

Interim Determination

ACCESS DISPUTE BETWEEN TELSTRA CORPORATION LIMITED (ACCESS SEEKER) AND OPTUS MOBILE PTY LIMITED (ACCESS PROVIDER)

DOMESTIC MOBILE TERMINATING ACCESS SERVICE (MTAS)

Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act 1974*
on 13 November 2006

Interim Determination under Section 152CPA of the Trade Practices Act

Background

1. The MTAS is an access service for the carriage of voice calls from a point of interconnection, or potential point of interconnection, to a B-Party (the end-user to whom a telephone call is made) directly connected to the access provider's digital mobile network.¹ After holding a public inquiry, the Australian Competition and Consumer Commission (the Commission) declared the MTAS pursuant to section 152AL(3) of the *Trade Practices Act 1974* (the Act). A copy of the declaration was published in the Commonwealth of Australia Gazette No. GN 28, 14 July 2004.
2. In June 2004, pursuant to section 152AQA of the Act, the Commission made a determination setting out the pricing principles, including price-related terms and conditions, that are to apply in respect of the MTAS (the *MTAS Pricing Principles Determination*). This determination can be found in Appendix D to the *Mobile Services Review: Mobile Terminating Access Service Final Decision* of June 2004 (MTAS Final Report). The Commission is required to have regard to this *MTAS Pricing Principles Determination*, including the price related terms and conditions, when arbitrating an access dispute (section 152AQA(6) of the Act).
3. On 13 November 2006, the Commission received written notification (the notification) from Telstra Corporation Limited (Telstra) of an access dispute in relation to the supply by Optus Mobile Pty Limited (Optus Mobile) to Telstra of the MTAS. Telstra's notification was provided to the Commission under section 152CM(1) of the Act.
4. The notification states that Optus Mobile provides the MTAS to Telstra (and Telstra also provides the MTAS to Optus Mobile) under an Access Agreement dated 14 August 1992 (Access Agreement), as varied from time to time. The notification states that the Access Agreement does not specify pricing for the MTAS for the period from 1 January 2007 to 31 December 2007 (the relevant period).
5. The notification specifies that the dispute is about the price that Optus Mobile charges Telstra for Optus Mobile's supply of the MTAS for the relevant period. The notification

¹ ACCC, *Mobile Services Review Mobile Terminating Access MTAS, Final Decision*, (MTAS Final Report) June 2004, p. 239.

also sought an urgent interim determination to be made under sections CPA(1)&(3) of the Act for the period 1 January 2007 to 30 June 2007.

6. The Commission has formed the view that the requirements of section 152CM (1) of the Act are satisfied. That is:
 - Optus Mobile is a carrier;
 - Optus Mobile supplies the declared MTAS;
 - Standard access obligations apply to Optus Mobile in relation to the MTAS; and
 - Telstra is unable to agree with Optus Mobile about the terms and conditions on which Optus Mobile is to comply with those obligations.
7. In reliance on sections 152CPA(1)&(3) of the Act, this instrument is an interim determination relating to the terms and conditions of access on which the MTAS is to be provided by Optus Mobile to Telstra.

Interim Determination

8. Except where the parties subsequently agree otherwise, the charge payable by Telstra to Optus Mobile for the MTAS is to be 12 cents per minute for the period commencing on 1 January 2007 and expiring on 30 June 2007.
9. Except where the parties agree otherwise, other terms and conditions on which Optus Mobile currently supplies the MTAS to Telstra are to continue to apply.
10. This interim determination commences on 1 January 2007, and will remain in force until:
 - it expires on 30 June 2007
 - the date a final determination comes into effect; or
 - this interim determination is revoked;whichever occurs first.



