MOBILE TERMINATING ACCESS SERVICE: COMMENTS ON THE DRAFT ACCESS DETERMINATION EXPLANATORY STATEMENT

SUBMISSION TO THE
AUSTRALIAN COMPETITION
AND CONSUMER COMMISSION

October 2011

Contents

1. Summary

Vodafone Hutchison Australia Pty Limited (VHA) welcomes this further opportunity to participate in Australian Competition and Consumer Commission's (ACCC) Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS) for the period from 1 January 2012 to 30 June 2014.

VHA supports the ACCC's proposal to ensure that MTAS pricing moves to reflect a TSLRIC+ based assessment of overall MTAS costs. This is an important part of ensuring that an economically efficient outcome is delivered to the telecommunications industry and for end-users. However, the determination of a cost-based price is not the sole matter the ACCC is required to consider in making an access determination. In the case of MTAS, with its particular and unique position as an interconnection service for both mobile and fixed telephony services, careful consideration must be given to determining how the transition to a cost-based price can be optimised to ensure that a range of markets are not negatively impacted and to ensure that the transition best achieves the Long-Term Interests of End-users (LTIE).

In its initial MTAS Discussion Paper released earlier this year, the ACCC correctly identified the two enduring and problematic issues that must be resolved if the transition to TSLRIC+ MTAS pricing is to deliver economically efficient outcomes and promote the LTIE. Firstly, the ACCC identified that retail Fixed-to-Mobile (FTM) prices have remained high despite substantial reductions in MTAS:

> *The ACCC notes that from 1997 to 2010, the charge for PSTN terminating access, a wholesale input to domestic calls, declined by a factor of three, and retail prices for domestic calls dropped by 61.4 percent in real terms. In contrast, the MTAS rate declined nearly fivefold in real terms since 1997, but the average retail price for FTM calls fell by only 52.9 percent. Publicly available data confirms the relatively large margins in Telstra's FTM calls. Research conducted by the Royal Bank of Scotland reveals that in 2010 Telstra's calling yield for FTM calls was 35.7 cents per minute compared to 10.2 cents per minute and 13 cents per minute for national and local calls respectively.*[1]

As many submissions to this review have found, the maintenance of high FTM prices has inefficiently and unfairly benefited Telstra to the detriment of consumers and other mobile network operators.

Secondly, in its Discussion Paper the ACCC observed that the maintenance of high FTM prices by Telstra in particular is the result of structural problems with the fixed line services market:

> *The ACCC considers that the lack of FTM pass-through demonstrates inherent structural issues in the fixed line services market where integrated operators remain dominant with their full suite of services. Consumers who acquire a variety of services such as voice, data or pay TV tend to select integrated operators so as to obtain bundle discounts and a single bill. 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. Integrated providers also have the ability to use their savings from the regulated reductions in the MTAS rate to subsidise price reductions in services or geographic areas where competition does exist.*[2]

With this in mind, VHA has two key concerns about the ACCC's draft MTAS access determination:

---

[1] ACCC, Discussion Paper *"Domestic Mobile Terminating Access Service (MTAS) Public Inquiry to make an Access Determination"*, p 5
[2] Ibid, p 8.

1. **The ACCC's proposed front-loaded glide path sees more than half the MTAS price reduction occur in the first year of the three year transition.** This is despite the ACCC's enduring concerns that previous MTAS reductions have increased FTM margins for integrated operators,[3] in particular Telstra.
2. **The absence of any mechanism to ensure that MTAS price reductions provided to integrated operators are passed on to end-users in an allocatively efficient manner.** It would be an unsatisfactory and damaging outcome if all that resulted from MTAS price reduction in the short and medium term was the creation of an increased economic rent for integrated operators.

Without reconsideration of these matters VHA believes that, as it stands, the MTAS Access Determination will:

- create significant distortions in a number of telecommunications markets;
- provide little, if any, benefit to end-users; and
- provide an inefficient and inappropriate windfall to integrated operators, in particular Telstra.

It is important to acknowledge that reductions in the MTAS rate will not promote the LTIE if the benefits are not passed through to consumers in the form of lower retail prices. Historically, lack of retail FTM pass-through means Telstra has been the primary beneficiary of previous reductions in MTAS prices. This is not the purpose of the MTAS declaration. VHA estimates that $1.1 billion in unrealised consumer benefits accrued to Telstra due to lack of retail FTM pass-through between 1 July 2004 and 31 December 2010. If the glide path in the draft MTAS access determination were to be implemented VHA estimates an additional $605 million in unrealised consumer benefits could accrue to Telstra due to lack of FTM pass-through, with 44% of that figure directly due to the proposed reductions in the MTAS price.[4]

Therefore, without adjustments to the glide path and the inclusion of measures that may improve pass-through, VHA does not agree that the current proposed transition glide path to 3.6 cpm in the Draft MTAS Access Determination satisfies the legislative criteria set out in section 152BCA of the *Competition and Consumer Act 2010*. In particular, it does not:

- promote the LTIE of carriage services or of services supplied by means of carriage services;
- consider the legitimate business interests of VHA (and others) as a supplier of the MTAS and its investment in facilities used to supply the declared service; or
- lead to the economically efficient operation of mobile networks.

Telstra's windfall gain will come at the expense of retail FTM consumers and its competitors in the mobile industry (including VHA). In these circumstances, it is difficult to believe a sudden, sharp reduction in the MTAS rate to 6 cpm from the ACCC's previously determined indicative price of 9 cpm will have the effect of promoting the LTIE. Instead, a smooth transition from the existing MTAS price (9 cpm) to the ACCC's estimate for the long-term cost of supplying the MTAS (indicatively, 3.6 cpm) is required. VHA recommends a uniform rate reduction of 1.8 cpm in each of the relevant periods (see Table 1).

[3] Integrated operators are defined as those that provide both fixed and mobile voice services, and who directly supply the MTAS (i.e., excluding MVNOs).
[4] The volume of residential FTM minutes is assumed to decline by 0.4% year-on-year and the volume of business is assumed to decline by 5.1% year-on-year. The residential and business average FTM revenue per minute is assumed to stay constant at the level indicated by ACCC (2011), *Imputation testing and non-price terms and conditions report relating to the accounting separation of Telstra for the March quarter 2011*.

Table 1: VHA's proposed glide path options compared to the glide path in the draft access determination

	1 January 2012 to 31 December 2012	1 January 2013 to 31 December 2013	1 January 2014 to 30 June 2014
Recommended approach: Uniform rate reduction (cpm)	7.2	5.4	3.6
Change on previous period (cpm)	*-1.8*	*-1.8*	*-1.8*

This glide path is appropriate given the retail lack of FTM pass-through (and subsequent uncertainty over total welfare impacts from previous MTAS price reductions). It also provides an appropriate period for VHA (and others) to recalibrate pricing structures in the transition toward the long-term efficient price for the MTAS.

