any rounding applied) to be effective from 1 July 2015.[[102]](#footnote-102)

* + - * 1. Application to person SMS (A2P)

A number of submitters specifically commented on the implication of the draft price on application to person (A2P) SMS.

VHA submitted that there is a risk that the regulated price for SMS termination could fall below customers’ marginal utility of receiving A2P SMS, leading to an exponential increase in spam. To deal with this, VHA proposed that the ACCC set an interim price of 4 cents per SMS for A2P SMS, with a possible mid-term review. VHA also recommended the inclusion of a term in the non-price terms and conditions (NPTCs) providing MNOs with the ability to cancel a service if they identify that spam is originated in a particular aggregator.[[103]](#footnote-103)

Telstra submitted that the ACCC should not adopt a regulated price for SMS termination, or if it did, this rate should not apply to A2P SMS services.[[104]](#footnote-104) Telstra suggested that the ACCC could specify that the FAD pricing apply to mobile to mobile operators only. Two A2P SMS aggregators, Dialogue Communications (Dialogue) and Mblox, expressed views in response to the draft decision report. Dialogue objected to the application of a SMS termination rate of 0.03 cents per SMS to A2P SMS services on the basis that it fails to account for the true cost of providing a compliant A2P SMS service in Australia. Dialogue also considered that the application of the MTAS to A2P SMS is unnecessary as the market already offers robust competition and that the 0.03 cents per SMS price would significantly change the structure of the A2P industry as content providers would be incentivised to directly seek interconnection with the MNOs, rather than acquiring services from A2P SMS aggregators. Dialogue considered that this would result in a less efficient industry structure as each MNO would be required to implement dedicated infrastructure to provide the MTAS service to content providers. Dialogue also considered it is not reasonable to expect that MNOs will pass the cost reduction on to end-users.[[105]](#footnote-105)

Mblox considered there is merit in the reduction of SMS interconnect pricing as a way of increasing MNOs’ ability to compete with one another, in particular for off-net A2P SMS. However, Mblox was concerned by the possible implication that A2P SMS aggregators and content providers would be able to request access to the MTAS directly from MNOs. Mblox argued that in that case MNOs, aggregators and content providers would see their revenues reduced to the extent of removing incentives to provide the service and to undertake further investment. Mblox also considered that a decrease in the cost of A2P SMS termination will increase spam significantly, undermining the use of A2P SMS to deliver mission critical messages. Mblox recommended that the regulated price of 0.03 cents per SMS be applicable only to the termination of SMS sent between MNOs and MVNOs as this would promote competition in the A2P SMS market.[[106]](#footnote-106)

* 1. ACCC’s views
     + - 1. Deriving the cost of SMS termination

The ACCC discussed with WIK-Consult the approach to deriving the SMS termination cost in the original benchmarking report, in particular the use of SMSC investment costs in the benchmark cost models instead of the actual information provided by the MNOs. WIK-Consult reiterated its view expressed in the report that it decided to use SMSC cost information from the cost models due to the extreme disparity and inconsistency of the information provided by the three MNOs, both in terms of SMSC acquisition costs and the number of SMSCs provisioned. While the features of the SMSCs contained in the cost models (such as capacity and utilisation rate) may not be uniform across the benchmark countries, this is the case with all equipment used in the cost models and it would not be practical to seek to adjust for all these differences in a benchmarking approach.

The ACCC’s benchmarking study revealed a significant difference between the submissions of MNOs in Australia regarding the costs of SMSCs and the costs of SMSCs in other benchmark countries. In essence, SMSCs operate in a similar way regardless of location. WIK-Consult advised that the information provided by MNOs was inconsistent with other jurisdictions that it had examined. The ACCC did not receive any evidence that sought to distinguish the costs of SMSCs in Australia from the benchmark countries or which would otherwise explain the disparity.

While the ACCC’s preference would be to rely on actual information provided in the course of an inquiry, after considering the evidence and the available benchmarks, it has decided that the figures submitted by the MNOs are not representative of the efficient investment costs for an SMSC by a hypothetical efficient operator.

The ACCC considers that the information obtained in the cost models provide a reasonable range within which the costs of acquisition of an SMSC in Australia should lie. The ACCC also notes that the election of the upper end of the benchmarked SMSC costs represents a conservative approach.

WIK-Consult also noted in its report that under the assumption that SMS traffic follows the same 2G/3G proportion as voice traffic, the use of 2G and 3G voice traffic share provided by the MNOs is appropriate for the calculation of the conveyancing cost of SMS termination. WIK advised that this approach aligns with the methodology followed in the benchmark cost models, where the same 2G to 3G migration path is assumed for both voice and SMS services. The ACCC agrees that the use of homogeneous migration profiles for voice and SMS is a reasonable assumption. In addition, a further refinement in the calculation of the conveyancing costs is likely to have a negligible impact in the final cost of SMS termination, given the very small contribution of conveyancing in the total cost.[[107]](#footnote-107)

* + - * 1. Application-to-person SMS

Two key issues were raised in relation to A2P SMS in the submissions:

* First, whether the termination of A2P SMS should be subject to a regulated price at all and if so, whether it would be appropriate for different regulated prices to apply to the termination of A2P SMS as opposed to person-to-person (P2P) SMS; and
* Secondly, whether A2P SMS providers could request access to the MTAS directly from the MNOs.

The ACCC has carefully considered submissions which argue that a reduction in the price for A2P SMS will result in an increase in spam or commercial messages to end-users[[108]](#footnote-108). The ACCC considers that a reduction in the price of A2P SMS termination may lead to an increase in the number of A2P messages received by end-users. The ACCC has discussed this issue with the ACMA. The ACCC notes that submissions assume that an increase in commercial messages from parties with whom end-users have a commercial relationship will be unwanted or that an increase in messages will decrease the value of SMS to consumers. The ACCC does not consider there is sufficient evidence to make these assumptions. However, even in circumstances where messages are unwanted the *Spam Act 2013* requires every commercial message to contain a functional and legitimate 'unsubscribe' facility. End-users are therefore able to unsubscribe from commercial messages that they do not wish to receive.

The ACCC also considers that given there are no technical differences between the termination of A2P SMS and P2P SMS, there is no justification to set different regulated prices for A2P SMS and P2P SMS terminations. Setting a different regulated price for terminating A2P SMS above the estimated cost of SMS termination would mean that the pricing for this service is not based on efficient costs, and would therefore be inconsistent with the objective of promoting the LTIE as discussed in **Chapter 2**.

The ACCC notes that several submissions raise the issue whether the regulated SMS termination rate should apply to the termination of A2P SMS. One of the submissions suggested that the ACCC specify that the pricing in the FAD should only apply to MNOs on the basis of the wording in the Fixed Line FAD 2011 [[109]](#footnote-109) which limits the application of the FAD to non-NBN networks. The ACCC considers that the express limitation in the Fixed Line FADs merely clarifies that position in relation to section 152BC(4B) of the CCA. The ACCC does not consider that a term in the FAD as suggested in that submission is appropriate.

The second key issue raised by a number of stakeholders was in relation to who could access the regulated MTAS service. The ACCC considers that this issue relates to the scope of the MTAS declaration as contained in the service description and therefore falls outside the scope of the MTAS FAD inquiry which specifically deals with setting the terms and conditions of access. The ACCC will release an explanatory note to the 2014 MTAS declaration final decision at the time of publication of this FAD in response to stakeholders’ submissions on this issue.[[110]](#footnote-110)

* 1. Regulated SMS termination rate

The ACCC’s final decision is to set a regulated SMS termination rate of 0.03 cents per SMS effective from 1 January 2016, consistent with the position in the draft decision. This is based on the estimated cost of SMS termination in WIK-Consult’s revised report (with rounding applied). The ACCC notes that while the estimation of the termination rate for voice was adjusted from 1.61 cents per minute to 1.68 cents per minute in WIK’s revised report, the impact of this change on the estimated SMS termination rate is immaterial, therefore the SMS termination rate remains unchanged.

The ACCC considers that the commencement date of 1 January 2016, consistent with that applied to the mobile voice termination rate, will provide industry with a period of transition to adjust their commercial arrangements to reflect the new regulated rate.

The ACCC does not consider that a glide path over the course of the FAD period will be appropriate as it significantly delays the implementation of cost-based prices. Considering that the commercial SMS termination rates have been well over cost for a long period of time, the ACCC considers that a one-off reduction in the regulated rate to efficient cost level with a short delay in implementation strikes a good balance between promoting the LTIE and minimising the impact on industry.

1. Fixed-to-mobile pass-through

Key Points

* The ACCC has decided not to impose a mechanism mandating integrated operators to pass through reductions in the mobile voice termination rate, consistent with the view expressed in the draft decision.
* The ACCC’s analysis in the draft decision shows that Telstra has largely passed through previous reductions in the mobile voice termination rate. The ACCC did not receive additional evidence which warrant a change of position.
  1. ACCC’s draft decision

The ACCC’s draft decision was not to include a mechanism in the FAD which would require integrated operators to pass through their savings from reduced mobile voice termination rate to their retail customers in the form of lower prices for FTM calls.

The ACCC found that there was evidence of FTM pass-through of past reductions in the mobile voice termination rate and further reductions are expected to be passed onto end-users in the form of lower retail prices. The ACCC considered that evidence presented to the contrary was not convincing.[[111]](#footnote-111)

The ACCC also considered that additional intervention, in the form of a mandated FTM pass-through mechanism, may not promote the LTIE. A pass-through mechanism that links the reductions in the mobile voice termination rate to retail FTM prices may restrict the ability of integrated operators to pass through the benefit in other forms. It may also be ineffective as an FAD containing a pass-through mechanism could be avoided by access agreements containing inconsistent terms and conditions.[[112]](#footnote-112)

* 1. Submissions to draft decision

Telstra agreed with the ACCC’s draft decision not to impose a mandated FTM pass-through mechanism in the MTAS FAD. Telstra submitted that the ACCC’s analysis and evidence that Telstra submitted to the ACCC in the previous FAD inquiry demonstrated that reductions in the mobile voice termination rate had been passed through to end-users. Telstra also submitted that a FTM pass-through mechanism is likely to distort competition because it will force parties to pass through MTAS price reductions to the FTM price only and thus prevent any reductions from being passed through to other components of the fixed services bundle.[[113]](#footnote-113)

VHA did not agree with the ACCC’s draft decision and argued that there is no evidence that end-users have benefitted from significant MTAS reductions in the past. VHA considered that the ACCC’s views that significant pass-through could be consistent with increasing retail margin is misguided and the focus should be on the consideration of whether a reduction of MTAS had the effect of promoting competition or encouraging economically efficient use of, or investment in, infrastructure. VHA reiterated the findings of the 2009 Analysys Mason report on the welfare implications of FTM pass-through in support its view.[[114]](#footnote-114)

Macquarie Telecom submitted that the lack of competitive pressure means that integrated operators have little incentive to pass through savings from reductions in the MTAS directly to consumers in the FTM price. It argued that dominant integrated providers also have the ability to use their savings from the regulated reductions in the MTAS voice and SMS rates to subsidise price reductions in services or geographic areas where competition does exist. Macquarie Telecom therefore considered that a pass-through measure on dominant integrated operators would be more effective in promoting the LTIE.[[115]](#footnote-115)

Macquarie Telecom also submitted that the reduced MTAS prices for MTM and FTM should be pass-through to all wholesale service operators and fixed and mobile virtual network operators to ensure a level playing field.[[116]](#footnote-116)

* 1. ACCC’s final decision

After considering submissions to the draft decision, the ACCC maintains its view that the FAD should not include a mandated FTM pass-through mechanism for integrated operators.