Graeme Samuel
Chairman



Ed Willett
Commissioner

DATED: 18 December 2006

Interim Determination

ACCESS DISPUTE BETWEEN TELSTRA CORPORATION LIMITED (ACCESS SEEKER) AND OPTUS NETWORKS PTY LIMITED (ACCESS PROVIDER)

DOMESTIC MOBILE TERMINATING ACCESS SERVICE (MTAS)

Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act 1974*
on 13 November 2006

Interim Determination under Section 152CPA of the Trade Practices Act

Background

1. The MTAS is an access service for the carriage of voice calls from a point of interconnection, or potential point of interconnection, to a B-Party (the end-user to whom a telephone call is made) directly connected to the access provider's digital mobile network.¹ After holding a public inquiry, the Australian Competition and Consumer Commission (the Commission) declared the MTAS pursuant to section 152AL(3) of the *Trade Practices Act 1974* (the Act). A copy of the declaration was published in the Commonwealth of Australia Gazette No. GN 28, 14 July 2004.
2. In June 2004, pursuant to section 152AQA of the Act, the Commission made a determination setting out the pricing principles, including price-related terms and conditions, that are to apply in respect of the MTAS (the *MTAS Pricing Principles Determination*). This determination can be found in Appendix D to the *Mobile Services Review: Mobile Terminating Access Service Final Decision* of June 2004 (MTAS Final Report). The Commission is required to have regard to this *MTAS Pricing Principles Determination*, including the price related terms and conditions, when arbitrating an access dispute (section 152AQA(6) of the Act).
3. On 13 November 2006, the Commission received written notification (the notification) from Telstra Corporation Limited (Telstra) of an access dispute in relation to the supply by Optus Networks Pty Limited (Optus Networks) to Telstra of the MTAS. Telstra's notification was provided to the Commission under section 152CM(1) of the Act.
4. The notification states that Optus Networks provides the MTAS to Telstra (and Telstra also provides the MTAS to Optus Networks) under an Access Agreement dated 14 August 1992 (Access Agreement), as varied from time to time. The notification states that the Access Agreement does not specify pricing for the MTAS for the period from 1 January 2007 to 31 December 2007 (the relevant period).
5. The notification specifies that the dispute is about the price that Optus Networks charges Telstra for Optus Networks' supply of the MTAS for the relevant period. The

¹ ACCC, Mobile Services Review Mobile Terminating Access MTAS, Final Decision, (MTAS Final Report) June 2004, p. 239.

notification also sought an urgent interim determination to be made under sections CPA(1)&(3) of the Act for the period 1 January 2007 to 30 June 2007.

6. The Commission has formed the view that the requirements of section 152CM (1) of the Act are satisfied. That is:
 - Optus Networks is a carrier;
 - Optus Networks supplies the declared MTAS;
 - Standard access obligations apply to Optus Networks in relation to the MTAS; and
 - Telstra is unable to agree with Optus Networks about the terms and conditions on which Optus Networks is to comply with those obligations.
7. In reliance on 152CPA(1)&(3) of the Act, this instrument is an interim determination relating to the terms and conditions of access on which the MTAS is to be provided by Optus Networks to Telstra.

Interim Determination

8. Except where the parties agree subsequently otherwise, the charge payable by Telstra to Optus Networks for the MTAS is to be 12 cents per minute for the period commencing on 1 January 2007 and expiring on 30 June 2007.
9. Except where the parties agree otherwise, other terms and conditions on which Optus Networks currently supplies the MTAS to Telstra are to continue to apply.
10. This interim determination commences on 1 January 2007, and will remain in force until:
 - it expires on 30 June 2007
 - the date a final determination comes into effect; or
 - this interim determination is revoked;whichever occurs first.



Graeme Samuel
Chairman



Ed Willett
Commissioner

DATED: 18 December 2006

**ACCESS DISPUTES BETWEEN TELSTRA CORPORATION LIMITED (ACCESS SEEKER)
AND
OPTUS MOBILE PTY LIMITED AND OPTUS NETWORKS PTY LIMITED (ACCESS
PROVIDERS)**

DOMESTIC MOBILE TERMINATING ACCESS SERVICE (MTAS)

Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act 1974*
on 13 November 2006