Unfortunately, even with a more tempered glide path for the MTAS Final Access Determination, the failure by Telstra to fully pass-through previous MTAS price reductions to consumers of FTM calls means it is difficult to be confident that future MTAS price reductions will promote the LTIE. The inherent structural issues in the fixed line services market are unlikely to change in the short to medium term. Reductions in the MTAS price without sufficient regard to inefficiencies in the fixed services market may exacerbate that market's structural problems and is contrary to the promotion of the LTIE. Given the extent of the lack of pass-through over the last decade, and the potential for this to worsen, an inadequately managed approach will deliver long-term damage to the Australian telecommunications market.

VHA reiterates its support for an incentive-based approach to address the lack of retail FTM pass-through (we provide additional suggestions in this paper). The adoption of an incentive-based approach will stimulate competition for the supply of FTM calls and provide assurance to the ACCC, the general public and access providers such as VHA that MTAS reductions are promoting the LTIE. VHA has made a set of suggested approaches to use MTAS pricing as an incentive to deliver economically efficient cost reflective outcomes at the end of this submission.

2. Lack of FTM pass-through is a market failure

The draft MTAS access determination risks exacerbating a problem long recognised by the ACCC in its regulation of the MTAS – the lack of FTM pass-through. The underlying causes relating to lack of FTM pass-through relate to inherent structural issues in the fixed line services market. For this reason, the access problem that led to the declaration of MTAS cannot be separated from the downstream structural problems evident in the fixed services market. If the proposed MTAS access determination is to promote the LTIE then it is imperative for the ACCC to take account of the conditions that exist in the retail FTM market today.

This is not to say that the ACCC should take a prescriptive approach to retail price outcomes, rather the ACCC needs to ensure that the approach to MTAS pricing optimises the benefits of MTAS price reductions for end users.

2.1 Retail FTM prices are too high

It is of significant concern that retail FTM prices have stayed high despite substantial reductions in price of its major wholesale input, the MTAS. At the end of 2004, Telstra's average FTM revenue was 40 cpm.[5] Six years later, Telstra's average FTM revenue had only fallen by 6 cpm,[6] a reduction of 15%, whereas the ACCC had reduced the indicative price for the MTAS from 21 cpm to 9 cpm, a reduction of 12 cpm or 57%.

Retail FTM prices clearly do not reflect underlying costs. As outlined by publicly available data, Telstra's cost in supplying FTM calls (including the MTAS) was 16 cpm at the end of 2010.[7] As outlined below, FTM margins in 2010 are more than 60% higher than they were in 2004. The size and persistence of the discrepancy between retail FTM prices and costs indicates the existence of a market failure that must be remedied.

2.2 Competition in fixed voice services has not been promoted

In 2004, the ACCC envisaged that reductions in the MTAS price would promote competition in the market for which FTM calls are supplied and create pressures on all providers to pass-through reductions in the price of the MTAS to end-users. However, the available evidence strongly suggests that previous reductions in the MTAS price have not been fully passed through to consumers.[8] In fact, Telstra's margin on residential FTM calls has increased from 31.7% in 1Q04 to 51.8% in 2Q11.[9] An increasing margin on FTM calls for the dominant supplier of fixed voice services is contrary to the ACCC's expectations that the MTAS price reductions would increase competition in the market in which FTM calls are provided.

It is sometimes claimed that reductions in the MTAS prices have been passed on in the bundle of fixed service providers. However, if such pricing structures do not promote competition then it is difficult to believe they are economically efficient. Telstra's market share in fixed voice

---

[5] VHA estimate of the weighted average FTM revenue per minute based on ACCC (2005), *Imputation testing and non-price terms and conditions report relating to the accounting separation of Telstra for the December quarter 2004*.
[6] VHA estimate of the weighted average FTM revenue per minute based on ACCC (2011), *Imputation testing and non-price terms and conditions report relating to the accounting separation of Telstra for the December quarter 2010*.
[7] ACCC (2011), *Imputation testing and non-price terms and conditions report relating to the accounting separation of Telstra for the December quarter 2010*.
[8] For example, the ACCC's quarterly reports on the *Imputation testing and non-price terms and conditions report relating to the accounting separation of Telstra* or the ACCC's annual reports on *Changes in prices paid for telecommunications services in Australia*.
[9] ACCC, *Imputation testing and non-price terms and conditions report relating to the accounting separation of Telstra*, for the respective quarters.

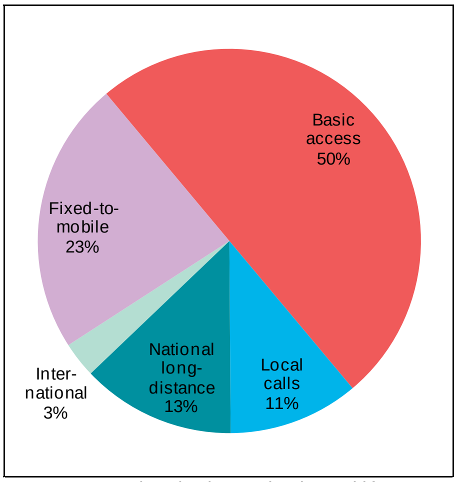
services was 70% in 2009-10 (and has generally been at that level or higher since 2004-05).[10] Telstra's EBITDA margin across the basket of PSTN services was 60% in 2009-10.[11] Telstra's ability to retain a high market share together with a high profit margin indicates a lack of competitive pressure and demonstrates that previous MTAS price reductions have not promoted competition in the market in which FTM calls are supplied. (By comparison, in the more competitive mobile services market Telstra's market share was 40% in 2009-10 and its EBITDA margin was 35%).[12]

2.3 Consumers of FTM calls are missing out

Telstra's fixed line customers made calls totalling 3.1 billion minutes in 2010-11.[13] They spend twice as much on FTM calls as they do on any other call type (see Figure 1). Given fixed line consumer demand to call mobile services, there are sizeable consumer benefits at stake from lack of FTM pass-through.

