FEDERAL COURT OF AUSTRALIA

Vodafone Australia Limited v Australian Competition & Consumer Commission

[2005] FCA 1294

TELECOMMUNICATIONS – access regime – declared services – pricing principles – where Commission must determine principles relating to price of access to declared service – where Commission's determination may contain 'price-related terms and conditions' – where Commission purported to specify price – whether such specification falls within 'terms and conditions relating to price or a method of ascertaining price' – whether price-related terms and conditions must be consistent with pricing principles – *Trade Practices Act 1974* (Cth) s 152AQA

ADMINISTRATIVE LAW – judicial review – expert evidence – whether relevant – whether of assistance in understanding specialised terms or principles

WORDS AND PHRASES - 'price-related terms and conditions', 'terms and conditions relating to price or a method of ascertaining price'

Acts Interpretation Act 1901 (Cth)
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Judiciary Act 1903 (Cth)
Telecommunications Act 1997 (Cth)
Telecommunications Act 1991 (Cth)
Telecommunications (Transitional Provisions & Consequential Amendments) Act 1997 (Cth)
Trade Practices Act 1974 (Cth) Part XIC, s 152AQA
Trade Practices (Telecommunications) Act 2001 (Cth)

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, applied
Price v Elder (2000) 97 FCR 218, referred to
Telstra Corporation Ltd & Ors v Seven Cable Television Pty Ltd & Ors (2000) 102 FCR 517, applied
Visa International Service Association and Anor v Reserve Bank of Australia (2003) 131 FCR 300, distinguished

VODAFONE AUSTRALIA LIMITED & ANOR v
AUSTRALIAN COMPETITION & CONSUMER COMMISSION

NSD 1151 of 2005

EDMONDS J
16 SEPTEMBER 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1151 of 2004**

BETWEEN:	**VODAFONE AUSTRALIA LIMITED (ACN 056 161 043) FIRST APPLICANT**
	VODAFONE NETWORK PTY LIMITED (ACN 081 918 061) SECOND APPLICANT
AND:	**AUSTRALIAN COMPETITION & CONSUMER COMMISSION RESPONDENT**

JUDGE: **EDMONDS J**

DATE OF ORDER: **16 SEPTEMBER 2005**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. the application be dismissed.

2. the applicants pay the respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1151 of 2004**

BETWEEN:	**VODAFONE AUSTRALIA LIMITED (ACN 056 161 043)** **FIRST APPLICANT**
	VODAFONE NETWORK PTY LIMITED (ACN 081 918 061) **SECOND APPLICANT**
AND:	**AUSTRALIAN COMPETITION & CONSUMER COMMISSION** **RESPONDENT**

JUDGE:	**EDMONDS J**
DATE:	**16 SEPTEMBER 2005**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

Introduction

1 This is an application for judicial review under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the AD(JR) Act') and s 39B of the *Judiciary Act 1903* (Cth). The application seeks to review the determination of the respondent (the Commission) made on or about 30 June 2004 under s 152AQA of the *Trade Practices Act 1974* (Cth) ('the Act') in relation to the Domestic Mobile Terminating Access Service ('MTAS').

2 The first applicant is a 'carrier' within the meaning of the *Telecommunications Act 1997* (Cth) and the second applicant is a wholly owned subsidiary of the first applicant. The applicants together (Vodafone) own and operate a mobile telephone network.

Background

3 The present proceedings arise in relation to the regulation of wholesale markets for access to a service provided using mobile telephony networks for the purpose of terminating or completing calls commenced either on a fixed network (such as that provided by Telstra) or a different mobile phone network. Access of this kind is required in order for persons to be

able to effect a telephone call from one network to another.

4 The service is a wholesale input to the various service providers because the charge for terminating such calls is levied by the service provider whose network terminates the call upon the service provider whose customer originates the call. For example, where a person seeks to make a call from a Telstra fixed line phone to a Vodafone mobile phone, it is necessary for Vodafone to make access to the service provided on its network available to Telstra. The price charged by Vodafone for such access (terminating the call) is borne initially by Telstra and ultimately by its customers in some manner.

5 Only the service provider who administers the relevant network can terminate calls to the customers (mobile phone holders) who subscribe to that network. For example, Telstra cannot terminate calls to Vodafone mobile phone customers and vice versa. As a consequence, each service provider has market power in respect of the supply of the MTAS in respect of its subscribers. This has led to a need to make provision for the regulation of prices in relation to each network's MTAS service where prices cannot be agreed between relevant parties.

6 Different service providers have opted for different technologies for the provision of mobile phone networks. For some time, the two leading technologies were known as Global System for Mobiles (GSM) and Code Division Multiple Access (CDMA) networks (these were often called second generation ('2G') technologies). These technologies have been improved by certain refined protocols, allowing for enhanced data rates on technology known as '2.5G'. More recently, a third generation technology, known as '3G', has begun to emerge that provides much higher data rates, which technology is being adopted by some service providers in Australia.

7 As at 13 September 1996, there was an access agreement registered under s 144 of the *Telecommunications Act 1991* (Cth) in relation to the Domestic GSM Terminating Access Service. At that time, mobile telecommunications services were provided by way of mobile network technologies including GSM communication networks.

8 In 1997, the Commission prepared a statement pursuant to subs 39(1) of the *Telecommunications (Transitional Provisions & Consequential Amendments) Act 1997* (Cth)

specifying that the Domestic GSM Terminating Access Service was an 'eligible service'. As a consequence of that statement and by operation of subs 39(10) of that Act, Part XIC of the Act had effect, in relation to the service, as if the Commission had made an instrument under subs 152AL(3) of the Act declaring the service to be a declared service.

9 In 2001, the Commission determined a pricing principle based upon retail price benchmarking to benchmark the movement in the MTAS access price against the movements of a carrier's overall package of retail mobile services. This had no statutory basis and the Commission was under no duty to use or publish such an estimate.

10 In March 2002, the Commission varied the Domestic GSM Terminating Access Service declaration for the purpose of including terminating access on CDMA mobile network technologies. The service description was varied to describe the service as the Domestic GSM and CDMA Terminating Access Service.

11 On 24 April 2003, the Commission published a discussion paper as part of its Mobile Services Review. In that paper a number of questions were set out to assist the parties preparing submissions. The first two of these were:

> *'1. In order to achieve the objective of promoting the LTIE [long term interests of end users], should the domestic GSM and CDMA terminating access service declaration continue unchanged, be varied or revoked?*
>
> *2. If the service description were varied, should it be broadened to include termination of calls on 3G networks?'*

The inquiry also included consideration of principles relating to the price of access to the declared service. The discussion paper included a question relating to the cost of providing mobile termination services and a question relating to whether the Commission should construct a cost model or benchmark against overseas estimates of costs.

12 On 29 August 2003 and 11 September 2003, as part of the inquiry, the Commission held public forums in Melbourne and Sydney respectively.

13 On 26 March 2004, the Commission published a draft decision [the 'Draft Decision'] in relation *inter alia* to whether it should extend the expiry date for the declaration of the Domestic GSM and CDMA Terminating Access Service. The Draft Decision proposed to make a declaration in respect of the MTAS. The Commission also published draft principles

relating to the price of access to the MTAS.

14 On 30 June 2004, the Commission:

(a) declared pursuant to subs 152AL(3) of the Act (the 'Declaration') the MTAS to be a declared service. The Declaration took effect on 1 July 2004 and expires on 30 June 2009. Annexure 1 to the Declaration set out the service description of the MTAS;

(b) made a determination under subs 152AQ(1) of the Act [the 'Determination'], determining principles relating to the price of access to the declared service (contained in Annexure 1 to the Determination). Annexure 2 to the Determination contains what is said to be price-related terms and conditions relating to access to the declared service (see subs 152AQA(2);

(c) published a final decision (the 'Final Decision') giving reasons for the Commission's declaration and Determination referred to in the preceding subparagraphs.

Statutory Regime

15 Part XIC of the Act was introduced into the Act by the *Trade Practices Amendment (Telecommunications) Act 1997* (Cth). It makes provision for a telecommunications access regime. The object of Part XIC is to promote the long-term interests of end-users of *carriage services* (as defined in the *Telecommunications Act 1997* (Cth) s 7) or of services provided by means of carriage services, having regard to the objectives of promoting competition in markets for listed services, of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users and of encouraging the economically efficient use of investment in relevant infrastructure (s 152AB).

16 The Commission has power under subs 152AL(3) of the Act to declare that an eligible service is a 'declared service'. If a declaration is made in respect of a service, the access provider must, upon request, make access available to service providers, taking all reasonable steps to ensure that the technical and operational quality is equivalent to that which the access provider provides itself: Section 152AR.

17 With effect from 27 September 2001, s 152AQA was inserted into Part XIC by the *Trade Practices Amendment (Telecommunications) Act 2001* (Cth). It effectively provides that where the Commission declares that an eligible service is a 'declared service', the

Commission must determine principles relating to the price of access to the declared service. Specifically, it relevantly provides:

> *'(1) The Commission must, by writing, determine principles relating to the price of access to a declared service.*
> *(2) The determination may also contain price-related terms and conditions relating to access to the declared service.*
> …
> *(6) The Commission must have regard to the determination if it is required to arbitrate an access dispute under Division 8 in relation to the declared service.*
> …
> *(8) In this section:*
> ***price-related terms and conditions** means terms and conditions relating to price or a method of ascertaining price'.*

18 Before making a determination under s 152AQA, the Commission is obliged to publish a draft of the determination and invite submissions and is obliged to consider submissions that are received: Subsection 152AQA(4).