The ACCC concluded in its draft decision that there was evidence that a considerable level of pass-through of reductions in the mobile voice termination rate to FTM retail prices had occurred. The ACCC reached this conclusion based on the comparison of changes in the average price for FTM calls in comparison to changes in the unit costs of providing FTM calls (including the cost mobile voice termination) between 2004 and 2013, using information obtained from Telstra’s Imputation Testing reports for the same period.

The ACCC does not consider submissions to the draft decision have provided new evidence supporting a lack of pass-through of reductions in mobile voice termination rates. The ACCC has considered the comparison of retail prices over time proposed by VHA. However, it is not persuaded that this analysis would support a conclusion that reductions have not been passed through.[[117]](#footnote-117) The ACCC maintains the view that an increase in Telstra’s FTM retail margins is insufficient by itself to indicate the absence of pass-through.

Given that a considerable level of pass through is observed in the absence of regulation, the ACCC remains of the view that a mandated pass-through safeguard is unlikely to further promote the LTIE. In addition, there are likely to be costs associated with monitoring and enforcing a pass-through mechanism, should such a mechanism be introduced.

Furthermore, as noted in the draft decision, the ACCC considers that regulating a specified reduction in retail prices may restrict a service provider’s ability to flexibly determine how it chooses to pass on its cost savings and limit (or even negate) potential improvements in the quality and range of retail services.

Finally, the ACCC considers that its practical ability to enforce a specified amount of pass-through in retail FTM prices is limited, given that FTM calls are usually offered as part of a bundle of services. This means that integrated operators could offset a decrease in FTM prices required by the pass-through mechanism by increasing prices for other services in the bundle. The ACCC notes that the Telstra Retail Price Controls previously applying to the bundle of services which generally includes FTM calls was revoked in March 2015.

For these reasons, the ACCC has decided not to impose a FTM pass-through mechanism in the FAD. Consistent with the view expressed in the draft decision, the ACCC considers that the reductions in the mobile voice termination rate to efficient cost levels will continue to facilitate an environment that promotes competition among MNOs and in related downstream markets. The ACCC expects the MNOs to pass through the reductions in the mobile voice termination rate to end-users of mobile and fixed-line voice services as well as its wholesale customers.

1. Duration of the FAD
   1. ACCC’s draft decision

The ACCC’s draft decision is that the price and non-price terms of the MTAS FAD should expire at the same time as the current MTAS declaration on 30 June 2019. The ACCC also noted that it may review the price terms of the FAD before this expiry date should there be evidence that the regulated termination rates no longer reflect the efficient costs of providing the services in Australia.

* 1. Submissions to draft decision

Telstra and VHA commented on the duration of the FAD and supported the ACCC’s draft decision that the MTAS FAD will expire on 30 June 2019.[[118]](#footnote-118)

In regards to the ACCC’s intention to review the regulated prices should there be significant development and take-up in VoLTE services, Telstra submitted that the ACCC should place priority on regulatory certainty at a time when the industry as a whole is going through a period of transition.[[119]](#footnote-119)

* 1. ACCC’s final decision

The ACCC maintains its views expressed in the draft decision that the MTAS FAD should expire at the same time as the current MTAS declaration. The ACCC does not consider there are circumstances which warrant a different expiry date.[[120]](#footnote-120)

The ACCC considers that it is important for it to closely monitor the development of VoLTE services in Australia and respond to changes in circumstances which warrant a variation in the FAD. Regulated prices which align with the efficient cost of providing the services promote the LTIE and this objective will be balanced against the need for regulatory certainty.

1. Non-price terms and conditions

On 24 August 2015, the ACCC released a combined report in respect of non-price terms and conditions for the final access determinations for the MTAS, the fixed line services and the DTCS (the combined report).[[121]](#footnote-121) The ACCC attached schedules of non-price terms and conditions to the combined report.

The combined report sets out the ACCC’s final decision on the non-price terms and conditions for the MTAS FAD, while this report sets out the ACCC’s decision on the price terms for the service. Together, these two reports constitute the ACCC’s report under section 505(1) of the *Telecommunications Act 1997* for the FAD inquiry on the MTAS.

The final FAD instrument for the MTAS containing all price and non-price terms for the service is attached to this report.

* + - * 1. Appendices

1. Relevant legislative framework for final access determinations

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

* 1. Content of final access determinations

Section 152BC of the *Competition and Consumer Act 2010* (CCA) specifies what an FAD may contain. It includes, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the standard access obligations (SAOs) and terms and conditions of access to a declared service.

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

* 1. Fixed principles provisions

An FAD may contain a fixed principles provision, which allows a provision in an FAD to have an expiry date after the expiry date of the FAD.[[122]](#footnote-122) Such a provision allows the ACCC to ‘lock-in’ a term so that it would be consistent across consecutive FADs.

* 1. Varying final access determinations

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

A fixed principles provision cannot be varied or removed unless the FAD sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.[[123]](#footnote-123)

* 1. 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.[[124]](#footnote-124)

* 1. Matters to consider when making FADs

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

1. whether the determination will promote the LTIE of carriage services or services supplied by means of carriage services
2. 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
3. the interests of all persons who have rights to use the declared service
4. the direct costs of providing access to the declared service
5. the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
6. the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and
7. the economically efficient operation of a carriage service, a telecommunications network or a facility.

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

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

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

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

* + 1. Paragraph 152BCA(1)(a)

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

The ACCC has published a guideline explaining what it understands by the phrase ‘long-term interests of end-users’ in the context of its declaration responsibilities.[[125]](#footnote-125) This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for making FADs for the mobile terminating access service (MTAS).

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

goods and services at lower prices

goods and services of a high quality, and/or

a greater diversity of goods and services.[[126]](#footnote-126)

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

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

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

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

\* Long-term: the long-term will be the period over which the full effects of the … decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the … industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.[[127]](#footnote-127)

To consider the likely impact of particular terms and conditions on the LTIE, the CCA requires the ACCC to have regard to whether the terms and conditions are likely to result in:

promoting competition in markets for carriage services and services supplied by means of carriage services

achieving any-to-any connectivity, and

encouraging the economically efficient use of, and economically efficient investment in:

the infrastructure by which listed carriage services are supplied, and

any other infrastructure by which listed services are, or are likely to become, capable of being supplied.[[128]](#footnote-128)

* + - * 1. Promoting competition

In assessing whether particular terms and conditions will promote competition, the ACCC analyses the relevant markets in which the declared services are supplied (retail and wholesale) and considers whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.[[129]](#footnote-129)

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

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

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

the markets for wholesale mobile voice terminations services on each MNO’s networks

the downstream market for retail mobile services

the downstream market for retail fixed voice services

the wholesale markets for SMS termination services on each MNO’s mobile network

the wholesale application-to-person SMS services market, and

the downstream application-to-person SMS services market.

* + - * 1. Any-to-any connectivity

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service. This must be the case whether or not the end-users are connected to the same telecommunications network.[[130]](#footnote-130)

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

* + - * 1. Efficient use of and investment in infrastructure

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

whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:

the technology that is in use, available or likely to become available

whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and

the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks

the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope

incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the NBN) by which services are, or are likely to become, capable of being supplied, and

the risks involved in making the investment.[[131]](#footnote-131)

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

productive efficiency – this is achieved where individual firms produce the goods and services that they offer at least cost

allocative efficiency – this is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e., those that provide the greatest benefit relative to costs), and

dynamic efficiency – this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

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

An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.[[132]](#footnote-132)

…efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.[[133]](#footnote-133)

…access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.[[134]](#footnote-134)

* + 1. Paragraph 152BCA(1)(b)

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

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment.[[135]](#footnote-135) The ACCC is of the view that the concept of ‘legitimate business interests’ in relation to FADs should be interpreted in a similar manner, consistent with the phrase ‘legitimate commercial interests’ used elsewhere in Part XIC of the CCA.

For completeness, the ACCC notes that it would be in the access provider’s legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.[[136]](#footnote-136)

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.[[137]](#footnote-137)

* + 1. Paragraph 152BCA(1)(c)

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

The ACCC considers that this matter requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.[[138]](#footnote-138) The access seekers’ interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete with the access provider in the provision of retail services.[[139]](#footnote-139)

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

The ACCC considers that this class of persons has an interest in being able to compete for the custom of end-users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.[[140]](#footnote-140)

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

* + 1. Paragraph 152BCA(1)(d)

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

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

The ACCC interprets this matter, and the use of the term ‘direct costs’, as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal’s approach in an undertaking decision.[[141]](#footnote-141) A contribution to indirect costs can also be supported by other matters.

However, the matter does not extend to compensation for loss of any ‘monopoly profit’ that occurs as a result of increased competition.[[142]](#footnote-142)

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs matter ‘is concerned with ensuring that the costs of providing the service are recovered.’[[143]](#footnote-143) The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this matter.[[144]](#footnote-144)

* + 1. Paragraph 152BCA(1)(e)

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

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

…requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.[[145]](#footnote-145)

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

* + 1. Paragraph 152BCA(1)(f)

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

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

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

…this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.[[146]](#footnote-146)

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

* + 1. Paragraph 152BCA(1)(g)

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

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.[[147]](#footnote-147)

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

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

the telecommunications networks and infrastructure used to supply these services.[[148]](#footnote-148)

* + 1. Subsection 152BCA(2)

Subsection 152BCA(2) provides that, in making an AD that applies to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,[[149]](#footnote-149) take into account:

the characteristics of those other eligible services

the costs associated with those other eligible services

the revenues associated with those other eligible services, and

the demand for those other eligible services.