The structural characteristics of the market in which FTM calls are supplied has led to consumers of FTM calls missing out on the benefits from previous reductions in the MTAS price. VHA estimates that $1.1 billion in unrealised consumer benefits accrued to Telstra due to lack of retail FTM pass-through between 1 July 2004 and 31 December 2010 (see Figure 2). Lack of retail FTM pass-through means Telstra has been the primary beneficiary from previous reductions in MTAS prices. If the ACCC's draft MTAS access determination were to be implemented VHA estimates an additional $605 million in unrealised consumer benefits could accrue to Telstra due to lack of FTM pass-through, with 44% of that figure directly due to the proposed reductions in the MTAS price.[14]

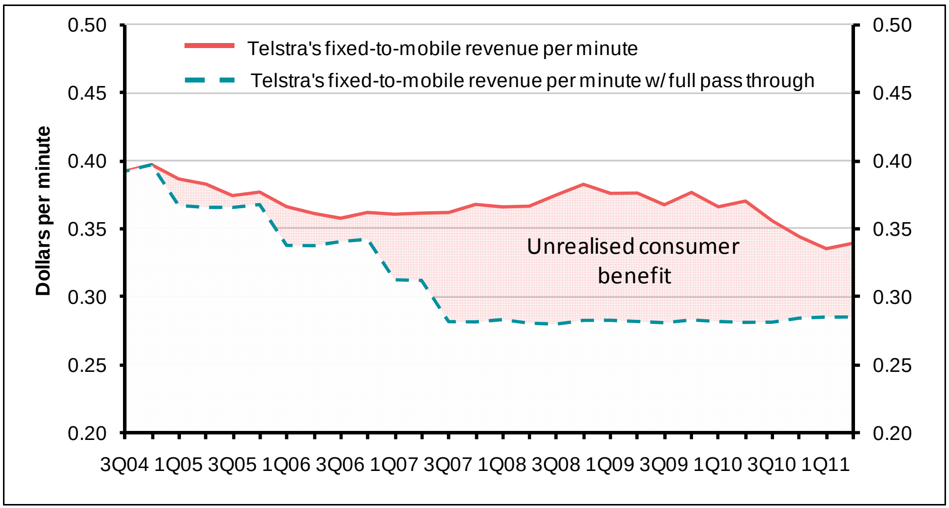
Figure 1: Share of consumer expenditure on various PSTN services (2009-10)



Source: ACCC (2011), *Changes in prices paid for telecommunications services in Australia, 2009-10*.

[10] In 2005-06, Telstra's market share was 69%. Source: ACCC, *Telecommunications competitive safeguards*, various years.
[11] Telstra (2011), *Annual report 2011*, p9.
[12] ACCC (2011), *Telecommunications competitive safeguards*, *2009-10*, p25 and Telstra (2011), *Annual report 2011*, p9.
[13] 13 Telstra (2011), *Annual report 2011*, p10.
[14] The volume of residential FTM minutes is assumed to decline by 0.4% year-on-year and the volume of business is assumed to decline by 5.1% year-on-year. The residential and business average FTM revenue per minute is assumed to stay constant at the level indicated by ACCC (2011), *Imputation testing and non-price terms and conditions report relating to the accounting separation of Telstra for the March quarter 2011*.

Figure 2: Telstra's average FTM revenue per minute and the unrealised consumer benefit

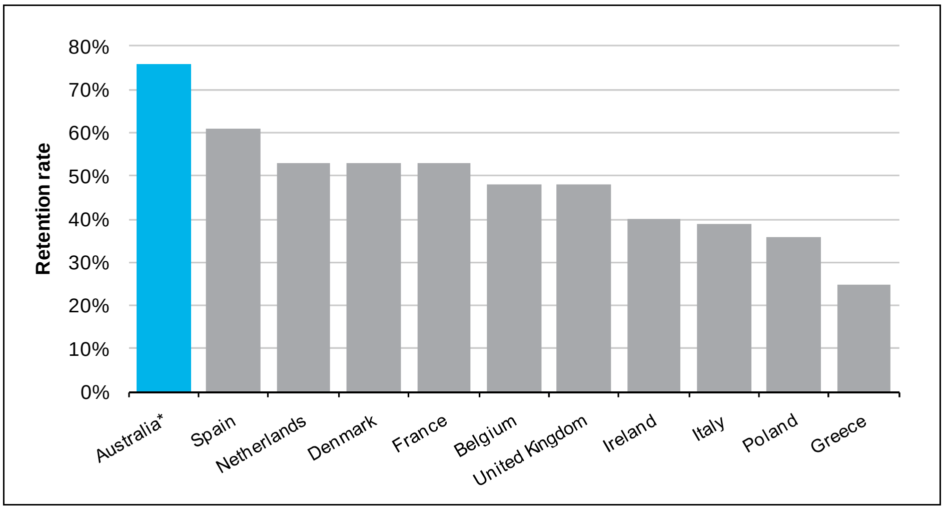


Note: Data is based on a volume-weighted average between residential and business segments.

Source: VHA based on the ACCC's *Imputation and non-price terms and conditions report*, various quarters.

Telstra's retention of the benefits from previous MTAS reductions is unparalleled in other international jurisdictions (see **Figure 3**). Of the countries benchmarked by Analysys Mason in its report for the ACCC only Denmark did not attempt to ensure that some form of FTM pass-through to retail prices occurred with reductions in MTAS pricing. Denmark was characterised by high and increasing retention margins over the four years of the study period.[15] However, even in these circumstances, Telstra remains a clear outlier.

Figure 2: Telstra's FTM retention rate compared to selected countries (2008)



Source: VHA Based on the ACCC's *Imputation and non-price terms and conditions report*, various quarters and Analysys Mason (2009), *Regulatory treatment of fixed-to-mobile pass-through*, Report for the ACCC, Public Version, October.

Evidence of persistent distortions to the economically efficient outcome in the market for FTM calls indicates a sizeable impost on consumers of FTM calls and should represent a material concern for the ACCC in setting regulated prices for the MTAS.

---

[15] Analysys Mason (2009), *Regulatory treatment of fixed-to-mobile pass-through*, Report for the ACCC, Public Version, October, p29.

3. The draft access determination does not satisfy the legislative criteria

The ACCC is required to take into account the legislative criteria set out in section 152BCA(1) of the *Competition and Consumer Act 2010* (CCA). The consideration of these legislative criteria should be considered across three dimensions:

- What is the long-term efficient price for supplying the MTAS?
- What is the appropriate transition path from the current MTAS price to the long-term efficient price for supplying the MTAS?
- Does the long-term MTAS efficient price create or exacerbate market failures in other adjacent or related markets? If so, are additional remedies required to mitigate such impacts?

The draft MTAS access determination focuses on the direct costs of providing the MTAS (that is, the long-term efficient price for supplying the MTAS). In that regard, VHA supports the ACCC use of the TSLRIC+ methodology to determine costs. However, while the focus on the direct cost of providing the MTAS is important, insufficient attention has been given to the three key aspects of the legislative criteria. As a consequence, VHA does not agree that the current draft access determination satisfies the relevant legislative criteria.