Statement of Reasons for the Interim Determinations

Background

1. The MTAS is an access service for the carriage of voice calls from a point of interconnection, or potential point of interconnection, to a B-Party (the end-user to whom a telephone call is made) directly connected to the access provider's digital mobile network.¹ After holding a public inquiry, the Australian Competition and Consumer Commission (the Commission) declared the MTAS pursuant to section 152AL(3) of the *Trade Practices Act 1974* (the Act). A copy of the declaration was published in the Commonwealth of Australia Gazette No. GN 28, 14 July 2004.
2. In June 2004, pursuant to section 152AQA of the Act, the Commission made a determination setting out the pricing principles, including price-related terms and conditions, that are to apply in respect of the MTAS (the *MTAS Pricing Principles Determination*). This determination can be found in Appendix D to the *Mobile Services Review: Mobile Terminating Access Service Final Decision* of June 2004 (MTAS Final Report). The Commission is required to have regard to this *MTAS Pricing Principles Determination*, including the price related terms and conditions, when arbitrating an access dispute (section 152AQA(6) of the Act).
3. On 13 November 2006, the Commission received written notification (the notification) from Telstra Corporation Limited (Telstra) of an access dispute in relation to the supply by Optus Mobile Pty Limited and Optus Networks Pty Limited (together 'Optus entities') to Telstra of the MTAS. Telstra's notification was provided to the Commission under section 152CM(1) of the Act.
4. The notification states that the Optus entities provide the MTAS to Telstra (and Telstra also provides the MTAS to the Optus entities) under an Access Agreement dated 14 August 1992 (Access Agreement), as varied from time to time. The notification states that the Access Agreement does not specify pricing for the MTAS for the period from 1 January 2007 to 31 December 2007 (the relevant period).
5. The notification specifies that the dispute is about the price that the Optus entities charge Telstra for the Optus entities supply of the MTAS for the relevant period. The notification

¹ ACCC, *Mobile Services Review Mobile Terminating Access MTAS, Final Decision, (MTAS Final Report)* June 2004, p. 239.

also sought an urgent interim determination to be made under sections CPA(1)&(3) of the Act for the period 1 January 2007 to 30 June 2007.

6. The Commission has formed the view that the requirements of section 152CM (1) of the Act are satisfied. That is:
 - the Optus entities are carriers;
 - the Optus entities supply the declared MTAS;
 - Standard access obligations apply to the Optus entities in relation to the MTAS; and
 - Telstra is unable to agree with the Optus entities about the terms and conditions on which the Optus entities are to comply with those obligations.

Discussion

7. Section 152CP of the Act provides that, unless the Commission terminates the arbitration under section 152CS, the Commission must make a written determination on access by the access seeker to the declared service. Section 152CP(5) of the Act provides that when the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.
8. Section 152CPA(1) of the Act provides that a determination may be expressed to be an interim determination.
9. Section 152CPA(3) of the Act provides that the Commission is not required to observe any requirements of procedural fairness in relation to the making of an interim determination if both:
 - the declared service is covered by a determination in force under section 152AQA; and
 - the price-related terms and conditions in the interim determination are consistent with the price-related terms and conditions in the section 152AQA determination.
10. Under section 152AQA(6) of the Act, the Commission must have regard to the *MTAS Pricing Principles Determination* if it is required to arbitrate an access dispute in relation to the MTAS.
11. In making these interim determinations, the Commission has had regard to the *MTAS Pricing Principles Determination* and the MTAS Final Report which sets out the supporting reasons in relation to the *MTAS Pricing Principles Determination*. As noted in paragraph 2 above, the MTAS is covered by a determination in force under section 152AQA. That determination specifies that the price of access to the MTAS for the period 1 January 2007 to 30 June 2007 is 12 cents per minute.
12. The Commission has made interim determinations that the price of the MTAS that the Optus entities supply Telstra for the period from 1 January 2007 to 30 June 2007 is 12 cents per minute. This means that the price-related terms and conditions in the interim determinations are consistent with the *MTAS Pricing Principles Determination* and as a result the Commission can rely on sections 152CPA(1)&(3) in making these interim determinations.
13. Section 152CR(4) specifies that, in making an interim determination, the Commission does not have a duty to take into account the matters that the Commission must take into

account in making a final determination under section 152CR(1). The Commission may take into account a matter referred to in section 152CR(1) or any other matters that it thinks are relevant.