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in making an AD, does not consider the declared service in isolation, but also considers other relevant services.[[150]](#footnote-150) As an example, the Explanatory Memorandum states:

…when specifying the access price for a declared service which is supplied by an access provider over a particular network or facility, the ACCC can take into account not only the access provider’s costs and revenues associated with the declared service, but also the costs and revenues associated with other services supplied over that network or facility.[[151]](#footnote-151)

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

* + 1. Subsection 152BCA(3)

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

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

The ACCC also considers that it should have regard to:

its previous decisions in relation to the MTAS

consultation documents and submissions in response to those documents

information provided to the ACCC by stakeholders.

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

1. Summary of submissions to draft decision

|  |  |  |
| --- | --- | --- |
| Stakeholders | Issues | Submissions |
| Telstra | Benchmarking and adjustments for voice termination | * The sample size is too small to minimise sampling bias and the benchmark countries have not been selected according to important comparability factors such as population density, land area and mobile network size. * The currency conversion adjustment should be based on PPP rates alone. * The 2G/3G elasticity assumption in the network usage adjustment is not based on sufficient evidence. * The WACC in the fixed-line services FADs inquiry is appropriate in principle but the proposed WACC values are not. * There should be an adjustment for population density and network size. Telstra’s network is significantly larger and likely to contain more sites in regional and remote areas than the benchmark countries. Also, the cost of deploying network infrastructure on a per user basis will be higher in Australia than benchmark countries. * The geographic terrain adjustment is not based on any international standards of measurement and results in a small adjustment. It is preferable to exclude it from the adjustments. * The spectrum adjustment accounts for spectrum fees but the implications of different operator’s spectrum holdings and their impact on total network cost should be taken into account. |
| SMS termination cost | * Does not support the regulation of SMS and the need to set a regulated price for SMS termination. Also, the costs of SMS centres should be based on the Australian MNOs’ provided costs, not costs in the benchmark cost models. |
| Application-to-person SMS | * A2P SMS should not have a regulated price. The provision of bulk SMS is a nascent service and pricing regulation risks inhibiting further development and also raises risks of congestion and increased SMS spam. * A2P SMS providers and SMS aggregators do not purchase SMS termination. They purchase bulk SMS as end-to-end services rather than standalone termination services. |
| Voice-over-LTE | * The timing of VoLTE deployment is unclear and VoLTE is unlikely to reach levels that will impact efficient costs of MTAS in the regulatory period. |
| Fixed-to-mobile pass-through | * A fixed-to-mobile pass-through mechanism in the FAD is unnecessary. |
| Duration of the FAD | * The FAD should expire at the same time as the declaration on 30 June 2019. |
| Optus | Benchmarking and adjustments for voice termination | * Australia-specific adjustments are ‘arbitrary’. * The currency conversion adjustment should occur at the latter end of the selected adjustments. * The network usage adjustment should not include 4G data traffic as most of the benchmark cost models do not include 4G technology. Also, the elasticity values for the 2G/3G voice traffic shares are inconsistent with the elasticity values in the benchmark cost models. * The WACC adjustment should be based on a mobile operator WACC, not the fixed line services FADs WACC * There is no reasonable evidence or basis for the geographic terrain adjustment’ * It is unclear why spectrum capital costs are adjusted but other capital costs, such as base stations and backhaul, are not. There should either be adjustments for all major capital cost differences or no adjustments. The proposed spectrum adjustment lacks evidence. * Correcting the network usage and WACC adjustments would result in a benchmark value of 2.29 cents per minute. |
| SMS termination cost | * Supports the broad pricing approach for SMS termination and argues SMS centre costs should be based on Optus actual cost figures. |
| Reduced MTAS rates | * The reduced MTAS rates do not promote the LTIE. The flow-through of lower MTAS rates to retail plans is determined by the customer lifetime value of end-users. However, the prevalence of unlimited voice and SMS plans means lower MTAS rates provide limited benefit to end-users. * The reduction in the MTAS rate is unforeseeably large and its commencement in January is mid-way through MNOs’ financial year which disrupts financial and internal business planning. * A glide-path for of MTAS rates for voice and SMS would avoid regulatory shock and better promote the LTIE. |
| VHA | Benchmarking and adjustments for voice termination | * The currency conversion should be based solely on a PPP-adjusted exchange rate (calculated using the average market exchange rate for 2014 calendar year instead of a 10-year average). * The WACC adjustment should be based on a mobile only WACC. * The network usage adjustment should not include 4G voice traffic as it is difficult to estimate the impact of 4G technology on costs. Also, the elasticity values for 2G/3G voice traffic shares in the network usage adjustment are not based on evidence. * There should be an adjustment for network coverage to reflect the cost of providing mobile coverage in regional and remote Australia. This adjustment should be based on the differences in the numbers of coverage sites in Australia and the benchmark countries. * There should be an adjustment for backhaul costs to reflect the impact of Australia’s geography on backhaul costs. * The spectrum adjustment should be based on different technologies’ use of different spectrum bands and using busy hour information to apportion costs for 3G spectrum. 4G traffic and spectrum should be disregarded. |
| SMS termination cost | * Does not support the regulation of SMS. Acknowledges that its proposed changes to the benchmarking study are unlikely to materially affect the draft SMS termination rate. |
| Application-to-person SMS | * Regulated pricing for A2P SMS would impact the A2P SMS industry and risk increasing SMS spam. A gradual reduction in the termination rate for A2P SMS is appropriate with an initial rate of 4 cents per SMS |
| Reduced MTAS rates | * There is no need to reduce MTAS rates as It is in the LTIE to maintain voice termination rate at the current rate, and if a cost-adjusted benchmarking approach is preferred, the voice termination rate should be set between 3.26–4.15cpm * Supports the implementation of the regulated voice termination rate from 1 January 2016 |
| Fixed-to-mobile pass-through | * A fixed-to-mobile pass-through mechanism in the FAD is important. The absence of pass-through will strengthen Telstra’s fixed line monopoly to the detriment of competing MNOs and end-users. |
| Duration of the FAD | * Supports the expiry date of 30 June 2019 |
| Macquarie Telecom | Benchmarking and adjustments for voice termination | * Generally supports the benchmarking study and draft decision rates but favours a pure LRIC methodology. |
| SMS termination costs | * Supports the pricing approach and estimated cost of 0.028 cents per SMS |
| Reduced MTAS rates | * Supports a short transition period for implementing voice termination rate until 1 January 2016 * SMS termination rate should be implemented as soon as practicable |
| Fixed-to-mobile pass-through | * A pass-through mechanism will better promote the LTIE while adhering to a consistent cost-based pricing methodology * MTAS reductions should also be passed through to wholesale service operators (for both FTM and MTM) * The pass-through mechanism should be incorporated in Record Keeping Rules |
| Voice-over-LTE | * Should include a formal trigger for a reduction in MTAS prices when VoLTE penetration reaches 25% |
| Duration of FAD | * Supports the expiry date of 30 June 2019 |
| iiNet | Benchmarking voice termination and SMS termination costs | * Generally supports the benchmarking study and SMS termination cost but favours a pure LRIC methodology and prices. |
| Voice-over-LTE | * The ACCC should continue to monitor the use of this technology |
| TPG | Benchmarking study | * Generally supports the benchmarking study and the draft mobile voice termination rate |
| Voice-over-LTE | * The ACCC should review the mobile voice termination rate as soon as there is evidence it no longer reflects efficient cost |
| Mblox and Dialogue Communications | Application-to-person SMS | * The SMS termination rate should not apply to A2P SMS termination * The application of SMS termination rate to A2P SMS termination will lead to significant structural changes in the A2P sector, including enabling A2P content providers to bypass SMS aggregators and seek SMS termination at FAD prices directly from the mobile carriers. The 0.03 cents per SMS is below the true cost of providing an A2P SMS |

1. Final access determination instrument



**Final Access Determination No. 1 of 2015 (MTAS)**

*Competition and Consumer Act 2010*

The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes

this final access determination under section 152BC of the *Competition and*

*Consumer Act 2010.*

Date of decision: 19 August 2015

**1. Application**

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

* 1. This FAD replaces the previous FAD for the MTAS (Final Access Determination No. 7 of 2011).
  2. The prices in this FAD are exclusive of tax payable under *the Utilities (Network Facilities Tax) Act 2006* (ACT).
  3. The prices in this FAD are exclusive of Goods and Services Tax (GST).

**2. Definitions and interpretation**

2.1 Schedule 1 applies to the interpretation of this instrument.

2.2 The Schedules form part of this instrument.

**3. Commencement and duration**

3.1 This FAD commences on 1 January 2016.

3.2 This FAD remains in force up until and including 30 June 2019.

**4. Terms and conditions of access**

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

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

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

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

**INDEX TO SCHEDULES**

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Schedule 1 - Interpretation and definitions

*Interpretation*

In these FADs, unless the contrary intention appears:

(a) the singular includes the plural and vice versa;

(b) the words “including” and “include” mean “including, but not limited to”; and

(c) terms defined in the CCA or the *Telecommunications Act 1997* have the same meaning.