There are three legislative criteria that VHA believes have not been satisfied:

- determining whether the proposed glide-path will promote the long-term interests of end-users (**LTIE**) of carriage services or of services supplied by means of carriage services;[16]
- the legitimate business interests of a carrier who supplies the declared service and the carrier's investment in facilities used to supply the declared service; or
- the economically efficient operation of a telecommunications network.

VHA's assessment of the ACCC's reasoning with respect to these legislative criteria is presented on the following pages:

[16] To determine whether the draft access determination promotes the LTIE, the ACCC has had regard to the following objectives (which are referred to in section 152AB(2) of the CCA):

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

Part 152BCA criterion	ACCC reasoning	VHA response
Promote the LTIE: Promote competition in relevant markets	The ACCC considers competition is unaffected in *individual* MTAS markets (that is, those for each MNO) as a result of its pricing proposal. It reasons that this is because of the lack of substitutes for the service provided by each MNO and because MNOs are not constrained in their pricing decisions for the MTAS, which means they can raise price above its underlying costs of production. The ACCC considers that competition is promoted in the FTM market on the basis that the MTAS will be driven towards its underlying costs of production. In relation to retail mobile services, the ACCC states that setting the MTAS at efficient costs means "MNOs are left to compete on their relative efficiencies and competitive merits in the markets for retail mobile services".[17] No explicit comment is provided on whether this represents an increase in competition.	The ACCC has not considered mobile market competition as a whole or the potential effects on competition from the different impacts of MTAS rate reductions on the different MNOs. As Telstra and Optus have both fixed and mobile networks, they stand to benefit from reductions in the MTAS in a way that VHA will not. It is incumbent on the ACCC to explain how strengthening the economic viability of Telstra (which is expected to realise cost savings), while weakening the viability of Optus and Vodafone (that are expected to suffer net revenue losses) promotes mobile market competition. The ACCC's suggested outcomes in the FTM market are contingent on the existence of competition (or potential competition) in this market. However, the ACCC's various investigations into the fixed voice market have consistently pointed to the absence of robust competition. For example, Telstra continues to supply around 70 per cent of all fixed voice services and the HHI for the market is 5287.[18] These figures have hardly changed over the past four or five years. The ACCC recently observed that 'lack of competitive pressure means that the integrated operators have little incentive to pass-through savings from reductions in the MTAS directly to consumers in the FTM price'.[19] This finding is supported by data for FTM pass-though. Data for the average price of the MTAS and Telstra's average FTM prices for PSTN calls indicate that over the period 2003-04 to 2009-10, the pass though rate for reductions in the MTAS price has been limited. Seven years of substantial reductions in the price of the MTAS have not coincided with any improvement in the state of competition in fixed-line markets. Clearly factors other than the price of the MTAS affect competition in this market. In these circumstances, decreasing the price of the MTAS without any obligations around FTM pass-through simply has the effect of increasing the margins earned by fixed-line operators (especially Telstra). The ACCC does not indicate whether its draft access determination promotes retail mobile competition. If end users are not benefiting from reductions in FTM prices, they may end up being worse off depending on the extent of the waterbed effect. This is borne out by the welfare analysis undertaken by Frontier Economics, which shows that consumers could have been up to $3.2 billion worse off and (taking into account impacts on the production side) society as a whole $1.1 billion worse off from past regulation of the MTAS.[20]

[17] ACCC (2011), *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS)*, Draft Access Determination Explanatory Statement, September 23, p12.
[18] ACCC, *Telecommunications competitive safeguards for 2009–10* (Report 1 in *ACCC Telecommunications reports 2009-10),* May 2011, pp. 11-20.
[19] ACCC, *Domestic mobile terminating access service – Public inquiry to make an access determination,* Discussion paper, June 2011, p. 8.
[20] Frontier Economics (2011), *Welfare analysis of implications of reduced mobile termination rates*, Prepared for Vodafone Hutchison Australia, July, p33. This report was attached in Annex C to VHA's submission to the ACCC's Discussion Paper on the MTAS FAD.

Part 152BCA criterion	ACCC reasoning	VHA response
Promote the LTIE: Efficient use of, and investment in, infrastructure	The ACCC states it has considered, among other things, the ability of suppliers to exploit economies of scale and risks involved in investment. Its assessment is that lower MTAS prices as a key wholesale input for 'network providers' will encourage investment and reduce risks for existing and potential network owners. It also states that pricing of the MTAS if aligned to efficient costs will increase demand and investment in infrastructure.	The ACCC fails to consider two crucial negative influences on efficient use of, and investment in, infrastructure that follow in the absence of full FTM pass-through. First, in the presence of non-competitive conditions in the FTM market, the absence of FTM pass-through means there will be higher profits to fixed operators and less FTM calls than is efficient. This will distort investment incentives in the fixed market. Second, less FTM calls means there will be less mobile termination than is allocatively efficient. Further, there will be less "claw back" of lost termination revenue from increased FTM call volumes that would otherwise be the case if pass-through was full. In turn, this will mean mobile operators will either have to raise mobile prices to hold onto existing revenues – with potential reductions in allocative efficiency; or they will need to suffer reduced mobile revenues. In turn, this will reduce the profitability of, and hence incentives for, efficient investment in mobile networks.
The legitimate business interests of carriers who supply the MTAS	The ACCC defines legitimate business interests as the ability for an access provider to earn normal commercial returns. It considers that it has allowed for this in setting the MTAS based on a conservative estimate of the forward looking costs of the service.	By regulating MTAS rates to cost but not requiring full pass-through, the volume of calls to mobile networks (and hence the level of mobile termination) will be below levels that are likely to be allocatively efficient, and mobile termination revenues will be less than that which should be expected at these lower MTAS rates. In turn, this could jeopardise the ability of mobile operators to earn a normal commercial rate of return. Moreover, in the FTM market, the ACCC will be allowing operators to earn more than normal commercial returns if it does not ensure pass-through. This seems inconsistent with the approach to defining legitimate business interests under this criterion.
The economically efficient operation of a telecommuni-cations network	The ACCC interprets this criterion as embodying the standard aspects of economic efficiency (productive, allocative and dynamic efficiency) as applying to the operation of facilities that supply the declared services as well as for those networks or facilities that use the declared service. It claims this criterion will be achieved by a MTAS price that reflects costs relying on the same reasoning it applies for the efficient use of, and investment in infrastructure criterion under the LTIE.	The points VHA has made above in relation to the efficient use of investment in infrastructure and legitimate business interest are also relevant to this criterion. VHA reiterates that MTAS regulation without pass-through will lead to volumes of calls to mobile networks that are not allocatively efficient in a way that negatively affects the economically efficient operation of mobile and fixed communications networks.

