



# **DOMESTIC MOBILE TERMINATING ACCESS SERVICE (MTAS)**

**Public Inquiry to make an Access Determination**

**Discussion Paper**

**June 2011**



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# 1 Introduction

## 1.1 *Legislative framework*

Under section 152BCI(2) the ACCC is required to commence a public inquiry into a proposal to make an access determination for any service which is a declared service as at 1 January 2011. The public inquiry must commence within 12 months of 1 January 2011.

Pursuant to this requirement, this discussion paper commences a public inquiry under Part 25 of the *Telecommunications Act 1997* into making a final access determination (FAD) for the declared domestic digital mobile terminating access service (MTAS) under section 152BC of the *Competition and Consumer Act 2010* (CCA).

An FAD provides a base set of terms and conditions that access seekers can rely on if they are unable to come to an agreement with an access provider on the terms and conditions of access to a declared service.

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

- whether the determination will promote the long-term interests of end users (LTIE) of carriage services or services supplied by means of carriage services
- 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.

Further detail on the new access regime and criteria for making FADs can be found in Appendix B of this discussion paper.

## 1.2 *Background*

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

The MTAS was declared by the ACCC in its current form on 30 June 2004 and re-declared without alteration in 2009. The MTAS declaration will expire on 30 June 2014.<sup>1</sup>

The ACCC has applied TSLRIC+ principles to price the per-minute charge for terminating a voice call on a mobile network since 2004. This approach saw the MTAS rate decline from over 21 cpm to 9 cpm. Table 1 below sets out the historical glide path in MTAS indicative prices.

**Table 1: Historical MTAS indicative prices<sup>2</sup>**

<b>Time period</b>	<b>cpm</b>
1 July 2004 – 31 December 2004	21
1 January 2005 – 31 December 2005	18
1 January 2006 – 31 December 2006	15
1 January 2007 – 30 June 2007	12
1 July 2007 – 31 December 2011	9

In 2007 and 2009, the ACCC estimated the costs of a hypothetical efficient operator providing the MTAS on a 2G network by using the outputs of the WIK cost model. The ACCC set the indicative MTAS rate at 9 cpm noting that this rate was a conservative upper bound estimate. The *MTAS Pricing Principles Determination for the period 1 January 2009 to 31 December 2011* (2009 pricing principles determination) cautioned that the WIK model's application as a tool to estimate the efficient cost of supplying the MTAS in the Australian context might become increasingly limited.<sup>3</sup>

This discussion paper sets out a number of options for consideration regarding the future regulation of the MTAS in an FAD. The ACCC invites submissions on the options presented, any alternative options which the ACCC could consider and any other issues which may be dealt with in an FAD. In particular, the ACCC invites interested parties to indicate:

- (a) the option they consider is the most appropriate methodology for estimating the price of the MTAS;
- (b) whether different regulatory approaches should be applied to the termination of mobile-to-mobile (MTM) and fixed-to-mobile (FTM) calls; and
- (c) whether a mechanism for fixed-to-mobile pass-through of the MTAS cost is required.

<sup>1</sup> ACCC, *Mobile terminating access service — An ACCC final report on reviewing the declaration of the mobile terminating access service*, May 2009.

<sup>2</sup> ACCC, *MTAS Pricing Principles Determination for the period 1 July 2004 to 30 June 2007*, *MTAS Pricing Principles Determination for the period 1 July 2007 to 31 December 2008* and *MTAS Pricing Principles Determination for the period 1 January 2009 to 31 December 2011*.

<sup>3</sup> ACCC, *MTAS Pricing Principles Determination for the period 1 January 2009 to 31 December 2011*, p. 19.

## 2 Consultation process for final access determination

The ACCC requests written submissions to this discussion paper from interested parties before 5.00 pm on **27 July 2011**. After consideration of the submissions from interested parties, the ACCC intends to develop a draft FAD. Following the consultation on this draft the ACCC will issue a Final Statement of Reasons and the FAD late in the final quarter of 2011.

The ACCC encourages industry participants, other stakeholders and the general public to make submissions to the ACCC to assist it in determining an FAD for the MTAS.

To foster an open, informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. If interested parties wish to submit commercial-in-confidence material as part of their submission to the ACCC, parties should submit both a public and commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The *ACCC-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC website: <http://www.accc.gov.au>.

Please forward submissions by email to the following contact officers:

**Contact Officer:**

Lauren Zhu

Communications Group  
Australian Competition & Consumer  
Commission  
GPO Box 3648  
Sydney NSW 2001

Phone: (02) 9230 3827  
Facsimile: (02) 9223 1092  
Email: [lauren.zhu@acc.gov.au](mailto:lauren.zhu@acc.gov.au)

A copy of correspondence should be sent to:

Julian James

Acting Director  
Communications Group  
Australian Competition & Consumer  
Commission  
GPO Box 3648  
Sydney NSW 2001

Phone: (02) 9230 9155  
Facsimile: (02) 9223 1092  
Email: [julian.james@acc.gov.au](mailto:julian.james@acc.gov.au)

## **3 MTAS market overview**

### **3.1 *What is the MTAS?***

The MTAS is provided by mobile network operators (MNOs) in order to enable the completion of voice calls from a carriage service provider's network to an MNO's network. The MNOs that currently provide the MTAS include Telstra, Optus and VHA, all of which operate national 2G (GSM) and 3G (WCDMA) networks. Acquirers of the MTAS include the three MNOs, fixed line operators, and VoIP providers. The many mobile virtual network operators (MVNOs) obtain MTAS via the three MNOs and generally do not directly provide or acquire MTAS themselves.

A voice telephone call involves two elements – origination and termination. Origination refers to the carriage of a voice call from the end user device which initiates the call (often referred to as the 'A-Party') to the point of interconnection (POI) with the destination mobile network. Termination refers to the carriage of a voice call from the POI to the end user device to which the telephone call is made, that is, the 'B-Party'.

Australia uses an interconnection charging model in which the terminating network receives a payment from the originating network. That is, the calling party network pays model (CPNP). Under CPNP, the originating network usually recovers the termination costs, and the costs it incurs from originating the call, from the retail price it charges its customer for making the call.

### **3.2 *Downstream market segments***

The ACCC notes that whilst the MTAS is a homogeneous wholesale product the parties obtaining the MTAS are not homogenous. The diverse origination characteristics of voice calls create different dynamics in downstream retail markets. Calls between mobile networks (MTM calls) and calls that originate on non-mobile networks and terminate on mobile networks (FTM calls) exhibit different properties. Although both types of calls involve the provision of the homogeneous MTAS, the origination element of the call is heterogeneous and is affected by different competitive dynamics. The ACCC considers that the MTM and FTM MTAS voice calls are sufficiently different to be evaluated separately.

#### **3.2.1 MTM calls**

The market for retail mobiles services is dominated by three MNOs which have similarity of scale. However, the ACCC notes that VHA is not an integrated telecommunications provider like Telstra and Optus. The ACCC notes that the structure of the mobile sector has changed significantly in the recent past due to the merger of Vodafone Australia with Hutchison 3G Australia to create VHA. In terms

of subscriber market share, Telstra has approximately 41 per cent, Optus has 32 per cent and VHA has 27 per cent.<sup>4</sup>

The ACCC notes that the market for retail services in which MTM calls are supplied has experienced material price declines exhibited through the increasing value and variety of bundles and lower priced calls that are offered by MNOs, MVNOs and other resellers.