*Definitions*

**ACCC** means the Australian Competition and Consumer Commission

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

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

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

**ACDC** means the Australian Commercial Disputes Centre Limited

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

**ACMA** means the Australian Communications and Media Authority

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

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

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

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

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

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

**Calendar Day** means a day reckoned from midnight to midnight

**Carriage Service** has the same meaning given to that term in section 7 of the

*Telecommunications Act 1997* (Cth)

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

**Charge** means a charge for the supply of a Service

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

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

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

(c) information which has been independently developed or obtained by the other party;

or

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

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

**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:

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

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

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

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

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

**FAD** means Final Access Determination

**Fault** means:

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

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

**General Notification** has the meaning set out in clause 10.1

**Indemnifying Party** means the Party giving an indemnity under this FAD

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

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

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

**Liability** (of a party) means any liability of that party (whether in contract, in tort, under statute

or in any other way and whether due to negligence, wilful or deliberate breach or any other cause) under or in relation to this FAD, or part of this FAD or in relation to any Event or series of related Events;

**Listed Carriage Service** has the same meaning given to that term in section 7 of the

*Telecommunications Act 1997* (Cth)

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

**Major Network Modernisation and Upgrade** means a modernisation or upgrade that results in a Service no longer being supplied or adversely affects the quality of that Service (or any services supplied by an Access Seeker to their end-users using the Service), but does not mean, or include, an Emergency Network Modernisation Upgrade or an National Broadband Network related upgrade

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

ending:

1. 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

**MTAS** means the mobile terminating access service declared under section 152AL of the CCA.

**National Broadband Network** means a national telecommunications network for the high-speed carriage of communications, where NBN Co has been, is, or is to be, involved in the creation or development of the network. To avoid doubt, it is immaterial whether the creation or development of the network is, to any extent, attributable to:

(a) the acquisition of assets that were used, or for use, in connection with another telecommunications network; or

(b) the obtaining of access to assets that are also used, or for use, in connection with another telecommunications network

**NBN Co** means NBN Co Limited (ACN 136 533 741), as the company exists from time to time

(even if its name is later changed).

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

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

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

**Party** means a party to this FAD

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

**Regulatory Determination** means an access determination or a binding rule of conduct.

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

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

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

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

**Structural Separation Undertaking** means:

(a) an undertaking given by Telstra under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which came into force in accordance with section 577AB, and any amendment to that undertaking which comes into force in accordance with subsection 577B(6); and

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

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

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

# Schedule 2 - Price

2.1 The price applicable to the mobile voice termination service is as follows:

|  |  |
| --- | --- |
| Time period | Cent per minute |
| 1 January 2016 – 30 June 2019 | 1.7 |

2.2 The price applicable to the SMS termination service is as follows:

|  |  |
| --- | --- |
| Time period | Cent per SMS |
| 1 January 2016 – 30 June 2019 | 0.03 |

Schedule 3 - Billing and notification

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. The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 3.
3. The Access Provider must provide the Access Seeker with an invoice each month in respect of Charges payable for the Service unless the parties agree otherwise
4. The Access Provider is entitled to invoice the Access Seeker for previously uninvoiced Charges or Charges which were understated in a previous invoice, provided that:

a) the Charges to be retrospectively invoiced can be reasonably substantiated to the Access Seeker by the Access Provider; and

b) subject to clause 3.5, no more than 6 Months have elapsed since the date the relevant amount was incurred by the Access Seeker’s customer, except where:

i. the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld); or

ii. to the extent that the Charges relate to services supplied by an overseas carrier and the Access Provider has no control over the settlement arrangements as between it and the overseas carrier, in which case the Access Provider shall invoice such amounts as soon as is reasonably practicable.

1. The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Standard) and the provisions of any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Code) in relation to billing. Where the effect of a Standard or Code is that an Access Seeker is not permitted to invoice its customers for charges that are older than a specified number of days, weeks or months (the Backbilling Period), the Access Provider must not invoice the Access Seeker for a Charge which was incurred by the Access Seeker’s customers that, as at the date the invoice is issued, is older than the Backbilling Period.
2. Subject to clause 3.12
   1. 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.
   2. 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.
   3. All amounts owing and unpaid after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day authorized dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5 per cent.
3. In addition to charging interest in accordance with clause 3.6 or exercising any other rights the Access Provider has at law or under this FAD, where an amount is outstanding and remains unpaid for more than 20 Business Days after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this FAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.
4. Unless the parties otherwise agree, there is no setting-off (i.e. netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise administration and financial costs, the parties must consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties’ respective invoice dates and other procedures to allow set-off to occur efficiently.
5. The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice, and the service the Charge relates to. Nothing in this clause 3.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
6. 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.
7. Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal proceedings in relation to any Billing Dispute.
8. 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 or otherwise terminated. 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).
9. Except where payment is withheld in accordance with clause 3.12, the Access Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.
10. A Billing Dispute Notice must be given to the Access Provider in relation to a Charge, at the earlier of:
11. as soon as reasonably practicable after the Access Seeker becomes aware a Billing Dispute exists, or
12. within six Months of the invoice for the Charge being issued in accordance with clause 3.6.
13. The Access Provider must acknowledge receipt of a Billing Dispute Notice within two Business Days by providing the Access Seeker with a reference number.
14. Within five Business Days of acknowledging a Billing Dispute Notice under clause 3.15(a), the Access Provider must, by written notice to the Access Seeker:
15. accept the Billing Dispute Notice; or
16. reject the Billing Dispute Notice if the Access Provider reasonably considers that:
17. the subject matter of the Billing Dispute Notice is already being dealt with in another dispute;
18. the Billing Dispute Notice was not submitted in good faith; or
19. the Billing Dispute Notice is incomplete or contains inaccurate information.
20. If the Access Provider fails to accept or reject the Billing Dispute Notice within five Business Days of acknowledging the Billing Dispute Notice under clause 3.15(a), the Access Provider is taken to have accepted the Billing Dispute Notice.
21. For avoidance of doubt, if the Access Provider rejects a Billing Dispute Notice under clause 3.15(b)(ii)C, the Access Seeker is not prevented from providing an amended Billing Dispute Notice to the Access Provider relating to the same dispute provided that the amended Billing Dispute Notice is provided within the timeframe under clause 3.14.
22. The Access Seeker must, as early as practicable and in any case within five Business Days, unless the Parties agree on a longer period, after the Access Provider acknowledges a Billing Dispute Notice, provide to the other party any further relevant information or materials (which were not originally provided with the Billing Dispute Notice) on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).
23. Without affecting the time within which the Access Provider must make the proposed resolution under clause 3.1, the Access Provider may request additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution pursuant to clause 3.18. This additional information may be requested up to 10 Business Days prior to the date on which the Access Provider must make the proposed resolution under clause 3.18. The Access Seeker must provide the requested information within five Business Days of receiving the request. If the Access Seeker fails to do so within five Business Days, the Access Provider may take the Access Seeker’s failure to provide additional information into account when making its proposed resolution.
24. The Access Provider must try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of accepting a Billing Dispute Notice under clause 3.15 (or longer period if agreed by the parties), by notifying the Access Seeker in writing of its proposed resolution of a Billing Dispute. That notice must:
25. explain the Access Provider’s proposed resolution (including providing copies where necessary of all information relied upon in coming to that proposed resolution); and
26. set out any action to be taken by:
27. the Access Provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or
28. the Access Seeker (e.g. payment of the disputed Charge)

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

1. If the Access Seeker does not agree with the Access Provider’s decision to reject a Billing Dispute Notice under clause 3.15 or the Access Provider’s proposed resolution under clause 3.17, it must object within 15 Business Days of being notified of such decisions (or such longer time as agreed between the parties). Any objection lodged by the Access Seeker with the Access Provider must be in writing and state:
2. what part(s) of the proposed resolution it objects to;
3. the reasons for objection;
4. what amount it will continue to withhold payment of (if applicable); and
5. 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

1. provide a revised proposed resolution (Revised Proposed Resolution in this Schedule 3); or
2. confirm its proposed resolution
3. Any:
4. withdrawal, adjustment or refund of the disputed Charge by the Access Provider; or
5. payment of the disputed Charge by the Access Seeker (as the case may be),

must occur as soon as practicable and in any event within one Month of the Access Provider’s notice of its proposed resolution under clause 3.18 or its Revised Proposed Resolution under clause 3.19 (as applicable), unless the Access Seeker escalates the Billing Dispute under clause 3.23. If the Access Provider is required to make a withdrawal, adjustment or refund of a disputed Charge under this clause but its next invoice (first invoice) is due to be issued within 48 hours of its proposed resolution under clause 3.18 or its Revised Proposed Resolution under clause 3.19 (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.

1. Where the Access Provider is to refund a disputed Charge, the Access Provider must pay interest (at the rate set out in clause 3.6) on any refund. Interest accrues daily from the date on which each relevant amount to be refunded was paid to the Access Provider, until the date the refund is paid.
2. Where the Access Seeker is to pay a disputed Charge, the Access Seeker must pay interest (at the rate set out in clause 3.6) on the amount to be paid. Interest accrues daily from the date on which each relevant amount was originally due to be paid to the Access Provider, until the date the amount is paid.
3. If
   1. the Access Provider has not proposed a resolution according to clause 3.18 or within the timeframe specified in clause 3.18, or
   2. the Access Seeker, having first submitted an objection under clause 3.19 is not satisfied with the Access Provider’s Revised Proposed Resolution, or the Access Provider’s confirmed proposed resolution, within the timeframes specified in clause 3.19,

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

1. If the Access Seeker wishes to escalate a Billing Dispute, the Access Seeker must give the Access Provider a written notice:
   1. stating why it does not agree with the Access Provider’s Revised Proposed Resolution or confirmed proposed resolution; and
   2. seeking escalation of the Billing Dispute.
2. A notice under clause 3.24 must be submitted to the nominated billing manager for the Access Provider, who must discuss how best to resolve the Billing Dispute with the Access Seeker’s nominated counterpart. If the Parties are unable to resolve the Billing Dispute within five Business Days of notice being given under clause 3.24 (or such longer period as agreed between the parties) the Billing Dispute must be escalated to the Access Provider’s nominated commercial manager and the Access Seeker’s nominated counterpart who must meet in an effort to resolve the Billing Dispute.
3. If the Billing Dispute cannot be resolved within five Business Days of it being escalated to the Access Provider’s nominated commercial manager and the Access Seeker’s nominated counterpart under clause 3.25 (or such longer period as agreed between the parties):
   1. either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation must be conducted in accordance with the mediation guidelines of the Australian Commercial Disputes Centre (ACDC) and concluded within three Months of the proposal (unless the parties agree to extend this timeframe); or
   2. if the parties either do not agree to proceed to mediation within five Business Days of being able to propose the appointment of a mediator under clause 3.26(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal proceedings to resolve the matter.
4. The parties must ensure that any person appointed or required to resolve a Billing Dispute takes into account the principle that the Access Seeker is entitled to be recompensed in circumstances where the Access Seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end-user an amount which is the subject of a Billing Dispute (a Backbilling Loss), provided that:
   1. such principle applies only to the extent to which the Billing Dispute is resolved against the Access Provider; and
   2. such principle applies only to the extent to which it is determined that the Backbilling Loss was due to the Access Provider unnecessarily delaying resolution of the Billing Dispute.
   3. Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
5. Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
6. All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause 3.25 (or their respective nominees).
7. There is a presumption that all communications between the Parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.
8. If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that three or more out of any five consecutive invoices for a given Service are incorrect by 5 per cent or more, then, for the purposes of clause 3.21, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 3.6, plus 2 per cent. The remedy set out in this clause 3.31 is without prejudice to any other right or remedy available to the Access Seeker.