4. A different glide path is required

The key requirement for a glide path is to ensure a smooth transition to a long-term, cost-based price. That objective will be achieved with the proposed glide path in the draft access determination (as outlined in Table 2).

Table 2: ACCC's proposed glide path options

	1 January 2012 to 31 December 2012	1 January 2013 to 31 December 2013	1 January 2014 to 30 June 2014
Draft access determination	6.0	4.8	3.6
Change on previous period (cpm)	*-3.0*	*-1.2*	*-1.2*

VHA does not agree that the proposed glide path to 3.6 cpm in the draft MTAS access determination is appropriate given the state of competition in the market in which FTM calls are supplied. Between 2004 and 2007, the MTAS price was reduced by 57% but during and since that time there has been no evidence of a significant improvement in competition in the fixed line services market or in the level of FTM pass-through. There is little reason to expect that a sharp reduction in the regulated price of the MTAS would suddenly stimulate competition in the fixed line services market. In fact sharp, front-loaded reductions could have significant adverse consequences for competition in both the FTM and mobile services market and provides no benefits for consumers. In short, there are no compelling reasons for reducing the MTAS rate by 3 cpm in 2012.

For the reasons set out below, VHA recommends a glide path that commences from the existing MTAS rate and is reduced at a uniform rate of 1.8 cpm in each period of the glide path (see Table 3).

Table 3: VHA's proposed glide path options

	1 January 2012 to 31 December 2012	1 January 2013 to 31 December 2013	1 January 2014 to 30 June 2014
Recommended approach: Uniform rate reduction (cpm)	7.2	5.4	3.6
Change on previous period (cpm)	*-1.8*	*-1.8*	*-1.8*

4.1 Front-loading reductions in the MTAS rate will not benefit consumers

There is no justification for front-loading reductions in the MTAS price given the ACCC's well-documented concerns about the lack of FTM pass-through. Telstra, the dominant supplier of FTM calls, has no short-term incentive to reduce its FTM prices. Therefore, fixed line consumers will not benefit from sharp reductions in the MTAS rate by any more than they would benefit from a gradual reduction in the MTAS rate.

Many consumers of both fixed and mobile services have taken up contracts with pricing structures that reflect the previous regulatory MTAS price (9 cpm) and whose duration stretches throughout parts, if not all, of 2012. These customers are highly unlikely to benefit at all from changes to pricing structures that may result from a reduction in the MTAS price in 2012. Instead the costs and benefits of changes to the regulatory price of the MTAS are borne by the access provider and the access seeker.

Even for fixed line consumers who will sign new service contracts during 2012, the extent to which fixed line consumers might benefit will be muted by the lack of FTM pass-through. The modest benefits that are realised by FTM consumers will come at the expense of mobile consumers. Frontier Economics observes that "where competition in retail mobile markets is stronger than competition in fixed-line markets… reductions in the price of the MTAS will, on balance, be far less likely to be welfare enhancing for consumers and society as a whole, and may indeed be welfare reducing".[21] In the absence of retail FTM pass-through, Frontier Economics' analysis suggests that when fixed and mobile markets are considered together the impact on consumer welfare from reductions in the MTAS price is negligible and may in fact be negative in some circumstances.[22]

4.2 Telstra would reap a significant windfall gain

Since the ACCC released its Explanatory Statement several industry analysts have released their assessments of the financial impact of the draft MTAS access determination on Telstra. They expect the impact of the proposed MTAS glide path will boost Telstra's EBITDA by:

- $21m-$60m for the year ending 30 June 2012;
- $59m-$78m for the year ending 30 June 2013; and
- $63-$100m for the year ending 30 June 2014.[23]

By contrast, VHA (and Optus) are expected to be adversely impacted by the proposed glide-path (see **Table 4**).[24]

Table 4: RBS' forecast of EBITDA impact from draft MTAS access determination ($ million)

	2012	2013	2014
Telstra	55.5	77.6	99.8
Optus	-30.4	-42.6	-54.8
VHA	-25.0	-35.0	-45.0

Note: FY - Financial year ending 30 June.
Source: RBS Equities (Australia) Limited (2011), *ACCC to cut MTAS to 3.6c*, Flashnote, 23 September.

The windfall gain to Telstra, which comes at the expense of both fixed line consumers and mobile competitors, is unjustifiable given that inherent structural issues will inhibit the emergence of competition in the fixed line market in the short-term. Reductions in the MTAS price that enlarge the economic rents earned by Telstra (and reduce the competitiveness of Telstra's closest rivals) are likely to have the effect of entrenching, rather than promoting, competition in the relevant markets.

By contrast, a smoother transition from the existing MTAS price has several pro-competitive advantages:

- Fixed and mobile operators based their pricing structures on the expected cost of future inputs. A smooth transition will permit these operators to adjust their pricing structures in a manner that best promotes competition.
- A more tempered glide path will constrain the economic rents earned by Telstra in the supply of FTM calls being used to distort competitive outcomes in related or adjacent markets. This may have the effect of promoting competition in the fixed line market more effectively than a sudden drop in the MTAS rate, which will only benefit existing suppliers of the service.

---

[21] Frontier Economics (2011), *Welfare analysis of implications of reduced mobile termination rates*, Prepared for Vodafone Hutchison Australia, July, p vi.
[22] Frontier Economics (2011), *Welfare analysis of implications of reduced mobile termination rates*, Prepared for Vodafone Hutchison Australia, July.
[23] Credit Suisse Equities (Australia) Limited (2011), *Draft mobile termination decision cuts rates to 6cpm in 2012 and 3.6cpm in 2014*, 26 September; RBS Equities (Australia) Limited, *Telco services: ACCC to cut MTAS to 3.6c*, 23 September 2011; and UBS Securities Australia Ltd (2011), *ACCC draft pricing minor positive for TLS*, 27 September 2011.
[24] RBS Equities (Australia) Limited, *Telco services: ACCC to cut MTAS to 3.6c*, 23 September 2011.

4.3 Regulatory certainty is best promoted by a smooth transition from the previous indicative price

Large changes in termination rates impose adjustment costs on consumers and mobile network operators. Glide paths allow time for access providers and, to a lesser extent, access seekers to adjust new wholesale prices and restructure their existing business practices. In this way, glide paths are intended to help balance the potential short-term welfare gains stemming from immediate price reductions with regulatory certainty required to protect long-term efficient investment incentives.