19 The Commission is obliged to publish any determination made under s 152AQA.

20 Division 8 of Part XIC provides a regime for the arbitration of access disputes by the Commission. The carrier or provider and the access seeker are all parties to the access dispute (s 152CO). Subdivision D of Division 8 makes detailed provisions for procedural rights in relation to the conduct of the arbitration. The Commission may make an interim determination of the dispute (s 152CPA) or a 'determination' (s 152CP). In making a 'determination' (but not an interim determination) the Commission must take into account (subs 152CR(1)):

(a) whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;
(b) the legitimate business interests of the carrier or provider, and the carrier's or provider's investment in facilities used to supply the declared service;
(c) the interests of all persons who have rights to use the declared service;
(d) the direct costs of providing access to the declared service;
(e) the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else;
(f) the operational and technical requirements necessary for the safe and reliable

operation of a carriage service, a telecommunications network or a facility;

(g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

21 Consequently, the only legal significance of a determination made under s 152AQA is that the Commission is required to have regard to it if it, the Commission, is required to arbitrate an access dispute under Division 8 of Part XIC in relation to a declared service: subs 152AQA(6).

22 A determination made under s 152AQA has no effect to the extent that it is inconsistent with any ministerial pricing determination made under s 152CH of the Act: Subsection 152AQA(7). Ministerial pricing determinations are disallowable instruments for the purposes of s 46A of the *Acts Interpretations Act 1901* (Cth): Subsection 152CH(2). A determination setting out model terms and conditions made under s 152AQB has no effect to the extent that it is inconsistent with a determination made under s 152AQA: Subsection 152AQB(10).

The Declaration, Determination and Final Decision

23 The Declaration is headed "*Declaration under section 152AL(3)*" and provides:

> *'The Australian Competition and Consumer Commission declares pursuant to section 152AL(3) of the Trade Practices Act 1974 (Cth) that the Domestic Mobile Terminating Access Service is a 'declared service' for the purposes of Part XIC of the Act.*
>
> *The Domestic Mobile Terminating Access Service is described in Annexure 1.*
>
> *This declaration takes effect on 1 July 2004 and expires on 30 June 2009.*
>
> *Note: The previous declaration of a Domestic Mobile Terminating Access Service expired on 30 June 2004.*
>
> | | | |
> |---|---|---|
> | *(sgd)Graeme Samuel* | *(sgd)Louise Sylvan* | *(sgd)Edward Willett* |
> | *Chairman* | *Deputy chair* | *Commissioner* |
>
> *For the Australian Competition and Consumer Commission.*
>
> *DATED: 30 June 2004.'*

24 Annexure 1 to the Declaration provides:

'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.'

Annexure 1 to the Declaration corresponds to Appendix A to the Final Decision.

25 Appendix D to the Final Decision is headed "*Determination under section 152AQA*" and provides:

'The Australian Competition and Consumer Commission determined pursuant to section 152AQA of the Trade Practices Act 1974 (the Act) that the principles specified at Annexure 1 and the price related terms and conditions specified at Annexure 2 are to apply in respect of the Domestic Mobile terminating Access Service.

Note: For the effect of this determination, see subsection 152AQA(6) of the Act.

This determination takes effect on 1 July 2004 and expires on 30 June 2007.

Note: A pricing determination may be repealed, rescinded, revoked, amended or varied by the Commission.

(sgd) Graeme Samuel
Chairman.'

26 Annexure 1 to the Determination is headed '*Principles relating to the price of access to the Domestic Mobile terminating Access Service*' and provides:

> *'The price of the Domestic Mobile Terminating Access Service should follow an adjustment path such that there is a closer association of the price and underlying cost (ie. TSLRIC+) of the service.*
>
> *The adjustment path should have the following characteristics:*
>
> - *The starting price should be set at the lowest price at which the service is being supplied;*
> - *The end price should be set at the upper end of the range of reasonable estimates of the TSLRIC+ of supplying the service that are currently available;*
> - *The adjustment path should commence on 1 July 2004 and conclude on 1 January 2007;*
> - *Decrements should initially be made on a six monthly basis then, as prices become more proximate to TSLRIC+, be made on an annual basis; and*
> - *Each decrement between the start price and the end price should be of equal amount.'*

27 Annexure 2 to the Determination is headed "*Price related terms and conditions relating to access to the Domestic Mobile Terminating Access Service*" and provides:

> *'The price of access to the Domestic Mobile Terminating Access Service for the periods specified in Column 1 of the following table is as specified in column 2.*

Column 1	*Column 2*
1 July 2004 – 31 December 2004	*21 cpm**
1 January 2005 – 31 December 2005	*18 cpm*
1 January 2006 – 31 December 2006	*15 cpm*
1 January 2007 – 30 June 2007	*12 cpm'*

> * Cents per minute.

28 TSLRIC+, referred to in Annexure 1 to the Determination, is the acronym for total service, long-run, incremental cost to a producer of providing the service plus some allocation with costs common to other services but unable to be specifically allocated. TSLRIC+ is a methodology used by regulators to determine prices for access to regulated services.

29 The Final Decision is headed "*Final Decision on whether or not the Commission should extend, vary or revoke its existing declaration of the mobile terminating access service*". It consists of an Executive Summary, nine chapters, an Annexure and four Appendices. The Commission's decision and reasons for the Declaration and Determination are summarised in the Executive Summary (at pp. xix, xx) in the following terms:

> *'The Commission has formed a view that declaration of a varied MTAS would be in the LTIE, and is therefore appropriate under Part XIC of the Act. More specifically, the Commission believes the existing declaration of the MTAS should be varied to include voice services terminating on 3G mobile networks. Accordingly, the Commission has determined under section 152ALA of the Act that the existing GSM and CDMA terminating access service description should:*
>
> - *not be extended;*
> - *not be revoked;*
> - *be allowed to expire;*
> - *be replaced by a new declaration made under section 152AL of the Act; and*
> - *the new declaration should include termination of voice calls on 2.5G and 3G mobile networks.*
>
> *The full varied service description can be found at Appendix A of this report. The declaration will expire on 30 June 2009.*
>
> *Further, the Commission has reached a decision that its pricing principles for the MTAS should also be amended. In particular, the Commission believes a new pricing principle should be adopted for the three year period commencing on 1 July 2004. The pricing principle would require the price of the MTAS to gradually decrease towards a conservative TSLRIC+ target price of 12 cents per minute over a staged adjustment period commencing on 1 July 2004 and concluding on 1 January 2007. The first stage would involve immediate reduction of the price of the MTAS to 21 cents per minute on 1 July 2004. This would then be followed by three further annual reductions in the price of the service of 3 cents per minute each on 1 January in each of the three successive years, such that the price of the MTAS reaches 12 cents per minute by 1 January 2007.'*

Vodafone's Challenge

30 Vodafone does not challenge the Declaration nor the description of the MTAS in Annexure 1

to the declaration. In particular, Vodafone does not challenge the inclusion of termination of voice calls on 2.5G and 3G mobile networks in the Declaration.

31 Turning to the Determination, no challenge is made to Annexure 1 to the Determination, that is, the principles relating to the price of access to the MTAS.

32 The only challenge is to Annexure 2 to the Determination. This challenge is formulated under two heads – a general challenge and, additionally, the application of Annexure 2 to 3G mobile networks.

33 The general challenge to Annexure 2 is put on two alternative bases:

(i) Subsection 152AQA(2) of the Act did not authorise the Commission to *specify* a price for access to the declared service, only price-related terms and conditions relating to such access; alternatively,

(ii) subs 152AQA(2) of the Act did not authorise the Commission to specify a price, prices or a pricing methodology for access to the declared service which were not determined *in accordance with*, or *in a manner consistent with*, the pricing principles determined under subs 152AQA(1) and set out in Annexure 1 to the Determination.

34 The additional head of challenge to Annexure 2 to the Determination – its application to 3G mobile networks – is put on the basis that notwithstanding the Commission laid down a cost based pricing principle in Annexure 1 to the Determination, the Commission simply ignored the cost of 3G.

35 But while the second alternative of the general challenge to Annexure 2 contends that the adjustment path in Annexure 1 prescribes a mandatory process and a departure from the process, whatever the result, leads to invalidity, no challenge is made to the end result or price of 12 cents per minute. In other words, it is not asserted that that figure was not reasonably open to the decision maker to arrive at.

Grounds of Review

36 The challenge to Annexure 2 to the Determination, both the general challenge and the additional head of challenge, are grounded in Vodafone's further amended application as

follows:

(1) That each of the inclusion of Annexure 2 and the application of Annexure 2 in relation to third generation mobile networks *was not authorised by the enactment pursuant to which* each *was purportedly* made;

(2) That each of the inclusion of Annexure 2 and the application of Annexure 2 in relation to third generation mobile networks *was an improper exercise of the power conferred by the enactment in pursuance of which each was purportedly made, in that each was an exercise of a power for a purpose other than the purpose for which the power is conferred*.

(3) That each of the inclusion of Annexure 2 and the application of Annexure 2 in relation to third generation mobile networks *involved an error of law*.

(4) That each of the inclusion of Annexure 2 and the application of Annexure 2 in relation to third generation mobile networks *was an unreasonable exercise of the power conferred on the respondent by s 152AQA of the Act*.