In the wholesale market for MTM termination, the ACCC is of the view that voice traffic flows between any pair of the three operators with similar scale are likely to be broadly symmetrical. This may mean that the MTAS revenues exchanged are likely to be relatively balanced.

*Question on which the ACCC seeks views:*

- 1) Is the flow of voice traffic between any pair of mobile network operators broadly symmetrical?

### **3.2.2 FTM calls**

The ACCC has on several occasions expressed the view that it does not consider the retail market within which FTM services are provided to be effectively competitive.<sup>5</sup> In 2009 the ACCC stated that substantial reductions in the MTAS rate since 2004 had failed to be fully passed through to end users of FTM services.<sup>6</sup> At that time, the ACCC noted interested parties' views that the fixed line market is still dominated by Telstra and Optus and that this has held back competition by reducing the ability of smaller competitors to influence pricing in the retail market.<sup>7</sup>

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.<sup>8</sup> In contrast, the MTAS rate declined nearly five fold in real terms since 1997, but the average retail price for FTM calls fell by only 52.9 percent.<sup>9</sup> Publicly available data confirms the relatively large margins in Telstra's FTM calls. Research conducted by the Royal Bank of Scotland<sup>10</sup> 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.

<sup>4</sup> RBS, *Telco Services—Mobile market grows 8.2% in 1H11*, 4 March 2011, Chart 5.

<sup>5</sup> For example, ACCC, *Mobile Terminating Access Service, An ACCC Final Report on reviewing the declaration of the mobile terminating access service*, May 2009, p. 21; ACCC, *Mobile Services Review—Mobile Terminating Access Service, Final Decision on whether or not the Commission should extend, vary or revoke its existing declaration of the mobile terminating access service*, June 2004, p. 109.

<sup>6</sup> ACCC, *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, March 2009, pp. 22–24.

<sup>7</sup> ACCC, *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, March 2009, pp. 22–24.

<sup>8</sup> ACCC estimates based on data from reporting carriers under Division 12 RKR.

<sup>9</sup> *ibid.*; real declines in the MTAS rate are based on an estimated MTAS rate of 30 cpm in 1997 and CPI figures from the Australian Bureau of Statistics.

<sup>10</sup> RBS, *Telco Services—2011 outlook and 1H reporting preview*, 28 January 2011, Charts 11 and 12.

The above evidence suggests decreases in the MTAS rate has not lead to improved retail pricing for end users of FTM services. Therefore, the ACCC has not been provided with any evidence to suggest that the ACCC should resile from its previously stated views that competition in this submarket is ineffective. The ACCC also notes that input cost reductions are likely to be retained by providers in the form of increased margins with further detrimental impacts on consumer welfare.

*Question on which the ACCC seeks views:*

- 2) Is there any evidence which suggests that retail pricing of FTM services reflects the reducing cost of MTAS?

## 4 Potential for differential regulatory approaches to the MTAS

When the ACCC declared MTAS and implemented an indicative price glide path for the service in 2004, it considered that reductions in the price of this essential wholesale input would quickly benefit end users in both downstream markets:

- (a) the retail mobile services market; and
- (b) the market within which FTM services are provided.

The sustained high retail prices for FTM calls is in stark contrast to the market for retail mobiles services where declines in the MTAS rate are associated with real decreases in retail prices and innovative retail initiatives.

The different market dynamics regarding FTM and MTM termination suggests that although from a technical perspective the MTAS is the same regardless of the origination technology, from a competition, and therefore regulatory perspective, the two downstream market segments are distinct. The ACCC is therefore open to a more tailored regulatory approach to meet the criteria specified in subsection 152BCA(1) of the CCA.

### 4.1 *MTM termination*

The characteristics of the wholesale and retail mobile services markets noted in section 3.2.1 suggest that regulated MTAS pricing may have become less relevant for MTM termination, although regulation may remain relevant for the purposes of any-to-any connectivity. The ACCC therefore sees an opportunity for the three MNOs to adopt a 'no payment exchanged' bill-and-keep (BAK) arrangement among themselves. The ACCC notes that this would reduce frictional and transactional costs associated with collecting, reconciling and billing the large volume of call detail records (CDR).

A BAK system for MTM termination may take the form of a price of zero for MTM termination in the MTAS FAD, or be implemented under access agreements among the MNOs if commercial BAK arrangements can be reached. In this regard, the ACCC notes that under the CCA, access agreements prevail over access determinations to the extent of any inconsistency.<sup>11</sup> The ACCC therefore considers that access agreements may be an appropriate mechanism for MNOs to implement MTAS agreements that depart from the ACCC's general approach to MTAS pricing. The ACCC also considers that there is an opportunity to deregulate MTM termination if any-to-any connectivity can be assured.

The ACCC notes that implementing BAK only for MTM termination may give rise to concerns about arbitrage activities specifically designed to take advantage of differential regulatory pricing. For example, a lower price for MTM termination or

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<sup>11</sup> CCA, section 152BCC.

MTM BAK may create an incentive for fixed line and third-party operators to route their traffic through mobile networks before terminating on a mobile network so as to bypass the higher FTM termination charges.

If BAK arrangements were to be adopted, the ACCC would work with the industry to ensure that these concerns are adequately addressed before or as part of the FAD. For example, MNOs may be able to prevent serious arbitrage activities by appropriately structuring their access agreements to prohibit re-routing. Similar terms and conditions can be included in the MTAS FAD so that it is readily enforceable using the right of action in respect of contraventions of access determinations.<sup>12</sup> In this regard, the ACCC also notes that compliance with any applicable access determination is a carrier licence condition.<sup>13</sup>

*Questions on which the ACCC seeks views:*

- 3) Are MNOs likely to negotiate BAK-based access agreements for MTM calls commercially, and if so, within what timeframes?
- 4) Should the ACCC set a price of zero for MTM termination in the MTAS FAD?
- 5) If commercial BAK arrangements for MTM termination were implemented successfully, should MTM termination be deregulated?
- 6) If MTM termination was deregulated, how would any-to-any connectivity be maintained?

## **4.2 FTM termination**

With respect to FTM termination, the ACCC's past approach has not fettered fixed line providers' discretion as to how they would respond to lower MTAS prices. This was guided primarily by the expectation that competitive forces would ensure that consumers benefit from lower FTM calling prices. As discussed in section 3.2.2, despite multiple reductions in the MTAS rate since 2004, this expectation has not been realised.

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.