Schedule 4 - Creditworthiness and Security

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

4.2

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

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

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

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

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

1. fixed and floating charges;
2. personal guarantees from directors;
3. Bank Guarantees;
4. letters of comfort
5. mortgages;
6. a right of set-off;
7. a Security Deposit; or
8. 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:

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

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

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

4.5 The Access Provider may from time to time where the circumstances reasonably require, request Ongoing Creditworthiness Information from the Access Seeker to determine the ongoing creditworthiness of the Access Seeker. The Access Seeker must supply Ongoing Creditworthiness Information to the Access Provider within 15 Business Days of receipt of a request from the Access Provider for such information. The Access Provider may, as a result of such Ongoing Creditworthiness Information, having regard to the factors referred to in clause 4.3 and subject to clause 4.7, reasonably require the Access Seeker to alter the amount, form or the terms of the Security (which may include a requirement to provide additional security), and the Access Seeker must provide that altered Security within 20 Business Days of being notified by the Access Provider in writing of that requirement.

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

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

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

1. 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);
2. a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker must co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the Access Seeker’s creditworthiness. To that end, the Access Seeker agrees to procure written consents (as required under the *Privacy Act 1988* (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the Access Provider to:
3. obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;
4. disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and
5. obtain and use a consumer credit report;
6. 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
7. the Access Seeker’s credit rating, if any has been assigned to it; and
8. any other information reasonably required to determine the ongoing creditworthiness of the Access Seeker, as agreed between the parties before the request under clause 4.5 is made.

4.9 The Access Seeker may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.

4.10 Subject to this Schedule 4, the parties agree that a failure by the Access Seeker to provide the warranties set out in clause 4.7 or to provide Ongoing Creditworthiness Information constitutes:

* 1. an event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) of the Access Seeker and the Access Seeker must provide that altered Security within 15 Business Days after the end of the period set out clause 4.5; or
  2. breach of a material term or condition of this FAD.

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

Schedule 5 - General dispute resolution procedures

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

1. in the case of a Billing Dispute, the dispute must be managed in accordance with the Billing Dispute Procedures; or
2. subject to clause 5.2, in the case of a Non-Billing Dispute, the dispute must be managed in accordance with the procedures set out in this Schedule 5.
   1. To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless otherwise determined, that Non-Billing Dispute must be resolved in accordance with the Billing Dispute Procedures. The Access Provider may seek a determination from an independent third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access Provider.

For the purposes of this clause 5.2:

* 1. the independent third party must be a person who:

1. has an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
2. have an appreciation of the competition law implications of his/her decisions; and
3. not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
   1. the independent third party may include an arbiter from the ACDC.
   2. If a Non-Billing Dispute arises, either party may, by written notice to the other, refer the Non-Billing Dispute for resolution under this Schedule 5. A Non-Billing Dispute must be initiated only in good faith.
   3. Any Non-Billing Dispute notified under clause 5.3 must be referred:
4. initially to the nominated manager (or managers) for each party, who must endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 5.3 or such other time agreed by the parties; and
5. if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within a further five Business Days to refer the Non-Billing Dispute to an Expert Committee under clause 5.11, or by written agreement submit it to mediation in accordance with clause 5.10.
   1. If:
6. under clause 5.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation; or,
7. under clause 5.10(f), the mediation is terminated; and
8. 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.

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

1. the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 5 or clause 5.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 5.5; or
2. the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 5 or clause 5.2 (if applicable).
   1. Each party must continue to fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 5 are pending.
   2. All communications between the parties during the course of a Non-Billing Dispute and in connection with that Non-Billing Dispute, are made on a without prejudice and confidential basis.
   3. Each party must, as early as practicable, and in any case within 14 Calendar Days unless a longer period is agreed between the parties, after the notification of a Non-Billing Dispute pursuant to clause 5.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).
   4. Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 5.4(b):
3. any agreement must include:
4. a statement of the disputed matters in the Non-Billing Dispute; and
5. 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;
6. it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the provisions of this clause 5.10. In the event of any inconsistency between them, the provisions of this clause 5.10 prevail;
7. it must be conducted in private;
8. in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator must:
9. have an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
10. have an appreciation of the competition law implications of his/her decisions; and
11. not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
12. the parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who will attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other’s chosen representatives or to limit other representatives from the parties attending during the mediation;
13. it must terminate in accordance with the ACDC Guidelines;
14. the parties must bear their own costs of the mediation including the costs of any representatives and must each bear half the costs of the mediator; and
15. any agreement resulting from mediation binds the parties on its terms.
    1. The parties may by written agreement in accordance with clause 5.4(b), submit a Non-Billing Dispute for resolution by an Expert Committee (**Initiating Notice**), in which case the provisions of this clause 5.11 apply as follows:
16. The terms of reference of the Expert Committee are as agreed by the parties. If the terms of reference are not agreed within five Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee is deemed to be terminated.
17. An Expert Committee acts as an expert and not as an arbitrator.
18. The parties are each represented on the Expert Committee by one appointee.
19. The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 5.10(d)(i), (ii) and (iii).
20. Each party must be given an equal opportunity to present its submissions and make representations to the Expert Committee.
21. The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.
22. Unless the parties agree otherwise the parties must ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.
23. If the dispute is not resolved within the timeframe referred to in clause 5.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
24. The Expert Committee has the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.
25. The Expert Committee must give written reasons for its decision.
26. 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.
27. Each party must bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties must each bear half the costs of the independent member of the Expert Committee.
    1. Schedule 5 does not apply to a Non-Billing Dispute to the extent that:
28. 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)
29. a party has initiated a dispute under the dispute resolution process referred to in clause 5.12(a), and
30. the issue the subject of that dispute is the same issue in dispute in the Non-Billing Dispute.

Schedule 6 - Confidentiality

* 1. Subject to clause 6.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:

1. use or copy such Confidential Information except as set out in this FAD; or
2. disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.

6.2 For the avoidance of doubt, information generated within the Access Provider’s Network as a result of or in connection with the supply of the relevant Service to the Access Seeker or the interconnection of the Access Provider’s Network with the Access Seeker’s Network (other than information that falls within paragraph (d) of the definition of Confidential Information) is the Confidential Information of the Access Seeker.

6.3 The Access Provider must upon request from the Access Seeker, disclose to the Access Seeker quarterly aggregate traffic flow information generated within the Access Provider’s Network in respect of a particular Service provided to the Access Seeker, if the Access Provider measures and provides this information to itself. The Access Seeker must pay the reasonable costs of the Access Provider providing that information.

6.4 Subject to clauses 6.5 and 6.10, Confidential Information of the Access Seeker may be:

1. used by the Access Provider:
2. for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;
3. for the purposes of supplying Services to the Access Seeker;
4. for the purpose of billing; or
5. for another purpose agreed to by the Access Seeker; and
6. disclosed only to personnel who, in the Access Provider’s reasonable opinion require the information to carry out or otherwise give effect to the purposes referred to in paragraph (a) above.

6.5 A party (**Disclosing Party**) may to the extent necessary use and/or disclose (as the case may be) the Confidential Information of the other party:

1. to those of the Disclosing Party’s directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential Information is reasonably required to be disclosed in connection with the provision of the Service to which this FAD relates;
2. to any professional person for the purpose of obtaining advice in relation to matters arising out of or in connection with the supply of a Service under this FAD;
3. to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;
4. 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;
5. 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;
6. with the written consent of the other party provided that, prior to disclosing the Confidential Information of the other party:
7. the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party;
8. if required by the other party as a condition of giving its consent, the Disclosing Party must provide the other party with a confidentiality undertaking in the form set out in Annexure 1 of this Schedule 6 signed by the person or persons to whom disclosure is to be made; and
9. if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 6.6;
10. in accordance with a lawful and binding directive issued by a regulatory authority;
11. if reasonably required to protect the safety of personnel or property or in connection with an emergency;
12. as required by the listing rules of any stock exchange where that party’s securities are listed or quoted;
13. in accordance with a reporting obligation, or in response to a request from a regulatory authority or any other Government body, in connection with the Access Provider’s Structural Separation Undertaking where the party cannot comply with the reporting obligation or request without using or disclosing the Confidential Information, provided that:
14. prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party; and
15. unless prohibited by law, the Disclosing Party informs the other Party in writing as soon as reasonably practicable after receiving the request that the Disclosing Party will disclose Confidential Information to the regulatory authority or any other Government body to fulfil that reporting obligation or respond to that request.
16. in response to a request from a regulatory authority or any other Government body in connection with interception capability (as that term is used in Chapter 5 of the *Telecommunications (Interception and Access) Act 1979* (Cth)) relating to access to a declared service, where the party cannot comply with the request without using or disclosing the Confidential Information, provided that:
17. prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the confidential information of the other party; and
18. unless prohibited by law, the Disclosing Party informs the other Party as soon as reasonably practicable after receiving the request that the Disclosing Party will disclose Confidential Information to the regulatory authority or any other Government body to respond to that request.

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

1. protect the confidentiality of the other party’s Confidential Information; or
2. enforce its rights in relation to its Confidential Information.

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

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

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

6.10 If:

1. the Access Provider has the right to suspend or cease the supply of the Service under:
2. Schedule 7 due to a payment breach, or
3. under clause 7.8
4. after suspension or cessation of supply of the Service under this FAD, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment,

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

1. 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
2. without limiting clause 6.10, disclose to a credit reporting agency:
3. the defaults made by the Access Seeker to the Access Provider; and
4. the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD.

**Annexure 1 of Schedule 6**

**Confidentiality undertaking form**

*[Amend where necessary]*

CONFIDENTIALITY UNDERTAKING

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

1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking (Confidential Information) that is in my possession, custody, power or control.

2 I acknowledge that:

(a) this Undertaking is given by me to [Provider] in consideration for [Provider] making the Confidential Information available to me for the Approved Purposes (as defined below);

(b) all intellectual property in or to any part of the Confidential Information is and will remain the property of [Provider]; and

(c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [undertaking company] in relation to the Confidential Information except as expressly provided in this Undertaking.