(4A) That each of the inclusion of Annexure 2 and the application of Annexure 2 in relation to third generation mobile networks *was an improper exercise of a power conferred by the enactment in pursuance of which each was purportedly made, in that each involved a failure to take into account a relevant consideration or relevant considerations in the exercise of the power*.

37 The first three grounds are what might be called grounds of statutory construction. While the competency of ground (4) may not depend on the characterisation of the power as legislative or administrative, by Vodafone's own concession, ground (4A) is in terms specific to an exercise of an administrative discretion. Consequently, if the power is legislative in character and not administrative, this ground of review would not be open.

38 However, neither side saw a different outcome depending on my view of this issue. Vodafone's argument before me proceeded on the basis that Vodafone succeeded whatever the character of the power, while the Commission's argument was that Vodafone lost whatever the character of the power. This explains why the Commission was prepared to argue its objection to the admissibility of certain evidence sought to be relied upon by Vodafone on the assumption that the power was administrative in character.

Admissibility of Mr Attenborough's Evidence

39 Counsel for Vodafone sought to read an affidavit made by Nigel Graham Attenborough, a director of National Economic Research Associates (NERA), and Head of NERA's European Telecommunications Practice. Mr Attenborough is an economist specialising in the area of telecommunications. Exhibited to Mr Attenborough at the time of swearing his affidavit was a copy of a report dated 16 December 2004 which he had prepared at the request of Vodafone for the purpose of the proceedings. Counsel for the Commission objected to the relevance of this affidavit but indicated that if the affidavit was admitted into evidence, they would seek to read the affidavit of another economic expert, Dr Karl-Heinz Neumann, General Manager of WIK Consult GmbH and General Manager and Director of WIK GmbH a telecommunications research and consultancy organisation.

40 After extensive argument, I ruled that Mr Attenborough's affidavit was not admissible, with the consequence that counsel did not read Dr Neumann's affidavit.

41 At that time, I gave brief reasons for my ruling and indicated that I would elaborate on those reasons in my reasons for judgment on the substantive issues in the proceedings. I now do so.

42 Mr Attenborough attached a curriculum vitae to his report. There is no question about his competence to express views about any matter of economic theory, or involving economic expertise, that falls for determination by the Court. The question was whether the views expressed by him in his report went to any such issue.

43 Mr Attenborough was asked to provide a report which addressed the following matters:

> '*1. Adopting the definition of TSLRIC+ used by the Commission in its Final Decision*
>
> *a. please explain the concept of TSLRIC+;*
> *b. if any aspects of the Commission's definition of TSLRIC+ are incomplete, please state what these aspects are;*
> *c. what method or methods can be used to determine the TSLRIC+ of a telecommunications network?*
> *d. What data is required to determine the TSLRIC+ of a telecommunications network?*
>
> *2. Based on your review of the Final Decision and the Documents*

referred to in the letters from Gilbert and Tobin (Appendix B):

a. *Please describe the method by which the Commission derived the prices in Annexure 2 of the Final Decision in so far as they are applicable to the supply of MTAS on Australian 2G mobile networks;*
b. *Please explain how, if at all, the method used by the Commission was consistent with, or departed from, the method or methods of determining TSLRIC+ identified by you in your answer to 1(c), and the data used by the Commission was consistent with, or departed from, the data required to determine TSLRIC+ which was identified by you in answer to 1(d);*
c. *Please explain whether the process adopted by the Commission to determine the prices in Annexure 2 of the Final Decision involved:*
    i *the determination of the TSLRIC+ of the MTAS on Australian 2G mobile networks and, if not, why not?*
    ii *the determination of a reasonable estimate of the TSLRIC+ of the MTAS on Australian 2G mobile networks and, if not, why not?*
    iii *the determination of a range of reasonable estimates of the TSLRIC+ of the MTAS on Australian 2G mobile networks and, if not, why not?*

3. *Based on your review of the Final Decision and the documents identified above:*

a. *Please explain the differences in methods, data used or likely result, if any, between the determination of the TSLRIC+ of the supply of MTAS on Australian 2G mobile networks and Australian 3G mobile networks;*
b. *Please describe the method by which the Commission derived the prices in Annexure 2 of the Final Decision in so far as they are applicable to the supply of MTAS on 3G mobile networks;*
c. *Please explain how, if at all, the method used by the Commission to derive the prices in Annexure 2 of the Final Decision, in so far as they are applicable to the supply of MTAS on 3G mobile networks, was consistent with, or departed from, the method or methods identified by you in answer to 1(c), and the data required to determine TSLRIC+ which was identified by you in answer to 1(d);*
d. *Please explain whether the process adopted by the Commission to determine the prices in Annexure 2 of the Final Decision in so far as they are applicable to the supply of MTAS on 2G and 3G mobile networks involved:*
    i *the determination of TSLRIC+ for the supply of MTAS on 3G mobile networks and, if not, why not?*
    ii *the determination of a reasonable estimate of TSLRIC+ for the supply of MTAS on 3G mobile networks and, if*

not, why not?

iii *the determination of a range of reasonable estimates of TSLRIC+ for the supply of MTAS on 3G mobile networks and, if not, why not?*

2.3 I have also been asked to explain the following terms as used in the ACCC's Final Decision (the page numbers below refer to the pages in the Final Decision):

a. GSM, CDMA and 3G;
b. Fixed costs (page 146);
c. Incremental costs (page 204);
d. Organisational [-level] costs (pages 204 and 209);
e. Common costs (page 208), including [mark-ups to account for] common costs based on Ramsey principles (page 210);
f. Equi-proportionate mark-up (page 208);
g. Cost-modelling – top down or bottom up (page 214)'

44 None of these matters go (in the sense of being relevant) to grounds (1) to (3) inclusive of the challenge to Annexure 2 of the Determination: [See [36], *supra*]. Grounds (1) to (3) inclusive are grounds of statutory construction and the methodologies and processes adopted by the Commission in its Determination [see [25] *supra*], including Annexure 2 [see [27] *supra*], are irrelevant to those grounds.

45 Grounds (4) and (4A) of the challenge to Annexure 2 to the Determination [see [36] *supra*] share a common particularisation. They are both predicated on the basis that the inclusion of Annexure 2 and the application of Annexure 2 in relation to third generation mobile networks involve the failure to take into account a relevant consideration or relevant considerations in relation to the exercise of the power. No other basis is relied on.

46 The relevant considerations which the Commission is said to have failed to take into account in including Annexure 2 and its application in relation to third generation mobile networks are particularised in Vodafone's further amended application in the following way:

'(iA) In arriving at a final price of 12 cpm for the purposes of its inclusion in Annexure 2 to the Determination, the Respondent purported to determine what it described as its "best estimate" of TSLRIC+ by relying on cost studies conducted in other countries which is not a recognised method for deriving TSLRIC in a different country.

(i) In arriving at a final price of 12 cpm for the purposes of its inclusion in Annexure 2 to the Determination, the Respondent purported to

determine what it described as its "best estimate" of TSLRIC+ by relying on cost studies conducted in other countries without taking into account:

A. whether the regulatory regime under which these costs were determined meant they were consistent with the pricing principle defined by the Respondent;

B. the extent to which the input costs and/or costing methodology used to determine these costs meant they were consistent with the pricing principle defined by the Respondent;

C. the need to adjust the prices to reflect the factors that affect costs in different jurisdictions;

D. whether the definition of the relevant cost increment differed from cost study to cost study; and from the pricing principle defined by the Respondent;

D1. assessing whether and, if so, how the definition of TSLRIC+ differed from cost study to cost study, and from the pricing principle defined by the Respondent and adjusting for any such difference including any difference as to:

(1) the manner in which the boundary between traffic driven costs is to be drawn; and

(2) whether network common fixed costs are excluded and whether there is to be any differentiation between traffic driven costs and customer driven network costs;

E. the extent to which the definition and allocation of "contributions towards common organizational-level costs" *and* "common network and non-network costs" *used in these cost studies differed between each of the overseas cost studies considered, and differed from the pricing principle defined by the Respondent;*

F. whether the rate of return assumed or implicit in these studies represented a "normal rate of return" *consistent with the pricing principle defined by the Respondent;*

G. the need to convert these costs to Australian dollars using a consistent and reasonable conversion methodology.

(ii) In arriving at a final price of 12 cpm for the purposes of its inclusion in Annexure 2 to the Determination, the Respondent purported to determine what it described as its "best estimate" of TSLRIC+ by relying on data provided to the Respondent by carriers under the Regulatory Accounting Framework (RAF), which the Respondent

requires carriers to submit under s 151BU of the TPA, without taking into account:

A. *whether there were differences in input costs and/or costing methodology to ensure they were consistent with the pricing principle defined by the Respondent;*

B. *similar data provided by other carriers under the RAF;*

B1. *that Telstra and Optus are integrated fixed and mobile operators and stand alone mobile operators such as the Applicants face a different costs structure;*

C. *the fact that the analysis of the RAF data did not address the likely costs in the period the subject of the determination;*

D. *the methodological differences between the RAF data and the pricing principle defined by the Respondent;*

E. *the differences between the RAF's approach and the approach to depreciation of capital costs and other key factors required for the pricing principle defined by the Respondent;*

F. *the differences between the cost allocation methodology used for the RAF's full allocated costs approach and the allocation methodology required by the pricing defined by the Respondent.*

G. *the possibility that originating and terminating calls may use network resources to a different extent;*

H. *that the Respondent did not have before it the means to analyse the RAF data to properly separate out mobile and fixed network costs and did not do so;*

I. *that, to be properly satisfied that the figures derived from the RAF data were accurate enough to be used as a TSLRIC+ proxy, it would be necessary:*

(1) *to revalue assets on a current costs basis and to adjust depreciation accordingly;*

(2) *to take account of holding gains and losses;*

(3) *to make an attempt to separate out common fixed costs from those that form part of TSLRIC in order to determine the "+" component in TSLRIC+; and*

(4) *to establish precisely how costs have been allocated to different mobile services and whether the process of*

allocation used yield costs that are reliable enough having regard to the level of detail provided;

and that none of those steps was undertaken by the Respondent.