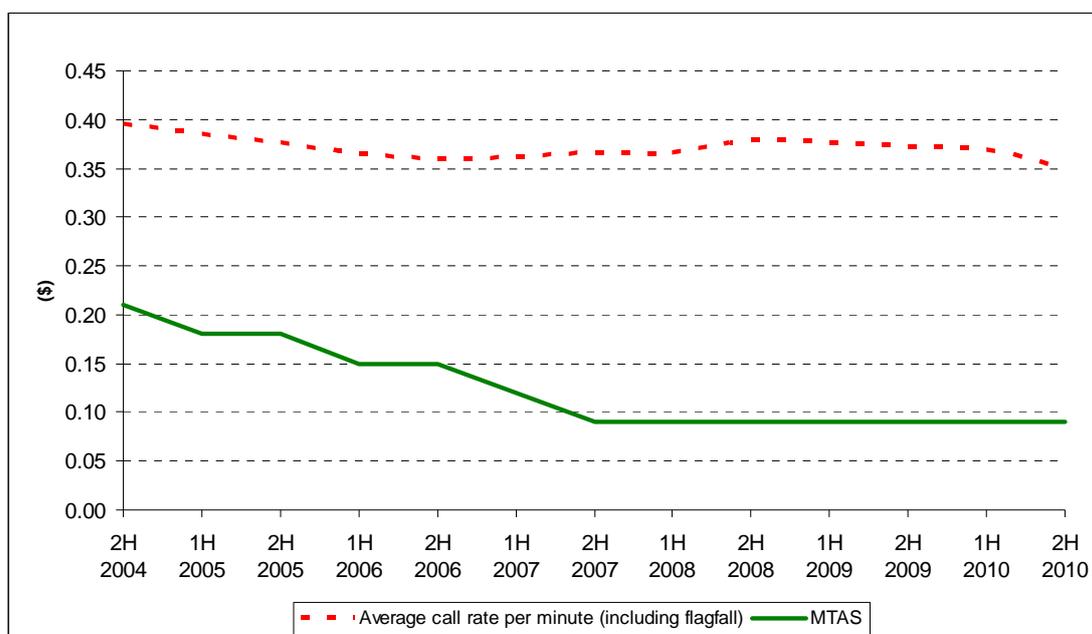
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<sup>12</sup> CCA, section 152BCQ

<sup>13</sup> CCA, section 152BCO.

For example, figure 1 below illustrates Telstra’s retail FTM prices relative to the MTAS rate over the period in which the MTAS fell from 21 cpm to 9 cpm. The average call rate per minute is calculated by dividing Telstra’s half-yearly revenue for FTM calls by the number of call minutes. Despite multiple and substantial reductions in the MTAS rate, Telstra’s average FTM prices remained relatively stable. The ACCC also notes that Telstra’s recent move to per-minute billing increment from 30-second blocks results in further increases consumer expenditure on FTM calls.<sup>14</sup>

**Figure 1: Evolution of Telstra’s retail FTM call rates compared to the MTAS<sup>15</sup>**



The ACCC is aware that structural issues in the fixed line services market cannot be addressed by reductions in the MTAS rate alone. An Analysys Mason report commissioned by the ACCC finds that regulating FTM pass-through in conjunction with the MTAS would increase consumer surplus through reduced retail pricing.<sup>16</sup> The ACCC is considering whether applying a pass-through safeguard to integrated operators will be beneficial to end users. To this end, the ACCC notes that it can make access determinations applying different provisions with respect to different access seekers or different classes or access seekers.<sup>17</sup>

The ACCC envisages that any pass-through safeguard would be independent of the general MTAS pricing (to be discussed in Chapter 6), and may operate only until a minimum level of pass-through, to be determined by the ACCC, has been achieved.

A pass-through safeguard could take the form of a requirement that any further reduction in the MTAS rate be linked to a full or partial pass-through obligation.

<sup>14</sup> ‘Telstra to bill calls in minute blocks’, itnews, <<http://www.itnews.com.au/News/245658.telstra-to-bill-calls-in-minute-blocks.aspx>>, accessed on 10 May 2011.

<sup>15</sup> Based on information submitted by Telstra under the ACCC’s imputation testing RKR.

<sup>16</sup> Analysys Mason, *Regulatory treatment of fixed-to-mobile pass-through*, public version, p. 46, available from

<<http://www.accc.gov.au/content/item.phtml?itemId=897537&nodeId=a31ef9fd399ac98ad77bce21e6ff53cb&fn=Analysys%20Mason%20final%20report%20on%20FTM%20passthrough.pdf>>.

<sup>17</sup> CCA, subsection 152BC(5).

Alternatively, the regulated MTAS rate could be expressed as a function of a firm's retail FTM call price, for example, by deducting the costs of providing a FTM call other than the MTAS (i.e., PSTN originating access, transmission and retail costs) and a normal commercial return from the firm's average retail FTM price. Such a 'retail-minus' formula would apply until a certain price floor is reached.

The ACCC seeks interested parties' views on whether these or other measures designed to encourage FTM pass-through would assist competition in the fixed line services market and prevent integrated operators from retaining the savings from regulated reductions in the MTAS rate at the expense of fixed line end users.

*Questions on which the ACCC seeks views:*

- 7) Should reductions in the MTAS rate be subject to a pass-through safeguard for fixed or integrated operators?
- 8) If a percentage pass-through obligation is adopted, should pass-through occur at the same time, or after the reduction in the MTAS rate? What is the most effective way for the ACCC to monitor compliance with the provision?
- 9) If a 'retail-minus' approach is adopted, should integrated operators lodge their average retail prices with the ACCC? If so, how often should retail prices be reviewed?
- 10) If a 'retail-minus' approach is adopted, what should the floor price be before integrated operators can return to the standard MTAS price set out in the FAD?
- 11) What factors should the ACCC consider in setting a minimum level of pass-through?
- 12) Are there other pass-through safeguard measures that promote the LTIE?

## 5 Mobile industry developments

This chapter outlines the changing dynamics of the mobile industry.

### 5.1 *Changes in technology and take-up by end users*

The mobile industry is highly dynamic and a number of significant changes have occurred since the ACCC issued the 2009 pricing principles determination, and continue to occur. Consumer behaviour in the retail telephony services market is changing rapidly, particularly with respect to mobile voice and data consumption. Mobile networks are continuously evolving to adapt to this change. As a result, mobile networks will be fundamentally different to those modelled during the ACCC's previous MTAS pricing inquiries, which are relevant for the pricing principles going forward.

The ACCC notes that voice minutes on mobile networks have been growing steadily, which should reduce the per-minute cost of termination over time. More significantly, the importance of data services in MNOs' retail offerings drives MNOs to make efficient use of, and investment in their networks. The ACCC notes that 3G users surpassed 2G in mid-2009, growing by 38 percent throughout the year to constitute nearly 60 percent of all mobile subscribers in Australia.<sup>18</sup> Telstra remained the largest player in 3G and mobile broadband and VHA has emerged as a strong number three player, and surpassed Optus in the 3G segment.<sup>19</sup> Telsyte projects 3G subscribers as a percentage of total users to grow from over two-thirds to 90 percent in the next five years, and anticipates 2G to be completely phased out by 2015.<sup>20</sup>

In the foreseeable future, capital expenditures incurred by MNOs will mostly relate to meeting the growing demand for mobile data through upgrades to HSPA, HSPA+ or LTE, and acquisition of additional spectrum. The ACCC understands that LTE networks have lower capital and operational costs (expressed as cost per bit of data delivered) than current 3G/HSPA networks. The growing popularity of 3GPP standards such as HSPA and LTE worldwide will help drive down the real costs of network equipment for Australian MNOs. The ACCC also understands that most modern network equipment is software-upgradeable from HSPA to HSPA+ and/or LTE, while others can be co-located with new network equipment.<sup>21</sup>

Data and mobile broadband services will also be the primary source of revenue growth for MNOs. Analysys Mason predicts that demand for content and applications will drive mobile data to become the main engine of growth and that mobile voice services have become commoditised in mature markets so MNOs will become even more reliant on mobile data revenue for growth.<sup>22</sup> In this scenario, voice will

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<sup>18</sup> Telsyte, Australian Mobile Services Market, 2009 Review & 2010-2014 Forecast, April 2010, p. 1.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> Rysavy Research, *Transition to 4G*, September 2010.