3 I will:

(a) only use the Confidential Information for:

(i) the purposes listed in Attachment 2 to this Undertaking; or

(ii) any other purpose approved by [Provider] in writing;

(the Approved Purposes);

(b) comply with any reasonable request or direction from [provider] regarding the Confidential Information.

4 Subject to clause 5, I will not disclose any of the Confidential Information to any other person without the prior written consent of [Provider].

5 I acknowledge that I may disclose the Confidential Information to which I have access to:

1. any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:

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

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

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

1. other persons, if required to do so by law, but then only:

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

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

to the extent necessary as required by law; and

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

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

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

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

(a) termination of this Undertaking;

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

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

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

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

(a) that is in the public domain; or

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

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

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

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

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

Signed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Witness signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Witness name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**ATTACHMENT 1**

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

**ATTACHMENT 2**

**[Approved purpose(s)]**

Schedule 7 – Suspension and Termination

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

1. during an Emergency; or
2. where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider’s Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency;
3. where, in the reasonable opinion of the Access Provider, the Access Seeker’s Network or equipment adversely affects or threatens to affect the normal operation of the Access Provider’s Network or access to the Access Provider’s Network or equipment (including for the avoidance of doubt, where the Access Seeker has delivered Prohibited Traffic onto the Access Provider’s Network);
4. where an event set out in clauses 7.8(a) to (i) occurs
5. and is entitled to continue such suspension until (as the case requires) the relevant event or circumstance giving rise to the suspension has been remedied.
   1. If:
6. the Access Seeker has failed to pay monies payable under this FAD;
7. a Court determines that (and the decision is not subject to an appeal) the Access Seeker’s use of:
8. its Facilities in connection with any Service supplied to it by the Access Provider;
9. the Access Provider’s Facilities or Network; or
10. any Service supplied to it by the Access Providers,

is in contravention of any law; or

1. the Access Seeker breaches a material obligation under this FAD (**Suspension Event**) and:
2. as soon as reasonably practicable after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:
   1. citing this clause;
   2. specifying the Suspension Event that has occurred;
   3. requiring the Access Seeker to institute remedial action (if any) in respect of that event; and
   4. specifying the action which may follow due to a failure to comply with the notice, (**Suspension Notice**) and:
3. the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 7.2, the **Remedy Period**), the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable after the expiry of the Remedy Period:
4. refuse to provide the Access Seeker with the Service:
   1. of the kind in respect of which the Suspension Event has occurred; and
   2. 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
5. suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed.
   1. For the avoidance of doubt, subclause 7.2(a) does not apply to any monies payable that are the subject of a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.
   2. In the case of a suspension pursuant to clause 7.2, the Access Provider must reconnect the Access Seeker to the Access Provider’s Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider must do so subject to payment by the Access Seeker of the Access Provider’s reasonable costs of suspension and reconnection.
   3. If:
6. an Access Seeker ceases to be a carrier or carriage service provider; or
7. an Access Seeker ceases to carry on business for a period of more than 10 consecutive Business Days or
8. in the case of an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or
9. an Access Seeker breaches a material obligation under this FAD, and:
10. that breach materially impairs or is likely to materially impair the ability of the Access Provider to deliver Listed Carriage Services to its customers; and
11. the Access Provider has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and
12. the Access Seeker fails to institute remedial action as specified in the Breach Notice within 10 Business Days after receiving the Breach Notice (in this clause 7.5, the **Remedy Period**), or
13. the supply of the Service(s) to the Access Seeker has been suspended pursuant to the terms and conditions of this FAD for a period of three Months or more, the Access Provider may cease supply of the Service under this FAD by written notice given to the first-mentioned party at any time after becoming aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be).

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

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

1. the same breach; or
2. different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events;

except:

1. where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 7.2 in respect of a Suspension Event and the Suspension Event has not been rectified by the Access Seeker within the relevant Remedy Period specified in clause 7.2; and
2. where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 7.5(d)(ii), the time period for the purposes of clause 7.5(d)(ii) will be 20 Business Days from the expiry of the time available to remedy the Suspension Event.
   1. For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 7.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause 7.5.
   2. 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:
3. 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
4. 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
5. a holder of an encumbrance takes possession of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or
6. the other party is or is likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
7. 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
8. 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
9. 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
10. the other party seeks or is granted protection from its creditors under any applicable legislation; or
11. anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.
    1. The cessation of the operation of this FAD:
       1. does not operate as a waiver of any breach by a party of any of the provisions of this FAD; and
       2. is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.
    2. 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:
       1. 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, and/or,
       2. in respect of a Service which has been suspended for a period of 10 or more consecutive Business Days under Schedule 7 of this FAD, for the period extending beyond that 10 Business Day suspension period to the extent the Service remains suspended under Schedule 7 of this FAD,

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

Schedule 8 - Liability and Indemnity

* 1. Subject to clause 8.2, each Party’s liability in respect of:

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

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

* 1. The liability limitation in clause 8.1 does not apply to the Access Seeker’s liability to pay the Charges for the Service provided under this FAD, or the Parties’ indemnification obligations under clauses 8.3 and 8.4.
  2. Each Party indemnifies the other Party against all Loss arising from the death of, or personal injury to, a Representative of the other Party, where the death or personal injury arises from:

1. an act or omission that is intended to cause death or personal injury; or
2. a negligent act or omission;

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

* 1. Each Party indemnifies the other Party against all Loss arising from any loss of, or damage to, the property of the other party (or the property of a representative of the other Party), where the loss or damage arises from:
     1. an act or omission that is intended to cause death or personal injury; or
     2. a negligent act or omission;

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

* 1. Each Party indemnifies the other Party against all Loss arising from a claim by a third person against the Innocent Party to the extent that the claim relates to a negligent act or omission by the first Party or by a Representative of the first Party.
  2. Subject to clauses 8.3 and 8.4, a Party has no Liability to the other Party for or in respect of any consequential, special or indirect Loss or any loss of profits or data.
  3. A Party has no Liability to the other Party for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any end-user of a Party or any other third person who is not a Representative of a Party.
  4. The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 8 to the extent that the liability the subject of the indemnity claim is caused or contributed to by:

1. a breach of this FAD;
2. an act intended to cause death, personal injury, or loss or damage to property; or
3. a negligent act or omission;

by the Innocent Party.

* 1. The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 8 or for in respect of a claim brought against the Innocent Party by an end-user of the Innocent Party, or a third person with whom the Innocent Party has a contractual relationship, to the extent that the Loss under such claim could have been excluded or reduced (regardless of whether such a Liability actually was excluded or reduced) by the Innocent Party in its contract with the end-user or third person.
  2. The Innocent Party must take all reasonable steps to minimise the Loss it has suffered or is likely to suffer as a result of an event giving rise to an indemnity under this Schedule 8. If the Innocent Party does not take reasonable steps to minimise such Loss then the damages payable by the Indemnifying Party must be reduced as is appropriate in each case.
  3. A Party’s liability to the other Party for Loss of any kind arising out of the supply of the Service under this FAD or in connection with the relationship established by it is reduced to the extent (if any) that the other Party causes or contributes to the Loss. This reduction applies whether the first Party’s liability is in contract, tort (including negligence), under statute or otherwise.
  4. The Indemnifying Party must be given full conduct of the defence of any claim by a third party that is the subject of an indemnity under clause 8.3 or 8.4, including, subject to the Indemnifying Party first obtaining the written consent (which must not be unreasonably withheld) of the Innocent Party to the terms thereof, the settlement of such a claim.
  5. Nothing in this Schedule 8 excludes or limits a Party’s entitlement to damages under Part 5 of the Telecommunications (Consumer Protection and Service Standards) Act 1999.

Schedule 9 - Communication with end users

* 1. The Access Provider may communicate and deal with an Access Seeker’s end-users as expressly provided in clauses 9.2 to 9.4 and as otherwise permitted by law.
  2. Subject to clause 9.3, the Access Provider may communicate and deal with the Access Seeker’s end-users:

1. in relation to goods and services which the Access Provider currently supplies or previously supplied to the end-user provided that the Access Provider only communicates and deals through its retail division;
2. as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;
3. where the Access Provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;
4. in a manner or in circumstances agreed by the Parties; or
5. in or in connection with an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property.
   1. If:
6. an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker’s goods and/or services with the Access Seeker and must not engage in any form of marketing or discussion of the Access Provider’s goods and/or services;
7. an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider, the Access Provider may engage in any form of marketing or discussion of the Access Provider’s goods and/or services; and
8. an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider and the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker’s goods and/or services, with the Access Seeker, but may otherwise engage in any form of marketing or discussion of the Access Provider’s goods and/or services.
   1. Where a Party communicates with the end-user of the other Party, that first mentioned Party must, where practicable, make and maintain records of that communication with the other Party’s end-user in circumstances where that communication discusses anything concerning the other Party’s goods or services with the end-user. For the avoidance of doubt, the obligation in this paragraph does not include a requirement to provide such records to the other Party (however such a requirement may arise pursuant to any dispute resolution procedure).
   2. For the purposes of clauses 9.2 to 9.4, a “**communication**” shall include any form of communication, including without limitation telephone discussions and correspondence.
   3. Neither Party may represent that:
9. it has any special relationship with or special arrangements with the other Party, including through the use of the other party’s trade marks, service marks, logos or branding unless otherwise agreed;
10. there are no consequences for an end-user when an end-user signs an authority to transfer their accounts or services;
11. a Service has any characteristics or functionality other than as specified in a relevant standard form of agreement or the service description for the Service or in any specifications, collateral or brochures published in relation to the Service; or
12. the other Party participates in the provision of the first mentioned Party’s services, provided that a Party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other Party.
    1. Where a Party communicates with an end-user of either Party, the first mentioned Party shall ensure that it does not attribute to the other Party:
13. blame for a Fault or other circumstance; or
14. the need for maintenance of a Network; or
15. the suspension of a Service,

provided that this requirement does not require a Party to engage in unethical, misleading or deceptive conduct.

* 1. This Schedule 9 shall be subject to any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to communications or dealings with end-users.

Schedule 10 - Network modernisation and upgrade notice periods

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

* 1. Except where the parties agree otherwise, the Access Provider may make a Major Network Modernisation and Upgrade by:

1. providing the Access Seeker with notices in writing in accordance with clauses 10.2 and 10.4 (**General Notification**) and clauses 10.3 and 10.5 (**Individual Notification)**; and
2. consulting with the Access Seeker, and negotiating in good faith, to address any reasonable concerns of the Access Seeker, in relation to the Major Network Modernisation and Upgrade.