(iii) In arriving at a final price of 12 cpm for the purposes of its inclusion in Annexure 2 to the Determination, the Respondent purported to determine what it described as its "best estimate" of TSLRIC+ without quantifying or attempting to quantify the cost differences between the cost of supplying MTAS on 3G compared with 2G.'

47 The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account in making that decision: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 per Mason J; at 55 per Brennan J (as both were then).

48 Mason J went on to say [at 39,40]:

'What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors -- and in this context I use this expression to refer to the factors which the decision-maker is bound to consider -- are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard: see Reg v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd, adopting the earlier formulations of Dixon J in Swan Hill Corporation v Bradbury, and Water Conservation and Irrigation Commission (NSW) v Browning. By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.' [Footnotes omitted]

49 In *Price v Elder* (2000) 97 FCR 218 at 221 [13] the Court adopted what Mason J said in the following terms:

'Failure to take into account a relevant consideration can only be made out

> *as a ground of review of an administrative decision if the decision maker fails to take into account a consideration that he or she is bound to take into account in making that decision. What factors a decision maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the relevant factors are not expressly stated in the statute, they must be determined by implication from the subject matter, scope and purpose of the … Act… .Where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except insofar as there may be found in the subject matter, scope and purpose of the statutes some implied limitation on the factors to which the decision maker may legitimately have regard. Where a discretion is unconfined by the terms of the statute, a court will not find that the decision maker is bound to take a (sic) particular matter into account unless an implication that he or she is bound to do so is to be found (sic) in the subject matter, scope and purpose of the Act:'*

See too *Telstra Corporation Ltd & Ors v Seven Cable Television Pty Ltd & Ors* (2000) 102 FCR 517 at 551,552.

50 In my view, the language of s 152AQA does not contain any matters which the Commission, expressly or by implication, is bound to take into account in making a determination of 'principles relating to the price of access to a declared service" mandated by subs 152AQA(1) of the Act nor does it contain any matters which the Commission, expressly or by implication, is bound to take into account if it wishes to include in that determination 'price related terms and conditions relating to access to the declared service' as permitted by subs 152AQA(2) of the Act.

51 But, says Vodafone, once the Commission determined principles relating to the price of access to a declared service and, even though it was not necessary for it to do so, included in that determination 'price related terms and conditions relating to access to the declared service' as permitted by subs 152AQA(2), it had to do the latter in accordance with the pricing principles it had determined under subs 152AQA(1). In other words, once pricing principles are determined under subs 152AQA(1), they are a relevant consideration which the Commission is bound to take into account in including, if it so wishes, 'price related terms and conditions relating to access to the declared service' under subs 152AQA(2), and it did not do so.

52 Even if one accepts that this is right, and I shall return to this later, how does this make Mr Attenborough's affidavit relevant to the issues before the Court? Mr Attenborough was not asked to opine on whether the 'price related terms and conditions relating to access to the

declared service' in Annexure 2 to the Determination accorded with the pricing principles in Annexure 1 to the Determination. The closest it gets, and it is not very close, is:

> *'3c Please explain how, if at all, the method used by the Commission to derive the prices in Annexure 2 of the Final Decision, insofar as they are applicable to the supply of MTAS on 3G mobile networks, was consistent with, or departed from, the method or methods identified by you in answer to 1(c), and the data required to determine TSLRIC+ which was identified by you in answer to 1(d).'*

But this calls for a comparison between the method used by the Commission to derive the prices in Annexure 2, and even then only insofar as it is applicable to the supply of MTAS on 3G mobile networks, and the method or methods identified by Mr Attenborough in his answer to 1(c) and the data identified by Mr Attenborough in answer to 1(d). It does not, in any way, require Mr Attenborough to address, nor, not surprisingly, does he address the failure, or otherwise, of the Commission to specify 'price related terms and conditions relating to access to the declared service' in Annexure 2 to the Determination in accordance with the pricing principles in Annexure 1 to the Determination.

53 In support of its argument that I should nevertheless admit the evidence of Mr Attenborough, senior counsel for Vodafone referred me to the decision of Tamberlin J of this Court in *Visa International Service Association and Anor v Reserve Bank of Australia* (2003) 131 FCR 300 at 438, 439, where his Honour said:

> *'662. The evidence in this case was that the expressions 'competition', 'market' and 'efficiency' had a meaning in the area of economics.*
>
> *663. Having regard to the context in which the question arises, I consider the appropriate approach to the expert evidence is to allow it on the basis discussed by Street J in* Ancher, Mortlock, Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd *[1971] 2 NSWLR 278 at 286, where his Honour, speaking of expert evidence sought to be led from architects in a case relating to copyright infringement, said:*
>
> > *"In view of the volume of expert evidence, and the differing views expressed by the expert witnesses, I should state that use that can properly be made of that evidence in reaching a decision in a suit such as this. The decision upon the issue of similarity is an original decision for the court itself. It is to be reached upon an assessment of such similarities and dissimilarities as appear to the court between the plans or buildings under consideration. The fact that one particular expert of the highest authority and unimpeachable credit is permitted to swear to an opinion on similarity or dissimilarity does not relieve the court of the responsibility of forming its own opinion on this issue.*

> *In this sense the expert evidence in a suit such as the present fulfils a somewhat unusual role. It is almost as if each side calls an expert to argue out with counsel in examination-in-chief and cross-examination the similarity of dissimilarity which that particular expert sees between the plans and houses.* ***By attending to the progress of this argumentative process … the court is enabled to perceive and more readily to appreciate the points of similarity and dissimilarity. In this way the tendering of expert evidence is of value in exposing the facets of the ultimate question to which the expert opinion evidence is directed. But the important point is that, in distinction for the judicial process in relation to expert evidence such as is encountered in litigation, a court in the present type of litigation is entitled, and, indeed, bound, to form and act on its own original opinion."*** (Emphasis added).

664. A not dissimilar approach was recently adopted in the Western Australia Court of Appeal's decision in Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd *(2002) 25 WAR 511, where at [107], Parker J, with whom Malcolm CJ and Anderson J agreed, made the following observations:*

> *"While the evidence does not establish that particular terms in issue had uniform, accepted and certain meanings, it does establish that some words or phrases used in the Act and the Code are in common use in that field of economics which is concerned with competition policy, or more particularly with the regulation of essential infrastructure. In this context the words or phrases convey a meaning to those familiar with this field of economics which differs from that which the words themselves suggest in ordinary everyday usage. As the subject matter is by nature conceptual there is no uniform, accepted and certain meaning, but there is a principle or theory, the essential tenets of which are widely understood, though there need not be uniform acceptance of them.* ***In my view expert evidence may relevantly and usefully inform the Court as to this specialised usage, of which the Court would otherwise be unaware****, so that the Court can determine whether the Act and Code is using particular words or phrases in their ordinary everyday usage, or in the specialised usage among those versed in this field of economics.* ***Further, the expert evidence provides an appreciation of the nature and objectives of competition policy in the field of economics, and, in particular, in the regulation of essential infrastructure, so that the policy and objectives of the Act can be discerned with a greater and more reliable appreciation of the possibilities. In addition, the potential relevance of some concepts and provisions in the Act and Code can be more readily understood****."* (Emphasis added)

665. The emphasis in these cases is on informing and assisting the court with a view to illuminating an understanding of the terms used in relation to the issues raised.

666. In the present matter I am satisfied that the expert evidence was admissible on the basis that it is of assistance in understanding more fully the relevance and practical content of the concepts of 'competition', 'efficiency' and 'market', so far as they are relevant to the present proceedings. In the particular context of a central bank charged with the regulation of the Australian economy where it is necessary to interpret terms which have a particular meaning in the art of economics, it would be inappropriate to shut out consideration of such evidence as being inadmissible, irrelevant or unnecessary.'

54 But immediately before this passage, his Honour had said [at 437, 438]:

'658. In Telstra Corporation Ltd v Seven Cable Television Pty Ltd*, the Full Court upheld the decision of Wilcox J in relation to his Honour's rejection of expert evidence from an economist, Dr Williams, in relation to evidence of an opinion that he had formed regarding various matters, including market definition.*

659. Wilcox J ruled that Dr Williams' opinion evidence was inadmissible as irrelevant, essentially for the reason, that by virtue of the terms of the applicable statutory provision 'it was for the ACCC (not a hypothetical economist) to determine what steps it needed to undertake in order to consider those matters and achieve satisfaction'.