<sup>22</sup> <[http://www.analysismason.com/About-Us/News/Insight/Growth-returns-to-telecoms-markets--with-mobile-leading-the-way/?utm\\_campaign=RES-Insight%2023rd%20September%202010](http://www.analysismason.com/About-Us/News/Insight/Growth-returns-to-telecoms-markets--with-mobile-leading-the-way/?utm_campaign=RES-Insight%2023rd%20September%202010)>, accessed on 12 May 2011.

increasingly be regarded as an application delivered over mobile data, that is, using Internet Protocol (IP) or over the internet.

Recent financial results from the industry already show evidence of this trend, as the data revenue portion of ARPU continues to increase for all three MNOs.<sup>23</sup> Data revenue as a percentage of ARPU continued to increase for all three MNOs in 2009-10. RBS estimates that mobile data revenues across the industry grew 22.8 percent in the second half of 2009-10 (versus 23.1 percent in the first half) while voice revenues largely remained flat at around 1.6 percent.<sup>24</sup>

The ACCC has previously stated that the application of the best-in-use technology as well as the most efficient network design would reflect efficient costs.<sup>25</sup> As consumption of mobile data continues to grow and MNOs build and/or optimise their networks for delivery of data services, the ACCC expects the portion of network costs attributable to providing voice termination will continue to fall, particularly as MNOs migrate their user base onto 3G networks.

## **5.2 Interactions with fixed line services**

In examining the MTAS and related markets it is important to note the structural changes that have arisen. The most pronounced change is the relative volume of voice calls made over fixed networks, as compared to voice call volumes on mobile networks. As of June 2008, for example, the number of fixed line call minutes was only marginally higher than the number of mobile call minutes, at 60 billion and 56 billion respectively.<sup>26</sup> The fixed line usage decline is confirmed in Telstra's financial reports. In the half-year ended December 2010 Telstra reports that PSTN revenue declined by 8.4 percent. In terms of usage, Telstra reports local calls fell 14 percent in the half-year and national long distance minutes declined 9.3 percent.<sup>27</sup>

The shift towards increased mobile usage is also evident in the ongoing decline in the number of fixed line services in operation (SIOs), as some consumers have been motivated to 'cut the cord' and switch entirely to mobile services. For example the Australian Communications and Media Authority (ACMA) reports that fixed line

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<sup>23</sup> Data revenue as a percentage of ARPU continued to increase for all three MNOs in 2009-10. Data now constitutes 38.5 percent of Telstra Mobile's ARPU, up from 32.9 percent from the year before. Data revenue is 40 percent of Optus's ARPU, up from 35 percent. For VHA, data revenue as a percentage of ARPU went up from 31.2 percent to 39.4 percent as of June 2010. See Telstra Corporation Limited, *Annual Report 2010*; Singapore Telecommunications Limited and subsidiary companies, *Management discussion and analysis of financial condition, results of operations and cash flows for the first quarter ended 30 June 2010*; Hutchison Telecommunications (Australia) Limited, *2010 Half Year Results Presentation*.

<sup>24</sup> RBS, *Telco Services—Mobile market grows 8.8% in 2H10*, 18 August 2010, page 1.

<sup>25</sup> ACCC, *MTAS Pricing Principles Determination for the period 1 January 2009 to 31 December 2011*, p. 11, 19 March 2011..

<sup>26</sup> ACMA, *Convergence and Communications Report 1: Australian household consumers' take-up and use of voice communications services*, p. 10.

<sup>27</sup> <<http://www.telstra.com.au/abouttelstra/investor/financial-information/financial-results/index.htm>>, accessed on 14 April 2011.

penetration peaked in June 2004 and had declined by one million SIOs by June 2009.<sup>28</sup>

Although these trends do not directly impact on the wholesale provision of the MTAS, it is important to assess the implications for the MTAS of a shift in voice traffic from fixed to mobile networks and consequent retail constructs, such as ‘bucket plans’ for mobile services. As a result, the MNOs have been a beneficiary of the shift away from fixed lines.

### 5.3 Impact on emerging services

MTAS pricing also affects many emerging services such as VoIP service providers, ‘over-the-top’ application providers such as Skype and in the near future, retail services providers (RSPs) on the NBN. The ACCC notes that the current indicative MTAS price is much higher than the PSTN termination rate. The retail implication of this difference is a large disparity between charges for calls to fixed lines and calls to mobile phones. Table 2 demonstrates that while emerging services providers tend to offer very competitive rates for calls to fixed lines, charges for calls to mobile phones remain high in comparison.

**Table 2: A comparison of emerging services retail charges**

	Charges to fixed line services	Charges to mobile services
<b>iiNet VoIP</b> <sup>29</sup>	15c untimed	29c/min in 30s blocks
<b>vividwireless (Engin)</b> <sup>30</sup>	11c untimed	29.7c/min
<b>Skype</b> <sup>31</sup>	3c/min	26.9c/min
<b>Fring</b> <sup>32</sup>	2c/min	8.9c/min
<b>Google Voice</b> <sup>33</sup>	1.9c/min	13.1c/min

In contrast, a Skype or Fring call to a country where a low or no termination fee is charged by the terminating network (e.g., the US and Hong Kong) incurs the same or very similar per minute rate for calls to fixed lines and mobile phones. The ACCC

<sup>28</sup> Australian Communications and Media Authority (ACMA), *Communications Report 2009-10 series, Report 2 – Take-up and use of voice services by Australian consumers*, 18 November 2010 (ACMA report).

<sup>29</sup> <<http://www.iinet.net.au/voip/netphone-call-rates.html>>, accessed on 7 June 2011.

<sup>30</sup> <<http://www.vividwireless.com.au/get-it-now/phone-plans/starter-phone/features>>, accessed on 7 June 2011.

<sup>31</sup> <<http://www.skype.com/intl/en/prices/payg-rates/?currency=AUD>>, accessed on 7 June 2011.

<sup>32</sup> <<http://www.fring.com/fringout/rates/>>, accessed on 7 June 2011, USD–AUD exchange rate as at 7 June 2011.

<sup>33</sup> <<https://www.google.com/voice/rates>>, accessed on 7 June 2011, USD–AUD exchange rate as at 7 June 2011.

therefore considers high MTAS prices to be a key obstacle for these emerging low-cost providers and potential NBN RSPs in offering competitive call rates to mobiles. It could stifle innovation in this emerging sector and delay the potentially large consumer benefit from the adoption of these new and innovative services.