In setting the indicative price for the MTAS at 9 cpm for the period from 1 January 2009 to 31 December 2011, the ACCC set the industry's expectations about the cost of supplying the MTAS and the impact of other relevant matters (including the lack of FTM pass-through) on its decision. VHA does not believe that the ACCC's previous assessment regarding the state of competition in the relevant markets has materially changed. The MTAS Discussion Paper indicated the ACCC continued to hold concerns about lack of FTM pass to the view it expressed in 2009 when it stated:

> *The ACCC is disappointed with respect to reductions in retail FTM prices, as it appears no significant reduction in retail FTM prices has emerged despite earlier expectations… Telstra, as of 1 November 2008, commenced billing FTM calls in 30 second increments thereby raising the effective price paid for FTM calls significantly. This suggests that FTM pass-through is not evident despite the MTAS indicative price decreasing significantly.*[25]

(Telstra has since introduced 60 second billing increments for FTM calls).[26]

Given the ACCC has not built a new cost model to estimate the cost of supplying the MTAS, the only new evidence at the ACCC's disposal is the cost of supplying the MTAS in other international jurisdictions. This new information is not sufficient for access providers and access seekers to reasonably determine the ACCC would take a sharply different view on the regulated price for the MTAS in 2012 to the view it previously took on the indicative price for the MTAS in 2011. Therefore, VHA does not believe that regulatory certainty has been achieved by the proposed glide path in the draft MTAS access determination.

At the very least a smoother glide path will be more likely to avoid the mere transfer of rents to Telstra in the short term.

[25] ACCC (2009), *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, p22.
[26] Telstra (2011), http://www.telstra.com.au/home-phone/plans-rates-connections/.

5. Addressing the lack of FTM pass-through

Even with a different glide path for the MTAS Final Access Determination, the failure by Telstra to fully pass-through previous MTAS price reductions to consumers of FTM calls means it is difficult to be confident that future MTAS price reductions will promote the LTIE. Additional measures are required to address the lack of FTM pass-through and ensure that economic distortions in the market in which FTM calls are supplied do not cause long-term damage to the Australian telecommunications market.

There are several ways to address the lack of FTM pass-through:

> Interventionist approach - impose explicit retail price controls for FTM calls on Telstra that return Telstra's margin to a reasonable level; or

> Incentive-based approaches – ensure that the wholesale MTAS rate paid by both integrated operators (that is, carriers with both fixed and mobile businesses) and non-integrated operators facilitates a competitive outcome. This could be achieved by ensuring that integrated operators must demonstrate that they are reducing their FTM prices before they receive further MTAS price reductions. Alternatively, it could be achieved by setting different MTAS rates for different carriers.

5.1 Interventionist approach

Lack of FTM pass-through could be addressed by the use of retail price controls for FTM calls. Retail price controls for Telstra are set at the discretion of the Minister for Broadband, Communications and the Digital Economy pursuant to sections 154(1) and 155(1) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

In general, VHA does not support the use of retail price controls as the primary mechanism for addressing economic problems. They should only be used as a last resort. Retail price controls are undesirable from both a practical and an economic efficiency perspective. Retail price controls do not necessarily target the underlying problem – the inherent structural issues in the fixed services market. Instead they may entrench the existing market structure and undermine attempts to improve competitive pressure within the relevant market. Moreover, retail price controls are seldom effective at constraining monopoly (or duopoly) pricing structures as prices are often set above the efficient level.

Further, the use of retail price controls will give rise to coordination problems because they are not set by the ACCC, which makes it difficult for them to be set in conjunction with the MTAS rate. In addition, the current price controls do not expire until 30 June 2012 – mid-way through the first year of the MTAS final access determination. These coordination problems are detrimental to economic efficiency and the LTIE.

Retail price controls will require separate information gathering, on-going compliance monitoring and enforcement regime to be effective. These arrangements impose additional costs on the Government, the regulator and the regulated firm.

That said, if the ACCC does not endeavour to tackle the problems created by lack of FTM pass-through then a new Price Control regime may be necessary. As outlined above it would be a fundamentally poor policy outcome to allow the monopolistic pricing of FTM to continue particularly in the face of the MTAS price reductions that have been proposed by the ACCC.

If the ACCC considers, as suggested by the draft MTAS access determination,[27] that explicit retail price controls for residential and business FTM services are the best means of addressing the lack of FTM pass-through then it should make a recommendation to the Minister on the specific form of any retail price control sub cap. In the draft access determination despite suggesting that price control were a potential solution to the problems that they had identified, the ACCC provided no advice to the Government or to industry about how a retail price control may deliver the appropriate outcome.

The Department of Broadband, Communications and the Digital Economy recently commenced a Retail Price Controls Review.[28] The Review considers the appropriate policy framework for retail price controls and the services, if any, which should be subject to price controls. However, specific price caps for FTM calls are not explicitly discussed within the Department's Discussion Paper. If the ACCC still considers retail price controls provide an appropriate mechanism for addressing the lack of FTM pass through, its input to the Department's Review is imperative to overcome coordination problems and ensure price controls reflect the regulated price reductions for the MTAS.

If the Government has not made a decision to introduce a new retail price control then the ACCC cannot base its decision on an assumption that the Government will make a decision for this to occur. In this situation, VHA urges the ACCC to consider a mechanism that fits within the MTAS access determination process.

5.2 Incentive-based approaches

VHA believes that an approach that provides incentives for the market, including integrated operators, to pass on MTAS price reduction is the most effective way to address lack of FTM pass-through. Incentive-based approaches to addressing market failure have several advantages over more prescriptive regulatory approaches (such as retail price controls). First, incentive-based approaches do not lock in the existing market structure but instead stimulate competition. Second, individual firms adjust to incentives at their own pace, which helps to avoid unintended consequences. Third, incentive-based approaches tend to be flexible which makes them easier to change or remove than interventionist approaches. Fourth, the regulator (or the government) requires less information to implement an incentive-based approach than is required for interventionist approaches.

VHA believes there are three different incentive-based approaches the ACCC could adopt to encourage integrated operators to pass-through the benefits to consumers of FTM calls:

1. set MTAS rates that are conditional on integrated operators reducing their retail margin on FTM calls;
2. set MTAS rates that are conditional on integrated operators providing a minimum level of retail FTM pass-through from future reductions in the MTAS price; or
3. set different MTAS rates for different carriers (with lower MTAS rates set for integrated carriers).

It is important to note these approaches are not focused on setting the retail price of FTM; they are focused on ensuring that there is a more efficient market response in the supply of FTM calls due to a reduction in the MTAS price.

The first two options provide integrated operators with an incentive to pass-through the benefits of MTAS reductions to end-users. They also stimulate competition in the market in which retail FTM calls are supplied by making a lower MTAS rate immediately available to fixed-

[27] ACCC (2011), *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS)*, Draft Access Determination Explanatory Statement, September 23, p18.
[28] DBCDE (2011), *Retail price controls review*, Discussion paper.

only operators. This, in turn, acts as a further incentive for integrated operators to pass on the benefits of MTAS price reductions to consumers of FTM calls.