660. At 549-550 the Full Court said:

> *"So far as Dr William's opinion on market definition was concerned, in the absence of a claim of Wednesbury perversity* [Associated Provincial Picture Houses Ltd v Wednesbury Corporation *[1948] 1KB 223*] *(and that claim was not advanced before us), Wilcox J ruled that 'it was for the ACCC to determine the facts pertinent to its exercise of statutory power'. Nor, in his Honour's opinion, was market definition itself an issue in these proceedings because it was not an operative part of the ACCC process of reasoning.*
>
> *We are not persuaded that his Honour erred in principle in declining to accept this evidence as not relevant to an issue in a claim for judicial review such as this. This is not to deny that, in other statutory context, expert economic opinion evidence may be admissible as* ***capable of illuminating the issues for decision****. Clearly, in some cases it can especially if the meaning of a technical term is involved. But here the essential question for his Honour, as was explicitly recognised in his reasons, was whether the ACCC had erred in law (not fact) in addressing the statutory issue, namely, whether the ACCC is satisfied that declaration will promote the LTIE, as there defined. It is true that this definition picks up several concepts, for instance the notion of competition, which are complex. But none of them has any special technical meaning or trade usage that requires explication by an expert economist.*

> *In our opinion, the question whether the views of Dr Williams on these matters would assist the Court … was essentially a matter for his Honour's assessment at the hearing. Wilcox J had to make an assessment, during the proceeding, whether FOXTEL had demonstrated the nexus necessary to establish the adjectival relevance of the material tendered. As the trial judge, his Honour's views are entitled to respect, particularly in this area. Moreover, we are now concerned with the question at the level of substantive relevance – a more difficult threshold for FOXTEL to pass; and there still remains the question whether rejection of the evidence had any material consequence in terms of his Honour's overall approach.*
>
> *We are not persuaded that his Honour erred in ruling that the opinions of Dr Williams would not assist in the determination of the legal issues before his Honour." (*Emphasis added*).*

661. In the present case, there is a claim of Wednesbury perversity and the statutory context is different to that in the Telstra case. In my view these differences are significant. The present case is concerned with economic regulation by the RBA and it would be unrealistic to ignore the guidance afforded by economic experts as to whether the terms have a meaning in the field of economics and as to the way in which the concepts have been applied and operation in practice.'

55 There is no claim of *Wednesbury* perversity in the present case and the statutory context is the same as in the *Telstra* case, that case being concerned with, inter alia, Part XIC of the Act. For these reasons, I do not think the decision of Tamberlin J in *Visa International* is of any great assistance to the issue of the admissibility of Mr Attenborough's evidence in the present case.

56 For the reasons more fully set out at [44] to [52] inclusive, I ruled that Mr Attenborough's affidavit was not admissible on the ground that it was not relevant to any of the issues before the Court. Moreover, with the benefit of reflection, it does not seem to provide me with any assistance in understanding any relevant economic terms or principles: Cf [662] to [666] of *Visa International* per Tamberlin J.

Vodafone's General Challenge to Annexure 2

57 In its written submissions, Vodafone summarises its general challenge to Annexure 2 in two contentions. First, it submits that, as a matter of construction, the Commission was not empowered by s 152AQA, including subs 152AQA(2), to specify prices in relation to a declared service such as the MTAS. Secondly, Vodafone contends that even if s 152AQA

authorised the specification of prices, then it did not authorise prices which had not been determined in accordance with the pricing principles made pursuant to subs 152AQA(1) as set out in Annexure 1 to the Determination and that, in this case, they were not so determined.

58 The first of these contentions was developed in the following way:

- After a service has been declared, subs 152AQA(1) obliges the Commission to 'determine principles relating to the price of access' to the declared service. The remainder of the section then refers to a concept of 'determination'. The 'determination' consists of the 'principles relating to the price of access' made under subs 152AQA(1) and any 'price related terms and conditions' which may be made under subs 152AQA(2). Subsection 152AQA(6) obliges the Commission to 'have regard to the determination' if it is required to arbitrate an access dispute under Division 8 in relation to the declared service.
- In empowering the Commission to determine 'principles relating to the price of access' subs 152AQA(1) is not authorising the Commission to determine a price. In this context, 'principles' is meant in the sense of 'a general rule as a guide to action' (Shorter Oxford English Dictionary as cited in *Preci Services Pty Limited v Minister for Health, Housing and Community Services* (1992) 36 FCR 395, 404) or a 'fixed rule or adopted method as to action' (Macquarie Dictionary). A 'principle' does not encompass a specific direction that determines the outcome (*McCreagh v Frearson* [1922] WN 365, 366).
- The Commission contends that the source of the power to fix the prices set out in Annexure 2 to the Determination is subs 152AQA(2) which confers a discretion to include in a determination 'price-related terms and conditions'. The difficulty with this contention is that it is inconsistent with the structure of Part XIC as a whole. As noted above, the result of the exercise of power under subs 152AQA(2) forms part of the 'determination' which the Commission then must have 'regard to' in arbitrating an access dispute under Division 8 (subs 152AQA(6)). In order for the Commission to have 'regard to' the determination it must treat it as a 'fundamental element' in making a determination concerning an access dispute (*R v Hunt; ex parte Sean Investments Pty Limited* (1979) 180 CLR 322, 329.2 (per Mason J)). This is particularly the case if the Commission is determining an interim access dispute. With an interim access dispute a determination under s 152AQA is the only factor that the Act expressly states must be taken into account.

- The principles determined under subs 152AQA(1) provide the focus or guidance for the inquiry as to price that will be determined when resolving an access dispute. If the determination also includes a specific price then the outcome of the inquiry raised by the principles will be foreclosed and the principles will be rendered otiose. Senior Counsel for Vodafone in his oral submissions made clear at the outset that Vodafone accepted that whatever else the power of the Commission is, it [subs 152AQA(2)] does not operate to empower the setting of a price which ousts, as it were, or forecloses any dispute of the issue on an arbitration or forecloses an outcome of an arbitration. By its terms Annexure 2 specifies a price (the 'price of access … is as specified'). To have regard to that as a fundamental element in decision making would be to adopt it. If subs 152AQA(2) empowers the Commission to fix a price then, in arbitrating an access dispute, it will have to choose between 'having regard' to the pricing principles specified under subs 152AQA(1) or 'having regard' to the price specified under subs 152AQA(2) but it cannot do both. It is extremely unlikely that the application of any particular form of pricing principles will always produce one definitive price yet Annexure 2 purports to do that. Of necessity the application of pricing principles may result in different prices in at least some different contexts especially if further information is available. The result is that if the Commission 'has regard' to the specified prices as a fundamental element in its decision making it will necessarily be putting the principles to one side because the issues that they raise will not be addressed. Alternatively it could 'have regard' to the principles as a fundamental element in its decision making but to do so it must effectively ignore Annexure 2. For example, if the result of the application of the principles in a particular context yields a price of say 25c (or a range of 20 to 25c), but the terms and conditions purportedly made under subs 152AQA(2) specify the prices to be 15c, how can the Commission then 'have regard' to the Determination as a whole as a 'fundamental element' in making the Determination or even 'have regard' to each of its elements?
- The definition of price-related terms and conditions in subs 152AQA(8) does not overcome this difficulty. The phrase 'relating to' in subs (8), although broad, must take its meaning from its context and the Act as a whole: *O'Grady v Northern Queensland Co Limited* (1990) 169 CLR 356 at 376 (per McHugh J). Having regard to the overall purpose of Part XIC and specifically the principles and the role the Determination must play in the arbitration of an access dispute, Vodafone submits this definition does not extend to authorise the fixing of a price. Instead it is directed towards matters concerning

the terms on which the price will be paid or ancillary matters that may assist in the application of the pricing principles specified under subs 152AQA(1).

- Presumably the Commission places reliance on that part of the Explanatory Memorandum to the Trade Practices Amendment Bill which refers to the Commission setting 'indicative' prices under s 152AQA. Throughout the Final Decision it refers to the specified prices as 'indicative'. Further in discussing the role of the specified prices it stated in the Final Decision:

> *'Were the Commission required to make an arbitral determination, or consider an undertaking provided to it, relating to the MTAS, a party may argue against the application of the indicative price related terms and conditions. The Commission would have regard to the particular circumstances and information provided to it in relation to the matter before it at that point in time in deciding whether or not to apply them'* (emphasis added)

  This approach suggests that the Commission will treat the specified prices as a *prima facie* applicable unless persuaded not to adopt it. Even if recourse may be had to the Explanatory Memorandum in the interpretation of subs 152AQA(2), it is of no assistance as the terms of Annexure 2 do not express the prices to be either 'indicative' or 'presumptive'. Instead it specifies what they will be ('price of access … is as specified in column 2'). This is not the language of a factor or consideration to be taken into account but of prescription.

- If it is accepted that the power specified in subs 152AQA(2) does not enable the ACCC to specify prices then relief must follow. The determination of this contention does not turn upon whether the power can be characterised as being either administrative or legislative in nature.

59 In the alternative, Vodafone submits that even if subs 152AQA(2) enables the Commission to specify a price then to validly form part of a determination under s 152AQA the price so specified must have been derived in accordance with the rule, guide or method etc outlined in the principles determined under subs 152AQA(1). This contention was developed in the following way:

- Were it otherwise, a further and even greater internal inconsistency than that adverted to above would arise such that the Determination would become absurd. In the event that there was a determination which contained pricing principles on the one hand and a price

which was not determined in accordance with those principles on the other then how could the Commission have regard to such a determination as a 'fundamental element' in its decision making process when determining an access dispute? Whereas the inconsistency above is concerned with a determination that raises an inquiry (being the application of the pricing principles) and then purports to answer it; in this case the pricing principles would raise an inquiry and the specified price would answer a different (and unstated) question. In that event, the price so fixed would be meaningless. It would represent a term or condition of access which either had no underlying rationale or, to the extent it had one, it would differ from the pricing principles. If the Commission adopted the presumptive approach discussed above and the prices in Annexure 2 were not calculated in accordance with the pricing principles then there would, in effect, be a presumption against the application of the pricing principles. This is fundamentally inconsistent with the statutory scheme.