#### **5.4 Transition to Internet Protocol based mobile networks**

The ACMA recently stated that Australia is a ‘mature’ user of mobile technology with a fast uptake of new services and that data demand is expected to increase rapidly as a result of this trend until about 2018. The ACMA expects an increase in demand for machine-to-machine (M2M) applications to sustain this growth through to 2020.<sup>34</sup> This environment should encourage MNOs to continuously improve the efficiencies of their networks including, for example, by rolling out LTE networks.

The ACCC notes that all three MNOs have plans to provision LTE in their networks and all have already conducted LTE trials successfully.<sup>35</sup> LTE roll-outs have been flagged by MNOs worldwide, which will have the beneficial effect of harmonising the network equipment market, driving down equipment prices.<sup>36</sup> LTE is an IP-based technology and does not support circuit-switched voice calls. As end users migrate onto these more efficient packet-switched networks, LTE has the potential of impacting the relevance of circuit-switched voice calls and, in turn, the MTAS.

The current revenue model in the industry, which relies on profit from wholesale voice termination, provides an incentive for MNOs to retain their legacy circuit-switched technologies in order to earn termination revenue from fixed line and VoIP operators. Mobile operators currently use both circuit-switched and packet-switched networks concurrently. The ACCC considers that this legacy revenue model may delay innovation and reduce efficient investment, and is unlikely to be sustainable in the longer run.

The changes outlined above make it clear that the costs of providing the MTAS are declining and the focus of the mobile industry is also shifting. The ACCC anticipates that ongoing technological advancements and real reductions in equipment costs will provide further scope for reductions in the efficient costs of providing the MTAS. The ACCC notes that equipment costs are not the sole costs associated with the provision of the MTAS.

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<sup>34</sup> ACMA, *Towards 2020—Future spectrum requirements for mobile broadband*, May 2011, p. 33.

<sup>35</sup> ‘VHA to launch LTE mobile services this year’, itnews, <<http://www.itnews.com.au/News/254514,vha-to-launch-lte-mobile-services-this-year.aspx>>, accessed on 12 May 2011.

<sup>36</sup> For example, the Global mobile Suppliers Association’s ‘Evolution to LTE’ report states that 208 operators in 80 countries are now investing in LTE.

## 6 Discussion of methodology for MTAS pricing

This chapter outlines a number of options in relation to the regulation of the MTAS. The ACCC seeks submissions from interested parties on the options presented and any other options which the ACCC should consider.

### 6.1 *TSLRIC and TSLRIC+*

TSLRIC pricing encourages access providers to continue minimising the cost of providing the MTAS, while at the same time acknowledging the legitimate commercial interests of an efficient access provider. TSLRIC also encourages competition by promoting efficient entry and exit from the industry.

The efficiency gains from adopting TSLRIC pricing depend upon correctly modelling network costs of the best-in-use technology that is commercially available. For the mobile industry, which continues to be subject to rapid technological change, this means a very short regulatory horizon and the requirement for an unduly large number of subjective judgments about network design, patterns of demand and pricing paths that may be invalidated quickly by technological changes. Updating the inputs to or reworking an economic model frequently involves large costs, additional regulatory burden from the associated consultation processes, and more subjective judgments being made. Not updating the economic model will almost certainly lead to under- or over-recovery. Both scenarios will likely offset some or all of the efficiency gains from TSLRIC pricing.

The inclusion of common costs as a mark-up to TSLRIC may also be problematic as it could lock in over-recovery in an environment where voice termination is becoming a small fraction of overall network capacity. The ACCC notes that when TSLRIC+ was first adopted as the preferred pricing methodology for the MTAS, mobile networks were predominantly 2G networks focused on delivering voice services. Current networks are being optimised for mobile data and undergoing another transformation to IP-based networks.

The ACCC notes recent regulatory events have cast doubt on whether continued application of TSLRIC+ pricing will best promote the LTIE beyond 2011. The Australian Competition Tribunal stated that TSLRIC+ is overly complex and has called for a 'simpler and more appropriate pricing methodology'.<sup>37</sup> The international trend in terms of mobile termination pricing is also moving away from TSLRIC as outlined in section 6.2.

In the context of the cost changes occurring in the mobile industry, the ACCC is seeking to determine whether the application of TSLRIC or TSLRIC+ as a pricing methodology for the MTAS remains appropriate.

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<sup>37</sup> Application by Telstra Corporation Limited ABN 33 051 775 556 [2010] ACompT 1, 10 May 2010, at [198]-[199].

*Questions on which the ACCC seeks views:*

- 13) Does TSLRIC+ remain an appropriate methodology for deriving an MTAS price?
- 14) Is a new cost model required to estimate the price of the MTAS using a TSLRIC+ pricing methodology?

## **6.2 Pure LRIC**

The ACCC notes that the European Commission (EC) recommended in 2009 that National Regulatory Authorities (NRA) in Europe move away from high termination prices and adopt a bottom-up pure LRIC methodology to price mobile termination.<sup>38</sup> A number of European jurisdictions have responded by cutting mobile termination rates significantly. Regulators in the UK, Germany, Belgium and the Netherlands have adopted a pure LRIC approach as the basis for setting regulated prices for mobile termination.<sup>39</sup>

In contrast to TSLRIC, pure LRIC approaches do not include the common costs of a network providing a full range of services. In the context of regulatory price-setting, pure LRIC only incorporates the costs of producing an additional unit of the service. Essentially, it is the difference in the long-run costs of an access provider who supplies a full range of services and an access provider who supplies the full range of services except voice termination provided to other carriers.

A pure LRIC approach acknowledges the legitimate business interests of access providers by allowing for efficient cost recovery. However, access providers may only recover the cost of additional infrastructure investments if those investments are necessary to providing the MTAS. This ensures that access seekers acquiring voice termination are not subsidising access providers for network and investment costs incurred in providing data services.

In order to provide an accurate estimate of forward-looking efficient costs of supplying the MTAS using the best-in-use technology and the optimal network design tailored to Australian-specific factors such as geography and topology a bottom up approach to pure LRIC is required. This involves constructing a cost model reflecting the network of a hypothetical, forward-looking efficient operator providing a full range of services and then deriving the pure LRIC of providing the MTAS on a per-minute basis.

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<sup>38</sup> European Commission, *Commission recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC)*, Official Journal of the European Union, L 124/67, 20 May 2009.

<sup>39</sup> Ofcom, *Mobile Termination Review Statement*, 15 March 2011, Executive Summary; Bundesnetzagentur, *Bundesnetzagentur announces final approval of mobile termination rates*, Press Release, 24 February 2011; BIPT, *Decision du Conseil de L'IBPT du 29 juin 2010 relative a la definition des marches, L'analyse des conditions de concurrence, L'identification des operateurs puissants et la determination des obligations appropriees pour le marche 7 de la liste de la recommandation de la Commission Europeenne du 17 decembre 2007—Terminaison D'appel vocal sur les reseaux mobiles individuels*, 29 June 2010; OPTA, *Voice terminating regulation*, public version, 30 September 2010.