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

* 1. The period of notices given under a General Notification provided by the Access Provider to the Access Seeker:

1. must be an Equivalent Period of Notice; and
2. in any event, must not be less than 30 weeks before the Major Network Modernisation and Upgrade is scheduled to take effect.
   1. An Individual Notification must be provided by the Access Provider to the Access Seeker as soon as practicable after the General Notification, taking account of all the circumstances of the Major Network Modernisation and Upgrade.

*Information to be provided in the notices*

* 1. A General Notification must include a general description of the proposed Major Network Modernisation and Upgrade, including the indicative timing for the implementation of the Major Network Modernisation and Upgrade.
  2. An Individual Notification must include the following information in addition to the information provided in the relevant General Notification:

1. the anticipated commencement date for implementing the Major Network Modernisation and Upgrade
2. the anticipated amount of time it will take to implement the Major Network Modernisation and Upgrade;
3. details of the Access Seeker’s activated Services, or Services in the process of being activated at the date of the notice, that are likely to be affected by the Major Network Modernisation and Upgrade;
4. the likely action required by the Access Seeker as a result of the Major Network Modernisation and Upgrade (including the possible impact of the Major Network Modernisation and Upgrade upon the Access Seeker’s Service); and
5. details of who the Access Seeker may contact to obtain further information about the Major Network Modernisation and Upgrade.
   1. An Individual Notification only needs to be given where a Service has been activated or the Access Provider is in the process of activating a service as at the date of the Individual Notification, and:
6. the Major Network Modernisation and Upgrade will require the Access Seeker to take particular action in order to continue to use the Service; or
7. the Major Network Modernisation and Upgrade will result in the Service no longer being supplied or the Service being suspended for a period of no less than 20 Business Days.
   1. Where the Access Provider has provided the Access Seeker with an Individual Notification, the Access Provider must provide the Access Seeker with:
8. updates about the Major Network Modernisation and Upgrade covered by the notice, including:
9. any update or change to the information provided in the Individual Notification;
10. any new information available at the time of the update about:
11. how the Access Seeker may be impacted by the Major Network Modernisation and Upgrade; and
12. what steps the Access Seeker will be required to take to facilitate the Major Network Modernisation and Upgrade.
    1. The updates referred to in subclause 10.7(a) must be provided regularly (which is not required to be any more frequently than Monthly) after the Individual Notification.

*Emergency Network Modernisation and Upgrade*

* 1. In the event of an Emergency, the Access Provider may conduct an Emergency Network Modernisation and Upgrade, and

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

*Negotiations in good faith*

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

1. it complies with clauses 10.1 to 10.8; and
2. it has consulted with the Access Seeker and has negotiated in good faith, and addressed the reasonable concerns of the Access Seeker in relation to the Major Network Modernisation and Upgrade.
   1. Notwithstanding any continuing negotiations between the Access Provider and the Access Seeker pursuant to clauses 10.1 and 10.10, if the Access Provider has complied with this Schedule 10, a Major Network Modernisation and Upgrade may proceed within a reasonable time period, taking account of all the circumstances, after an Individual Notification has been issued, unless both parties agree otherwise.
   2. In attempting to reach a mutually acceptable resolution in relation to a variation under clauses 10.1 and 10.10, the parties must recognise any need that the Access Provider may have to ensure that the specifications for the Services which the Access Providers supplies to more than one of its customers need to be consistent (including, without limitation having regard to the incorporation by the Access Provider of any relevant international standards).

*Dispute Resolution*

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

*Miscellaneous*

* 1. A requirement for the Access Provider to provide information in written form includes provision of that information in electronic form.
  2. Any information provided by the Access Provider in electronic form must be in a text-searchable and readable format.

Schedule 11 - Changes to operating manuals

* 1. Operational documents concerning the Service that have been provided to the Access Seeker by the Access Provider, or should be provided because they affect the supply of the Service including the technical and operational quality of the Service, or affect the rights and/or obligations of an Access Seeker, may be amended:

1. by the Access Provider from time to time to implement or reflect a change to its standard processes, subject to:
2. giving 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and a marked-up copy of the proposed new operational document that clearly identifies all amendments; and
3. allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and where provided, the Access Provider having reasonably considered those comments and implemented any such comments where the Access Provider considers it reasonable to do so; and
4. otherwise, by agreement of the parties.

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

11.1B For the purposes of 11.1(a)(ii), an Access Provider in considering whether it is reasonable for it to implement any comments may consider whether the changes reflect all Access Seeker and the Access Provider’s interests.

* 1. Upon completion of the process set out in clause 11.1, the Access Provider must notify the Access Seeker and make available to the Access Seeker a copy of the new operational document
  2. Where operational documents concerning the Service are amended in accordance with clause 11.1 and the Access Seeker believes that the amendments:

1. are unreasonable; or
2. deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;

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

Schedule 12 – Recourse to regulated terms

12.1 Unless otherwise agreed by the parties, if

1. an Access Agreement between an Access Provider and an Access Seeker is in force and the Access Agreement relates to access to the same Service which one of the FADs relates to;
2. the ACCC makes or varies a Regulatory Determination in relation to the Service and the new Regulatory Determination or the variation deals with a matter other than price; and
3. a party to the Access Agreement proposes, by written notice, to the other party to vary the Access Agreement to reflect the terms and conditions in the new or varied Regulatory Determination about that matter,

each party must:

1. consider the proposed changes in good faith; and
2. negotiate the proposed changes in good faith for a reasonable period not exceeding 20 Business days unless a longer period of time is agreed in writing, including, if requested by the other party, to meet with the other party to discuss the other party’s proposal.

12.1A If the process under clause 14.1 does not result in a variation to the Access Agreement, this is not a Non-Billing Dispute or Billing Dispute for the purposes of this FAD.

12.2 Unless otherwise agreed by the parties, if

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

either party may terminate the Access Agreement in respect of that Service (but only in respect of that Service) by providing the other party with a written notice, and termination will take effect on the expiry of the period specified in the notice, which must be no less than 120 Business Days after the day that notice is provided.