- Vodafone submits that the legal consequence of an attempt to use the power conferred by subs 152AQA(2) to fix prices which have not been determined in accordance with the principle specified in subs 152AQA(1) is invalidity. Moreover, this is so irrespective of how the nature of the power exercised under the subsection can be classified; ie either as legislative or administrative.
- First, if a price is fixed under subs 152AQA(2) in a manner which is not consistent with the principles made under subs 152AQA(1) and the power is legislative in nature then the Determination would be *ultra vires* the Act in that there will have been an attempt to effect a determination which 'departs from or varies the plan which the legislature has adopted to attain its ends' (*Shanahan v Scott* (1957) 96 CLR 245, 250). The scheme of the Act which requires the ACCC to have regard to the Determination as a fundamental element in its decision making when determining an access dispute would be frustrated. For similar reasons, if the exercise of power is properly characterised as administrative, it would be 'not authorised' by the enactment it was made under (ie the Act) and would otherwise involve an error of law (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 376-378 (per Toohey and Gaudron JJ)).
- Secondly, for the same reasons, if a determination included prices that had not been derived in accordance with the pricing principles under subs 152AQA(1) then it would constitute an unreasonable exercise of the discretionary power conferred by subs 152AQA(2). The Determination would be internally inconsistent and relevantly

irrational and unreasonable (*Re Minister for Immigration and Multicultural Affairs; ex parte Appellant S20/2002* (2003) 77 ALJR 1165, 198 ALR 59 at [66]-[73] (per McHugh and Gummow JJ)). This would be the case irrespective of whether it was delegated legislation or the result of the exercise of an administrative power (see *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381 at 398-400).

- Thirdly, if the relevant power is classified as administrative then to the extent that the Commission did not take into account matters that were necessarily required to be taken into account by their own pricing principles, then its decision will have involved a failure to take into account relevant considerations.

The Commission's Response to the General Challenge to Annexure 2

60 In its written submissions, the Commission developed its response to the general challenge to Annexure 2 in the following way:

- Neither the determined principles nor the price-related terms and conditions determine the price of access to a declared service. Their primary significance is that the Commission is bound to have regard to them if an access dispute arises and if a determination under Div 8 of Pt X1C of the Act is to be made. While the Commission must have regard to them if it is required to arbitrate an access dispute under Div 8, it remains open to any party to contend that either the principles or the price-related terms and conditions are not appropriate.
- It is apparent that, when Vodafone refers to specifying a price in a determination, they understand this as a specification that 'determines a price' and something that 'forecloses' 'the outcome of the enquiry'. That is, Vodafone considers that the effect of Annexure 2 is to foreclose the price outcome of any arbitration. As noted at [58] *supra*, Senior Counsel for Vodafone specifically eschewed reliance on any such contention.
- The Commission acknowledges that s 152AQA does not empower it to make a determination that specifies one or more prices that foreclose the outcome of any arbitration and which render any pricing principle (and presumably all other mandatory considerations) otiose.
- However, the Commission did not do this and did not purport to do this in the present case. It is clear that Annexure 2 when read against its legislative context and the Final Decision, does not purport to specify prices of this kind. The prices noted in Annexure 2 are merely indicative prices generated to assist the market to have a better idea as to what

the Commission considers might be the consequence of the pricing principles stated in Annexure 1 on the information currently available to it. It is noted on the face of the determination that '[f]or the effect of this determination, see subs 152AQA(6) of the Act'. In any arbitration, the pricing principles and the indicative prices (and the historical data upon which those prices are based) would be considered by the Commission along with other matters, including any further evidence tendered and submissions made by the parties. None of the matters in the determination would foreclose the outcome of the arbitration, least of all the indicative numbers, especially where newer data relevant to that issue becomes available during the course of the arbitration.

- At page 186 of the Final Decision the following is said:

  > '*Further, the Commission notes that the pricing principles it establishes here for the MTAS are not binding. In the event of arbitration of an access dispute, or assessment of an undertaking determination, the Commission will have full regard to the matters presented before it, including responses of interested parties to new material provided in the pricing principle determination covered across both Chapter Eight and Nine of this report'*.

- If the Court accepts that Annexure 2 does not specify prices of this kind, then both of Vodafone's arguments must be rejected. The first should be rejected because the Determination does not specify prices in any way that is proscribed. There is not restraint in s 152AQA upon providing indicative prices. Indeed, it is expressly permitted by subs 152AQA(8), which provides that price-related terms and conditions means terms and conditions 'relating to price' or a method of ascertaining price. The expression 'relating to' price is extremely wide: See *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 354, McHugh, Gummow, Kirby and Hayne JJ at [87] and certainly wide enough to include indicative prices. One of the terms and conditions under which or on which access is provided is price. The Explanatory Memorandum confirms that the expression was intended to allow for the specification of indicative prices. Moreover, this construction promotes the object and policy of the section in providing information to the market that could facilitate negotiations or expedite arbitrations.
- The second argument should be rejected because it is premised upon an alternative hypothesis that is not relevant. That is, Vodfone's second argument is premised upon the Court making a finding, contrary to its primary submission, that s 152AQA does permit specification of prices that foreclose the outcome of any arbitration. It is said that, if this is permitted, then such prices must be determined in accordance with the pricing principles in Annexure 1. However, on the Commission's case, this hypothesis simply

does not arise. The Commission does not say that it can determine prices of that kind but only indicative prices.

- Vodafone's lengthy arguments designed to establish that the Annexure 2 prices did not result from the strict application of the principles in Annexure 1 become irrelevant if the Commission's construction of the legislation is accepted.
- This would itself constitute a sufficient basis to dismiss the application. However, there a further reasons for doing so.

61 The Commission's written response to the alternative contention of Vodafone's general challenge to Annexure 2 developed in [59] above, was put in the following way:

- There is no express provision in the statute creating 'a requirement that the price-related terms and conditions under subs 152AQA(2) must be determined in accordance with the pricing principles set out under subs 152AQA(1). There may be cases where price-related terms and conditions cannot be 'determined in accordance with' pricing principles because they cover different subject matters. For example, a price-related term might deal with the timing for payments of price between service providers, in circumstances where the relevant pricing principles (like the present one) do not deal with that question in a way that allows the terms to be 'determined in accordance with' the principle. This is a strong reason for not drawing any general statutory implied requirement of the kind advanced by Vodafone.
- Moreover, it would be surprising if there was an implied requirement that price-related terms included in a determination would be 'invalid' if not determined in accordance with the pricing principles. This is because neither the principles nor the terms are determinative of any rights or of the outcome of the arbitration.
- Put another way, if prices fixed in a final determination of an arbitration are valid even though determined otherwise than in accordance with the pricing principles set out in a s 152AQA determination, there could be no justification for imposing an implied requirement that the Commission's initial indicative prices could, for the same reason, be invalid. Indicative prices may involve errors in their derivation (though none is conceded here) and they may not be particularly helpful to parties to an arbitration or the Commission if they are based on very limited data (which is not conceded to be the case here either) but they would not be invalid. At most, any flaws of the kind advanced by Vodafone would support a submission that the indicative prices should be given little or no weight if better evidence had become available during the course of the arbitration.

- It may be accepted that the specification of prices in a determination under s 152AQA will be more helpful to market participants the more indicative they are of likely outcomes from an application of the determined pricing principles. However, it is wrong to assume that, as Vodafone does, that prices are either determined in accordance with the pricing principles or they are not in some pure sense. Prices may be indicative even though it would be possible to undertake further calculations that would make them better indications of likely outcomes. The question is not binary, as Vodafone would have it, but one of fact and degree.
- The Commission contends that there is no precondition for the valid inclusion of indicative prices in a determination under s 152AQA in the terms advanced by Vodafone. That is, even if the prices are not 'determined in accordance with the pricing principle', they would not be invalid. At most, they would be less valuable indications of likely outcomes of any arbitration.

62 The Commission, in its written submissions, further developed its argument, by reference to how it contended the Determination should be construed and, in the light of that construction, contended that even if there was a requirement that Annexure 2 be determined in accordance with Annexure 1 (contrary to the Commission's submissions), that requirement was satisfied. The argument was developed in the following way:

- The Determination must be read in context. Hence, it should be read with the Final Decision, as identifying the relevant mischief, and construed in accordance with the reasons and an analysis contained therein. Annexures 1 and 2 should be construed on the basis that its provisions are intended to give effect to harmonious goals (see *Project Blue Sky* [70]), which goals are explained in the Final Decision. Alternatively, if the Determination is an administrative decision, it and the reasons for it contained in the Final Decision should be given a beneficial construction (see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259). That Annexure 1 and 2 should be read together is particularly clear from the fact that they were made at the same time, by the same decision-maker and as a consequence of the same enquiry process, and premised upon common reasoning.
- Against this background, it is extremely difficult to construe, as Vodafone contends, the reference in Annexure 1 to the Determination to 'the range of reasonable estimates of TSLRIC+ of supplying the services that are currently available' as not referring to the estimates of TSLRIC+ relied upon by the Commission in making Annexure 2. The

Commission says that it is clear beyond argument that in referring to 'reasonable' estimates, the Commission was referring to the estimates that it had referred to and relied upon. This is a matter for its judgment and also a matter of fact and degree. If that is accepted then, Annexure 2 was calculated in accordance with Annexure 1 (on any test of that relationship) because the Commission clearly considered that the estimates that it had, being the best estimates available to it at the time fell within its concept of 'reasonable estimates'.