The ACCC notes, however, that pure LRIC cost modelling has a number of disadvantages similar to those of TSLRIC cost modelling outlined above. Modelling a hypothetical operator still requires a large number of subjective judgements and forecasts of voice traffic volumes over the FAD period.

*Question on which the ACCC seeks views:*

15) Is pure LRIC an appropriate methodology for deriving an MTAS price?

### **6.3 *International benchmarking***

Benchmarking mobile voice termination rates in countries with comparable cost and industry characteristics to Australia may be an alternative approach to determining an appropriate MTAS rate.

A rigorous international benchmarking study would require various adjustments for Australian-specific factors such as urbanisation, population density, transmission distances, cost of equipment and labour and so on.

The ACCC notes that if more European countries were to follow the EC's 2009 recommendation mentioned in the previous section an international benchmarking approach may potentially achieve similar results as a bottom-up pure LRIC model. As a number of major European jurisdictions have already undertaken pure LRIC cost modelling work, international benchmarking could produce these results in a more expedited fashion.

*Questions on which the ACCC seeks views:*

16) Is international benchmarking an appropriate methodology for deriving the MTAS price?

17) Which parameters should be adjusted so as to ensure a benchmarked result reflects Australian conditions?

### **6.4 *Actual costs supplied by MNOs***

The retail mobile services market is characterised by three MNOs of similar scale which are able to constrain the others' retail pricing. This environment is likely to encourage MNOs to continuously improve the efficiencies of their networks and to make efficient investments in new network elements. As such, it may be reasonable to expect that MNOs' actual costs do not depart significantly from forward-looking efficient costs. If this assumption is correct, then an approach taking into account the actual costs of terminating a mobile call would involve very few regulatory processes while promoting the LTIE and the legitimate business interests of the MNOs.

This actual cost approach may require MNOs to provide the ACCC (on a confidential basis if necessary) a copy of their internal management accounts of the costs associated with providing the MTAS. This is different to regulatory accounts under the Regulatory Accounting Framework (RAF) Record-Keeping Rules (RKR). The RAF RKR are generated in order to fulfil regulatory reporting obligations whereas the former is used to assist management in making internal business decisions and hence more likely to reflect true cost drivers. The ACCC also notes that the RAF RKR do not require segregated reporting of the MTAS, so cost estimates based on existing RAF reports would not be accurate or reliable.

The ACCC understands that the MNOs may be applying different accounting rules to allocate cost to the MTAS, resulting in significant differences in cost figures. For example, one network may be calculating unit costs in terms of network capacity used; another could be based on the number of minutes terminated, or even the number of revenue-generating minutes only.

If this approach were adopted, the ACCC would work closely with the MNOs to standardise the relevant cost allocation rules. The ACCC would need to review the original internal cost accounts (not reworked for the ACCC's purposes) and may require certain common costs to be excluded upfront. The ACCC would also need to determine a way in which three sets of cost figures can be consolidated into a single MTAS price to be set in the FAD.

*Questions on which the ACCC seeks views:*

- 18) Are MNOs actual costs an appropriate methodology for deriving the MTAS price?
- 19) On what basis could MNOs demonstrate that their actual costs are efficiently incurred?
- 20) What is an appropriate timeframe for the MNOs to provide the ACCC with this information?
- 21) In the likely event that the MNOs provide the ACCC with different MTAS cost figures, how should the ACCC arrive at a single price for the MTAS in the FAD? For example, would a weighted average be appropriate and what weighting factors should be used?

## **6.5 Bill and Keep (BAK)**

Under a BAK system, there are no per minute charges levied between interconnected operators for the exchange of traffic (unless there are significant traffic imbalances) and generally no payments are exchanged. The costs of call termination may be recovered from the terminating network's customers via retail charges or be absorbed by the MNO itself. For the reasons discussed in chapter 5 above, the unit cost of terminating a voice call on current and future mobile networks is likely to continue declining.

Section 4.1 noted that the characteristics of the MTM segment of the MTAS make commercial BAK arrangements suitable for MTM termination. However, it may be useful to also assess the application of BAK arrangements to FTM termination.

A growing body of academic literature suggests that BAK is more efficient than CPNP and has the potential to send signals on on-net/off-net price discrimination whereas cost-based pricing incentivises MNOs to set off-net prices higher than on-net prices.<sup>40</sup> This is because under BAK, the calling party and receiving party's networks share the total costs of the call, regardless of whether the parties are on the same network, fixed or mobile. BAK recognises that theoretically both the caller and the recipient derive utility from a call in most cases, and imposes some of the cost of a call on each of the calling and receiving networks, thereby improving allocative efficiency.

MNOs will improve productive efficiency through a significant reduction in frictional costs associated with collecting and reconciling the large volume of CDRs under the current interconnection charging regime. In the longer run, BAK systems will substantially reduce the regulatory burden on MNOs by eliminating the need for mobile industry record-keeping rules (RKR).

Adopting BAK may increase overall end user welfare. Variations of BAK have been adopted internationally, most notably in the US, Canada, Hong Kong and Singapore. The academic literature concludes that countries with BAK arrangements have low retail prices and very high mobile utilisation rates with little price discrimination between on-net and off-net calls.<sup>41</sup> The Body of European Regulators for Electronic Communications recently found that BAK is likely to deliver a material welfare gain to consumers overall, driven by higher usage and lower price per minute.<sup>42</sup>

As discussed in chapter 5, rapid technological advancements and the growth of mobile data services will continue to drive down the cost of voice termination. As the cost per minute comes close to zero, the difference between cost-based pricing methodologies and BAK will diminish. In these circumstances, the benefit of setting cost-based rates may be outweighed by the higher regulatory cost of determining an appropriate price and the substantial regulatory burden on MNOs in collecting the information required by the regulator in making that decision.

As foreshadowed in section 4.1, because a BAK regime actually simplifies interconnection arrangements among MNOs, the ACCC envisages it could commence at the start of 2012 for MTM termination. For FTM termination pricing, a glide path may be more appropriate to account for the large disparity between current MTAS and PSTN TA.

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<sup>40</sup> For an Australian analysis see Gans and King (2000); for the European context, see Vogelsang (2003), Cave (2006), Littlechild (2006) and Harbord & Pagnozzi (2010).

<sup>41</sup> Recent literature concludes that call externalities, such as an increase in consumer welfare from making or receiving a call, creates a strategic motive for off-net/on-net price discrimination. MNOs internalise externalities on their own networks (on-net) and strategically manipulate prices when externalities arise on rival networks (off-net). See Harbord (2008), Armstrong and Wright (2007) and Calzada and Valletti (2007).

<sup>42</sup> BEREC, *BEREC Common Statement on Next Generation Networks Future Charging Mechanisms/Long Term Termination Issues*, June 2010, p. 49.

*Questions on which the ACCC seeks views:*

- 22) Is a BAK system an appropriate methodology for the MTAS?
- 23) What is the traffic imbalance (if any) between FTM and mobile-to-fixed (MTF) calls?