The third option does not make stipulations about the market behaviour of integrated operators but it does acknowledge that integrated operators who have not fully passed on previous MTAS price reduction should be on a different glide path to the rest of the industry. The approach also mitigates the risks to economy-wide efficiency associated with persistent distortions to allocative efficiency in the FTM market.

The three approaches are discussed in more detail below.

1. Retail FTM margin reduction

The ACCC could adopt conditional MTAS rates to create incentives for integrated operators to reduce their margin on FTM calls. The conditional MTAS rates presented in Table 5 are based on the FTM pass-through safeguard advocated by VHA in its Submission on the MTAS Discussion Paper.[29] Provided the integrated operator reduces its FTM margin via a reduction in the average residential FTM revenue then it will be entitled to an MTAS price reduction. Non-integrated operators would not have this requirement and would follow the recommended glide path.

Table 5: Proposed safeguard mechanism to improve incentives for retail FTM margin reduction

	1 January 2012 to 31 December 2012	1 January 2013 to 31 December 2013	1 January 2014 to 30 June 2014
Average Residential FTM revenue (cpm)*	25.0	19.7	15.5
MTAS rate chargeable to integrated carriers if threshold <u>is not met</u> (cpm)	9.0	9.0	9.0
MTAS rate chargeable to integrated carriers if threshold <u>is met</u> and to non-integrated carriers (cpm)	7.2	5.4	3.6

* This metric is based on information from the ACCC's *Imputation and non-price terms and conditions report*, which currently applies to Telstra. Telstra's residential FTM average revenue per minute for 2Q11 was 35.0 cpm.

The proposed FTM pass-through safeguard is intended to provide stimulus to competition in the market in which FTM calls are supplied. It does this through:

- providing integrated operators with access to a lower MTAS rate, which encourages these operators to lower their prices for retail FTM calls;
- increasing the differential between the MTAS rate if the threshold is met and the MTAS rate if the threshold rate is not met, which provides integrated carriers with an increasing incentive to reduce wholesale MTAS costs; and
- reducing integrated operators' ability to set above cost prices for the MTAS to raise costs for rival FTM service providers.

The primary advantage of this approach is that it provides consumers, the ACCC, access providers, and access seekers with assurance that welfare is being maximised and that the LTIE is being achieved. It is also the most economically efficient approach.

[29] For further details see http://www.accc.gov.au/content/item.phtml?itemId=1000778&nodeId=52e278f144d38b480e8b5c6f9b25e963&fn=VHA%20submission%20to%20the%20MTAS%20FAD%20discussion%20paper.pdf

2. Minimum levels of retail FTM pass-through

Conditional MTAS rates could also be used to provide incentives for a minimum level of FTM pass-through. That is, there would be a protection in place to ensure that FTM margins would not increase due to a MTAS price reduction. The threshold for retail FTM prices could be set to more closely align with, for instance, Telstra's current residential FTM revenue per minute (35.0 cpm).[30]. The MTAS rate chargeable to integrated carriers would not be reduced for integrated operators who have not fully passed through the benefits of previous MTAS price reductions to consumers of FTM calls.

VHA sets out a pass-through safeguard targeting a minimum level of retail FTM pass-through in Table 6. Given there is less discrepancy between the existing levels of pass-through for residential FTM users and the proposed retail threshold, the incentives do not need to be as strong as in the proposed mechanism targeting FTM margin reduction. Therefore, integrated carriers could be on a downward glide path even if they do not fully pass-through the benefits of MTAS price reductions in the form of reduced imputed prices for FTM calls.

Table 6: Proposed safeguard to provide incentives for a minimum level of FTM pass-through

	1 January 2012 to 31 December 2012	1 January 2013 to 31 December 2013	1 January 2014 to 30 June 2014
Average Residential FTM revenue (cpm)*	33.2	31.4	29.6
MTAS rate chargeable to integrated carriers if threshold <u>is not met</u> (cpm)	9.0	7.2	5.4
MTAS rate chargeable to integrated carriers if threshold <u>is met</u> and to non-integrated carriers (cpm)	7.2	5.4	3.6

* This metric is based on information from the ACCC's *Imputation and non-price terms and conditions report*, which currently applies to Telstra. Telstra's residential FTM average revenue per minute for 2Q11 was 35.0 cpm.

3. Create improved competitive pressure by applying short-term differences in MTAS rates

The simplest incentive mechanism to implement would be where ACCC sets different MTAS rates for different carriers. Differential MTAS rates by carrier have previously been used in several European countries to encourage competition.[31] The lack of FTM pass is a valid justification for establishing a different glide path for integrated carriers.

Moreover, it provides a strong medium-term incentive for integrated carriers to pass-through future reductions in the MTAS. It sends a signal that FTM calls are a relevant eligible service under section 152BCA(2) and that distortions to allocative efficiency in that market are relevant to setting MTAS rates because they impact whether a cost-based approach to pricing the MTAS promotes the LTIE.

While setting different MTAS rates for different carriers will not directly target the problem created by lack of FTM pass-through, it may limit the unintended consequences that occur from its existence. For example, the approach would:

- reduce windfall gain from lack of FTM pass-through;

30 ACCC (2011), *Imputation and non-price terms and conditions report for the June 2011 quarter*.

31 Within a European context, different MTAS rates are sometime set for new entrants in mobile markets who may be subject to higher unit costs for a transitional period before having reached the minimum efficient scale.

- reduce the revenue transfer from the competitive mobile services industry to the uncompetitive fixed voice services industry; and
- reduce integrated operators' ability to use above-cost prices for the MTAS to raise costs for rival FTM service providers.

If differential MTAS rates are adopted by the ACCC it might be reasonable for the different rates to converge by the end of the MTAS access determination and reconsidered by the ACCC in its next review of the MTAS. An example of how differential MTAS rates might transition toward the ACCC's long-term estimate for the cost of supplying the MTAS is illustrated in Table 7.

Table 7: Glide paths for the MTAS that depend on which network a call terminates

	1 January 2012 to 31 December 2012	1 January 2013 to 31 December 2013	1 January 2014 to 30 June 2014
MTAS rate paid by integrated carriers (cpm)	9.0	6.3	3.6
MTAS rate paid by non-integrated carriers (cpm)	7.2	5.4	3.6

While VHA believes setting a different MTAS rate for integrated operators' (who have not historically passed through MTAS reductions) will provide them with a strong medium-term incentive to improve the pass-through of MTAS reductions to retail FTM prices, VHA believes the use of conditional MTAS rates will provide a better and more immediate incentive to improve retail FTM pass-through.