- The second limb of Vodafone's case depends upon reading Annexure 1 out of context. It is said that the estimates that the Commission thought were reasonable estimates were not (according to Mr Attenborough) and as such the Commission failed to apply its own principle. However, the expression 'reasonable estimate of the TSLRIC+' does not have any fixed meaning of the kind suggested by Vodafone. It should be construed in such a way as to give effect to the harmonious goals of the Determination as explained in detail in the Final Decision.
- It is apparent that the TSLRIC+ concept was seen by the Commission primarily in terms of its contrast to an alternative measure considered by it, namely Short Run Marginal Costs ('SRMC'). 'TSLRIC' was described as a 'concept' in general terms. It was understood broadly and included similar concepts such as LRIC ('Long Run Incremental Cost') and other 'variants'. The Commission regularly referred to 'a TSLRIC pricing methodology', revealing the breadth behind the notion used by it.
- The Commission acknowledged that it had not developed a TSLRIC+ model that it could use to set a price for the MTAS at the time of the making of the Declaration and Determination. It noted that development of such a model would be costly and time consuming. It chose to adopt a pricing principle that would see a closer association between price and TSLRIC+ (an expression broadly equated with underlying cost of the service). It had to choose an end price or target price which the adjustment path would reach during the period of the Determination. It did this on the basis of cost estimates that it currently had, which it variously described as 'reasonable estimates of the TSLRIC+'; 'reasonable cost estimates available to it'; 'best estimates of TSLRIC+ … available … at this point in time'; 'best measures the Commission has available to it of the TSLRIC+'; 'the range of best estimates available to it of the TSLRIC+'. These expressions were expressly stated by the Commission to include cost models developed in overseas jurisdictions and TSLRIC+ proxies based on data provided to it by mobile operators using

the Regulatory Accounting Framework ('RAF') data. The Commission acknowledged that because it was not modelling TSLRIC+ itself it was introducing a measure of risk into its assessment of an appropriate target price.

- The Commission contends that, when read in context, it is clear that the indicative prices set out in Annexure 2 were based upon cost measures that the Commission considered provided reasonable estimates for the purpose of Annexure 1. If Annexure 1 and 2 are read together, there can be no argument that Annexure 2 is not calculated in accordance with Annexure 1. Vodafone may wish to argue that the cost measures adopted should not have been considered by the Commission to have been reasonable estimates of TSLRIC+, but arguments of that kind go to the merits and not the lawfulness of the Determination. Moreover, they are merits arguments that were, in large measure, made by Vodafone and some others to the Commission and rejected by it for compelling reasons.
- Vodafone says that its case does not challenge the merits of the Commission's decision but only the lawfulness of it by virtue of an alleged failure of Annexure 2 to be calculated in accordance with Annexure 1. If the Court accepts the expression 'reasonable estimates of the TSLRIC+' used in Annexure 1 should be understood as referring to estimates including the estimates that the Commission considered were reasonable at the time it drafted this expression, Vodafone's case must fail. Even if there was a requirement that Annexure 2 be determined in accordance with Annexure 1 (contrary to the Commission's submissions), it clearly was in any event. The balance of and the bulk of Vodafone's arguments, being quibbles about whether the estimates accepted by the Commission as being reasonable should have been so accepted, are merits arguments and must be rejected.

Reasoning and Conclusion on General Challenge to Annexure 2

63 I have come to the conclusion that there is only one issue raised by Vodafone's general challenge to Annexure 2 of the Determination and that is whether subs 152AQA(2) of the Act empowers the Commission to specify a price or prices as part of the Determination. Accepting that any such specification of price or prices are indicative only, and do not prescribe, does any such specification fall within the concept of 'price-related terms and conditions' as defined in subs 152AQA(8)? I shall return to this below.

64 It is implicit in what I have said in [63] that I do not think there is any requirement that any 'price-related terms and conditions' have to be 'in accordance with' or 'consistent with' the

pricing principles determined under subs 152AQA(1). It would undoubtedly be helpful to the marketplace if they were, but it is impossible to read in any mandatory requirement in this regard. Apart from anything else, the 'price-related terms and conditions' included in a determination under s 152AQA may, in a particular case, deal with subject matters which have nothing to do with the pricing principles under subs152AQA(1). In such a context, accord or consistency is totally irrelevant.

65 That said, in the present case I find, for the reasons advanced in the Commission's written submissions in [62] *supra*, that the prices specified in Annexure 2 to the Determination are in accordance with and consistent with the pricing principles in Annexure 1 to the Determination. In particular, the end price in Column 2 of the Table in Annexure 2, is in accordance with and consistent with the second characteristic of the adjustment path in Annexure 1.

66 Which brings me back to what I see as the only live issue raised by Vodafone's general challenge to Annexure 2, namely, whether the subs 152AQA(2) empowered the Commission to specify a price or prices as part of the Determination. Senior Counsel for Vodafone submitted that a price, even an indicative price, is not a term or condition relating to price [the first limb of the subs 152AQA(8) definition] and an indicative price is not a method of ascertaining a price [the second limb of the subs 152AQA(8) definition]. The second of these submissions may be readily accepted – the specification of a price, indicative or otherwise, is not a method of ascertaining a price. The first does not compel such a ready response.

67 For Vodafone, it is submitted that a price is a determined condition relating to itself; a price, even an indicative price, is not a term or condition relating to price. Support for this view may be found in the argument that if the specification of price, albeit indicative price, is to be included as a 'term [or] condition relating to price', surely 'a method of ascertaining a price' would also be included in the first limb of the subs 152AQA(8) definition, rendering the second limb otiose. If the second limb is to be given any work to do, the first limb should be read as not including a method of ascertaining price, nor, *a fortiori*, specification of a price, albeit an indicative one.

68 For the Commission, it is submitted that the normal meaning of 'terms and conditions relating to price' would encompass 'price', namely, its specification. In other words, if one

was asked to identify in a document the terms and conditions relating to price, one would include in that identification the terms and conditions which specified the price or a method of ascertaining it. In this latter case, the second limb of the subs 152AQA(8) definition should be seen as having been included out of an abundance of caution.

69 After considering and weighing the merits of the respective arguments, I have come to the conclusion that subs 152AQA(2) does empower the Commission, if it decides to exercise the discretion vested in it by that provision, to specify a price or prices as part of its subs 152AQA(1) determination, and for the following reasons:

(1) The phrase 'price related terms and conditions' must be read by reference to the definition of that phrase in subs 152AQA(8). If it were not for that definition, then I think there would be much to support Vodafone's argument that subs 152AQA(2) only authorises inclusion of terms and conditions which are related to price, but not the specification of price itself. But the phrase is to defined a mean, inter alia, terms and conditions 'relating to price', and it is difficult, if not impossible, to resist the conclusion that the specification of a price or prices as part of a subs 152AQA(1) determination is a term or condition relating to price.

(2) The second limb of the subs 152AQA(8) definition clearly contemplates that the determination may contain a way of working out a price or prices or, to use the words of the definition, 'a method of ascertaining a price'. Accepting that any such price so ascertained is indicative only and does not foreclose any dispute of the issue on an arbitration, what legislative purpose is served by construing the first limb of the definition in a way which would deny the Commission power to specify a price or prices which are equally only indicative. None is apparent.

(3) Indeed, having regard to the object of introducing Part XIC into the Act [see [15] *supra*], such a construction is arguably at odds with the legislative purpose of Part XIC.

70 For these reasons, Vodafone's general challenge to Annexure 2 must fail, whether or not the making of a determination under s 152AQA of the Act is to be characterised as being of a legislative or administrative character.

Vodafone's Additional Challenge to Annexure 2

71 As indicated in [34] *supra*, the additional head of challenge to Annexure 2 to the

Determination – its application to 3G mobile networks – is put on the basis that notwithstanding the Commission laid down a cost based pricing principle in Annexure 1 to the Determination, the Commission simply ignored the cost of 3G.