## **6.6 *Implementation of a new pricing regime***

Regardless of the pricing methodology eventually adopted in the FAD, the ACCC is cognisant that all of the above options will likely produce a new MTAS rate that departs significantly from the current rate. Taking into account the legitimate business interests of the MNOs, it may be appropriate to consider transitional prices in implementing the new regime so as to minimise regulatory shock.

The ACCC considers that there are two options for considering the timing of the reduction in MTAS pricing: a glide path, and a single transition point. The ACCC is open to submissions regarding the frequency of adjustments on any glide path, that is whether changes in price should occur annually or semi-annually, and by what magnitude.

*Questions on which the ACCC seeks views:*

- 24) Should there be a glide path or a single transition point?
- 25) If a glide path was implemented what would be the appropriate frequency and size of adjustments?
- 26) If a glide path was implemented, should the end point be cost-based, BAK-based or zero?

## 7 Regulatory period of access determination and other issues

The ACCC considers that the expiry date of the FAD should be aligned with the MTAS declaration timeframe of 30 June 2014. It is not aware of any circumstances that warrant the specification of another date as the expiry date of the FAD.

*Question on which the ACCC seeks views:*

27) Are there any circumstances that warrant a difference in the expiry dates of the access determination and the MTAS declaration?

The ACCC notes that the current MTAS service description (set out in Appendix A) relates only to domestic voice calls terminating on a B-Party device that is directly connected to an MNO's digital mobile network. The MTAS does not include messaging services, such as short messaging service (SMS), voicemail, call diversion, or data services.

*Questions on which the ACCC seeks views:*

28) Is the current MTAS service description appropriate and relevant to the continued promotion of the long-term interests of end-users?

29) Would there be significant consumer benefits gained from including other mobile termination services in the MTAS service description?

## 8 Non-price terms and conditions

The ACCC is minded to include non-price terms and conditions (NPTCs) in an MTAS FAD. The ACCC considers that the most appropriate NPTCs for the purposes of an MTAS FAD are based on the ACCC's 2008 Model Terms.

The NPTCs that are likely to be considered for inclusion in an MTAS FAD cover the following areas:

- (a) billing and notification
- (b) creditworthiness and security
- (c) general dispute resolution procedures
- (d) confidentiality provisions
- (e) communication with end users
- (f) network modernisation and upgrade provisions
- (g) suspension and termination
- (h) facilities access

The terms and conditions covering the areas above incorporate the wording of the 2008 Model Terms. Similarly, the ACCC has not included the following clauses from the 2008 Model Terms because they are not relevant or do not apply to the MTAS:

- the liability (risk allocation) provisions which are contained in clause C of the 2008 Model Terms
- the changes to operating manual provisions which are contained in clause I of the 2008 Model Terms, and
- the ordering and provisioning terms which are contained in clause J of the 2008 Model Terms.

The ACCC will consider any submissions in relation to NPTCs made in response to this discussion paper and other access determination inquiries when consulting on a draft FAD.

*Questions on which the ACCC seeks views:*

- 30) Please provide comments regarding the appropriateness of the proposed NPTCs above.
- 31) Should the ACCC include terms and conditions relating to liability and risk allocation in the FAD? If so, should it apply to all access seekers equally, or should it be restricted to a particular class of access seekers?
- 32) Please provide any comments regarding additional NPTCs the ACCC ought to include in the FAD.

## 9 Questions on which the ACCC seeks views

Submissions should address the following matters.

- 1) Is the flow of voice traffic between any pair of mobile operators broadly symmetrical?
- 2) Is there any evidence which suggests that retail pricing of FTM services reflects the reducing cost of MTAS?
- 3) Are MNOs likely to negotiate BAK-based access agreements for MTM calls commercially, and if so, within what timeframes?
- 4) Should the ACCC set a price of zero for MTM termination in the MTAS FAD?
- 5) If commercial BAK arrangements for MTM termination were implemented successfully, should MTM termination be deregulated?
- 6) If MTM termination was deregulated, how would any-to-any connectivity be maintained?
- 7) Should reductions in the MTAS rate be subject to a pass-through safeguard for fixed or integrated operators?
- 8) If a percentage pass-through obligation is adopted, should pass-through occur at the same time, or after the reduction in the MTAS rate? What is the most effective way for the ACCC to monitor compliance with the provision?
- 9) If a 'retail-minus' approach is adopted, should integrated operators lodge their average retail prices with the ACCC? If so, how often should retail prices be reviewed?
- 10) If a 'retail-minus' approach is adopted, what should the floor price be before integrated operators can return to the standard MTAS price set out in the FAD?
- 11) What factors should the ACCC consider in setting minimum level of pass through?
- 12) Are there other pass-through safeguard measures that promote the LTIE?
- 13) Does TSLRIC+ remain an appropriate methodology for deriving an MTAS price?
- 14) Is a new cost model required to estimate the price of the MTAS using a TSLRIC+ pricing methodology?
- 15) Is pure LRIC an appropriate methodology for deriving an MTAS price?
- 16) Is international benchmarking an appropriate methodology for deriving the MTAS price?
- 17) Which parameters should be adjusted so as to ensure a benchmarked result reflects Australian conditions?
- 18) Are MNOs actual costs an appropriate methodology for deriving the MTAS price?
- 19) On what basis could MNOs demonstrate that their actual costs are efficiently incurred?
- 20) What is an appropriate timeframe for the MNOs to provide the ACCC with this information?

- 21) In the likely event that the MNOs provide the ACCC with different MTAS cost figures, how should the ACCC arrive at a single price for the MTAS in the FAD? For example, would a weighted average be appropriate and what weighting factors should be used?
- 22) Is a BAK system an appropriate methodology for the MTAS?
- 23) How significant is the traffic imbalance (if any) between FTM and mobile-to-fixed (MTF) calls?
- 24) Should there be a glide path or a single transition point?
- 25) If a glide path was implemented what would be the appropriate frequency and size of adjustments?
- 26) If a glide path was implemented, should the end point be cost-based, BAK-based or zero?
- 27) Are there any circumstances that warrant a difference in the expiry dates of the access determination and the MTAS declaration?
- 28) Is the current MTAS service description appropriate and relevant to the continued promotion of the long-term interests of end-users?
- 29) Would there be significant consumer benefits gained from including other mobile termination services in the MTAS service description?
- 30) Please provide comments regarding the appropriateness of the proposed NPTCs above.
- 31) Should the ACCC include terms and conditions relating to the liability and risk allocation in the FAD? If so, should it apply to all access seekers equally, or should it be restricted to a particular class of access seekers?
- 32) Please provide any comments regarding additional NPTCs the ACCC ought to include in the FAD.

# Appendix A: Service description for the MTAS

## Domestic Mobile Terminating Access Service

The Domestic Digital Mobile Terminating Access Service is an access service for the carriage of voice calls 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 *Trade Practices Act 1974* 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.

**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.

## Appendix B: Legislative framework for access determinations

The telecommunications access regime contained in Part XIC of the Competition and Consumer Act 2010 (CCA) was amended with effect from 1 January 2011 by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* (CACs Act). The amendments replace the previous negotiate/arbitrate framework with a range of different access mechanisms, including up-front access determinations.