Commission's views

14. As outlined in the Commission's *Resolution of telecommunications access disputes – a guide, March 2004 (revised)*, (the *Access Disputes Guidelines*), the Commission considers that, for the purposes of making an interim determination, it does not need to have all the information necessary for making the final determination, nor to have reached a view on all outstanding issues between the parties. Rather, the Commission considers that it only needs sufficient information to provide a reasonable basis for the terms and conditions set out in the interim determination.²
15. The Commission is of the view that the *MTAS Pricing Principles Determination* provides a reasonable basis for making interim determinations in these disputes. The Commission notes that the *MTAS Pricing Principles Determination* was the outcome of a thorough review process based on input from a variety of stakeholders. At present the Commission considers that the *MTAS Pricing Principles Determination* and the supporting *MTAS Final Report* represent the best available information for it to consider when determining what the price of the MTAS should be in an interim determination.
16. Further, the Commission considers that a decision to make an interim determination that is consistent with the *MTAS Pricing Principles Determination* provides a degree of regulatory and commercial certainty to the parties by contributing to a more timely resolution of disputes.
17. A more timely resolution of disputes meets the aim of the interim determination process. That is, as discussed in the *Access Disputes Guidelines*, the Commission sees interim determinations as being important for the efficient operation of the access regime, as they help ensure access seekers get timely access to declared services.³ Accordingly, an interim determination that is consistent with the *MTAS Pricing Principles Determination* contributes to meeting the aims of the interim determination process.
18. The object of Part XIC of the Act is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services (LTIE). The Commission considers that the LTIE is best promoted by MTAS pricing that tends toward the underlying cost of providing the service.⁴ In this regard, the Commission indicated in the *MTAS Final Report* that the price of supplying the MTAS which best promotes the LTIE should be estimated with reference to the TSLRIC+ concept.⁵
19. As noted above at paragraph 15, the *MTAS Pricing Principles Determination* was the outcome of a thorough review process based on input from a variety of stakeholders. As detailed in the *MTAS Final Report*, the price related terms and conditions outlined in the *MTAS Pricing Principles Determination* were informed by benchmarking cost modelling exercises undertaken in a number of overseas jurisdictions, cost information provided by

² *Resolution of telecommunications access disputes – a guide, March 2004 (revised)*, p. 51.

³ *Ibid.*, p. 50.

⁴ See *MTAS Final Report*, sections 8.2 and 8.3, pp. 187-211.

⁵ See *MTAS Final Report*, sections 8.2.5 and 8.3, pp. 202-211.

Telstra and Optus under the Regulatory Accounting Framework (RAF), submissions from interested parties provided to the Commission in the course of the Mobiles Services Review, and expert advice the Commission sought from Analysys.⁶ On this basis, the Commission is of the view that the *MTAS Pricing Principles Determination* represents an appropriate basis on which to determine the content of these interim determinations.

20. The *MTAS Pricing Principles Determination* outlines an indicative price path for the supply of the MTAS, trending downward toward 12 cents per minute over a 30 month period from 1 July 2004 to 1 January 2007, as detailed in the table below.

Time period	Price related terms and conditions (cpm)
1 July 2004 – 31 December 2004	21
1 January 2005 – 31 December 2005	18
1 January 2006 – 31 December 2006	15
1 January 2007 – 30 June 2007	12

21. The 12 cents per minute ‘target price’ in the *MTAS Pricing Principles Determination* was set having regard to the best information the Commission had available to it at the time of making the *MTAS Pricing Principles Determination* in relation to the TSLRIC+ of providing the MTAS. On the basis of this information, the Commission formed the view that the TSLRIC+ of supplying the MTAS in Australia was likely to fall in the range of 5–12 cents per minute. As a conservative approach, the Commission selected the upper bound of this range (i.e. 12 cents per minute) for the *MTAS Pricing Principles Determination*.⁷
22. Consistent with its adjustment path toward a price of 12 cents per minute for the supply of the MTAS (the upper bound of the TSLRIC+ identified), the Commission considers that an interim price of 12 cents per minute should be set for the period from 1 January 2007 to 30 June 2007.
23. The Commission notes that the price related terms and conditions contained in the *MTAS Pricing Principles Determination* are indicative only, and also, that the Commission has publicly stated that in the event of arbitration it would consider submissions put forward about the application of those principles, if more reliable and robust pricing and cost information was put before it. Further, the Commission may, if appropriate, decide to backdate the final determination in this arbitration. Therefore, the Commission will have regard to information submitted by the parties regarding MTAS pricing for the purpose of the final determination.

⁶ See *MTAS Final Report*, chapter 8, pp. 185-211 and chapter 9, pp. 212-228.

⁷ See *MTAS Final Report*, chapter 9, pp. 212-228 and Annexure, pp. 229-238.