Legal matters relevant to implementing an incentive-based approach

The ACCC is empowered to impose the incentive mechanisms outlined above in its final access determination. An access determination by the ACCC may make different provision with respect to different access seekers or different classes of access seekers: section 152BC(5) of the *Competition and Consumer Act 2010* (CCA). Further, section 152BC(3) of the CCA provides that in making an access determination, the ACCC may:

- specify any other terms and conditions of an access seeker's access to the declared service: section 152BC(3)(b); or
- deal with any other matter relating to access to the declared service: section 152BC(3)(j).

The Australian Competition Tribunal has held that a proposed pass-through provision is a 'term and condition' in relation to the supply of MTAS[32] and the inclusion of a pass-through mechanism does not raise any issue of invalidity.[33]

In making its final access determination, the ACCC must give 'fundamental weight' to the LTIE. This is because the overriding object of Part XIC is 'to promote the [LTIE]…'.[34] As discussed earlier in this submission, the retail market within which FTM calls are provided is not effectively competitive. As a consequence, retail prices for FTM calls have not fallen in line with the significant reductions in the regulated MTAS rate and any further reductions in the MTAS rate are unlikely to be passed through to end users of FTM calls. This is clearly not in the LTIE.

32 *Re Vodafone Network Pty Ltd* [2007] ACompT 1 (at [272]-[273]).
33 *Re Vodafone Network Pty Ltd* [2007] ACompT 1 (at [272])
34 *Telstra Corporation Ltd v ACCC* [2008] FCA 1436 at [120] and [122].

Of additional relevance for the ACCC in considering the lack of FTM pass-through is section 152BCA(2) of the CCA. This section came into effect last year, and was unavailable to the Tribunal in *Re Vodafone Network Pty Ltd* [2007] ACompT 1. As noted in the Explanatory Memorandum accompanying the legislative change, section 152BCA(2):

> *… is intended to ensure that, in making an access determination that applies to carriers or CSPs, the ACCC is not limited to considering the particular declared service that the access determination relates to in isolation, but is able to consider it in the context of the other relevant services which the carrier or CSP provides.*[35]

A consideration of FTM services under section 152BCA(2) suggests the MTAS should be made subject to one of the incentive mechanisms noted above to ensure that FTM consumers benefit from any future reductions in the MTAS. Such an approach best achieves the LTIE, as the interests of 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.[36]

5.3 The benefits of improving FTM pass-through

Consumer welfare will be significantly enhanced by adopting measures to address the lack of FTM pass-through. The price of FTM calls would be cheaper and FTM call volumes would increase. Indeed, if the price of FTM calls more closely reflected its underlying cost Analysys Mason estimates the volume of FTM calls traffic would double.[37] The high price of FTM calls is distorting consumer behaviour and adversely affecting consumer welfare. The consumer benefit from addressing lack of FTM pass-through in Australia is more than five times the consumer benefit realised from regulation of the MTAS.[38]

Measures to address the lack of FTM pass-through are also required to ensure efficient outcomes in the supply of the MTAS. Lack of allocative efficiency in the supply of FTM calls means fewer FTM calls are occurring than would be the case if the market in which FTM calls are supplied was competitive. This means the return on investment from infrastructure-related to the provision of the MTAS is less than is appropriate. The removal of distortions to allocative efficiency in the market in which FTM calls are supplied will encourage economically efficient use of, and investment in, infrastructure in the mobile services market.

Lack of FTM pass-through is damaging competition in the market in which FTM calls are supplied. Reductions in the MTAS price without sufficient regard to inefficiencies in the fixed services market may exacerbate that market's structural problems. Therefore, there is a clear advantage in adopting a measure that stimulates competition in the market in which FTM calls are supplied rather than a measure that risks entrenching the existing market structure. For this reason, VHA strongly favours the adoption of an incentive-based approach to addressing the lack of FTM pass-through.

The lack of FTM pass-through is a significant and enduring market failure. Without action, it will worsen in the short to medium term unless measures are taken to address it. If the ACCC's proposed draft MTAS access determination were to be implemented VHA estimates an $605 million in unrealised consumer benefits could accrue to Telstra due to lack of FTM pass-through, with 44% of that figure directly due to the proposed reductions in the MTAS price. For this reason, regulation of the MTAS cannot be separated from the problem created by the

---

[35] Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition And Consumer Safeguards) Bill 2010* (Cth) at p178.
[36] *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].
[37] Analysys Mason (2009), *Regulatory treatment of fixed-to-mobile pass-through*, Report for the ACCC, Public Version, October, p46.
[38] VHA estimate based on comparison of consumer surplus from the regulating FTM pass-through and regulating MTAS in 2007/08 in Analysys Mason (2009), *Regulatory treatment of fixed-to-mobile pass-through*, Report for the ACCC, Public Version, October, pp 46-48.

lack of FTM pass-through. The lack of FTM pass-through must be addressed to ensure economic regulation of the MTAS promotes the LTIE.

A Non-price terms and conditions

VHA's comments and recommendations on the non-price terms and conditions are summarised in the table below.

Schedule and clause	VHA comments and recommendations
Schedule 2	
2.4(b) subject to clause 2.5, no more than five Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld).	This provision for back billing should be changed to six months in line with current industry practice and to ensure consistency with clause 2.14.
2.30 If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that three or more out of any five consecutive invoices for a given Service are incorrect by 5 percent or more, then, for the purposes of clause 2.20, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question shall be the rate set out in clause 2.6, plus 2 percent. The remedy set out in this clause 2.30 shall be without prejudice to any other right or remedy available to the Access Seeker.	With respect to the reference to clause 2.6, it is unclear if this intended to set the rate at 90 day authorised dealers' bank bill rate published in the *Australian Financial Review* rate plus 2.5% plus 2% or the 90 day authorised dealers' bank bill rate plus 2%.
Schedule 3	
3.3 The Security (including any varied Security) shall only be requested when it is reasonably necessary to protect the legitimate business interests of the Access Provider and shall be of an amount and in a form which is reasonable in all the circumstances. As a statement of general principle the amount of any Security shall be calculated by reference to: (a) the aggregate value of all Services likely to be provided to the Access Seeker under this FAD over a reasonable period; or (b) the value of amounts invoiced under this FAD but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD). For the avoidance of doubt, any estimates, forecasts or other statements made or provided by the Access Seeker may be used by the Access Provider in determining the amount of a Security.	VHA recommends this clause be amended as follows: (a) the aggregate value of all Services likely to be provided to the Access Seeker under this FAD over a reasonable period ***less the aggregate value of all Services likely to be provided by the Access Seeker to the Access Provider under this FAD over the same period***; or (b) the value of amounts invoiced under this FAD but unpaid ***less the value of amounts invoiced but unpaid by the Access Seeker to the Access Provider under this FAD*** (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).