The new access regime enables the ACCC to set default price and non-price terms in access determinations. An access determination will only apply where there is no commercial agreement between the access seekers and access provider. The access determinations create a benchmark which access seekers can fall back on while still allowing parties to negotiate different terms. No access disputes can be notified to the ACCC in relation to this declared service once the FAD is made.<sup>43</sup>

Access determinations can be interim or final. Where access determinations specify terms and conditions of access they must include terms and conditions relating to price (or a method of ascertaining a price) and may also contain non-price terms, although this is not compulsory.<sup>44</sup> Compliance with access determinations is a carrier licence condition<sup>45</sup> and a service provider rule.<sup>46</sup> The access determinations do not apply to the extent they are inconsistent with various other instruments and agreements, including access agreements between parties.<sup>47</sup>

Under the new access regime, the ACCC is able to incorporate provisions in access determinations which provide that the Standard Access Obligations (SAOs) are not applicable (either unconditionally or subject to conditions or limitation). Similarly, it may include provisions that restrict or limit the application of any or all of the SAOs.<sup>48</sup>

### Public inquiry

The new regime requires the ACCC to consider making access determinations for all declared services. If no access determination has previously been made for a declared service (such as the MTAS), the ACCC must commence a public inquiry into the making of an access determination for that service within 12 months of the CCA coming into force.<sup>49</sup> The ACCC must make an FAD within 6 months of commencing a public inquiry. The ACCC can seek an extension of the time frame by up to 6 months.<sup>50</sup>

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<sup>43</sup> Items 207(2) and (3) of the CACS Act.

<sup>44</sup> CCA, subsection 152BC(3).

<sup>45</sup> CCA, section 152BCO.

<sup>46</sup> CCA, section 152BCP.

<sup>47</sup> CCA, section 152BCC.

<sup>48</sup> CCA, paragraphs 152BC(3)(h) and (i).

<sup>49</sup> CCA, section 152BCI(2).

<sup>50</sup> CCA, subsection 152BCK(2) and (3).

## **Content of access determinations**

Section 152BC of the CCA specifies what an access determination may contain. These include, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the SAOs and terms and conditions of access to a declared service which fall outside the SAOs. Access determinations can make different provisions with respect to different access providers or access seekers.<sup>51</sup>

## **Fixed principles provisions**

An access determination may contain a fixed principles provision, which allows a provision in an access determination to have an expiry date after the expiry date of the access determination.<sup>52</sup> Such a provision would allow the ACCC to ‘lock in’ a term so that it would be consistent across multiple access determinations.

## **Varying an access determination**

Section 152BCN allows the ACCC to vary or revoke an access determination. A fixed principles provision cannot be varied or removed unless the access determination sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.<sup>53</sup>

## **Commencement and expiry provisions**

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

An access determination must have an expiry date, which should align with the expiry of the declaration for that service unless there are circumstances that warrant a different expiry date.<sup>54</sup>

## **Criteria to consider when making an access determination**

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

- whether the determination will promote the long-term interests of end users (LTIE) of carriage services or services supplied by means of carriage services
- 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

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<sup>51</sup> CCA, section 152BC(5).

<sup>52</sup> CCA, section 152BCD.

<sup>53</sup> CCA, subsection 152BCN(4).

<sup>54</sup> CCA, subsection 152BCF(6).

- 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.

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

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

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

The first criterion for the ACCC to consider when making an access determination 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’.

### **3.5.1 Paragraph 152BCA(1)(a)**

The ACCC has previously published a guideline explaining what it understands by the phrase ‘long-term interests of end users’ in the context of its declaration responsibilities.<sup>55</sup> 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 an access determination for the 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.<sup>56</sup>

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

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<sup>55</sup> 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.

<sup>56</sup> *ibid.*, p. 33.

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.<sup>57</sup>

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.<sup>58</sup>

### ***Promoting competition***

In assessing whether particular terms and conditions will promote competition, the ACCC will analyse the relevant markets to which the declared service is an input and consider whether the terms set in those markets remove obstacles to end users gaining access to carriage services and services supplied by means of carriage services.<sup>59</sup>

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

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

The ACCC's view is that the relevant markets for the purpose of making an access determination for the MTAS are:

- the market within which FTM services are provided, and
- the market for retail mobile services.

### ***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

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<sup>57</sup> *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

<sup>58</sup> Subsection 152AB(2) of the CCA.

<sup>59</sup> 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].

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.<sup>60</sup>

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

### ***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.<sup>61</sup>

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

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

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

...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.<sup>62</sup>

...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

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<sup>60</sup> Subsection 152AB(8) of the CCA.

<sup>61</sup> Subsections 152AB(6) and (7A) of the CCA.

<sup>62</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.<sup>63</sup>

...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.<sup>64</sup>

### **Paragraph 152BCA(1)(b)**

The second criterion requires the ACCC to consider ‘the legitimate business interests of the carrier or provider’ 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.<sup>65</sup> 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.<sup>66</sup>

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.<sup>67</sup>

### **Paragraph 152BCA(1)(c)**

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

The ACCC considers that this criterion requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup>

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<sup>63</sup> *ibid.* at [164].

<sup>64</sup> *ibid.*

<sup>65</sup> ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

<sup>66</sup> ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

<sup>67</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [89].

<sup>68</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [91].

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

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

### **Paragraph 152BCA(1)(d)**

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

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

The ACCC interprets this criterion, and the use of the term ‘direct costs’, as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal’s approach in an undertaking decision.<sup>71</sup> A contribution to such apportioned costs can also be supported by other criteria.

However, the criterion does not extend to compensation for loss of any ‘monopoly profit’ that occurs as a result of increased competition.<sup>72</sup>

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs criterion ‘is concerned with ensuring that the costs of providing the service are recovered.’<sup>73</sup> The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.<sup>74</sup>

### **Paragraph 152BCA(1)(e)**

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

In the 1997 Access Pricing Principles, the ACCC stated:

This criterion requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.<sup>75</sup>

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

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<sup>71</sup> *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

<sup>72</sup> 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.

<sup>73</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [92].

<sup>74</sup> *ibid.* at [139].

<sup>75</sup> 1997 Access Pricing Principles, p. 11.

### **Paragraph 152BCA(1)(f)**

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

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

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.<sup>76</sup>

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

### **Paragraph 152BCA(1)(g)**

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

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.<sup>77</sup>

Consistent with the approach adopted by the Tribunal in considering an undertaking, the ACCC considers that in applying this criterion, 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.<sup>78</sup>

### **Subsection 152BCA(2)**

Subsection 152BCA(2) provides that, in making an access determination that applies to a carrier or carriage service provider who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,<sup>79</sup> take into account:

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<sup>76</sup> ACCC, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

<sup>77</sup> Access Dispute Guidelines, p. 57.

<sup>78</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [94]-[95].

<sup>79</sup> ‘Eligible service’ has the same meaning as in section 152AL of the CCA.

- 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 access determination, does not consider the declared service in isolation, but also considers other relevant services.<sup>80</sup> 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.<sup>81</sup>

### **Subsection 152BCA(3)**

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

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<sup>80</sup> Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

<sup>81</sup> *ibid.*