1. Section 152BC of the *Competition and Consumer Act 2010* (Cth) (the CCA). [↑](#footnote-ref-1)
2. Section 152BCC of the CCA. [↑](#footnote-ref-2)
3. Section 152BCH of the CCA. [↑](#footnote-ref-3)
4. The declared telecommunication services are the six fixed line services (the unconditioned local loop service, line sharing service, public switched telephone network originating access, public switched telephone network terminating access, the wholesale line rental service, and the local carriage service) the domestic transmission capacity service, and the MTAS. Supplementary prices refer to additional charges incurred for using a declared service. [↑](#footnote-ref-4)
5. Primary prices are the charges for direct use of a declared service. [↑](#footnote-ref-5)
6. See WIK-Consult, *Benchmarks for the mobile termination access service in Australia: Final Report*, 15 April 2015 (WIK Report). [↑](#footnote-ref-6)
7. See WIK-Consult, *Benchmarks for the mobile termination access service in Australia: Revised final report*, 26 July 2015 (WIK Revised Report). [↑](#footnote-ref-7)
8. Sections 152BC(3) and (8) of the CCA. [↑](#footnote-ref-8)
9. Section 152BCA(1) of the CCA. [↑](#footnote-ref-9)
10. Sections 152AB(6) and (7A) of the CCA. [↑](#footnote-ref-10)
11. Section 152BCA(3) of the CCA. [↑](#footnote-ref-11)
12. WIK Revised Report, p. 12. [↑](#footnote-ref-12)
13. ACCC, *Mobile terminating access service final access determination: draft decision*, May 2015, pp. 9–11 (Draft Decision). [↑](#footnote-ref-13)
14. ibid, pp. 8–9. [↑](#footnote-ref-14)
15. ibid, p. 12. [↑](#footnote-ref-15)
16. ibid, p. 13. [↑](#footnote-ref-16)
17. ibid, p. 16. [↑](#footnote-ref-17)
18. ibid, pp. 17–18. [↑](#footnote-ref-18)
19. ibid, p. 17. [↑](#footnote-ref-19)
20. See Macquarie Telecom, *Mobile terminating access service: Final access determination draft decision*, 5 June 2015 (Macquarie Telecom submission); iiNet; *Mobile terminating access service final access determination draft decision*, May 2015 (iiNet submission); TPG, *Submission by TPG Telecom Limited (TPG) to Australian Competition and Consumer Commission – Mobile terminating access service (MTAS) final access determination draft decision*, received 20 May 2015 (TPG submission). [↑](#footnote-ref-20)
21. Telstra, *Response to the ACCC’s mobile terminating access service final access determination – draft decision*, Public version, 15 June 2015, p. 9 (Telstra submission). [↑](#footnote-ref-21)
22. ibid, p. 11. [↑](#footnote-ref-22)
23. VHA, *MTAS access determination: draft decision – submission to the Australian Competition and Consumer Commission*, Public version, June 2015, pp. 9–10 (VHA submission). [↑](#footnote-ref-23)
24. Draft decision, p. 12. [↑](#footnote-ref-24)
25. Draft decision, pp. 8–9. [↑](#footnote-ref-25)
26. Draft decision, p. 12. [↑](#footnote-ref-26)
27. Commerce Commission, *Standard terms determination for the designated services of the mobile termination access services (MTAS) fixed-to-mobile voice (FTM), mobile-to-mobile voice (MTM) and short messaging services (SMS)*, 5 May 2011, p. 67. [↑](#footnote-ref-27)
28. Telstra submission, p. 12. [↑](#footnote-ref-28)
29. Network Strategies, *Benchmarking mobile termination access service in Australia: Review of the methodology,* 5 June 2015, pp. 27–29 (Network Strategies Report). [↑](#footnote-ref-29)
30. Telstra submission, p. 12. [↑](#footnote-ref-30)
31. VHA submission, p. 11. [↑](#footnote-ref-31)
32. ibid, p.14. [↑](#footnote-ref-32)
33. Optus, *Submission in response to ACCC draft decision: Mobile terminating access service final access determination*, Public version, June 2015, p. 22 (Optus submission). [↑](#footnote-ref-33)
34. The use of mobile site is chosen because it was considered a network element that is largely dependent on non-tradeable local inputs where presumably the application of PPP-adjustment would be necessary and appropriate. [↑](#footnote-ref-34)
35. Analysys, *Examination of mobile termination costs*, 30 June 2004. [↑](#footnote-ref-35)
36. ibid, p. 5. [↑](#footnote-ref-36)
37. Analysys, *Examination of mobile termination costs*, 30 June 2004, p. 5. [↑](#footnote-ref-37)
38. WIK Report, p. 24; WIK Revised Report, p. 26. [↑](#footnote-ref-38)
39. WIK Report, p. 23. [↑](#footnote-ref-39)
40. ibid, pp. 28–30. [↑](#footnote-ref-40)
41. Telstra submission, pp. 12–13; Network Strategies Report, p. 41. [↑](#footnote-ref-41)
42. Optus submission, pp. 21–22. [↑](#footnote-ref-42)
43. VHA submission, pp. 16–17. [↑](#footnote-ref-43)
44. WIK Revised Report, pp. 34–36. WIK-Consult also conducted simulations on the same model to obtain the change in the cost estimate resulting from an increase in the network usage from the average observed in the benchmark countries to that observed in Australia. This is discussed further in **section 3.3.5**. [↑](#footnote-ref-44)
45. ibid, pp. 36–38. [↑](#footnote-ref-45)
46. Telstra submission, pp. 13–15. [↑](#footnote-ref-46)
47. Telstra submission, p. 13. [↑](#footnote-ref-47)
48. Optus submission, pp. 34–38. [↑](#footnote-ref-48)
49. VHA submission, pp. 15–17. [↑](#footnote-ref-49)
50. Draft decision, p. 14. [↑](#footnote-ref-50)
51. WIK Revised Report, p. 39. [↑](#footnote-ref-51)
52. Optus submission, p. 33. [↑](#footnote-ref-52)
53. Telstra submission, pp. 16–22. [↑](#footnote-ref-53)
54. Optus submission pp. 25–27. [↑](#footnote-ref-54)
55. This will be discussed further in **section 3.3.5** in relation to geographic coverage. [↑](#footnote-ref-55)
56. Only four of the nine models in the benchmark include 4G traffic. [↑](#footnote-ref-56)
57. See WIK Revised Report, pp. 34–36. [↑](#footnote-ref-57)
58. See WIK Revised Report, p. 36. [↑](#footnote-ref-58)
59. Telstra submission, p. 17. [↑](#footnote-ref-59)
60. ibid. [↑](#footnote-ref-60)
61. Network Strategies Report, [↑](#footnote-ref-61)
62. VHA submission, pp. 20–21. [↑](#footnote-ref-62)
63. ibid, pp. 21–22. [↑](#footnote-ref-63)
64. Optus submission, pp. 24–25. [↑](#footnote-ref-64)
65. Strictly speaking, population density refers to the number of people per square kilometre of land area and the coverage area may be different from the land area. However, for the current purpose, the ACCC will refer to population density as the number of people per square kilometre of coverage area which is the more relevant indicator. [↑](#footnote-ref-65)
66. Telstra submission, p. 11. [↑](#footnote-ref-66)
67. WIK Revised Report, pp. 42–43. [↑](#footnote-ref-67)
68. WIK Report, pp. 35–37. [↑](#footnote-ref-68)
69. Telstra submission, pp. 21–22. [↑](#footnote-ref-69)
70. Optus submission, pp. 26–27. [↑](#footnote-ref-70)
71. VHA submission, p. 21. [↑](#footnote-ref-71)
72. WIK Revised Report, p. 14. [↑](#footnote-ref-72)
73. Telstra submission, p. 22. [↑](#footnote-ref-73)
74. ibid, p. 23. [↑](#footnote-ref-74)
75. Optus submission, p. 27. [↑](#footnote-ref-75)
76. ibid, pp. 27–28. [↑](#footnote-ref-76)
77. VHA submission, p. 22. [↑](#footnote-ref-77)
78. ibid, pp. 22–23. [↑](#footnote-ref-78)
79. WIK Revised Report, pp. 17–19. [↑](#footnote-ref-79)
80. WIK Revised Report, p. 44. [↑](#footnote-ref-80)
81. Ibid. [↑](#footnote-ref-81)
82. WIK Revised Report, p. 58. [↑](#footnote-ref-82)
83. Draft Decision, p. 17. [↑](#footnote-ref-83)
84. TPG submission. [↑](#footnote-ref-84)
85. iiNet submission, p. 3. [↑](#footnote-ref-85)
86. Telstra submission, pp. 23–24. [↑](#footnote-ref-86)
87. Macquarie Telecom submission, p. 9. [↑](#footnote-ref-87)
88. Macquarie Telecom, *Mobile terminating access service: Final access determination Draft decision – Supplemental submission*, 12 June 2015. [↑](#footnote-ref-88)
89. Optus submission, pp. 7–12. [↑](#footnote-ref-89)
90. Optus submission, p. 10. [↑](#footnote-ref-90)
91. Telstra submission, pp. 26-27. [↑](#footnote-ref-91)
92. Optus submission, pp. 17–20. [↑](#footnote-ref-92)
93. VHA submission, pp. 10–11. [↑](#footnote-ref-93)
94. Optus submission, pp.12–16. [↑](#footnote-ref-94)
95. ACCC, *MTAS Final Access Determination Discussion Paper*, August 2014, pp. 9–10. [↑](#footnote-ref-95)
96. Draft Decision, pp. 20–21. [↑](#footnote-ref-96)
97. ibid, p. 20. [↑](#footnote-ref-97)
98. This is rounded off from the estimated cost of 0.028 cents per SMS. [↑](#footnote-ref-98)
99. Draft Decision, p. 23. [↑](#footnote-ref-99)
100. Telstra submission, p.30 and Optus submission, p.32. [↑](#footnote-ref-100)
101. iiNet submission, p.3. [↑](#footnote-ref-101)
102. Macquarie telecom submission, p.13. [↑](#footnote-ref-102)
103. Vodafone submission, p.35. [↑](#footnote-ref-103)
104. Telstra submission, p.29. [↑](#footnote-ref-104)
105. Dialogue Communications, *Submission in response to ACCC mobile terminating access service final access determination draft decision*, Public version, 5 June 2015, pp. 4–7 (Dialogue submission). [↑](#footnote-ref-105)
106. Mblox, *Submission in response to the mobile terminating access service final access determination draft decision*, 4 June 2015, pp. 3–5 (Mblox submission). [↑](#footnote-ref-106)
107. As per Table 5.4 of WIK’s report, conveyancing costs only represent 7% of the proposed rate of 0.03 cents/SMS. [↑](#footnote-ref-107)
108. The ACCC notes that in 2013-14 only 2.6% of all reported spam to the ACMA was in the form of SMS. [↑](#footnote-ref-108)
109. ACCC, *Final Access Determinations No.1 of 2011*, July 2011, p. 2. [↑](#footnote-ref-109)
110. This explanatory statement will be available at: <http://accc.gov.au/regulated-infrastructure/communications/mobile-services/mobile-terminating-access-service-declaration-review-2013/final-decision>. [↑](#footnote-ref-110)
111. Draft Decision, pp. 24–27. [↑](#footnote-ref-111)
112. ibid, p. 28. [↑](#footnote-ref-112)
113. Telstra submission, pp. 32–33. [↑](#footnote-ref-113)
114. VHA submission, pp. 26–29. [↑](#footnote-ref-114)
115. Macquarie Telecom submission, p. 7. [↑](#footnote-ref-115)
116. ibid, p. 8. [↑](#footnote-ref-116)
117. See Draft decision, pp. 24–25. [↑](#footnote-ref-117)
118. Telstra submission, p. 34; VHA submission, p. 8. [↑](#footnote-ref-118)
119. Telstra submission, p. 34. [↑](#footnote-ref-119)
120. Section 152BCF(6) of CCA. [↑](#footnote-ref-120)
121. Available at: <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices>. [↑](#footnote-ref-121)
122. Section 152BCD of the CCA. [↑](#footnote-ref-122)
123. Subsection 152BCN(4) of the CCA. [↑](#footnote-ref-123)
124. Subsection 152BCF(6) of the CCA. [↑](#footnote-ref-124)
125. ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act*, July 1999, in particular pp. 31–38. [↑](#footnote-ref-125)
126. ibid., p. 33. [↑](#footnote-ref-126)
127. *Seven Network Limited (No 4)* [2004] ACompT 11 at [120]. [↑](#footnote-ref-127)
128. Subsection 152AB(2) of the CCA. [↑](#footnote-ref-128)
129. Subsection 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] A CompT 3 at [92]; *Telstra Corporation Limited* [2006] A CompT at [97], [149]. [↑](#footnote-ref-129)
130. Subsection 152AB(8) of the CCA. [↑](#footnote-ref-130)
131. Subsections 152AB(6) and (7A) of the CCA. [↑](#footnote-ref-131)
132. Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [159]. [↑](#footnote-ref-132)
133. ibid. at [164]. [↑](#footnote-ref-133)
134. ibid. [↑](#footnote-ref-134)
135. ACCC, *Resolution of telecommunications access disputes – a guide,* March 2004 (revised) (Access Dispute Guidelines), p. 56. [↑](#footnote-ref-135)
136. ACCC, *Access pricing principles—telecommunications,* July 1997 (1997 Access Pricing Principles), p. 9. [↑](#footnote-ref-136)
137. Telstra Corporation Limited [2006] ACompT 4 at [89]. [↑](#footnote-ref-137)
138. Telstra Corporation Limited [2006] ACompT 4 at [91]. [↑](#footnote-ref-138)
139. ibid. [↑](#footnote-ref-139)
140. ibid. [↑](#footnote-ref-140)
141. Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137]. [↑](#footnote-ref-141)
142. See Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44: [T]he ‘direct’ costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market. [↑](#footnote-ref-142)
143. Telstra Corporation Limited [2006] ACompT 4 at [92]. [↑](#footnote-ref-143)
144. ibid. at [139]. [↑](#footnote-ref-144)
145. ACCC, 1997 Access Pricing Principles, p. 11. [↑](#footnote-ref-145)
146. ACCC, Final Determination – Model Non-price Terms and Conditions, November 2008, p. 8. [↑](#footnote-ref-146)
147. ACCC, Access Dispute Guidelines, p. 57. [↑](#footnote-ref-147)
148. *Telstra Corporation Limited* [2006] ACompT at [94]–[95]. [↑](#footnote-ref-148)
149. ‘Eligible service’ has the same meaning as in section 152AL of the CCA. [↑](#footnote-ref-149)
150. Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178. [↑](#footnote-ref-150)
151. ibid. [↑](#footnote-ref-151)