72 In its written and oral submissions, Vodafone developed its case on this additional head of challenge in the following way:

- Vodafone has purchased a licence to operate a 3G network for $253 million (Draft Decision, page 66). In April 2003 it announced that it would be delivering 3G based services to customers by mid 2005 (Draft Decision, page 147.3).
- In the Final Decision, the Commission discussed 3G mobile services as follows (Final Decision, page 20):

  > *'3G mobile services, by way of contrast, provide for wideband communications capable of conveying multimedia, video and other capacity-demanding applications. The widening of the bandwidth enables greater volumes of data to flow to mobile receivers allowing full broadband services such as full colour screens, video conferencing and Internet access.'*

  It also described '2G mobile services' as 'narrowband services which are typically regarded as providing voice services and basic data services such as SMS' and noted that between 2G and 3G technologies there is 'what is referred to as 2.5G services' which 'tend to provide greater functionality through higher data rates' (Final Decision, page 20).
- The Draft Decision considered whether the definition of the service that was to be declared should be technologically neutral and thus include 2.5G and 3G services. It suggested that it should (Draft Decision page, 25.3). The Final Decision confirmed this view (Final Decision, page 28.2). The Draft Decision did not state one way or another whether the relevant target price it was proposing applied to the provision of MTAS on 3G networks (Draft Decision, page 166-173). What is known is that the Commission did not have any cost information concerning the provision of MTAS on 3G networks. On 10 June 2004 the staff of the Commission forwarded a paper to the members of the Commission which, inter alia, referred to confidential material implying higher unit costs for termination and voice calls on 3G mobile networks.
- In a paper submitted to the Commission on 23 June 2004 under the heading 'Cost of Providing 3G Services are unknown', staff reiterated their lack of information concerning costs of the 3G network, indicated that the TSLRIC for providing an MTAS on the 3G

mobile network was likely to depend on a number of factors and said:

> '*… there should be no presumption that the Commission would set different prices for termination of voice calls depending upon the network type upon which such termination is provided.*'

- The only reference to 3G in Chapter 8 of the Final Decision (Pricing Principles) is the following statement which reflects the approach suggested by staff (Final Decision, page 211.9):

  > '*Finally, the Commission notes that this pricing principle applies equally to voice termination services supplied on 3G mobile networks as it does to all other forms of digital mobile technology. The Commission also notes there should be no presumption the Commission would set a different price for termination of voice calls on 3G networks as it would set for termination of voice calls on other digital mobile technology.*'

- There is no reference in Chapter 9 (Indicative Price-Related Terms and Conditions) of the Final Decision or the Annexure to 3G costs. Nevertheless, by its terms Annexure 2 to the Determination applies to the costs of providing the MTAS on 3G networks.
- Whatever be the merits of the approach suggested by the Commission's staff and adopted in its Final Decision, it represents a fundamental departure from the pricing principles specified in Annexure 1 to the Determination. Those pricing principles are directed to determining a closer association between the price charged and the underlying TSLRIC+ cost. To that end, it requires that the end point of the adjustment path be at the 'upper end of the range of reasonable estimates' of TSLRIC+. However, the Commission rejected that approach in relation to 3G and instead has purported to adopt a methodology that fixes the cost of supply of MTAS on 3G by reference to the fixed price for 2G *irrespective of cost*. With 3G, the Commission did not even attempt to apply a cost-based approach but instead fixed a price in order to ensure price and technology neutrality for the end consumer.
- The Commission's staff recognised that the likely cost of MTAS on 3G would be different to the MTAS on 2G and in fact higher. Neither the cost benchmarks from other countries nor the RAF data applies to the supply of MTAS on 3G. Thus, even if the fixing of prices in Annexure 2 is undertaken in a manner consistent with the principles in Annexure 1 insofar as 2G and 2.5G are concerned, it was not undertaken in accordance with that method so far as 3G was concerned.

73 In its written and oral submissions, the Commission put its response in the following way:

- It is common ground that Chapter 9 of the Final Decision does not address 3G separately.
- However, the subject-matter is the price of a service which is not defined in terms of technology: The TSLRIC+ of the MTAS is the cost of terminating mobile voice calls irrespective of technology. The question was the range of reasonable estimates of TSLRIC+ currently available of MTAS not of 3G by itself.
- It would be inconsistent with the definition of MTAS to have different numbers in Annexure 2 for the same service via the different technology of 3G.
- TSLRIC+ is not an estimate of *actual* costs but a long-run *efficient* cost concept. If the cost for voice by 3G technology were to be higher than for 2G that would not affect the TSLRIC+ of MTAS: It would show that 3G was not, relevantly, efficient. If the cost for voice by 3G technology was lower than 2G the upper end of the range of reasonable estimates for the MTAS would be inaffected.
- It is also to be seen that, as noted at page 18.8 of the Final Decision, Vodafone has said that Hutchison '3' in the UK charged significantly more for termination on its 3G network than on its regulated 2G network and that this difference was reflective of the relative cost structure for these types of networks. However, information before the Commission included an estimate from a 3G mobile operator that the cost was probably around 5-12 cpm on 3G networks.

74 In reply, Vodafone submitted that there is no basis in the evidence for this rationale for ignoring the cost of 3G. The Commission did not adopt it in its Final Decision. The suggestion that 'it would be inconsistent with the definition of MTAS to have different numbers in Annexure 2 for the same service via the different technology of 3G' is in itself inconsistent with the position adopted by the Commission's who, initially at least, preferred not to 'release indicative pricing' for 3G. The suggestion that: 'If the cost for voice by 3G technology were to be higher than for 2G that would not affect the TSLRIC+ of MTAS: It would show that 3G was not, relatively, efficient' assumes a number of matters concerning 3G compared to 2G in respect of which there is no evidence. Most importantly it assumes that, for voice termination, 3G does not provide a better quality service than 2G. It also assumes that mobile operators are able to switch all incoming mobile calls from 3G networks to 2G networks. Finally it assumes that throughout the period of the Declaration manufacturers of 3G mobile phones will continue to build mobile phones that can receive a 2G signal. There is no basis for these assumptions. As this entire issue is not addressed by the Commission it cannot be raised now. The Commission simply ignored the cost of 3G

notwithstanding that it laid down a cost based pricing principle.

75 To which the Commission further responded in the following way:

- The service referred to in the second characteristic in Annexure 1 is MTAS, by whatever technology it is provided so far as voice is concerned, not 2G, 2.5G or 3G.
- The Commission obviously rejected the view that the cost of 3G should be assessed separately: That is an exercise of judgment and there could be no attack on that at the level of judicial review.
- The second characteristic of Annexure 1 – the end price should be set at the upper end of the range of reasonable estimates of the TSLRIC+ of supplying the services that are currently available – is not concerned at all with a process, only with an end price; the price specified in Annexure 2 has that same characteristic and there has been no attack on the specified number.

Reasoning and Conclusion on Additional Challenge to Annexure 2

76 The grounds of this additional head of challenge to Annexure 2 are the same as the general challenge (see [36] *supra*), namely that the application of Annexure 2 in relation to 3G mobile networks:

(1) Was not authorised by the enactment pursuant to which it was purportedly made;

(2) Was an improper exercise of the power conferred by the enactment in pursuance of which it was purportedly made, in that it was an exercise of a power for a purpose other than the purpose for which the power is conferred;

(3) Involved in error of law;

(4) Was an unreasonable exercise of the power conferred on the respondent by s 152AQA of the Act; and

(4A) Was an improper exercise of a power conferred by the enactment in pursuance of which it was purportedly made, in that it involved a failure to take into account a relevant consideration or relevant considerations in the exercise of the power.

77 No arguments were advanced by Vodafone in relation to this additional head of challenge on grounds (1), (2), (3) or (4) and I do not propose to consider them further. The only argument advanced by Vodafone – that in applying Annexure 2 to 3G mobile networks, the Commission simply ignored the cost of 3G – can only be sustained under ground (4A) if it

can be shown that this was a mandatory consideration (see *Peko Wallsend Ltd* per Mason J at [48], *supra*) which the Commission was required to have regard to and, by its own admission did not. There is nothing in the legislation to indicate it as a requirement of a mandatory character; but, says Vodafone, it becomes mandatory by reason that in the Determination, Annexure 1 laid down a cost based pricing principle, namely TSLRIC+. Having done that, it was not open to the Commission to simply ignore the cost of 3G.

78 There are, I think, a number of answers, to this submission.

79 First, as I have already indicated in relation to Vodafone's general challenge to Annexure 2 (see [64] *supra*), I do not think there is any requirement that any 'price-related terms and conditions' have to be 'in accordance with' or 'consistent with' the pricing principles determined under subs 152AQA(1). It might be helpful if they were, but it is not a mandatory requirement.

80 Second, in any event, as indicated in [65] *supra*, I think the 'price-related terms and conditions' in Annexure 2 are, 'in accordance with' or 'consistent with' the pricing principles determined under subs 152AQA(1). Certainly, the end price in Column 2 of the Table in Annexure 2 is 'in accordance with' and 'consistent with' the second characteristic of the adjustment path in Annexure 1.

81 Third, the subject matter of the Declaration is the MTAS; that is the 'declared service' for the purposes of Part XIC of the Act, not any particular technology such as 3G. The MTAS is also the subject matter of the access pricing principles the subject of the Determination, not 3G or any other technology. The MTAS is also the subject matter of the access price-related terms and conditions contained in the Determination, not 3G or any other technology. So understood, that the Commission did not take into account the cost of 3G as part of these exercises, or failed to separately consider the cost of 3G with a view to coming up with a TSLRIC+ estimated end result to be separately expressed in Annexure 2, that is, separately from the 12 cpm, when there is no attack on that figure itself, is an attack on its judgment going to merits and has nothing whatsoever to do with judicial review.

82 Fourth, and I accept that this is not so much an answer to Vodafone's additional head of challenge as a safety net rationalisation, that it will always be open to Vodafone in any access

arbitration to produce evidence of actual 3G costs; in no way is that area of disputation foreclosed.

83 For the foregoing reasons, Vodafone's additional head of challenge to Annexure 2 must also fail, whether or not the making of a Determination under s 152AQA of the Act is to be characterised as being of a legislative or administrative character.

84 Having regard to the way Vodafone's application and the Commission's response were presented and argued, it is not necessary for me to come to a conclusion on whether the Commission's power to make a Determination under s 152AQA is legislative or administrative in character and I do not propose to do so. On either characterisation, Vodafone's application must fail.

85 The application should be dismissed with costs.

I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Edmonds.

Associate:

Dated: 16 September 2005

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Solicitor for the Respondent:	Australian Government Solicitor
Dates of Hearing:	6, 7 and 8 June 2005
Date of Judgment:	16 September 2005